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

Reply Brief of Appellant David C. Lowery

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Introduction

This settlement would divert the entirety of its $13 million common fund to attorneys, class representatives, and non-class third-party organizations. Meanwhile, millions of absent class members—the supposed principals of this action—would sacrifice all their related claims against Google in exchange for no compensation. Under Rule 23 and the due process principles it embodies, this arrangement is untenable.

As the "most adventuresome innovation" of the modern day class action system, Rule 23(b)(3) class-action certifications, especially settlement-only certifications, demand rigorous scrutiny "applied with the interests of absent class members in close view." *Amchem Prods, Inc. v. Windsor*, 521 U.S. 591, 615, 629 (1997) (internal quotation omitted). Class members' interests do not tolerate wholesale substitution of class payments with *cy pres* payments. Section I-I.A below. Nor do they tolerate denying absentees the opportunity to prove class membership just as the named plaintiffs do. Section I.B below. Nor do they tolerate a settlement that releases class members' damages claims for no unique consideration, and for no real consideration at all: class members get the same benefit as non-class-members and opt-outs. Sections I.C-I.D below. Nor do they tolerate compelling class members to subsidize class counsel's handpicked charities, especially not when class counsel harbors a preexisting relationship with one of the recipients. Sections II-III below. Nor do they tolerate paying class counsel as if the settlement achieved a direct pecuniary benefit for the class. Section IV below.

Article III courts are not philanthropic foundations; Rule 23 settlements are not charitable trusts; class counsel are not grantmakers; and class members are not donors. The Court should reverse settlement approval and the accompanying certification as an unauthorized experiment in "judicial inventiveness." *Amchem*, 521 U.S. at 620.

Argument

I. Rule 23 does not permit settlements to replace all class payments with *cy pres* payments when it is feasible to distribute funds to some class members.

According to the settling parties, their decision to gift the class's entire $9 million net settlement fund to non-class member charities fits comfortably within this and other circuits' longstanding jurisprudence on *cy pres*. That narrative is false.

This appeal asks whether, and under what circumstances, class settlements can substitute payments to third parties in lieu of payments to actual class members. Advising "caution regarding the use of such awards to circumvent individualized proof requirements and alter the substantive rights at issue," this Court has "left open" that question. *Molski v. Gleich*, 318 F.3d 937, 954-55 (9th Cir. 2003). Since *Molski*, two decisions of this Court have affirmed all-*cy pres* settlements, but neither decision establishes circuit law on the threshold question of when settling parties may use *cy pres* to displace class recovery.

First, in *Lane v. Facebook*, the appellant-objectors "concede[d]" that monetary payments to the class were "infeasible." 696 F.3d 811, 821 (9th Cir. 2012); *id.* at 825.

Stating that Lowery's appellate issue remains open is not "circular reasoning" (PB18)[1], rather it's a recognition that "[q]uestions which merely lurk in the record, neither brought to the attention of the court nor ruled upon, are not to be considered as having [been] so decided as to constitute precedents." *E. & J. Gallo Winery v. EnCana Corp.*, 503 F.3d 1027, 1046 n.14 (9th Cir. 2007) (internal quotation omitted). An earlier panel's unexamined acceptance of litigants' agreement on a point of law does not create binding precedent. *Medina-Rodriguez v. Barr*, 979 F.3d 738, 2020 U.S. App. LEXIS 34296, at *17 (9th Cir. 2020).

Second, *In re Google Referrer Header Privacy Litigation* subsequently premised its holding on these "teachings of *Lane*," holding that distributability depends on whether the fund can be divided on a non-*de minimis* basis among **all** members of the class. 869 F.3d 737, 742 (9th Cir. 2017). But because the Supreme Court vacated *Google Referrer* in *Frank v. Gaos*, it no longer binding law. 139 S. Ct. 1041 (2019). OB18. Moreover, decided without the benefit of the 2018 Amendments to Rule 23 or Justice Thomas's opinion in *Frank*, *Google Referrer* fails to persuade.[2]

The *Google Referrer* majority erred by failing to recognize that *cy pres* payments are qualitatively different—they "are not a form of relief to absent class members and should not be treated as such." *Frank*, 139 S. Ct. at 1047 (Thomas, J. dissenting). That

[1] "PB," "DB," and "OB" refer to Plaintiffs' Brief, Google's Brief, and Lowery's Opening Brief respectively.

[2] Even if the Court considers *Google Referrer* persuasive despite the circuit split it creates, it does not address the novel First Amendment question raised here. *See* Section II below.

category error infected *Google Referrer*'s core reasoning. It ***is*** this Court's responsibility to analyze "whether there may be 'possible' alternatives" to *cy pres*. *Contra Google Referrer*, 869 F.3d at 742. No other appellate case has ever adopted such a deferential posture when confronting with a *cy pres* proposal. The Supreme Court agreed to review *Google Referrer* for a reason: its rule of decision represented a sharp and idiosyncratic break from that of other Circuits. *E.g.*, *Pearson v. NBTY, Inc.*, 772 F.3d 778 (7th Cir. 2014); *In re BankAmerica Corp. Securities Litig.*, 775 F.3d 1060 (8th Cir. 2015). But it also departed from the healthy skepticism that this Court normally accords *cy pres* settlements. *See, e.g., In re Bluetooth Headset Prods. Liab. Litig.*, 654 F.3d 935 (9th Cir. 2011) (reversing approval of *cy pres* settlement); *Dennis v. Kellogg Co.*, 697 F.3d 858 (9th Cir. 2012) (same); *Nachshin v. AOL LLC*, 663 F.3d 1034 (9th Cir. 2011) (same). More recently, in *Koby v. ARS National Services*, this Court rejected a *cy pres* arrangement where there were 4 million class members and only $100,000 available in settlement funds. 846 F.3d 1071, 1074-75 (9th Cir. 2017). "Because the settlement gave the absent class members nothing of value, they could not fairly or reasonably be required to give up anything in return." *Id.* at 1080.

The parties' proposed standard to determine the distributability of a fund—whether "proof of individual claims would be burdensome or distribution of damages costly"—would open the floodgates to converting virtually every class action into a *cy pres*-only settlement. Establishing a claims process is always burdensome and always costly. This Court should explicitly adopt the Eighth Circuit's rule that a mere finding that distributions are "costly and difficult" cannot justify *cy pres* when class distributions remain feasible. *BankAmerica*, 775 F.3d at 1165; *see also Pearson,* 772 F.3d at 784.

A close inspection belies the settling parties' contention that their proposed standard aligns with that of other circuits. Both parties furnish a laundry list of cases that purportedly validate the application of *cy pres* here. PB27-31; DB24-25. The lists are Potemkin Villages.

Seven of the cases that appellees cite affirmatively reject premature and overexpansive reliance on *cy pres*. *See Pearson*, 772 F.3d at 784 (suggesting mailing $3 checks to class rather than diverting the money prematurely to *cy pres*); *BankAmerica*; *Klier v. Elf Atochem N. Am, Inc.*, 658 F.3d 468 (5th Cir. 2011); *Ira Holtzman, C.P.A. v. Turza*, 728 F.3d 682 (7th Cir. 2013); *In re Baby Prods. Antitrust Litig.*, 708 F.3d 163 (3d Cir. 2013); *Masters v. Wilhelmina Model Agency, Inc.*, 473 F.3d 423 (2d Cir. 2007); *Mace v. Van Ru Credit Corp.*, 109 F.3d 338 (7th Cir. 1997).

Three more of the cited cases accept *cy pres* distributions only to dispose of residual funds, not to substitute for class relief *ex ante*. *Powell v. Georgia-Pacific Corp.* addresses the residual *cy pres* distribution of a small "contingency fund" after a decade-long distribution of nearly 90% of the settlement funds and additional interest. 119 F.3d 703 (8th Cir. 1997). *In re Lupron Marketing & Sales Practices Litigation* involves a residual distribution after a claims process had already allowed class members full recovery of damages and further recovery would have been a legal windfall. 677 F.3d 21 (1st Cir. 2012).[3] And *In re Pharmaceutical Industry Average Wholesale Price Litigation* also involves a

[3] *Lupron* did state that declining a "supplemental consumer claims process" (an argument that objector-appellants were not even pressing) was within the district court's discretion, but it did certainly did not endorse bypassing the primary claims process and skipping straight to *cy pres*. *Id.* at 32.

residual distribution after a claims process had already paid claimant treble damages. 588 F.3d 24 (1st Cir. 2009).

Democratic Central Committee v. Washington Metro Area Transit Commission[4] and *New York v. Reebok*[5] are still less relevant, as neither even involved class proceedings. There was thus no Rule 23(a)(4) duty to maximize the recovery of the consumers who were harmed, and no corresponding fear that the "motivating factor" was "simply the quest for attorneys' fees." *Reebok*, 96 F.3d at 48.

That leaves just the vacated *Google Referrer* decision, the unexamined assumption of *Lane*, and the Third Circuit's inapplicable dicta in *Google Cookie* that "in accords with the purpose of the Rule 23(b)(2) structure" "a cy pres-only (b)(2) settlement" need not belong "to individual class members as monetary compensation." *In re Google Cookie Placement Consumer Privacy Litig.*, 934 F.3d 316, 328 (3d Cir. 2019). In other words, it is the appellees, and not Lowery, who are seeking to alter the "present approach"(PB40) of the appellate courts to *cy pres*.

Justice Thomas's reasoning in *Frank* spells out why settling parties and courts must always favor class relief over *cy pres* when at all feasible. *Frank*, 139 S. Ct. at 1047 (Thomas, J., dissenting). "[C]*y pres* payments are not a form of relief to the absent class members." *Id.* Google does not even allude to Justice Thomas's reasoning and plaintiffs brusquely dismiss it as premised on an "erroneous foundation." PB41. But Justice Thomas is correct. We know that *cy pres* payments are not a form of relief because no

[4] 84 F.3d 451 (D.C. Cir. 1996).

[5] 96 F.3d 44 (2d Cir. 1996).

complaint has ever requested *cy pres* in its prayer. Nor could it, because no named plaintiffs nor members of the class would ever have Article III standing to request that the defendant pay money to someone else; *cy pres* is a "remedial non-sequitur." Martin H. Redish, *et al.*, *Cy Pres Relief and the Pathologies of the Modern Class Action: A Normative and Empirical Analysis*, 62 FLA. L. REV. 617, 643 (2010); *cf. also Town of Chester v. Laroe Estates*, 137 S. Ct. 1645, 1651 (2017). Even if the *cy pres* recipients use the funding to "work on policies" purporting to benefit the class broadly (PB43), white papers, op-eds, educational materials for computer programmers, and the like simply do not compensate class members for their harm from Google's breach of existing law.

The 2018 Amendments to Rule 23(e), which postdate *Google Referrer*, also confirm Justice Thomas's interpretation by requiring courts to consider "the effectiveness of any proposed method of distributing relief to the class." Fed. R. Civ. P. 23(e)(2)(C)(ii). Plaintiffs protest (PB23 n.4) that the 2018 Amendments did not change the standard for when a settlement is non-distributable, but as this Court has recognized, the 2018 revamping of Rule 23(e)(2) demands that district courts review class settlements in a less deferential manner. *Roes v. SFBSC Mgmt., LLC*, 944 F.3d 1035, 1049 n.12 (9th Cir. 2019). "For the first time,…the rules and accompanying guidance to judges stress that they should pay close attention to how class action settlements are distributed." Jessica Erickson, *Automating Securities Class Action Settlements*, 72 VAND. L. REV. 1817, 1851 (2019). If settling parties may simply conclude that maximizing class relief "is not necessarily desirable" (1-ER-23), then Rule 23(e)(2)(C)(ii) has no meaning, or at least no teeth.

Plaintiffs denounce Lowery's position as a "categorical" insistence on a claims process. PB23. But Lowery's only categorical insistence is prioritizing class remedies over non-class *cy pres*. He does not insist on any particular method of getting relief to the class. He raises the example of a claims process only to show that direct class relief is not an impossibility.

A rule of actual feasibility cabins but does not eliminate *cy pres*. There may still be a place for tidying up residual funds from uncashed checks. Lowery does not ask the Court to disturb the "exacting standards" (PB40) that demand a close geographic and subject-matter nexus between *cy pres* recipients, class members, and the litigation. *See Dennis*, 697 F.3d at 865-67; *Nachshin*, 663 F.3d at 1041. He simply asks this Court to resolve the question left open by *Molski* in favor of a strict construction of the "distributability"/"feasibility" rule.

A bright-line rule is necessary because of "the substantial history of district courts ignoring and resisting circuit court *cy pres* concerns and rulings in class action cases." *BankAmerica Corp.*, 775 F.3d at 1064. "[D]istrict courts, predisposed to favor settlement and unaccustomed to inquisitorial judging, have been too willing to approve problematic settlements." Howard Erichson, *Aggregation as Disempowerment*, 92 NOTRE DAME L. REV. 859, 869 (2016). "No matter how virtuous the judge, the fact remains that courts are overworked, they have limited access to quality information, and they have an overwhelming incentive to clear their docket." Samuel Issacharoff, *Class Action Conflicts*, 30 U.C. DAVIS L. REV. 805, 829 (1997); *accord* Hillary A. Sale, *Judges Who Settle*, 89 WASH. U. L. REV. 377, 411 (2011).

While plaintiffs seek to justify (PB40) a lackadaisical approach to feasibility because of other strict limitations on *cy pres*, their full argument they would oppose zealous enforcement of other limitations as well. Take the conflict of interest between class counsel and the ACLU that the district court allowed. *See* OB40, 45; Section III below. On review, the plaintiffs again urge against adopting a rigorous class-protective rule in favor of allowing lower courts amorphous discretion. PB48 n.11. Same with any rule about attorneys' fees in *cy pres* settlements. *Compare* OB46-48, *with* PB55 n.17 (proposing to allow district courts unfettered discretion to determine how *cy pres* component should affect the fee award).

It is not unusual for settling parties to advocate for nebulous standards that bestow the maximum discretion to approve their preferred arrangements. In fact, that exact advocacy occurred in the cases that ultimately "articulated exacting standards." PB40; *see* Brief of Defendant-Appellee, *Nachshin v. AOL, LLC*, No. 10-55129, at 21, 23 (9th Cir. Aug. 19, 2010) (arguing for district court's "broad discretion" to apply the "modern flexible cy pres doctrine"); Brief of Plaintiffs-Appellees, *Dennis v. Kellogg Co.*, No. 11-55674, at 31 (9th Cir. Oct. 12, 2011) (arguing for deference to district court's finding that the charitable donation served the class's interests). Again, the settling parties prefer a regime of deference because it is all too common for district court to afford reciprocal deference to the settling parties' settlement recommendations. Brian Wolfman, *Judges! Stop Deferring to Class Action Lawyers*, 2 U. MICH. J.L. REFORM 80 (2013).

As a fallback if the Court agrees with Lowery that a meaningful feasibility threshold is appropriate, the settling parties hurl two projectiles at the idea of a claims made process that Lowery has floated.[6] Neither lands on target.

A. A claims-made process would fairly distribute the $9 million net settlement fund to claiming class members.

A claims process would not, as plaintiffs claim (PB36), compel 99% of the class to give their share to the remaining 1%. Rather, it would grant *all* 60 million class members an *equal* option to file a claim. It does not require discouraging claims or paring back the reach of the notice. *Contra* PB37. It simply requires honest disclosure that based on the size of the class and the available funds, *pro rata* payments will likely not exceed $10 dollars. No one thinks it ideal that plaintiffs' $0.22 *per capita* recovery will inspire apathy in 99% of class members. But the solution is not also eliminating the recovery of the hundreds of thousands of class members who will still wish to submit a claim. As Justice Kavanaugh explained at oral argument in *Frank*, "at least it's someone who—who, quote, to use your analogy, paid for the lottery ticket as opposed to giving the billion dollar award to someone who didn't buy the lottery ticket." Transcript of Oral Argument at 60, *Frank v. Gaos*, 139 S. Ct. 1041 (2019) (No. 17-961).

Class members paid for the ticket by providing the release of their claims to Google. Such class members are not "overcompensated" when other class members forego their shares because the measure of full compensation is the amount sought in

[6] Both amici supporting appellees recognize that class compensation must be prioritized over *cy pres* when possible, but neither grapples with Lowery's discussion of how class compensation is feasible here.

the complaint, not the agreed-upon settlement amount. *BankAmerica*, 775 F.3d at 1085; *Klier*, 658 F.3d at 479. "A vague anxiety over windfalls would not justify a finding [that cy pres distributions are preferable to class distributions]." Rhonda Wasserman, *Cy Pres In Class Action Settlements*, 88 S. CAL. L. REV. 97, 160 (2014). At the very least, a court should determine full compensation by reference to what the underlying law would permit if the plaintiffs succeeded on their asserted claims. *E.g., Masters*, 473 F.3d at 436 (reversing district court's failure to recognize the scope of its discretion to award treble damages to antitrust plaintiff class members rather than to third-party charities). Here, the ECPA, as pled in the operative complaint, allows statutory damages of up to $10,000. See 2-DSER-305; 18 U.S.C. § 2520(c)(2)(B).

Imagine this case going to trial. At trial, the court could allow statutory damages or not, and if so determine an amount. But the judge could not issue a verdict awarding a certain sum in damages and then immediately declare that entire sum payable to an unrelated third-party. *Turza*, 728 F.3d at 689-90.[7] Nor could the plaintiff's attorney choose to divert that money to a third party without his client's affirmative consent—no matter how virtuous the third party and no matter how odious the client.

A settlement is unfair if it rewards non-party organizations before fully satisfying the class's claims when the latter is feasible. "The private causes of action aggregated in this class action—as in many others—were created by Congress to allow plaintiffs to

[7] Even if plaintiffs were correct that each class member's property interest is strictly limited to her per capita share of the settlement fund, a claims-made approach is still "less [of] a *cy pres* approach." *Contra* PB38. Instead of all $10 being delivered to someone with no right to it, only $9.78 would be, and $0.22 would be returned to its rightful owner.

recover compensatory damages for their injuries." *Baby Prods.*, 708 F.3d at 173. There's nothing unseemly about a class action creating private benefit for class members; in fact that exemplifies a class action functioning properly as a large-scale joinder device. *See* Section I.C below.

Additionally, plaintiffs' argument proves too much, for it would turn workaday common-fund claims-made consumer settlements into all-*cy pres* deals, just because typical claims rates are low. OB32. Such an expansion of *cy pres* would amount to a radical departure from current practice. 1-ER-143-45; *see also In re Classmates.com Consolidated Litig.*, No. 09-cv-45, 2012 WL 3854501 (W.D. Wash. Jun. 15, 2012) (approving settlement of 60 million member class that divided a $2.5 million net fund among 700,000 claimants). In short order, settlements could funnel billions of dollars away from millions of class members and to favored charities instead, turning class attorneys into kingmakers at the expense of harmed consumers. *See, e.g., In re DRAM Antitrust Litig.*, No. 02-md-01486, Dkt. 2273 (N.D. Cal. May 4, 2016) ($310.7 million, 0.25% claims rate); *In re Yahoo! Inc. Customer Data Sec. Breach Litig.*, No. 16-md-02752, 2020 U.S. Dist. LEXIS 129939 (N.D. Cal. Jul. 22, 2020) ($117.5 million, 0.6% claims rate); *In re Anthem, Inc. Data Breach Litig.*, 327 F.R.D. 299 (N.D. Cal. 2018) ($115 million, 1.8% claims rate). That most class members are indifferent to small sums of recovery (*e.g., Pearson*, 772 F.3d at 782) does not imply that it is unfair for other class members to recover. [8]

[8] On the other hand, when *cy pres* beneficiaries are deep-pocketed institutions like MIT, with endowments approaching $20 billion, or ACLU, with an annual budget of

Plaintiffs may not redefine "compensate" (PB35), sacrifice recovery for hundreds of thousands of class members, and donate settlement proceedings to non-class charities. A small something beats a large nothing.

B. Class members can self-identify as the named plaintiffs and Lowery have.

While Google does not join the plaintiffs in disparaging class members' right of recovery, they do join the argument that there is no practicable method of replicating the jurisdictional discovery process to administer settlement claims. PB19-25; DB29-31. Of course, Lowery has never suggested replicating that time-consuming process, the results of which were not public and, in Google's own words, failed to resolve "open questions as to whether the Street View vehicles had captured Plaintiffs' data sufficient to confer standing." DB10; *accord* DB36.

Instead, Lowery's proposal would ask only that a settlement allow absent class members to make the same averments that the named plaintiffs did to consummate their settlement in federal court and claim incentive awards of $500-$5000. Namely, class members would need to attest that they used a WiFi connection at a certain location "to send and receive various types of private payload data," that that network "was not readily accessible to the general public," that that location "can be seen on Google Maps and Street View," and that on information and belief "Defendant surreptitiously collected, decoded, and stored data from her WiFi connection, including

several hundred million dollars, even a $1 million *cy pres* award (as in this case) is merely a drop in the bucket.

payload data, on at least one occasion." 2-DSER-290-96.[9] Again, these averments were the only basis on which the Court confirmed the named plaintiffs' standing and typicality, thus making them eligible for class representative service awards. 1-ER-6-10. Although Lowery raised this incongruity of treatment below, the district court did not address it, instead summarily concluding the settlement "treats class members equitably relative to each other." 1-ER-26 (quoting Rule 23(e)(2)(D)).[10]

There's a self-refuting inconsistency in the settling parties' insistence that class members cannot self-identify. (PB12, 19, 46; DB32-37). On the one hand, the parties have no qualms with binding such unaware class members to a settlement and irrevocably waiving their claims, including statutory damages claims with a potential face value of $10,000. *Compare Amchem*, 521 U.S. at 628 ("We recognize the gravity of the question whether class action notice sufficient under the Constitution and Rule 23 could ever be given to legions so unselfconscious and amorphous"). In fact, appellees even insist that class members can protect themselves by exercising their opt-out rights.

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[9] Lowery made similar, though slightly more detailed averments, to demonstrate his right to object to the settlement. 2-ER-138. It should not be surprising that the settling parties did not challenge Lowery's showing. *See* DB37. To do so would have admitted that named plaintiffs' own averments could not show standing.

[10] Lowery relies on twenty-three comparable settlements (*see* OB29-30; 1-ER-143-45) to rebut the argument that a $13 million settlement fund cannot be feasibly distributed where the class comprises 60 million members. Whether class members can self-identify is an entirely separate question. *Contra* PB21-22; DB34. This Court should resolve that latter question by holding absent class members to the same standard named plaintiffs used to effectuate their settlement and receive $500-$5000 incentive awards. And if class members cannot self-identify even after notification, the class should not be certified. OB36-39; Section I.D below.

PB15, 49, 53; DB28. On the other, after binding class members to this release, appellees then balk at the prospect of paying class members $5-$10 in exchange for that release.[11] It's almost as if, "having sidestepped" the class's interests in due notice and compensation, "Google and class counsel nonetheless obtained—for themselves anyway—the precise benefits that a Rule 23(b)(3) class gives to the defendant and class counsel: namely, a broad class-wide release of claims for money damages for the defendant, and a percentage-of-fund calculation of attorneys' fees for class counsel." *Google Cookie*, 934 F.3d at 329.

To prove class membership here, the named plaintiffs rely on the allegations of the complaint because "open questions" remain as to whether even they meet the class definition based on the technical analysis of Google's data. DB11. Absentees should be permitted to make the same averments to prove their class membership. Yet Google differentiates the quantum of proof necessary to demonstrate standing to invoke the courts' jurisdiction and that necessary to "establish class membership as part of a claims-recovery process." DB36. After *Frank*, it is unclear what precise level of evidence is necessary to prove standing at the settlement stage—whether it mirrors the pleading stage and requires only allegations in the complaint, or whether more is needed. *Muransky v. Godiva Chocolatier, Inc.*, 979 F.3d 917, 2020 U.S. App. LEXIS 33995, at *15 n.1 (11th Cir. 2020) (*en banc*); *compare In re Deepwater Horizon*, 756 F.3d 320, 324 (5th Cir. 2014) (Clement, J., dissenting from denial of rehearing *en banc*) (recommending a "higher standard" than the pleading stage). But let's assume Google is correct that

[11] Plaintiffs assert that "no claims could be filed in good faith." PB20. Yet class counsel signed and submitted the complaint under Fed. R. Civ. P. 11(b). 2-DSER-318.

determinations at the settlement stage still look to the complaint's allegations. There is no logic or authority commending Google's approach of applying *two different standards at the settlement stage*: a lesser one for proving class membership to invoke the jurisdiction of the court and entitle a named representative to an incentive award and a heightened one for proving class membership to participate in a claims process.

For their part, plaintiffs argue that the incentive awards are not analogous to class member claims because they "are not compensation for damages under the settlement." PB22. That is beside the point because class representatives "must be part of the class and possess the same interest and suffer the same injury as the class members." *Amchem*, 521 U.S at 625-26 (internal quotation omitted). Said differently, a class representative service award depends on a showing that the class representative qualifies as a bona fide class member. *In re Sonic Corp. Customer Data Sec. Breach Litig.,* 2019 WL 3773737, 2019 U.S. Dist. LEXIS 135573 (N.D. Ohio Aug. 12, 2019) (concluding, after supplemental briefing, that neither precedent nor "policy factors" support granting "non-class named plaintiffs" service awards). To make that showing, the named plaintiffs rely on the averments of the complaint. But their settlement forbids absent class members from relying on the same averments to make the same showing.

Class counsel recognize that they "may not arbitrarily prioritize the interests of any particular class member or subset of class members." PB36. Yet that is exactly what they have done by allowing the named plaintiffs to prove their class membership and obtain $500-$5000 incentive awards based on their averments, while denying absent class members the same right to self-identify and obtain a $5-$10 recovery.

C. Plaintiffs' negotiation of an all-*cy pres* settlement breached their Rule 23(a)(4) and (g)(4) duty to class members by favoring third parties over their putative principals.

Not only do plaintiffs disclaim the notion that they have breached their fiduciary duty to the class, they contend that it is Lowery's proposal that "subverts the fiduciary duties of counsel and the courts to the class as a whole." PB33. Plaintiffs repeatedly appeal to their duty to the class "as a whole," as if Lowery's proposal would not serve the class as a whole. PB13, 17, 23, 30, 34, 36, 38.

Plaintiffs err by assuming that the class "as a whole" has interests as an entity that differ from the interests of the individual class members in the aggregate. A Rule 23 class action is simply a "species" of joinder for the aggregation of pre-existing claims. *Shady Grove Orthopedic Assocs., P.A., v. Allstate Ins. Co.*, 559 U.S. 393, 408 (2010); *see generally* Andrew J. Trask, *The Roberts Court and the End of the Entity Theory*, 48 AKRON L. REV. 831, 851-54 (2015). A class "is not a legal entity to which any individual plaintiff's legal rights are to be sacrificed." *Mandujano v. Basic Vegetable Prods., Inc.*, 541 F.2d 832, 834 (9th Cir. 1976). Rather, the "class attorney continues to have responsibilities to each individual member of the class even when negotiating a settlement." *Id.* at 835. That necessarily means class counsel must prefer a settlement that gives all class members an opportunity to claim compensation over a settlement that gives no class member that opportunity, and a settlement that compensates some class members over a settlement that compensates none. Class counsel's fiduciary duty requires them "to take all steps that have reasonable potential to make one or more parties or represented persons better off without harming others." American Law Institute, *Principles of the Law of Aggregate Litig.* § 1.05, *cmt.* f (2010).

Nor does Rule 23 allow counsel the authority to deem anything besides class distributions the most "desirable" (PB10) or "best way" (PB35) to allocate settlement funds. *BankAmerica*, 775 F.3d at 1065 ("flatly reject[ing]" the idea that *cy pres* recipients could ever be more "worthy" than class members). That would "endorse[] judicially impermissible misappropriation of monies gathered to settle complex disputes among private parties" and is a reason that class action *cy pres* is "inherently dubious." *Id* (internal quotation omitted). By definition, *cy pres* can never surpass what is "next best"; "[c]ertainly, this law suit is not charitable." *In re Pet Food Prods. Liab. Litig.*, 629 F.3d 333, 363 (3d Cir. 2010) (Weis, J., concurring and dissenting).[12]

Plaintiffs' comparison of their settlement with the state AG settlement (PB41 n.7) highlights their misconception. That the AG settlement didn't obtain individual relief does not imply the private action should abandon the goal of compensation too. Enforcement agencies "do[] not bring suits subject to the strictures of Rule 23"; non-compensatory legal policy aims are thus more appropriate for those agencies. *Geier v. M-Qube, Inc.*, 2016 WL 3458345, 2016 U.S. Dist. LEXIS 82656, at *11 (W.D. Wash. Jun.

[12] Legal Aid amici argue that class members have a "general interest" in access to justice. LAO Br. 27. There are limitless general interests of all persons: "world peace," "healthy environment," or "eliminating poverty." *See Seinfeld*: *The Strike* (NBC television broadcast Dec. 18, 1997) (George fabricates a charity "The Human Fund" with the slogan "money for people"). But these are not the aims of private consumer litigation. LAO's own citation undermines their argument for broadly defined purposes and capacious discretion: "If this logic is generally applicable for *cy pres* distributions, then almost any outcome is justifiable… The possible distributions are infinite, and therein lies the problem." Note, Daniel Blynn, *Cy Pres Distributions: Ethics & Reform*, 25 GEO. J. LEGAL ETHICS 435, 438-39 (2012).

24, 2016). Nor does settlement of an enforcement action cost the victims their personal rights to bring an action. *See S.E.C. v. Citigroup Global Markets, Inc.*, 752 F.3d 285, 294 (2d Cir. 2014) (distinguishing between deferential review of government consent decrees and less-deferential review of proposed class-action settlements that compromise private rights). Under Rule 23, "the concept of class actions serving a 'private attorney general' or other enforcement purpose is illegal." S. Rep. No. 109-14, at 58-59 (2005); *cf. also Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240, 260-69 (1975) (judiciary cannot award fees on non-legislatively sanctioned "private attorney general" model).

Plaintiffs evince the same misconception when they maintain that *cy pres* creates better deterrence than direct payments. PB35. Even if one considers deterrence a worthy *private* litigation goal, it is simply not correct that *cy pres* provides better than class payments. Russell M. Gold, *Compensation's Role in Deterrence*, 91 NOTRE DAME L. REV. 1997 (2016) (explaining why compensating class members serves the role of deterrence better than paying attorneys or third-party charities). Defendants, in fact, often prefer to satisfy their settlement obligations with charitable contributions, especially when, under *Lane*, they can select recipients whom they already donate. OB24-25; *see also Rawa v. Monsanto Co.*, 2018 WL 2389040, 2018 U.S. Dist. LEXIS 88401, at *15 (E.D. Mo. May 25, 2018) (noting that defendant was unwilling to amend settlement to increase class claimants' share to reduce *cy pres*). The aim of deterrence is to dissuade unlawful corporate behavior. However, *cy pres* encourages meritless suits that do not distinguish between bad and good corporate behavior, simply because any nuisance lawsuit can generate a *cy pres* fund. (By contrast, not every nuisance lawsuit provides a pool sufficient

to confer benefit to class members). Even recognizing deterrence as "an important goal," it cannot "justify extinguishing a victim's claim in favor of compensating a third party." Jay Tidmarsh, *Cy Pres and the Optimal Class Action*, 82 GEO. WASH. L. REV. 767, 797 (2014).

Plaintiffs have no answer to the proposition that zealous fiduciaries would have advised class members to opt out. Whether the *cy pres* has value (PB 44 n.10) is irrelevant, opt outs enjoy that purported "value" as much as individuals who remain in the class and release their claims. Class counsel have an obligation to obtain unique consideration for their clients in exchange for providing Google a release. And they have an obligation not to "accept excessive fees and costs to the detriment of the class plaintiffs." *Lobatz v. U.S. West Cellular of Cal., Inc.*, 222 F.3d 1142, 1147 (9th Cir. 2000).

Because they did not discharge those obligations, certification of the settlement class violates 23(a)(4) and (g)(4). *Frank*, 1039 S. Ct. at 1047 (Thomas, J., dissenting).

D. If it is impossible to distribute settlement funds to class members, Rule 23(b)(3) certification is an error of law.

If the parties are correct that class members cannot identify themselves as such even after receiving class notice, and direct benefit is therefore impossible, then the class device is not "superior to other available methods for fairly and efficiently adjudicating the controversy." OB36-39 (citing, *inter alia*, *In re Hotel Tel. Charges*, 500 F.2d 86 (9th Cir. 1974)).

While Google does not address *Hotel Telephone*, plaintiffs assert that it is distinguishable because it did involve a *cy pres* distribution or a settlement. PB44. Neither distinction makes a difference. After fluid recovery—the precise remedy rejected in

Hotel Telephone—encountered a hostile reception from federal courts, the plaintiffs' bar rebranded it as *cy pres* with payments to charitable organizations rather than to future consumers. *See* Redish, *et al.*, *supra*, 62 FLA. L. REV. at 662-63.[13] And, aside from trial manageability concerns, the class certification prerequisites apply "undiluted" to settlement-class certifications. *Amchem*, 521 U.S. at 620. At base, "the requirements for certification are not the defendant's to waive; they are intended to protect absent class members." Alexandra D. Lahav, *Symmetry and Class Action Litigation*, 60 UCLA L. REV. 1494, 1506 (2013).

When a "great variety" of individualized determinations preclude class benefit, class certification should be denied even if "the suit will serve to 'punish' and 'deter' [legal] violations." *Hotel Telephone*, 500 F.2d at 91-92. Individualized determinations are the very reason the settling parties give for resorting to *cy pres*. *E.g.* PB20; DB20-21. Although this Court rejected the superiority argument in *Google Referrer*, its analysis was without the benefit of Justice Thomas's opinion in *Frank*. Here, the putative class is even less amenable to class treatment because the settling parties and the district court accept that the class definition precludes even informing members of the public whether they are members of the class. 1-ER-22-23; *see also Georgine v. Amchem Prods., Inc.*, 83 F.3d 610, 633-34 (3d Cir. 1996), *aff'd sub. nom Amchem Prods., Inc.. v. Windsor*, 521

[13] Amicus adverts to several states whose rules of procedure contemplate *cy pres*. LAO Br. 25-26. These rules do not apply in federal court nor speak to Fed. R. Civ. P. 23 procedure. Moreover, the federal law of equitable remedies is independent of state law. *Sonner v. Premier Nutrition Corp.*, 962 F.3d 1072, 1079 (9th Cir. 2020).

U.S. 591 (1997) (no superiority where settlement proposed to bind unaware class members).[14]

Google argues that because it includes "meaningful injunctive relief," the settlement is not "*cy pres*-only." DB46. Yet it calls *Lane*, *Google Referrer*, and *Google Cookie* "*cy pres*-only" settlements even though each of those settlements contained the same type of feeble throw-in prospective injunctive relief as in this case. *Compare* DB24 *with Lane*, 696 F.3d at 826; *Google Cookie*, 934 F.3d at 321; *In re Google Referrer Header Privacy Litig.*, 87 F. Supp. 3d 1122, 1132 (N.D. Cal. 2015). Just as in *Frank*, no one argues that the injunctive relief measures here "were valuable enough on their own to independently support the settlement." *Frank*, 139 S. Ct. at 1047 n.* (Thomas, J., dissenting); *accord* 1-ER-15 (finding that the injunctive component was "modest"); 1-ER-23 (finding it "adequate, if not the main benefit"); 1-ER-24 (finding it "not as significant in 2020 as it would have been in 2013"). Despite Google's repeated characterizations (DB22, 23, 46, 48, 49, 50), the district court never found the injunctive relief "meaningful." Moreover, neither appellee responds to Lowery's argument that the district court failed to consider the fact that the injunctive relief offered no unique relief to class members in consideration for their release of claims. OB13, 48. They have

[14] Lowery does not raise a stand-alone ascertainability argument of the sort repudiated by *Briseno v. ConAgra Foods, Inc.*, 844 F.3d 1121 (9th Cir. 2017). *Contra* PB45. *Briseno* does not resolve whether the superiority requirement of Rule 23(b)(3) demands the possibility of class benefit at the time of certification. *Cf. Schwarzschild v. Tse,* 69 F.3d 293, 297 (9th Cir. 1995) (indicating that courts should not certify classes after a defendant prevails against named plaintiffs on the merits).

thus forfeited the issue. *Moran v. Screening Pros, LLC*, 923 F.3d 1208, 1213 (9th Cir. 2019); *Clem v. Lomeli*, 566 F.3d 1177, 1182 (9th Cir. 2009).

If the settling parties are right that genuine class benefit is impossible, then (b)(3) settlement certification was unwarranted.

II. Approving a *cy pres* settlement without obtaining class members' consent compels their speech in violation of the First Amendment.

Google dismisses Lowery's First Amendment objection as "makeweight" because the *cy pres* money originates with Google, not the class. DB27. This fails to recognize that once monies become "settlement-fund proceeds, generated by the value of the class members' claims, [they] belong solely to the class members." *Klier*, 658 F.3d at 474; *accord BankAmerica*, 775 F.3d at 1064. Though each class member's share of the settlement fund is "small in amount, because it spread across the entire [class]," the monetary support to the third-parties is "direct." *Cahill v. PSC*, 556 N.E.2d 133, 136 (N.Y. 1990).

Plaintiffs, but not Google, advance the district court's conclusion that the imposition of a *cy pres* settlement does not constitute state action. PB49-50. All the citations (except for the *Motor Fuel* decision that found the issue waived, 872 F.3d 1094, 1114 n.7 (10th Cir. 2017)), however, involve bilateral consented-to agreements. Plaintiffs, like the district court below, do not address the "qualitative difference between enforcing a voluntary bilateral nondisclosure agreement and imposing an agreement upon non-consenting absent class members." OB43. Approval of class settlements does implicate the constitutional rights of absent class members, a principle that has established for at least eighty years since *Hansberry v. Lee*, 311 U.S. 32, 42-43, 45

(1940). Plaintiffs cannot navigate their way around *Hansberry*, *Ortiz* or other cases all showing that binding absent class members is a question of constitutional dimension. There would have been no reason for *Ortiz* to caution that Rule 23 must be read in light of due process concerns if class settlement approval orders were not state action in the first place. *Contra* PB51 n.15.

Imagine a class settlement 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. (This scenario is not as farfetched it may seem. *Cf.* Ahmed v. McDonald's, PUBLIC CITIZEN, https://www.citizen.org/litigation/ahmed-v-mcdonalds-3/). In plaintiffs' view, 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, the voluntary agreement does not bind absentees, the approval order does. Redish, *et al.*, *supra*, 62 FLA. L. REV. at 644.

Appellees do not dispute that the settlement funds advocacy that Lowery and some of the other class members oppose. Clinging to the class members' right of exclusion, both appellees argue that no one is compelled to donate. Under *Phllips Petroleum v. Shutts*, notice and an opportunity for exclusion is sufficient to exercise personal jurisdiction over absent class members. But class members' acquiescence in the loss of their First Amendment rights "cannot be presumed." *Janus v. AFSCME, Council 31*, 138 S. Ct. 2448, 2486 (2018). *Knox v. SEIU* also impugns an opt-out approach, characterizing it coming about "more as a historical accident than through the careful application of First Amendment principles." 567 U.S. 298, 312 (2012); *contra*

DB28. Lowery's right not to speak encompasses more than the right to dissociate by opt out. "Ascribing consent to class members' silence is untenable." Debra Lyn Bassett, *Class Action Silence*, 94 BOSTON U. L. REV. 1781, 1799 (2014).

Moreover, even if a tailored "opt-out" right could cure any First Amendment concerns, there is no such option here to merely abstain from (and to decrease proportionally) the *cy pres* donation. There is only the right to exit the class action entirely. The settling parties are conditioning class members' right to participate in the action on their tolerance of the compelled donation, tantamount to telling union members or regulated professionals that their dues are not mandatory because they are always free to quit and find a new profession. This is a Hobson's choice, not a true opt-out. *See Keller v. State Bar of California*, 496 U.S. 1, 10 (1990) ("Claimants cannot be required by government action to relinquish First Amendment rights as a condition of retaining employment."); *Wash. Legal Found. v. Mass. Bar Found.*, 993 F.2d 962, 978 (1st Cir. 1993), *superseded on other grounds by Phillips v. Washington Legal Foundation*, 524 U.S. 156 (1998) (where the burden to avoid is "more than an inconvenience" a rule requiring monetary contribution should be viewed as compulsory). Class members' only "choice" is to opt back into the "problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights." *Amchem*, 521 U.S. at 617 (internal quotation omitted).

Plaintiffs accuse Lowery (PB53) of failing to articulate a limiting principle but there is a natural limitation in the compelled subsidy line of cases. Expenditures on behalf of a discrete and limited group, like a union (*Janus*), a professional guild (*Keller*), or a certified class, implicate the First Amendment rights of members of those groups.

On the other hand, generalized expenditures of government or government speech itself, do not implicate private First Amendment rights against compelled speech or subsidy.[15]

Because the settling parties do not even suggest that the *cy pres* is narrowly tailored to serve a compelling interest, it cannot survive the strict scrutiny applied to compelled speech. *See Frudden v. Pilling*, 742 F.3d 1199, 1208 (9th Cir. 2014).

III. Significant prior affiliations with the *cy pres* recipients preclude settlement affirmance.

Even if it were appropriate for the settling parties to resort to *cy pres* and compel class members to subsidize private speech, the settlement must still be reversed because of the ACLU's significant prior affiliations with class counsel. OB44-46.

Plaintiffs posit that class counsel's previous co-counseling relationship with ACLU and its state affiliates is not "significant." Law dictates otherwise. It's a disqualifying conflict when class counsel and the named representatives have co-counseled together. *E.g., In re Southwest Airlines Voucher Litig.*, 799 F.3d 701, 714-16 (7th Cir. 2015). It's a disqualifying conflict when a judge has co-counseled with an attorney in a case before her within a recent time frame. *E.g.,* Cal. Code Jud. Ethics Canon 3E(5)(b) (mandating recusal when judicial officer has practiced law together with attorney at bar within the last two years). Indeed, any "legal, business, financial, professional or personal relationship" with other case participants suffices to trigger

[15] Nor are plaintiffs correct that Lowery's argument would eliminate all class action *cy pres*. If reserved for occasions in which class members make an affirmative election, or as escheat to the government, *cy pres* poses no First Amendment issues.

disclosure and consent ethics obligations. Cal. R. Prof. Cond. 1.7(c)(1). *Knapp v. Art.com* did not need to provide "further analysis" (PB48 n.11) as the conflict is apparent on its face. 283 F. Supp. 3d 823, 835 (N.D. Cal. 2017).

It is empty formalism to say the "selection of the recipient was made by the District Court, not class counsel." PB47; *compare* LAO Br. 16 ("concern about judicial involvement in selecting *cy pres* award recipients…is actually not presented by this appeal"). Class counsel generated the proposal to have ACLU designated a beneficiary, and the district court did not disturb it. That said, Google is equally mistaken to think that the district court's "ultimate choice" insulates the process from conflict. DB39. If anything, a grantmaking role for the district court introduces a heightened potential for mischief and a heightened "appearance of impropriety created by the specter of judges and outside entities dealing in the distribution and solicitation of large sums of money." *Keepseagle v. Perdue*, 856 F.3d 1039, 1071 n.10 (D.C. Cir. 2017) (Brown, J., dissenting) (internal quotation omitted); *see also Baby Prods.* 708 F.3d at 180 n.16 (similar). Such a process has resulted in for example, a $500,000 award to a university where the presiding judge lectured,[16] and a $1.5 million "Sic Vos Non Vobis" scholarship endowment at another judge's alma mater with that judge recommending the "distinctive" Latin name. *Perkins v. Am. Nat'l Ins. Co.*, 2012 WL 2839788 (M.D. Ga. July 10, 2012). Even aside from unseemly conflicts, distributing grants and reviewing the effectiveness of their use is not an appropriate use of judicial resources and transforms

[16] *In re Google Buzz Privacy Litig.*, 2011 WL 7460099, at *3 (N.D. Cal. Jun. 2, 2011).

courts into eleemosynary institutions. *S.E.C. v. Bear, Stearns & Co.*, 626 F. Supp. 2d 402, 415 (S.D.N.Y. 2009). That is not the federal courts' proper Article III function.

Google disclaims as "absurd" (DB43) the notion that they are directing funds to favored charities. One settlement's an accident; two is a coincidence; three is a pattern. *See Google Buzz*; *Google Referrer, Google Cookie*.[17] But as Lowery has already acknowledged, in a circuit-split with *Google Cookie*, *Lane* permits significant relationships between *cy pres* beneficiaries and defendants despite *ALI Principles* § 3.07 *cmt.* b. OB46. Lowery preserves that issue for further review.

The conflict between class counsel and the ACLU is an independent reason to reverse settlement approval.

IV. The fee award improperly used the 25% benchmark for a *cy pres*-only settlement fund.

This Court "review[s] de novo the legal bases of a fee award." *Chambers v. Whirlpool*, __F.3d__, 2020 U.S. App. LEXIS 35366 (9th Cir. Nov. 10, 2020); *accord K.C. v. Torlakson*, 762 F.3d 963, 966 (9th Cir. 2014); *contra* PB53. Because the class is not indifferent between class payments and *cy pres* payments, the fee methodology should not be indifferent either.

Thus, the value of a common fund *does* depend on the form that the distributions ultimately take. *Contra* PB54. This Court has long established ground rules to curb certain abuses regarding the use of injunctive and non-monetary relief because such

[17] Contrary to Google's false assertion (DB43 n.7), the record does support the proposition that Public Knowledge has previously received around $500,000 in monetary contributions from Google. *See* 1-PSER-80.

relief is "easily manipulable by overreaching lawyers seeking to increase the value assigned to the common fund." *Staton v. Boeing Co.*, 327 F.3d 938, 974 (9th Cir. 2003); *Roes*, 944 F.3d at 1055 (similar). Specifically, this Court has instructed that *cy pres* "must be examined with great care to eliminate the possibility that it serves only the self-interests of the attorneys and the parties, and not the class, by assigning a dollar number to the fund that is fictitious." *Dennis*, 697 F.3d at 868. More generally, it has endorsed the proposition that "the [Rule 23(e)] 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 (quoting *In re TD Ameritrade Accountholder Litig.*, 266 F.R.D. 418, 423 (N.D. Cal. 2009)).

Frank vacated *Google Referrer*. *Lane* provides plaintiffs no refuge either, as the appellants there did not challenge the fee award at all. Even so, Judge Kleinfeld in dissent observed disapprovingly that the fees were not based on any actual settlement fund but on what the settling parties "called the 'settlement fund.'" 696 F.3d at 829. Indeed, the very reason *Lane* permits *cy pres* beneficiaries to serve the interests of defendants—settlement is the "offspring of compromise"—also shows why it is inappropriate to treat *cy pres* payments as equivalent to class payments.

Premised on an error of law, the district court's Rule 23(h) award cannot stand.

Conclusion

For these reasons, this Court should vacate the settlement approval. If class benefit is unattainable because class members cannot self-identify even with the best

notice possible, it should vacate class certification. At a minimum, it should vacate the fee award.

Dated: December 3, 2020

Respectfully submitted,

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