No. 21-___

In the Supreme Court of the United States

DAVID LOWERY,

Petitioner,

v.

BENJAMIN JOFFE, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In *Frank v. Gaos*, 586 U.S. __, 139 S. Ct. 1041 (2019), the Court granted review of *In re Google Referrer Header Privacy Litigation*, 869 F.3d 737 (9th Cir. 2017), where the Ninth Circuit affirmed Rule 23(e)(2) approval of a class-action settlement with Google that paid no money to the class, but millions of dollars to class counsel and so-called *cy pres*—third-party charities that in that case had relationships with class counsel or the defendant. *Gaos* ultimately did not reach the merits, but vacated the Ninth Circuit opinion for a determination of Article III standing. 139 S. Ct. at 1046.

This case presents a functionally identical all-*cy pres* class-action settlement with Google, where class attorneys will receive $3.75 million while class members will receive no pecuniary benefit from the $13 million settlement fund. Instead, class counsel directed settlement money to, among others, a former client and a former co-counsel. The district court held *cy pres* appropriate because $13 million could not be divided across 60 million class members (though class settlements make similar divisions regularly) and because it accepted the settling parties' position that it would be too difficult to identify individual class members. It nevertheless certified a class the parties told it was unascertainable. The Ninth Circuit reaffirmed its decision in *Google Referrer* and affirmed the class certification, settlement approval, and fee award.

Furthermore, Petitioner and class member David Lowery, a musician and activist on creators' intellectual prop-

erty rights, objected below that several of the *cy pres* recipients take Google's side against him on controversial issues relating to copyright. The Ninth Circuit rejected Lowery's argument that the *cy pres* violated his First Amendment rights not to be compelled to subsidize speech he disagrees with, holding that he could opt out of the proposed settlement.

The first question presented here is identical to the one that the Court granted in *Gaos* but left unresolved; the second is an important issue that arises in class actions generally.

1. Whether, or in what circumstances, a *cy pres* award that provides no direct relief or benefit to class members comports with the Rule 23(e) requirement that a settlement binding class members must be "fair, reasonable, and adequate."

2. Whether Rule 23(b)(3) permits certification of a class where the district court has found that class members cannot be ascertained or even self-identify without an individualized "difficult and expensive" inquiry.

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

Petitioner David Lowery is a member of the plaintiff class and was an objector in the district court proceedings and the appellant in the court of appeals proceedings.

Respondents Benjamin Joffe; Lilla Marigza; Rick Benitti; Bertha Davis; Jason Taylor; Eric Myhre; John E. Redstone; Matthew Berlage; Patrick Keyes; Karl H. Schulz; James Fairbanks; Aaron Linsky; Dean M. Bastilla; Vicki Van Valin; Jeffrey Colman; Russell Carter; Stephanie Carter; and Jennifer Locsin were the named plaintiffs in the district court proceedings and appellees in the court of appeals proceedings.

Respondent Google Inc. was the defendant in the district court proceedings and appellee in the court of appeals proceedings.

Because Lowery is not a corporation, a corporate disclosure statement is not required under Supreme Court Rule 29.6.

STATEMENT OF RELATED PROCEEDINGS

In re Google Inc. Street View Elec. Comm. Litig., No. 20-15616 (9th Cir.) (opinion issued Dec. 27, 2021; order denying rehearing and rehearing *en banc* entered Feb. 3, 2022).

In re Google LLC Street View Elec. Comm. Litig., No. 3:10-md-02184-CRB (N.D. Cal.) (order granting in part and denying in part motion to dismiss issued Jun. 29, 2011; order granting final approval of class-action settlement and awarding fees and costs and entering final judgment issued March 18, 2020, and modified March 27, 2020).

Google, Inc. v. Joffe, et al., No. 13-1181 (U.S.) (order denying *certiorari* issued Jun. 30, 2014).

Joffe v. Google, Inc., No. 11-17483 (9th Cir.) (opinion on interlocutory appeal issued Sept. 10, 2013; order granting rehearing and amending opinion and denying rehearing *en banc* issued Dec. 27, 2013).

A different class action against Google raised the same question presented as this case:

Frank v. Gaos, No. 17-961 (U.S.) (order granting *certiorari* issued March 30, 2018; *per curiam* opinion vacating and remanding judgment issued March 20, 2019).

In re Google Referrer Header Privacy Litig., No. 15-15858 (9th Cir.) (opinion issued Aug. 22, 2017; order denying rehearing and rehearing *en banc* entered Oct. 5, 2017; order vacating judgment and remanding to district court issued May 13, 2019).

In re Google Referrer Header Privacy Litig., No. 5:10-cv-04809-EJD (N.D. Cal.) (opinion granting final approval of settlement Mar. 31, 2015; final judgment issued Apr. 2, 2015; notice of settlement in principle filed Oct. 6, 2021, but motion for preliminary approval of settlement not yet filed).

There are no other proceedings in any court that are directly related to this case.

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PETITION FOR WRIT OF CERTIORARI

A $13 million class-action settlement that awards absent class members no relief at all in exchange for their claims—no money, not even coupons—is not fair, reasonable, and adequate by any measure. *Frank v. Gaos*, 139 S. Ct. 1041, 1047–48 (2019) (Thomas, J., dissenting). Yet the Ninth Circuit upheld such a settlement because class counsel and the defendant agreed to donate, on behalf of the class, about $8.5 million to third parties, including class counsel's former client and former co-counsel and several nonprofits already funded by the defendant. (Most of the remainder of the settlement proceeds, of course, went to class counsel as fees and expenses.) It didn't matter that class members would receive the same relief whether they remained in the settlement and released their claims or opted out. App.40a. And it didn't matter whether some or all of a portion of settlement funds are "distributable"; a district court may approve a "*cy pres*-only settlement" that gives class members nothing in exchange for their claims. App.16a.

For good reason, every other court of appeals to consider the issue has disagreed with the Ninth Circuit's permissive approach. *See generally* Jeremy Kidd & Chas Whitehead, *Saving Class Members from Counsel*, 58 SAN DIEGO L. REV. 579 (2021) ("Kidd") (noting circuit split). Those courts' decisions have recognized that *cy pres* awards require special scrutiny because they can facilitate tacit or explicit collusion between defendants, who are eager to settle at the lowest price and with a minimum of fuss, and class counsel, who are seeking to maximize their fees and may be willing to accommodate defendants' interests in exchange for illusory relief. They recognize

that, in this way, *cy pres* awards present a heightened risk of conflict between class counsel and their putative clients, the members of the class. They recognize that *cy pres* awards may provide little or no benefit to class members. And above all else, they recognize that *cy pres* awards to third parties are not appropriate when any reasonable opportunity exists to compensate class members directly for their injuries—always the first-best use of settlement funds that, after all, are the property of the class.

By contrast, the Ninth Circuit's opinion here paves the way to divert that class property to third parties in just about every instance. In the Ninth Circuit's view, so long as the district court determines that it would be "burdensome" to make payments that require individualized conclusive proof of class membership or would be too small once divided across the entire class, it has not abused its discretion to sign off on *cy pres*. App.16a–20a. A court therefore need not consider alternatives to a *cy pres*-only settlement, such as funding a claims process where class members self-identify or requiring some sort of direct distribution, nor second-guess the propriety of class certification. *Id.* Thus, by defining a plaintiff class broadly enough, class counsel can grease the skids for a quick and easy *cy pres* deal with defendants that sells class members "down the river." *Mirfasihi v. Fleet Mortg. Corp.*, 356 F.3d 781, 785 (7th Cir. 2004). No other federal appellate circuit to consider *cy pres* questions in the face of class-member objections has endorsed a settlement that substitutes *cy pres* relief wholesale for class recovery,

leaving class members empty handed in the process. Indeed, the former Chief Judge of the Third Circuit classified past Ninth Circuit all-*cy pres* settlement approvals as "egregious" examples of "*cy pres* gone wrong." D. Brooks Smith, *Class Action and Aggregate Litigation: A Comparative International Analysis*, 124 PENN ST. L. REV. 303, 337 (2020) ("Smith").

Politicized recipients exacerbate the inherent problems of *cy pres* by "direct[ing] money to groups whose interests are purportedly aligned with the class members, but whom they have likely never heard of or may even oppose." App.40a. This implicates the First Amendment because of the lack of affirmative consent for class counsel to divert each class member's money to a third party. *Janus v. Am. Fed'n of State, Cty., and Mun. Emps., Council 31*, 138 S. Ct. 2448, 2486 (2018). Regrettably, the Ninth Circuit nullified that requirement, and the resulting *cy pres* makes petitioner Lowery worse off by funding groups—including programs at universities with billions of dollars in endowments—that work against his causes.

In this way, the decision below deepened a circuit split that already created an enormous incentive for forum-shopping by plaintiffs' attorneys seeking to bring and settle nationwide class actions like this one. Bringing suit within the Ninth Circuit's footprint guarantees that minor things like compensating class members for their injuries and holding defendants liable to the extent the law allows will not discourage reaching a quick settlement to the mutual benefit of defendants and class counsel, at the expense of class counsel's putative clients. Judging by the explosion in consumer class-action settlements featuring

cy pres awards within the Ninth Circuit, this has not gone unnoticed among the plaintiffs' bar.

OPINIONS BELOW

The Ninth Circuit's decision is reported at 21 F.4th 1102, and is reproduced at App.1a. The district court's decision approving the class-action settlement under Rule 23(e) is reported at 2020 U.S. Dist. LEXIS 47928, and is reproduced at App.43a.

JURISDICTION

The judgment below was entered December 27, 2021. The Ninth Circuit denied rehearing *en banc* on February 3, 2022. On March 18, 2022, Justice Kagan extended the time for this petition to June 3, 2022. *See* No. 21A519. This Court has jurisdiction under 28 U.S.C. §1254(1).

RULES INVOLVED

Rules 23(a)(4), (b)(3), and (e)(2) are reproduced at App.154a.

STATEMENT OF THE CASE

A. Plaintiffs and attorneys general sue Google over privacy violations, and Google settles.

In 2010, Google admitted that roving vehicles used to create its Street View mapping service also collected 600 gigabytes of private information from unencrypted wireless networks ("Wi-Fi") in thirty countries. *Joffe v. Google, Inc.*, 746 F.3d 920, 923 (9th Cir. 2013); 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 putative class actions, consolidated under an MDL in the Northern District of California. Plaintiffs claimed Google's actions violated various federal and state law rights and demanded billions of dollars in statutory and punitive damages and an injunction.

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 Google acquired any plaintiff's communications. App.46a. 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 of the named plaintiffs. *Id.* The special master issued a sealed report in 2017. *Id.* The district court found standing based on the allegations of the complaint without reference to the sealed report. App.51a.

While the underlying litigation was pending, Google entered into an agreement in March 2013 with attorneys general from 39 states—the "Assurance of Voluntary Compliance"—over the same Google practices. Dkt. 186 at 77. The Assurance included a "Privacy Program" that 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.

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." App.92a. "Acquired Payload Data" was data that Google's Street View vehicles acquired from unencrypted wireless networks from January 1, 2007 through May 15, 2020. App.91a. The class size was about 60 million members. App.52a & n.3.

Google would establish a $13 million fund, but none of that money would go to class members. App.96a. Rather, after attorneys' fees and costs, incentive awards to named plaintiffs, and administration costs, 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. App.97a–98a. The Settlement did not identify the *cy pres* recipients but merely 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 continue to comply with terms already in the Assurance of Voluntary Compliance and to maintain "educational webpages" repeating widely available public information on configuring secure encrypted wireless networks. App.8a, 98a–99a, 130a; Dkt. 189-1 at 8–11.

Class counsel requested $4 million in fees and expenses, uncontested by Google. Dkt. 185 at 7, 26. The fee request was based solely on a percentage of the $13 million settlement fund; class counsel made no claim that the injunction entitled them to fees. Dkt. 185 at 7, 13.

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 15.

The Electronic Privacy Information Center ("EPIC"), which had filed *amicus* in support of petitioner in *Frank v. Gaos*, also petitioned the district court for *cy pres* money. Dkt. 169.

At least four of the nine *cy pres* recipients—Public Knowledge, World Privacy Forum, ACLU, and EPIC—previously received Google *cy pres* money. App.137a–138a. Many recipients had received *cy pres* funds from other class actions involving big tech firms. *Id.* *Cy pres* recipient ACLU also had a pre-existing relationship with class counsel firms as their co-counsel or client. App.136a.

B. Lowery objects.

Class member David Lowery, represented by the nonprofit Center for Class Action Fairness, timely objected to the settlement approval, *cy pres* recipients, class certification, and fee request. App.111a. 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. Lowery self-identified with specificity as a member of the class, and the parties submitted no evidence rebutting his declaration. Dkt. 188-1.

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. App.122a–130a. The undisputed evidence was that claims rates were almost always less than one percent. App.123a–124a. In particular, the settlement for a similarly large class of over 100 million members in *Fraley v. Facebook, Inc.* could have a claims process after the district court rejected the possibility of a *cy pres*-only settlement, and could 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. Dkt. 188-2. A typical class-action settlement has 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 about $4–$5 each even after attorneys' fees. If distribution was possible, Lowery argued, then the settlement violated Rules 23(a)(4) and (e)(2)(C)(ii) when plaintiffs prioritized third parties over the class.

If, on the other hand, it really was not feasible to distribute any money to class members because of putative difficulties in identifying class members, then Lowery objected that class certification was inappropriate because the class was not ascertainable. App.145a–147a. Moreover, the class would not satisfy Rule 23(b)(3)'s requirement 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. App.142a–144a. But Lowery argued that class members could self-identify as he did, and as several courts of appeals said was possible. App.125a, 146a.

Lowery objected that without the affirmative consent of the class members, the *cy pres* awards constituted compelled speech in contravention of the First Amendment. App.131a–134a. Lowery argued that the violation was particularly noxious because the *cy pres* recipients included advocacy groups promoting policy positions with which Lowery disagreed. App.132a–134a; Dkt. 188-1.

Lowery also 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. App.136a–137a. 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 have otherwise made to the *cy pres* recipients. App.137a–139a.

Finally, Lowery objected to the proposed Rule 23(h) request. App.147a–152a. The request was based on a percentage of the fund, but that presupposed that a $13 million fund earmarked to third parties with nothing to the class was equal in value to $13 million paid to the class. App.147a. Lowery argued that because the class received no real marginal benefit over non-class members, any fee award would be impermissibly disproportionate. *Id.*

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. App.130a; Dkt. 189-1. Lowery also noted that the injunctive relief, like the *cy pres*, applied equally to class members and non-class members alike, and could not be consideration for the release of monetary claims. App.130a.

C. The district court rejects Lowery's objections and approves the settlement.

After satisfying itself that there was Article III standing under *Gaos*, App.45a–51a, the district court rejected Lowery's objection. First, the court held that Rules

23(a)(4) and (g)(4) were satisfied, finding that the *cy pres* award indirectly benefits the class and therefore the attorneys' fee award was not a windfall. App.53a–54a.

The district court found that the "modest" injunctive relief was "adequate" though "not the main benefit to the class" because of changes in the website, though it did not address Lowery's argument that the injunctive relief was not targeted to class members. App.61a, 76a–78a. (The district court noted that retroactive relief to the class was impossible. App.77a.) The district court rejected Lowery's Rule 23(b)(3) superiority argument based on Ninth Circuit precedent. App.56a–58a.

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, but whether it is feasible to distribute the fund to the class *as a whole.*" App.70a–71a (citing *Google Referrer*, 869 F.3d at 742). The court agreed with the settling parties' contention that a claims process was infeasible because class members would be unable to self-identify. App.71a–72a. 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. App.51a, 65a. The district court, following Ninth Circuit precedent, also 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. App.72a–73a.

The court rejected Lowery's class certification and First Amendment arguments. App.57a–58a, 76a n.10.

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. App.79a–80a & n.12. It held that Lowery's arguments about conflicts of interest did not implicate settlement fairness under circuit precedent, and did not apply the "significant prior affiliation" test Lowery requested. App.79a & n.11.

The court awarded $3.75 million in fees and costs, using a percentage of the total settlement fund net of settlement administration costs, rejecting Lowery's argument for discounting the value of the fund. App.61a n.6, 64a–65a, 85a–86a.

D. The Ninth Circuit affirms, endorsing *Google Referrer*.

On Lowery's appeal, the Ninth Circuit noted that *Frank v. Gaos* granted review of *Google Referrer,* but did not reach the *cy pres* question, and decided that *Google Referrer* remained "persuasive authority." App.15a. With *Google Referrer* and other Ninth Circuit *cy pres* precedents in hand (App.10a–14a), it affirmed without mentioning the 2018 amendments creating Rule 23(e)(2)(C)(ii) or Justice Thomas's dissenting opinion in *Gaos*.

The court "reject[ed] the suggestion that a district court may not approve a class-action settlement that provides monetary relief only in the form of *cy pres* payments to third parties." App.16a (citing *Google Referrer* and *Lane v. Facebook, Inc.*, 696 F.3d 811, 822 (9th Cir. 2012)).

The court reaffirmed *Google Referrer*'s holding that there was no requirement to test whether it was possible to distribute money to *some* of the class. App.17a–18a. It accepted the parties' representation that a claims process was impossible without "verification" and that "self-identification would be pure speculation." App.18a–20a. Class certification was still acceptable despite this inability to ascertain class members without an individualized "difficult and expensive" inquiry, and despite the lack of any direct class benefit, because the "diffuse" *cy pres* "benefit to society at large" permitted "meaningful relief." App.20a–23a.

The court found that the "modest injunctive relief," combined with the *cy pres* was a fair settlement of damages claims without addressing Lowery's argument that the relief applied equally to class members and non-class members alike. App.23a–26a.

The court rejected Lowery's First Amendment argument because of class members' ability to opt out. App.27a–28a. The requirement of "affirmative[] consent" in *Janus* did not apply because funds "could not feasibly be paid to class members." App.27a–28a.

The court, relying on earlier Ninth Circuit precedent, rejected Lowery's argument that the significant prior affiliations precluded some beneficiaries from receiving *cy pres*. App.28a–31a (citing *Lane*, 696 F.3d at 817–21).

Again following *Google Referrer*, the court rejected Lowery's argument for discounting the $13 million *cy pres* settlement fund as of lesser value than a $13 million

fund disbursed to the class for purposes of calculating attorneys' fees, while leaving open the possibility that some future district court may exercise its discretion to do so. App.31a–34a.

The court held that there was no fiduciary obligation for class counsel to advise "absent class members of the superiority of opting out en masse." App.34a–35a.

E. Judge Bade issues a concurring opinion to the panel opinion she authored, calling for a reconsideration of the *cy pres* doctrine.

Judge Bade issued a concurring opinion to the panel opinion she authored. App.35a–42a. "Because I am constrained to follow [Ninth Circuit] precedents, I authored and joined the majority opinion." App.36a. But, quoting Chief Justice Roberts's statement in *Marek v. Lane*, 571 U.S. 1003 (2013), Judge Bade wrote "separately to express some general concerns about *cy pres* awards." App.36a.

Judge Bade noted that *cy pres* presented a practical solution for some class-action problems, but questioned "whether we have allowed these practical advantages to inappropriately displace other concerns implicated by *cy pres* awards." App.36a–38a (citing authorities). Contrary to some courts' suggestion that *cy pres* is an indirect benefit, there is

> a compelling argument that class members receive no benefit at all from a settlement that extinguishes their claims without awarding them any damages, and instead directs money to groups whose interests are purportedly aligned with the

> class members, but whom they have likely never heard of or may even oppose.

App.40a; *see* App.39a–41a (citing authorities). In Rule 23(b)(3) class actions, *cy pres* settlements

> arguably benefit opt-outs more than class members because opt-outs reap any positive externalities of the settlement provisions while retaining the value of the claims that the settlement extinguished for class members.

App. 40a–41a & n.2. Judge Bade concluded,

> I further question whether *cy pres* awards are inherently unfair when the class receives no meaningful relief in exchange for their claims, see Fed. R. Civ. P. 23(e)(2), and whether such awards can be justified given the serious ethical, procedural, and constitutional problems that others have identified. Therefore, I respectfully submit that it is time we reconsider the practice of *cy pres* awards.

App. 41a–42a.

The Ninth Circuit denied Lowery's petition for rehearing and rehearing *en banc*, with Judge Bade voting to grant the petition for rehearing *en banc*. App.87a.

REASONS FOR GRANTING THE PETITION

As the Chief Justice recognized in *Marek*, 571 U.S. 1003 (2013), (Roberts, C.J., respecting denial of certiorari from the Ninth Circuit's decision in *Lane*), *cy pres* settlements raise "fundamental concerns." *Accord* App.37a–38a (Bade, J., concurring) (compiling authorities). Thus, the

Court granted review of *Google Referrer* in *Gaos*. Here, as in *Gaos* and *Lane*, the Ninth Circuit rejected that courts have any heightened obligation to police conflicts of interest involving *cy pres* awards. Here, as in *Gaos*, the petition presents an ideal and timely opportunity for the Court to resolve a deep circuit split over the use of *cy pres* awards in class-action settlements and provide much-needed guidance to the lower courts on a recurring issue of substantial importance. The circuit split identified in the *Gaos* petition has only deepened, and this case presents another circuit split on class-certification standards.

This petition should be granted for the same reasons that the petition was granted in *Gaos*. This case presents broad, significant, and recurring questions of law and policy that are not limited to any unique aspect of this particular case. Because of these features, and because class-action settlements are amenable to forum shopping, unless this Court intervenes, *cy pres* settlements will continue to find their way to the Ninth Circuit for approval when other circuits would reject them. This case presents an ideal vehicle for addressing *cy pres*. Unlike in *Gaos*, the district court resolved Article III standing under the correct standard. Lowery fully raised the Rule 23 and First Amendment *cy pres* issues below and the urgency of guidance from this Court is undiminished. As the author of the opinion below acknowledges in her concurrence, "it is time we reconsider the practice of *cy pres* awards." App.42a.

I. The circuits are in conflict.

A. The Ninth stands alone on *cy pres*.

In a series of four decisions, the Ninth Circuit has now established an outlier rule that courts may deem settlement funds eligible for *cy pres* distribution whenever a settlement fund cannot be spread among *every* member of the class. First, in in *Lane v. Facebook, Inc.*, 696 F.3d 811 (9th Cir. 2012), *cert. denied sub nom*, *Marek v. Lane*, 571 U.S. 1003 (2013), the Ninth Circuit affirmed approval of a *cy pres*-only arrangement because it would result in only "*de minimis*" payments if distributing the $9.5 million fund among 3.6 million class members. *Lane*, 696 F.3d at 821.

Then, in *Google Referrer*, the Ninth Circuit doubled down on *Lane*, holding that *cy pres* awards are appropriate even if an objector raises possible feasible alternatives that would direct money to some class members. *In re Google Referrer Header Privacy Litig.*, 869 F.3d 737, 742 (9th Cir. 2017), *vacated and remanded on other grounds sub. nom Frank v. Gaos*, 141 S. Ct. 1697 (2018).

In a 2018 case, the Ninth Circuit held that even when it is "technically feasible" to distribute funds to every class member in a case in which every member of a nationwide class was already getting a distribution, a court can decide that millions of dollars was "*de minimis*" and approve *cy pres* to local schools in a judge's home district establishing chairs in the defendant's name. *In re EasySaver Rewards Litig.*, 906 F.3d 747, 761–62 (9th Cir.

2018). This Court denied *certiorari* after defendants obtained an automatic stay in bankruptcy. *Perryman v. Romero*, No. 18-1074, 139 S. Ct. 2744 (2019).

Finally, the decision below reestablishes the rule of *Google Referrer*. It again announces that the standard for feasibility is not whether the funds can be distributed to ***some*** portion of the class. App.17a–18a. Instead, the Ninth Circuit looked to whether the gross fund ($13 million here) can be allocated among the entire class (60 million persons here) so that "proof of individual claims would be burdensome or distribution of damages costly," even when there is evidence that a claims process of self-identification would successfully feasibly distribute claims to a percentage of the class. App.19a–20a (quoting *Lane*, 696 F.3d at 819). In such cases, a *cy pres* award need only bear "a direct and substantial nexus to the interests of absent class members." App.22a (quoting *Lane*, 696 F.3d at 821).

Though the panel thought (App.17a) Lowery cited "no authority" for a more stringent view of feasibility, he did. Other circuits categorically reject the Ninth Circuit's test. In *Pearson v. NBTY, Inc.*, for example, the settlement allocated $2 million for awards to the 12 million class members, with $1.3 million in unclaimed funds going to a nonprofit as a *cy pres* award. 772 F.3d 778, 780 (7th Cir. 2014). The Seventh Circuit held that the *cy pres* residual was impermissible because the funds could have "feasibly be[en] awarded to the intended beneficiaries" (the class members), by providing broader notice, simplifying the claims process, or simply mailing checks to people known

to have purchased the product at issue from the defendant. *Id.* at 784. *Pearson* rejected the premise that the Ninth Circuit relied on here: class members need not prove their entitlement to small-dollar claims with "elaborate documentation"; instead, excessive demands for proof were evidence of an unfair claims process. *Id.* at 783.

The Eighth Circuit took the same approach in *In re BankAmerica Corp. Securities Litigation* to invalidate a *cy pres* distribution of the $2.5 million remaining in the settlement fund where the class members had already made some claims. 775 F.3d 1060, 1062 (8th Cir. 2015). As the court explained, the "inquiry *must* be based primarily on whether the amounts involved are too small to make individual distributions economically viable." *Id.* at 1064 (emphasis the court's; quotation omitted). As in *Pearson*, but contrary to the Ninth Circuit, there was no requirement that the residual be able to be distributed to *every* single class member; so long as it was feasible to distribute to *some* class members, settlements must do that.

The Fifth Circuit's decision in *Klier v. Elf Atochem North America, Inc.*, likewise conflicts with the decision below. 658 F.3d 468, 475 (5th Cir. 2011). There, the court rejected a *cy pres* award of unclaimed funds from a class-action settlement, holding that such awards are impermissible if it is "logistically feasible and economically viable to make additional pro rata distributions to class members." Under this test, a *cy pres* award may be made "only if it is not possible to put those funds to their very best use: benefitting the class members directly." *Id.* As the court stressed, "[t]he settlement-fund proceeds, having been generated by the value of the class members'

claims, belong solely to the class members" and "*[c]y pres* comes on stage only to rescue the objectives of the settlement when the agreement fails to do so." *Id.* at 475–76.

The Third Circuit has also rejected the Ninth Circuit's permissive approach to *cy pres* awards in Rule 23(b)(3) settlements of damages claims. In *In re Baby Products Antitrust Litigation*, the court vacated district court approval of a class-action settlement that, because of a low claims rate, would have distributed the bulk of the settlement fund to *cy pres* recipients. 708 F.3d 163 (3d Cir. 2013). "*Cy pres* distributions," the court stressed, "are inferior to direct distributions to the class because they only imperfectly serve the purpose of the underlying causes of action-to compensate class members." *Id.* at 169. "Barring sufficient justification," the court held, "*cy pres* awards should generally represent a small percentage of total settlement funds." *Id.* By contrast, the Ninth Circuit's *Lane* jurisprudence broadly sanctions "*cy pres*-only settlements." App.14a–15a; *Google Referrer*, 869 F.3d at 741.[1]

The Ninth Circuit also opens a new fissure in class-action settlement law by rejecting the Third Circuit's standard forbidding *cy pres* remedies if there is "a significant prior affiliation with any party, counsel, or the court."

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[1] In *dicta*, the Third Circuit has since suggested a *cy-pres* only settlement can be acceptable for a class certified under Rule 23(b)(2), because in that scenario the settlement funds "'belong' to the class as a whole, and not to individual class members as monetary compensation." *In re Google Inc. Cookie Placement Consumer Priv. Litig.*, 934 F.3d 316, 328 (3d Cir. 2019). Here, of course, we deal with a (b)(3) class.

Compare In re Google Inc. Cookie Placement Consumer Priv. Litig., 934 F.3d 316, 331 (3d Cir. 2019) *with* App.28a–30a (rejecting "significant prior affiliation" test citing egregious conflicts in *Lane*). In *Google Cookie*, as in *Gaos* and here, the *cy pres* beneficiaries were intertwined with Google and class counsel's interests. 934 F.3d at 330. Evidencing this new, additional circuit split, the Third Circuit by contrast would not permit approval of a *cy pres* remedy without investigation of "the nature of the relationships between the *cy pres* recipients and Google or class counsel." *Id.* This is exactly what the Ninth Circuit signed off on here. App. 28a–30a.

In short, every circuit other than the Ninth requires some inquiry about whether *cy pres* is distributable to some class members, and the Third Circuit also requires scrutiny of potential conflicts of interest in the selection of *cy pres* beneficiaries, while the Ninth requires none.

B. Courts split on ascertainability and on certification where no relief is available to the class.

The Ninth Circuit's class certification decision is unique and exacerbates a separate circuit split. The Third Circuit holds that "If class members are impossible to identify without extensive and individualized fact-finding or 'mini-trials,' then a class action is inappropriate." *Marcus v. BMW of North America, LLC*, 687 F.3d 583, 593 (3d Cir. 2012); *accord Carrera v. Bayer Corp.*, 727 F.3d 300 (3d Cir. 2013). But here, the Ninth Circuit made exactly the finding that individualized "difficult and expensive" inquiries were required to determine class membership that the Third Circuit forbids.

The Seventh Circuit takes an intermediate position on ascertainbility, holding that, while a class of plaintiffs cannot be "so difficult to identify that it is not adequately defined or nearly ascertainable," it is permissible to certify a class where individual class members self-identify. *Mullins v. Direct Digital, LLC*, 795 F.3d 654, 659, 669 (7th Cir. 2015) (quoting *Adashunas v. Negley*, 626 F.2d 600, 604 (7th Cir. 1980)). But class certification is unavailable under Rule 23(a) if no new relief is available to the class. *In re Aqua Dots Prod. Liab. Litig.*, 654 F.3d 748, 751–52 (7th Cir. 2013) (Easterbrook, J.). *Accord Gaos*, 139 S. Ct. at 1047–48 (Thomas, J., dissenting) (class certification inappropriate in a *cy pres*-only settlement).

The Eleventh Circuit takes a similar intermediate approach: "a proposed class is ascertainable if it is adequately defined such that its membership is capable of determination"; if it is administratively infeasible to identify class members, the class may flunk Rule 23(b)(3)(D). *Cherry v. Dometic Corp.*, 986 F.3d 1296, 1304 (11th Cir. 2021); *see generally id.* at 1301–05 (discussing positions of the various circuits, and rejecting *Carrera*). But only the Ninth Circuit has held that an administratively unmanageable class where no relief to the class is possible may still be certified because of the availability of *cy pres*.

This case presents an opportunity for the Court to resolve this long-running circuit split on certification while addressing *cy pres*.

II. The questions presented are important and recurring, and will only grow as parties forum-shop settlements to the Ninth Circuit.

As in *Gaos*, the Rule 23 questions presented here are important and recurring. As in *Gaos*, all the concerns identified by the Chief Justice in *Marek* are present: "when, if ever, such relief should be considered; how to assess its fairness as a general matter; whether new entities may be established as part of such relief; if not, how existing entities should be selected; what the respective roles of the judge and parties are in shaping a *cy pres* remedy; how closely the goals of any enlisted organization must correspond to the interests of the class." *Marek*, 571 U.S. at 1006. All of these concerns point to the same conclusion: courts should sharply curtail if not flatly prohibit application of the *cy pres* doctrine to class-action settlements. Although most circuits to consider the issue have reached this conclusion without direction from this Court, this precedent will have a limited impact, as most federal consumer class actions are nationwide in scope and can be forum-shopped to exploit the Ninth Circuit's permissive approach.

A. Application of *cy pres* to class-action settlements is a poor fit for the doctrine.

The use of *cy pres* awards as part of a class-action settlement is, in itself, a base contortion of the original purpose of the *cy pres* doctrine as historically applied in equity. As explained by the Seventh Circuit, "[*c*]*y pres* (properly *cy près comme possible*, an Anglo–French term meaning 'as near as possible') is the name of the doctrine

that permits a benefit to be given other than to the intended beneficiary or for the intended purpose because changed circumstances make it impossible to carry out the benefactor's intent." *Pearson*, 772 F.3d at 784. The doctrine originated in the area of charitable trusts and allowed, for example, the March of Dimes to shift to addressing birth defects once vaccines conquered polio. *Id.*

The use of *cy pres* to divert money to third parties has become common in class-action settlements. A 2017 article noted the use of *cy pres* in settlements were at their highest levels ever in 2015 and 2016, the most recent years covered in a study. Natalie Rodriguez, *Era of Mammoth Cases Test Remedy of Last Resort*, LAW360 (May 2, 2017). *See also Marek*, 571 U.S. at 1006 (Roberts, C. J., concurring in the denial of certiorari) (noting that "*[c]y pres* remedies, however, are a growing feature of class-action settlements"). But *cy pres* is a poor fit for class actions when courts permit settlements to be gamed to divert material amounts of money away from the class. There are no "changed circumstances" in these class-action settlements. There is no original "benefactor" whose wishes must accommodated "as near as possible," once the true beneficiary purpose ceased to exist. Even more fundamentally, there is no "charitable" objective in a Rule 23 class action. *In re Pet Food Prods. Liab. Litig.*, 629 F.3d 333, 363 (3d Cir. 2010) (Weis, J.) (concurring and dissenting in part). A class action is a procedural device to aggregate private claims for compensation to class members—not to create a charitable trust. *Cf. Shady Grove Orthopedic Assocs., P.A., v. Allstate Ins. Co.*, 559 U.S. 393, 408 (2010). In short, application of *cy pres* to

Rule 23 class settlements unquestionably extends the doctrine far beyond its original roots and rationale into an area where the doctrine's premises are not only utterly absent but *contrary* to the purposes of Rule 23. The doctrine cannot be stretched to encompass Rule 23 class-action settlements. This Court should so hold. *Keepseagle v. Perdue*, 856 F.3d 1039, 1059 (D.C. Cir. 2017) (Brown, J., dissenting) ("*Cy pres* took the judiciary to the utmost verge of the law even before it was applied to class actions" (cleaned up)); *cf. also Ira Holtzman, CPA & Assoc. Ltd. v. Turza*, 728 F.3d 682, 689–90 (7th Cir. 2013) (Easterbrook, J.).

The Ninth Circuit rejected any requirement to consider alternatives to *cy pres* and also justified its ruling with a demand for a "verification" mini-trial to prove the legitimacy of a claim that no other circuit requires. This position ignores Rule 23(e)(2)(C)(ii)'s requirement that district courts consider "the effectiveness of any proposed method of distributing relief to the class, including the method of processing class-member claims." If courts permit settling parties to dispense with class claims entirely, it erases Rule 23(e)(2)(C)(ii) from the books by making it automatic to clear the bar.

Furthermore, the Ninth Circuit's desire for *cy pres* has resulted in the tail wagging the dog: it certifies classes that other circuits would reject *because* the parties could resolve the resulting class action with *cy pres*. App.22a; *Briseno v. Conagra Foods, Inc.*, 844 F.3d 1121, 1129 (9th Cir. 2017). But there is a reason no class complaint includes a request for *cy pres* in its prayer for relief; *cy pres*

is not a cognizable form of class relief. *Gaos*, 139 S. Ct. at 1047 (Thomas, J., dissenting).

Contrary to the Ninth Circuit's position permitting the parties to bypass a claims process with self-identification, a defendant has no "due process right to a *cost-effective* procedure for challenging every individual claim to class membership." *Mullins*, 795 F.3d at 669. The Ninth Circuit's standard would permit nearly every consumer class-action settlement to be diverted to *cy pres*, because such settlements usually rely on self-identification because few customers maintain their receipts for low-value consumer good. *Cf. id.* at 666 n.3 (noting problem of courts requiring unrealistic proof for a class-action claim).

B. *Cy pres* creates improper incentives for class counsel.

While both class counsel and a defendant have an incentive to bargain fairly over the *size* of a settlement, they critically lack similar incentives to decide how to divvy it up—including the portion allocated to counsel's own fees. The defendant cares only about the bottom line, and will take any deal that drives it down. Meanwhile, class attorneys have an obvious incentive to seek the largest possible portion for themselves, and too often accept bargains that are worse for the class if their share is sufficiently increased. "From the selfish standpoint of class counsel and the defendant, … the optimal settlement is one modest in overall amount but heavily tilted toward attorneys' fees." *Eubank v. Pella Corp.*, 753 F.3d 718, 720 (7th Cir. 2014).

While a defendant and a class counsel might happily agree to a settlement when the defendant simply writes a check to class counsel in exchange for the release of the class's claims, one rarely sees something so blatant outside of John Grisham novels. 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 subtly trade benefits to defendants for bigger fees. These tools mainly 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 obviously abusive settlements.

Cy pres is one means of creating the illusion of relief. When courts award attorneys' fees based on the size of the *cy pres* fund rather than on the amount the class directly received, *cy pres* will "increase the likelihood and absolute amount of attorneys' fees awarded without directly, or even indirectly, benefitting the plaintiff." 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, 661 (2010) ("Redish"). As a result, class attorneys are financially indifferent over whether a settlement is structured to compensate their clients or to funnel settlement proceeds to third parties. Because *cy pres* can facilitate an early settlement with a profitable fee award and less resistance from defendants, class attorneys are rewarded for selling their putative clients down the river. Kidd at 609–11.

Cy pres is also enticing to lawyers interested in promoting their own personal political or charitable preferences. And 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 & n.114 (2015).

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

C. *Cy pres* creates the appearance of impropriety for district court judges.

The Ninth Circuit has affirmed *cy pres* awards from a nationwide class to three local San Diego schools, creating the appearance of conflicts of interest for the district court judge who lives in that community. *EasySaver*, 906 F.3d at 761–62; *cf. also* Kidd at 613–14 (case of *cy pres* to charity where judge's spouse sat on board). This is wrong. The district court here acted as a grant officer, approving the application of a nonprofit left out of the settlement to

join the beneficiary list and reallocating the distribution. App.79a–80a. "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). Fundamentally, trial courts "endorse[] judicially impermissible misappropriation" when they conclude that class members are less deserving than a charity. *BankAmerica Corp.*, 775 F.3d at 1065.

Cy pres tempts judges to play benefactor with someone else's money. Adam Liptak, *Doling Out Other People's Money*, N.Y. TIMES (Nov. 26, 2007). In another Google *cy pres* settlement, a district court *sua sponte* redirected proposed *cy pres* to a local university where the judge taught as a visiting law professor. *In re Google Buzz Privacy Litig.*, 2011 WL 7460099, at *3 (N.D. Cal. Jun. 2, 2011); Pamela A. MacLean, *Competing for Leftovers*, CALIFORNIA LAWYER (Sep. 2, 2011). "District courts should avoid the legal complications that assuredly arise when judges award surplus settlement funds to charities and civic organizations." *Klier*, 658 F.3d at 482 (Jones, C.J., concurring) (cleaned up); *accord SEC v. Bear, Stearns & Co.*, 626 F. Supp. 2d 402, 415–16 (S.D.N.Y. 2009).

D. *Cy pres* raises First Amendment concerns that the Ninth Circuit improperly minimized.

Cy pres awards, sanctioned and enforced by the district courts, also infringe on the First Amendment rights of class members by requiring them to subsidize political organizations or charities, chosen by the district court, class counsel, and defendants, but which individual class members may not support or approve. Such forced payments

require the "affirmative[] consent" of the class member and that consent may not be implied or "presumed." *See Janus*, 138 S. Ct. at 2486 (2018).

Governmental power (in the form of a district court order binding class members) may not sanction the redirection of property (a monetary recovery belonging to class members) to third parties to engage in expressive activity without the affirmative consent of the persons to whom those funds belong. As *Harris v. Quinn* stated, "'[t]he government may not prohibit the dissemination of ideas that it disfavors, *nor compel the endorsement of ideas that it approves*.'" 573 U.S. 616, 647 (2014) (quoting *Knox v. SEIU*, 567 U.S. 298, 309 (2012)) (emphasis added). *Knox* established that "compelled funding of the speech of other private speakers or groups" is unconstitutional in all but the most limited of circumstances, none of which are present in a *cy pres* context. 567 U.S. at 309–11.

Class counsel did not obtain the "affirmative consent" of each class member for these *cy pres* awards. Class members received only notice and the opportunity to opt out of the class. App.27a. Under *Janus*, an "opt out" opportunity is not "affirmative consent" and is thus insufficient: waiver of First Amendment rights "cannot be presumed." 138 S. Ct. at 2486. In short, whatever doubt remained after *Knox* and *Harris*, *cy pres* cannot survive *Janus*'s holding that "affirmative consent" is required.

But the Ninth Circuit read the affirmative-consent requirement out of this Court's precedent, restricting it to the facts of *Janus*. App.27a–28a. Here, a class action brought for the benefit of petitioner Lowery will fund organizations that work against his interests. Even beyond

the First Amendment implications, the selection of politicized beneficiaries implicates the fairness of *cy pres* settlements; if nothing else, canons of constitutional avoidance militate for interpreting Rule 23 in a way to limit *cy pres*.

E. Class members benefit when courts restrict *cy pres* abuse.

When courts limit the ability of class counsel to profit from *cy pres*, class counsel will respond to this incentive to "maximize the settlement benefits actually received by the class." *Pearson*, 772 F.3d at 781. That is more than abstract theory: experience bears it out:

- While *Baby Products* left open the possibility of approving *cy pres*, it reversed a settlement approval and ordered the district court to consider whether class counsel had adequately prioritized direct recovery in both terms of settlement approval and the fee award. 708 F.3d at 178. On remand, the parties arranged for direct distribution of settlement proceeds, and paid another $14.45 million to over one million class members—money the parties at first directed to *cy pres*—leading to an "exponential increase" in class recovery. *McDonough v. Toys "R" Us, Inc.*, 80 F. Supp. 3d 626, 660 (E.D. Pa. 2015).
- After objection to a claims-made settlement in a consumer class action over aspirin labeling where nearly all funds would have gone to *cy pres*, the parties used subpoenaed third-party retailer data to identify over a million class members (instead of the

18,938 who would have received $5 each in the original claims-made structure), and paid another $5.84 million to the class. Order 4, *In re Bayer Corp. Litig.,* No. 09-md-2023, Dkt. 254 (E.D.N.Y. Nov. 8, 2013); *id.* Dkt. 218-1.

- A similar successful objection to residual *cy pres* in an antitrust settlement increased class recovery from $2.2 million to $13.7 million. *Pecover v. Electronic Arts, Inc.*, No. 08-cv-2820, 2013 WL 12121865 (N.D. Cal. May 30, 2013); *id.* Dkt. 466.
- After this Court decided *Gaos*, Google broke its streak of four consecutive *cy pres*-only privacy class settlements with a direct electronic distribution of funds and a claims process for a class of tens of millions of members, though only $7.5 million was in the settlement fund. *In re Google Plus Profile Litig.*, No. 5:18-cv-06164-EJD, 2021 WL 242887 (N.D. Cal. Jan. 25, 2021).
- On remand in *Pearson*, the parties renegotiated to give class members at least $4 million more in cash. Settlement ¶¶7–8, No. 11-cv-07972, Dkt. 213-1 (N.D. Ill. May 14, 2015).

In short, as *Pearson* reasoned, if courts make lawyers direct money to clients to get paid, that is *exactly* what happens. Alison Frankel, *By Restricting Charity Deals, Appeals Courts Improve Class Actions*, REUTERS (Jan. 12, 2015).

F. Critical certification decisions now turn on venue.

This Court has repeatedly recognized the game-changing significance of certification decisions. "Certification … may so increase the defendant's potential damages liability and litigation costs that he may find it economically prudent to settle and to abandon a meritorious defense." *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 476 (1978). Certification magnifies the effect of "risk of error" on the merits: "Faced with even a small chance of a devastating loss, defendants will be pressured into settling questionable claims." *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 350 (2011).

Improper certification also jeopardizes the rights of absent class members. *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 620-21 (1997). Yet the opinion below greenlights classes composed of "legions so unselfconscious and amorphous." *Id.* at 628.

Circuit courts recognize that their divergence affects many certification decisions. *Mullins* explained, for example, that other courts' "heightened" ascertainability requirement "has defeated certification, especially in consumer class actions." 795 F.3d at 657. Indistinguishable cases can lead to wildly differing results. This petition presents an opportunity to resolve this split.

G. The circuit split encourages forum shopping.

The problem of the circuit split is especially acute because large class-action settlements—being both nationwide and non-adversarial—can be easily forum shopped.

Class-action settlements often feature a new complaint alleging a larger class to facilitate global settlement; little stops settling parties from relocating such a complaint in a more favorable jurisdiction for the breezier review. *Cf. Adams v. USAA Casualty Ins. Co.*, 863 F.3d 1069 (8th Cir. 2017) (reversing district court's sanctions of counsel for abuse of process for dismissing federal action "for the improper purpose of seeking a more favorable forum and avoiding an adverse decision").

The problem is exacerbated even more by the Ninth Circuit's holding that a court may disregard Rule 23(e)(2)(C)(ii) whenever the settlement fund divided by the total number of class members is "*de minimis*." In *EasySaver,* the court held a payment of about $3 to every single class member was "*de minimis*"—even though it would have been costless to augment the class benefit automatically being sent to every class member. 906 F.3d at 761. That definition of "*de minimis*" would permit *almost every consumer class-action settlement* to completely ignore payments to class members. Nearly all consumer and privacy class-action settlements are for less than a dollar or two per class member. The settlement of a 2015 data breach of insurer Anthem was for a record $115 million—but after attorneys' fees and settlement administration costs, there would be only about $0.65 per class member for the 79-million member class. Editorial Board, *The Anthem Class-Action Con*, WALL ST. J. (Feb. 11, 2018). The Ninth Circuit's test would have permitted the parties to divert all of that money to *cy pres* with no penalty to class counsel's fee.

Such large diversions are more than hypothetical. Just last month, the same district court that approved the settlement here signed an order permitting class counsel to divert *$76.1 million* of a Volkswagen-owner class's settlement fund to *cy pres* with no penalty to their previously awarded fee. The Ninth Circuit's permissive approach meant that there was no effort to provide direct distribution to the vast majority of class members (who received direct notice but failed to jump through the hoops of making a claim); no new notice to the class of the 55 newly identified *cy pres* recipients; no disclosure of potential conflicts of interest; no press coverage; and thus no objections before the court's rubber stamp. *In re Volkswagen "Clean Diesel" Litig.*, No. 3:15-md-02672-CRB, Dkt. 7961 (N.D. Cal. May 16, 2022). Another post-*Google Referrer* settlement paid $142 million to *cy pres* and $5 million to the class; the attorneys received $50 million. *Krueger v. Wyeth, Inc.*, 2020 U.S. Dist. LEXIS 211235, 2020 WL 6688838 (S.D. Cal. Nov. 12, 2020). Still other recent decisions in the Ninth Circuit have too readily accepted contentions that *cy pres* is appropriate because distributing $28/class member is too "burdensome and inefficient" or because $9.71 checks are "*de minimis*." *See respectively Beaver v. Tarsadia Hotels*, 2020 WL 1139662, 2020 U.S. Dist. LEXIS 40415, at *7 (S.D. Cal. Mar. 9, 2020), *and Knell v. FIA Card Servs, N.A.*, No. 12-cv-00426, 2020 U.S. Dist. LEXIS 217452, at *4 (S.D. Cal. Nov. 19, 2020); *see also Norcia v. Samsung Telcoms. Am., LLC,* 2021 WL 3053018, 2021 U.S. Dist. LEXIS 135256, *6 (N.D. Cal. Jul. 20, 2021) ($74,680 to class; over $2 million *cy pres* to Berkeley law school clinic).

By "put[ting] out the welcome mat" for *cy pres* settlements, the Ninth Circuit has "led to increased forum shopping." Kidd at 600, 604. As a result, nearly half of federal decisions involving *cy pres* originate in the Ninth Circuit. *Id.* at 603 & n.173.

Meanwhile, courts in other parts of the country have suggested "uncertainty about the legitimacy of cy pres distributions in class action settlements" in the wake of *Gaos*. *Ward v. Flagship Credit Acceptance LLC*, No. 17-cv-2069, 2020 U.S. Dist. LEXIS 25612, at *66 n.31 (E.D. Pa. Feb. 13, 2020); *see also Poblano v. Russell Cellular Inc.*, 543 F. Supp. 3d 1293, 1296 (M.D. Fla. 2021). Simply put, without a resolution in *Gaos* "[t]he U.S. class action system has yet to fully come to grips with the misuse of cy pres." Smith at 339. And, in the Ninth Circuit at least, the doctrine has unfortunately "run wild." *Id.*

If the circuit split remains, class counsel will be encouraged to breach their fiduciary duties to class members and forum-shop settlements to the Ninth Circuit for higher attorneys' fees and the opportunity to divert millions of dollars of their clients' recovery to their favorite charities.

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Judge Bade, the author of the opinion here, is correct in her concurrence. *Cy pres* presents "serious ethical, procedural, and constitutional problems"; "it is time we reconsider the practice of *cy pres* awards." App.41a–42a.
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CONCLUSION

The Court should grant the petition.

Respectfully submitted,

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June 3, 2022

APPENDIX

TABLE OF APPENDICES

Appendix A

FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

IN RE GOOGLE INC. STREET VIEW ELECTRONIC COMMUNICATIONS LITIGATION,	No. 20-15616 D.C. No. 3:10-md-02184CRB
BENJAMIN JOFFE; LILLA MARIGZA; RICK BENITTI; BERTHA DAVIS; JASON TAYLOR; ERIC MYHRE; JOHN E. REDSTONE; MATTHEW BERLAGE; PATRICK KEYES; KARL H. SCHULZ; JAMES FAIRBANKS; AARON LINSKY; DEAN M. BASTILLA; VICKI VAN VALIN; JEFFREY COLMAN; RUSSELL CARTER; STEPHANIE CARTER; JENNIFER LOCSIN, *Plaintiffs-Appellees*, DAVID LOWERY, *Objector-Appellant*, v. GOOGLE, INC., *Defendant-Appellee.*	OPINION

Appeal from the United States District Court for the Northern District of California

Charles R. Breyer, District Judge, Presiding

Argued and Submitted February 11, 2021

San Francisco, California

Filed December 27, 2021

Before: Marsha S. Berzon, Morgan Christen, and Bridget S. Bade, Circuit Judges.

Opinion by Judge Bade;

Concurrence by Judge Bade

In this consolidated class action lawsuit, plaintiffs alleged, on behalf of an estimated sixty million people, that Google illegally collected their Wi-Fi data through its Street View program. After a decade of litigation, including a complex, three-year forensic investigation to confirm the standing of the eighteen named plaintiffs, the parties reached a settlement agreement that provided for injunctive relief, *cy pres* payments to nine Internet privacy advocacy groups, fees for the attorneys, and service awards to class representatives—but no payments to absent class members. The district court approved the proposed settlement, finding that it was not feasible to distribute funds directly to class members given the class size and the technical challenges to verifying class members' claims.

David Lowery, one of two objectors to the settlement proposal, appeals the district court's approval of the settlement and grant of attorneys' fees. He argues that the district court should not have approved the settlement

because it was feasible to distribute funds to class members, and that if it truly was not feasible to do so, then the district court should not have certified the class. He also asserts that the settlement violated the First Amendment's prohibition on compelled speech, that the *cy pres* recipients had improper relationships with the parties and class counsel, that the district court awarded excessive attorneys' fees, and that class counsel and the class representatives breached their fiduciary duties. We conclude that the district court did not abuse its discretion in approving the settlement, certifying the class, or in its award of attorneys' fees, and that it did not commit legal error by rejecting Lowery's First Amendment argument. We affirm.

I

In 2007, Google launched Street View, a web-based technology that would eventually provide users with panoramic street-level images from numerous points along roads throughout the world. To obtain the images for Street View, Google deployed a fleet of specially adapted cars ("Street View Vehicles"). As it turned out, however, these vehicles did not simply take photographs; they were also equipped with Wi-Fi antennas and software designed to collect, decode, and analyze various kinds of data commonly transmitted over Wi-Fi networks. The Street View Vehicles collected basic identifying information—such as signal strength, broadcasting channel, data transmission rate, media access control ("MAC") address, and Service Set Identifier ("SSID")—from Wi-Fi networks along the

roads they travelled, apparently for the purpose of providing enhanced, "location-aware" services to Street View users.[1]

In May 2010, Google revealed that its Street View Vehicles had been collecting not just network identifying information, but also payload data—that is, substantive information such as emails, usernames, passwords, videos, photographs, and documents—that Internet users transmitted over unencrypted Wi-Fi networks when the Street View Vehicles were nearby. *See Joffe v. Google, Inc.*, 729 F.3d 1262, 1264 (9th Cir.), *amended and superseded on reh'g* by 746 F.3d 920 (9th Cir. 2013). In total, the Street View Vehicles apparently collected around three billion frames of raw data from wireless networks, including approximately 300 million frames containing payload data.

Google publicly apologized for collecting payload data, suspended operation of the Street View Vehicles, and stated that it had segregated the data and rendered it inaccessible. It insisted (as it still maintains) that it never intended to collect payload data. Nevertheless, the revelations led to state and federal investigations, including a joint investigation by the attorneys general of thirty-eight states and the District of Columbia. In March 2013, Google entered an Assurance of Voluntary Compliance ("AVC") with these attorneys general regarding its collection of

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[1] As Google explains it, this identifying information for Wi-Fi networks would allow Street View to utilize these networks as "unique geographical landmark[s]" for users to pinpoint their location when satellite-based GPS is unavailable.

WiFi data from Street View Vehicles. Among other provisions, the AVC stated that Google would destroy all payload data it had acquired, refrain from collecting or storing any additional payload data through Street View without notice and consent, maintain a "privacy program" as described in the AVC, and undertake a public service and education campaign.[2] The AVC also required Google to pay a total of $7 million to the attorneys general.

But Google's legal troubles related to the Street View Vehicles did not end with the AVC. Shortly after Google's May 2010 admission, at least thirteen putative class action lawsuits were brought based on the Street View Vehicles' collection of payload data. In August 2010, the Judicial Panel on Multidistrict Litigation consolidated eight of these cases and transferred them to the Northern District of California.

In November 2010, Plaintiffs filed a Consolidated Class Action Complaint asserting various state and federal claims, including violations of the Wiretap Act, *see* 18 U.S.C. § 2511, and seeking statutory and punitive damages as well as injunctive relief. Google moved to dismiss

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[2] The public service campaign was required to include several components, including "[d]evelop[ing] and promot[ing] a video on YouTube that explains how users can encrypt their wireless networks," keeping the video on YouTube for at least two years, writing "a blog post . . . explaining the value of encrypting a wireless network," and running "at least one half-page educational newspaper ad in a newspaper of national circulation and at least one half-page educational ad in the newspaper with the greatest circulation rate in each State."

the complaint, and the district court dismissed the state law claims on preemption and standing grounds but held that Plaintiffs had adequately alleged violations of the Wiretap Act. *See In re Google Inc. St. View Elec. Commc'ns Litig.*, 794 F. Supp. 2d 1067, 1073–87 (N.D. Cal. 2011). We affirmed in an interlocutory appeal. *Joffe*, 746 F.3d 920.

On remand, Google disputed the named plaintiffs' standing, and the district court appointed a special master to determine "whether any communications from [named] Plaintiffs' unencrypted Wi-Fi networks were actually acquired by Google." This investigation first required the eighteen named plaintiffs to provide "personal information and forensic evidence of their wireless network equipment," including MAC addresses, email addresses, and SSIDs, to the special master. Then, as the district court described it, the special master organized the massive troves of Street View data "into a searchable database," developed custom software to process the data, and "conducted complex technical searches" to identify whether the data contained any transmissions intercepted from the named plaintiffs. This process took three years and culminated in a report, filed under seal with the district court in 2017, which was apparently still not entirely conclusive on whether Google had intercepted payload data from the named plaintiffs.

In June 2018, the parties reached a settlement agreement for a class consisting of "all persons who used a wireless network device from which Acquired Payload Data was obtained" from January 1, 2007 through May 15, 2010. Class counsel estimated that this class included approximately sixty million members. The settlement agreement provided that Google would establish a $13 million

settlement fund. The agreement did not provide for any direct payments to absent class members. Instead, after attorneys' fees, litigation expenses, service awards for the class representatives, notice and claims administration costs, and escrow account charges and taxes, the remainder of the fund was to be divided equally among "one or more Proposed Cy Pres Recipient(s)." Plaintiffs would select the proposed recipients and, after disclosing the list to Google and consulting "in good faith regarding any concerns Google may have," would recommend them to the district court for approval. Each *cy pres* recipient would have to "commit to use the funds to promote the protection of Internet privacy."

Plaintiffs proposed eight *cy pres* recipients without objection from Google: the Center on Privacy & Technology at Georgetown Law, the Center for Digital Democracy, Massachusetts Institute of Technology's Internet Policy Research Initiative, World Privacy Forum, Public Knowledge, the Rose Foundation for Communities and the Environment, the American Civil Liberties Union Foundation (ACLU), and Consumer Reports. The Electronic Privacy Information Center (EPIC) also successfully petitioned the district court to be included as a *cy pres* recipient without objection from Google or Plaintiffs.

In addition to the provisions regarding the $13 million settlement fund, Google agreed to the following injunctive relief for a period of five years after final approval of the settlement agreement:

- To "destroy all Acquired Payload Data . . . within forty-five (45) days of Final Approval" of the settlement agreement;

- Not to "collect and store for use in any product or service Payload Data via Street View vehicles, except with notice and consent";

- To "comply with all aspects of the Privacy Program described in . . . the [AVC] and with the prohibitive and affirmative conduct described in [the AVC]," and to "confirm to Plaintiffs in writing on an annual basis that it remains in compliance"; and

- To "host and maintain educational webpages that instruct users on the configuration of wireless security modes and the value of encrypting a wireless network."

After the district court granted preliminary approval of the settlement agreement, two putative class members—David Lowery and David Franco—objected, and a group of state attorneys general, led by the Arizona Attorney General, filed an amicus brief objecting to the settlement agreement. At a fairness hearing in February 2020, Lowery's attorney and a representative from the Arizona Attorney General's Office both argued that *cy pres* relief was inappropriate and that the $13 million fund should instead be distributed to class members through either a claims process or a lottery distribution to class members who self-identified. Alternatively, Lowery argued that if it truly was not feasible to distribute the funds to class members, then class certification was inappropriate based on Federal Rule of Civil Procedure 23(b)(3)'s requirement that the class device be superior to other forms of adjudication. Lowery also argued that distribution of settlement funds to *cy pres* recipients constituted compelled speech in violation of the First Amendment, that

the proposed recipients had improper pre-existing relationships with counsel and the parties, and that the requested 25% fee was excessive.

In March 2020, the district court certified the class for settlement purposes under Rule 23(b)(3), granted attorneys' fees of 25% of the net settlement fund, and approved the settlement after considering the fairness factors of Rule 23(e)(2) and the reaction of the class members. The district court rejected Lowery's arguments about the feasibility of distribution and concluded that the inability to distribute funds did not preclude class certification. It also rejected Lowery's First Amendment argument, his objections to the *cy pres* recipients, and his objection to the fee award. Lowery timely appealed.

II

"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). "[W]e will affirm if the district judge applies the proper legal standard and his findings of fact are not clearly erroneous." *In re Bluetooth Headset Prods. Liab. Litig.*, 654 F.3d 935, 940 (9th Cir. 2011) (internal quotation marks and citation omitted). We also "review a district court's class certification decision for abuse of discretion." *Sali v. Corona Reg'l Med. Ctr.*, 909 F.3d 996, 1002 (9th Cir. 2018). We review a First Amendment challenge to the district court's approval of a settlement agreement de novo. *See Pac. Coast Horseshoeing Sch., Inc. v. Kirchmeyer*, 961 F.3d 1062, 1067 n.3 (9th Cir. 2020). "We also review for abuse of discretion a district court's award of fees and costs to class counsel, as well as its method of calculation."

Bluetooth Headset, 654 F.3d at 940. "Findings of fact underlying an award of fees are reviewed for clear error." *Id.*

III

Before turning to Lowery's specific objections to the settlement, we first review the development of *cy pres* provisions as a tool to address unclaimed or nondistributable funds from class action settlements, and our precedent addressing such provisions. As one court has explained, "[w]hen modern, large-scale class actions are resolved via settlement, money often remains in the settlement fund even after initial distributions to class members have been made because some class members either cannot be located or decline to file a claim." *Klier v. Elf Atochem N. Am., Inc.*, 658 F.3d 468, 473 (5th Cir. 2011); *see Six (6) Mexican Workers v. Ariz. Citrus Growers*, 904 F.2d 1301, 1307 (9th Cir. 1990). Courts have recognized a few possible solutions to the problem of unclaimed settlement funds. One option is to permit such funds to escheat to the government. *Hodgson v. YB Quezada*, 498 F.2d 5, 6 (9th Cir. 1974); *see* 28 U.S.C. § 2042 (providing that funds "unclaimed by the person entitled thereto" for five years revert to the federal treasury). In other cases, courts have permitted additional pro rata distributions to those class members who did claim funds. *See, e.g., Klier*, 658 F.3d at 475. "[I]n exceptional circumstances," courts have even recognized that "it may be proper to permit unclaimed sums to revert to the [defendant]." *YB Quezada*, 498 F.2d at 6; *see also, e.g., Van Gemert v. Boeing Co.*, 739 F.2d 730, 736–37 (2d Cir. 1984).

Beginning in the 1970s, some federal courts began to recognize another option for disbursing unclaimed settlement funds. In *Miller v. Steinbach*, the district court for the Southern District of New York considered "a somewhat unorthodox settlement" in a stockholders' derivative suit. No. 66 Civ. 356, 1974 WL 350, at *1 (S.D.N.Y. Jan. 3, 1974). "In view of the very modest size of the settlement fund" in that case "and the vast number of shares among which it would have to be divided," the parties agreed to, and the district court approved, an arrangement by which settlement funds would be paid to an employee retirement plan rather than class members. *Id.* The district court described this arrangement as "a variant of the *cy pres* doctrine at common law." *Id.* That doctrine, which "takes its name from the Norman French expression *cy pres comme possible* (or 'as near as possible'), is an equitable doctrine that originated in trusts and estates law as a way to effectuate the testator's intent in making charitable gifts." *In re Google Referrer Header Priv. Litig.*, 869 F.3d 737, 741 (9th Cir. 2017), *vacated and remanded*, *Frank v. Gaos*, 139 S. Ct. 1041 (2019).

In the years since *Miller*, federal courts have widely recognized the *cy pres* doctrine as a tool for "distribut[ing] unclaimed or non-distributable portions of a class action settlement fund to the 'next best' class of beneficiaries." *Nachshin*, 663 F.3d at 1036 (citation omitted). It is well established in this circuit that district courts may approve settlements with *cy pres* provisions that affect only a portion of the total settlement fund. *See, e.g., Molski v. Gleich*, 318 F.3d 937, 954 (9th Cir. 2003), *overruled on other grounds by Dukes v. Wal-Mart Stores, Inc.*, 603 F.3d 571 (9th Cir. 2010) (en banc). Moreover, although no binding Ninth Circuit precedent specifically addresses the

propriety of settlements where, as here, the *only* monetary relief comes in the form of *cy pres* payments to third parties, we upheld such a settlement in *Lane v. Facebook, Inc.*, 696 F.3d 811, 820–21 (9th Cir. 2012), and have repeatedly indicated that such settlements are permissible under appropriate circumstances.

For example, in *Nachshin v. AOL, LLC*, we reversed approval of a settlement that included *cy pres* payments "on behalf of a nationwide plaintiff class" to "four charities of the class representatives' choice" and three other agreedupon charities, including the Boys and Girls Club of America, the New Roads School of Santa Monica, Oklahoma Indian Legal Services, the Federal Judicial Center Foundation, and the Friars Foundation. 663 F.3d at 1036– 37. The district court approved *cy pres* payments to these charities, whose work had little to do with the plaintiffs' claims (unjust enrichment based on AOL's wrongful insertion of promotional messages into subscribers' emails), after the parties concluded that monetary damages "were small and difficult to ascertain," and "they could not identify any charitable organization that would benefit the class or be specifically germane to the issues in the case." *Id.* at 1037.

We reversed, not because the monetary relief went only to *cy pres* recipients instead of class members, but because the chosen recipients were unsuitable given the composition and injuries of the plaintiff class. The diverse assortment of *cy pres* recipients, we held, "fail[ed] to meet any of the guiding standards" for such settlements, *id.* at 1040, which require that *cy pres* disbursements "account for the nature of the plaintiffs' lawsuit, the objectives of the underlying statutes, and the interests of the silent

class members, including their geographic diversity," *id.* at 1036. We explained:

> We are also not persuaded by the parties' claims that the size and geographic diversity of the plaintiff class make it "impossible" to select an adequate charity. It is clear that all members of the class share two things in common: (1) they use the internet, and (2) their claims against AOL arise from a purportedly unlawful advertising campaign that exploited users' outgoing e-mail messages. The parties should not have trouble selecting beneficiaries from any number of non-profit organizations that work to protect internet users from fraud, predation, and other forms of online malfeasance. If a suitable *cy pres* beneficiary cannot be located, the district court should consider escheating the funds to the United States Treasury.

Id. at 1040–41.

We again considered a settlement that provided no monetary relief directly to absent class members in *Lane*, where a district court approved a settlement agreement in which Facebook would pay $9.5 million in exchange for a release of all the plaintiffs' class claims. 696 F.3d at 816. After attorneys' fees, administrative costs, and class representative payments, "Facebook would use the remaining $6.5 million or so in settlement funds to set up a new charity organization" "to educate users, regulators[,] and enterprises regarding critical issues relating to protection of identity and personal information online." *Id.* at 817 (alteration in original).

On appeal, objectors argued that the settlement was unfair because its *cy pres* provision gave Facebook too much control over the charity and because the settlement amount was too small. *Id.* at 820, 822. We affirmed the district court's approval of the settlement, reasoning that "[t]he *cy pres* remedy the settling parties here have devised bears a direct and substantial nexus to the interests of absent class members and thus properly provides for the 'next best distribution' to the class." *Id.* at 821. While we did not explicitly analyze the propriety of so-called "*cy pres*-only" settlements as a general matter,[3] we indicated that such arrangements *can* be appropriate provided they have "the requisite nexus between the *cy pres* remedy and the interests" of the class members. *Id.* at 822.

In *In re Google Referrer Header Privacy Litigation*, we reviewed a district court's approval of a settlement involving "a *cy pres*-only distribution of the [amount] that remain[ed] in the settlement fund after attorneys' fees, administration costs, and incentive awards for the named plaintiffs." 869 F.3d at 741. "As an initial matter,

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[3] The term "*cy pres*-only settlement" is a misnomer. As in *Nachshin*, *Lane*, and *Google Referrer*, the settlement here does not *only* provide *cy pres* payments to third parties; it also includes injunctive relief. While "*cy pres* only" may be a convenient shorthand for settlements that provide for monetary payments to third parties but not to absent class members, we apply the same standards when reviewing these settlements that we would for any class action settlement, asking whether the total relief afforded by the settlement—whether in the form of injunctive relief, *cy pres* payments, or direct monetary payments—adequately compensates class members for relinquishing their claims. *See Koby v. ARS Nat'l Servs., Inc.*, 846 F.3d 1071, 1079 (9th Cir. 2017).

we quickly dispose[d] of the argument that the district court erred by approving a *cy pres*-only settlement." *Id.* While recognizing that such "settlements are considered the exception, not the rule," we held that "they are appropriate where the settlement fund is 'non-distributable' because 'the proof of individual claims would be burdensome or distribution of damages costly.'" *Id.* (quoting *Lane*, 696 F.3d at 819).

The Supreme Court granted certiorari in *Google Referrer* on the issue of "whether a class action settlement that provides a *cy pres* award but no direct relief to class members satisfies the requirement that a settlement binding class members be 'fair, reasonable, and adequate.'" *Frank v. Gaos*, 139 S. Ct. 1041, 1045 (2019) (quoting Fed. R. Civ. P. 23(e)(2)). Ultimately, however, the Supreme Court did not reach this question; instead, it vacated and remanded on standing grounds. *Id.* at 1046. Our analysis of the *cy pres* issue in *Google Referrer*, while no longer binding, is still persuasive authority. See *Rosenbloom v. Pyott*, 765 F.3d 1137, 1154 n.14 (9th Cir. 2014).

IV

Turning to Lowery's arguments, we reiterate at the outset that strictly speaking, the settlement here is not, as Lowery describes it, a "*cy pres*-only settlement." Instead, it involves *cy pres* payments to third-party organizations and injunctive relief. Nonetheless, in evaluating whether the settlement was "fair, reasonable, and adequate" under Rule 23(e)(2), we first consider the district court's finding that it was not feasible to distribute funds directly to class members. Second, we consider Lowery's argument that if it was infeasible to distribute funds directly to class members, the district court should not have

certified the class. Third, we ask whether the total value of the settlement to the absent class members—that is, the value they indirectly receive through the *cy pres* provisions *plus* the value of the injunctive relief—is enough to justify the district court's approval of the settlement agreement. Finally, we turn to Lowery's argument that class counsel and the class representatives breached their fiduciary duties, his First Amendment challenge to the *cy pres* provisions, and his argument against the district court's award of attorneys' fees.

A

As a threshold issue, we reject the suggestion that a district court may not approve a class-action settlement that provides monetary relief only in the form of *cy pres* payments to third parties.[4] We have repeatedly approved such settlements, see *Google Referrer*, 869 F.3d at 741–42; *Lane*, 696 F.3d at 822, and therefore adopting a blanket rule against these arrangements, as Lowery advocates, would be incompatible with our precedents in which we have recognized that *cy pres* awards are an acceptable solution when settlement funds are not distributable. Our reasoning has not turned on what portion of the settlement funds— some or all—is not distributable. Instead,

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[4] Lowery does not directly assert that all such settlements are inappropriate. However, the dilemma he poses—either the funds were distributable, and thus *cy pres* relief was inappropriate, or the funds were not distributable, and thus class certification was inappropriate—is logically equivalent to arguing such settlements are never appropriate and requires us to consider whether Rule 23(e)(2) ever allows them.

we ask whether the *cy pres* disbursements "account for the nature of the plaintiffs' lawsuit, the objectives of the underlying statutes, and the interests of the silent class members." *Lane*, 696 F.3d at 821 (quoting *Nachshin*, 663 F.3d at 1036). In declining to "impose[] a categorical ban on a settlement that does not include direct payments to class members," *Google Referrer*, 869 F.3d at 742, we note that other circuits have generally taken a similar approach to ours, approving *cy pres* settlements when they satisfy the appropriate standards for fairness. *See In re Google Inc. Cookie Placement Consumer Priv. Litig.*, 934 F.3d 316, 326 (3d Cir. 2019) (rejecting the argument that "*cy pres*-only settlements are unfair per se under Rule 23(e)(2)" and recognizing that "[i]n some cases a cy *pres*-only settlement may be proper"); *see also, e.g., In re Lupron Mktg. & Sales Pracs. Litig.*, 677 F.3d 21, 31–34 (1st Cir. 2012); *Powell v. Ga.-Pac. Corp.*, 119 F.3d 703, 706–07 (8th Cir. 1997).

B

Lowery argues that, even if permissible in some circumstances, *cy pres* relief was inappropriate here because it was feasible to distribute settlement funds directly to class members. The district court found otherwise "[g]iven the 60 million person class size and the $13 million Settlement Fund," and because "it is unusually difficult and expensive to identify class members in this case." Lowery argues that the district court applied the wrong standard for determining feasibility by asking "whether it is feasible to hand-deliver checks to every single class member" instead of focusing on "the ability of *some* class members to make a claim." We disagree. Lowery cites no authority indicating that a district court must

consider only whether settlement funds are distributable to "some" of a class, nor does he explain what proportion of a class would satisfy his proposed "*some* class members" test.

More fundamentally, even assuming that the subset of class members who claim payments would be small enough that the settlement fund could provide meaningful value to every claimant, Lowery does not identify a viable way for a claims administrator to verify *any* claimant's entitlement to settlement funds.[5] Google asserts that verifying that a person has a valid claim would require making three determinations: "(1) the [claimant] had maintained an unencrypted Wi-Fi network in the relevant period; (2)

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[5] Lowery argues that district courts have insisted on direct payments to class members in analogous cases involving very large classes. As an initial matter, presenting conflicting decisions from other district courts, without more, does not establish that the district court here abused its discretion. *See Grant v. City of Long Beach*, 315 F.3d 1081, 1091 (9th Cir. 2002) ("The abuse of discretion standard requires us to uphold a district court determination that falls within a broad range of permissible conclusions in the absence of an erroneous application of law."). In any event, none of the examples Lowery cites involved the sort of technical challenges to identifying class members present here. *See Fraley v. Facebook, Inc.*, 966 F. Supp. 2d 939, 940–49 (N.D. Cal. 2013) (involving no dispute that claims were readily verifiable); *In re Carrier IQ, Inc. Consumer Priv. Litig.*, No. 12-md-02330-EMC, 2016 WL 4474366, at *3–4 (N.D. Cal. Aug. 25, 2016) (involving claims that were verifiable by reference to telephone numbers); *In re Google Plus Profile Litig.*, No. 5:18-cv-06164-EJD, 2021 WL 242887 (N.D. Cal. Jan. 25, 2021) (involving claims that the defendant could easily verify by compiling a "class list"), *appeal docketed*, No. 21-15365 (9th Cir. Mar. 2, 2021).

a Street View vehicle passed within range of that network; and (3) substantive communications (and not just technical network data) were transmitted within the precise fraction of a second when the Street View vehicle passed by and acquired payload data from the network." Lowery does not dispute that a claims administrator would have to verify these three facts to determine whether a claim is valid, nor does he suggest any means of third-party claims verification besides the method the special master used—a process that took three years of intensive investigation and analysis to verify the claims of eighteen named plaintiffs. Instead, Lowery asserts that the district court erred by refusing to allow claimants to "self-identify" as class members.[6]

But his observation that "proof beyond a reasonable doubt is not required to ascertain a class member in a claims process" is misplaced. As the district court found,

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[6] Lowery observes that the district court permitted the named plaintiffs to proceed based on self-identification, and that it recognized Lowery's own standing based on self-identification. He argues that by allowing some class members to self-identify but not others, the district court violated Rule 23's requirement that settlements "treat[] class members equitably relative to each other." Fed. R. Civ. P. 23(e)(2)(D). However, the district court permitted self-identification only at the pleading stage and when evaluating standing. It approved the settlement's provision for service awards to the named plaintiffs, but service awards are compensation "for work done on behalf of the class" throughout litigation, not damages awarded for substantive claims. *See Rodriguez v. W. Pub. Corp.*, 563 F.3d 948, 958 (9th Cir. 2009). Moreover, by the time the district court approved the service awards, the named plaintiffs' claims were supported not just by their self-identification, but also by the special master's extensive forensic analysis.

"[t]he only evidence" of class membership "is the intercepted data, and that evidence is not in the class member's possession" or readily accessible to the claims administrator. Lowery offers no alternative way for claimants to determine with any degree of probability whether they are class members.

Because self-identification would be pure speculation, and any meaningful forensic verification of claims would be prohibitively costly and time-consuming, we affirm the district court's finding that it was not feasible to verify class members' claims as would be necessary to distribute funds directly to class members. Further, as "proof of individual claims would be burdensome [and] distribution of damages costly," Lowery has not shown that the district court abused its discretion by approving the use of *cy pres* payments in the settlement. *Lane*, 696 F.3d at 819.

C

Alternatively, Lowery argues that if it was impossible to distribute settlement funds to class members, then class certification was an error of law because the class device was not superior to other available methods for fairly and efficiently adjudicating the controversy, as Rule 23(b)(3) requires. But *cy pres* provisions are tools for "distribut[ing] unclaimed or non-distributable portions of a class action settlement fund to the 'next best' class of beneficiaries." *Nachshin*, 663 F.3d at 1036 (citation omitted). If it were feasible to distribute the settlement fund to the class members, a *cy pres* settlement would not be employed.

Thus, in the guise of a Rule 23(b)(3) "superiority" argument, Lowery essentially repackages his argument that *cy pres* provisions, which by definition are used when settlement funds cannot be distributed to class members, are always improper. We have already rejected this argument, explaining that a blanket prohibition on so-called "*cy pres*-only" settlements, as Lowery advocates, would conflict with our precedent.

We addressed a similar argument in *Briseno v. ConAgra Foods, Inc.*, 844 F.3d 1121 (9th Cir. 2017), a class action lawsuit against a cooking oil manufacturer for false labelling, in which the defendant opposed class certification, arguing that plaintiffs "did not propose any way to identify class members and cannot prove that an administratively feasible method exists because consumers do not generally save grocery receipts and are unlikely to remember details about individual purchases of a low-cost product like cooking oil," so they could not verify their status as claimants. *Id.* at 1125. We rejected that argument, reasoning that Rule 23 never "mention[s] 'administrative feasibility'" and that recognizing a standalone "feasibility" requirement for class certification could render other Rule 23 provisions, such as "the likely difficulties in managing a class action," Fed. R. Civ. P. 23(b)(3)(D), superfluous. *Briseno*, 844 F.3d at 1125–26.

Lowery maintains that he is not making "a standalone ascertainability argument of the sort repudiated by *Briseno*." Instead, his argument, he says, is that "the superiority requirement of Rule 23(b)(3) demands the possibility of class benefit at the time of certification," and that if it is practically impossible to identify absent class members at the time of certification, then a class action "cannot be a superior method of adjudicating th[e] controversy"

because there is no possibility of providing meaningful relief. To be sure, if there were no possibility of providing meaningful relief via a class action settlement, Lowery's point might be persuasive. But in making his argument, Lowery assumes a critical premise: that it is impossible to provide meaningful relief to a class when there is no feasible way of identifying class members.

This premise is not supported by our case law. In upholding the validity of *cy pres* arrangements, we have repeatedly recognized that class members do benefit—albeit indirectly—from a defendant's payment of funds to an appropriate third party. *See Lane*, 696 F.3d at 819 (describing *cy pres* remedy as "a settlement structure wherein class members receive an indirect benefit (usually through defendant donations to a third party) rather than a direct monetary payment"); *Nachshin*, 663 F.3d at 1038 ("In the context of class action settlements, a court may employ the *cy pres* doctrine to put the unclaimed fund to its next best compensation use, e.g., for the aggregate, indirect, prospective benefit of the class." (internal quotation marks and citation omitted)).

Indeed, the factors that guide judicial oversight of *cy pres* settlement provisions—whether the distributions "account for the nature of the plaintiffs' lawsuit, the objectives of the underlying statutes, and the interests of the silent class members"—are designed to ensure that *cy pres* payments particularly "benefit the plaintiff class." *Id.* at 1036, 1040. If a *cy pres* award has a "direct and substantial nexus to the interests of absent class members," *Lane*, 696 F.3d at 821, as it must under our precedents, then it necessarily prioritizes class members' interests,

even if it also provides a diffuse benefit to society at large.[7] Thus, the infeasibility of distributing settlement funds directly to class members does not preclude class certification.

D

Accordingly, we next consider whether the settlement agreement provides sufficient value to the class, in the form of both *cy pres* relief and injunctive relief, to be "fair, reasonable, and adequate." Fed. R. Civ. P. 23(e)(2). We hold that the district court did not err by concluding that it does.

The injunctive relief in the settlement agreement, which required Google to "destroy all Acquired Payload Data," refrain from collecting or storing additional payload data through Street View without notice and consent, and comply with other AVC provisions specifically referenced in the settlement agreement, largely duplicated Google's obligations under the AVC. However, the injunctive relief extends beyond Google's AVC obligations. It requires Google to maintain its compliance until five years from final settlement approval—that is, at least two years

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[7] Lowery cites *In re Hotel Telephone Charges*, 500 F.2d 86 (9th Cir. 1974), to support his argument that "[w]hen a 'great variety' of individualized determinations preclude class benefit, class certification should be denied." But *In re Hotel Telephone Charges* is inapposite: it simply held that a class action involving "over six hundred defendants," "millions of plaintiffs," and "a great variety of individual questions" did not satisfy the requirements of predominance and manageability, not that an inability to identify class members precludes certification. *Id.* at 90– 92.

longer than the AVC required. Moreover, the injunctive relief in the settlement requires Google to post additional educational material online that the AVC did not require. The district court found that this injunctive relief offered "adequate, if not the main benefit to the class." Considering the unique challenges plaintiffs would have faced in proving their claims, we hold that the district court did not err by concluding this injunctive relief, together with the indirect benefits conferred by the *cy pres* provisions, was fair, reasonable, and adequate compensation to the class members.

In *Campbell v. Facebook, Inc.*, we considered a settlement agreement that included injunctive relief requiring "Facebook [to] make a plain English disclosure on its Help Center page" for one year, informing users about its "message monitoring practices." 951 F.3d 1106, 1123 (9th Cir. 2020). We affirmed the district court's finding that this relief "had value to absent class members," reasoning that it "ma[de] it less likely that users will unwittingly divulge private information to Facebook or third parties in the course of using Facebook's messaging platform." *Id.* We explained that "the relief provided to the class cannot be assessed in a vacuum" and that "the class did not need to receive much for the settlement to be fair because the class gave up very little." *Id.* We emphasized that the "class members' claims were weak enough that the class was fairly likely to end up receiving nothing at all had this litigation proceeded further," and that the injunctive relief provided a benefit that, while very small, was more than "nothing." *Id.* We also affirmed the district court's finding that this relief was not "duplicative" of a "change Face-

book had already made," because it required the disclosure "to stay on display for a year" and required an explanation written "in plain English." *Id.* at 1123 n.12.

Similarly, although the injunctive relief here requires relatively little of Google, it does extend Google's obligations beyond those in the AVC. Moreover, it does so in exchange for class members' relinquishment of legal claims that might have been quite difficult to prove and would likely have yielded very little per class member in damages. As the district court observed, the context of this settlement was "a case in which a vast but nonetheless difficult-to-identify class of people suffered intangible injury, and minimal damages."

The Arizona Attorney General argues that "the privacy landscape for technology companies has fundamentally changed" since 2013 and that companies like Google have "been forced to focus on user-privacy questions" for reasons independent of the Street View litigation. Given these changes, he asserts that "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." To that point, we have recognized that injunctive relief in a class action settlement is illusory if it "does not obligate [a defendant] to do anything it was not already doing," or if it merely requires a defendant to "continue" practices "it voluntarily adopted" before the settlement. *Koby v. ARS Nat'l Servs., Inc.*, 846 F.3d 1071, 1080 (9th Cir. 2017). Here, however, the district court specifically noted that the injunctive relief required Google to make "changes . . . it would not have made without the settlement," which would provide "some value to the class." On clear error

review, we will not second-guess the district court's factual findings based on speculation about what Google might hypothetically have done absent the settlement agreement. *Campbell*, 951 F.3d at 1123.

Viewing the modest injunctive relief together with the indirect benefits the class members enjoy through the *cy pres* provision, we affirm the district court's finding that the settlement was "fair, reasonable, and adequate." Fed. R. Civ. P. 23(e)(2).

E

Lowery argues that the settlement violates the First Amendment's prohibition on compelled speech by distributing class settlement funds to organizations "that take lobbying positions adverse to" his own interests and beliefs. The district court found no First Amendment violation, reasoning that "[t]he settlement agreement between the parties is not state action, . . . and class members ha[ve] the opportunity to exclude themselves from the settlement."

As a threshold matter, the parties dispute whether a district court's approval of a settlement agreement constitutes state action such that it implicates First Amendment protections. *See IMDb.com Inc. v. Becerra*, 962 F.3d 1111, 1120 (9th Cir. 2020) ("Private parties may freely bargain with each other to restrict their own speech, and those agreements may be enforced, without implicating the First Amendment."). We do not decide today whether, or under what circumstances, a district court's approval of a class action settlement agreement is "state action" for purposes of the First Amendment. Instead, we hold that the settlement agreement does not compel class members

to subsidize third-party speech because any class member who does not wish 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), can simply opt out of the class.[8]

Lowery cites *Janus v. American Federation of State, County, and Municipal Employees, Council 31*, 138 S. Ct. 2448, 2459–60 (2018), and *Knox v. Service Employees International Union, Local 1000*, 567 U.S. 298, 321–22 (2012), to argue that "silence is not consent and a waiver of First Amendment rights cannot be presumed." It is not entirely clear what connection Lowery intends to draw between these decisions and his First Amendment arguments, but *Janus* and *Knox* are inapposite. The Supreme Court held in *Janus* that states cannot require paycheck deductions for public employees to subsidize unions that engage in advocacy those employees find objectionable. It explained, "[n]either an agency fee nor any other payment to the union may be deducted from a nonmember's wages, nor may any other attempt be made to collect such a payment, unless the employee affirmatively consents to pay." 138 S. Ct. at 2486. But *Janus* involved mandatory deductions from an employee's paycheck, while the settlement here involves funds that, regardless of the *cy pres* provisions, could not feasibly be paid to class members. *See id.*

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[8] The district court found that the parties' notice to the class members, as approved and directed by the court, complied with Rule 23(c), (e), and (h) and the Due Process Clause, and provided notice of the lawsuit, the settlement, and the class members' rights, including their right to object to, or opt out of, the settlement. Lowery does not challenge this finding.

("Unless employees clearly and affirmatively consent before any money is taken from them, this standard cannot be met."). *Knox* is similarly inapposite because it dealt with whether a union must provide fresh notice and seek affirmative consent before exacting funds from nonmembers through paycheck deductions. 567 U.S. at 321–22.

Lowery observes that class members' decisions to opt out "wouldn't reduce the contribution in the class members' name[s]." But opting out does not entitle a class member to his pro rata portion of a settlement. On the contrary, it entitles him to retain his legal claim by not participating in the settlement. *See Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 176 (1974). If Lowery opts out, he will have disassociated himself from the subsidization of the *cy pres* recipients' speech. He will also have disclaimed any interest he might have had in the settlement funds as a class member. Thus, he would have no further interest in the terms of the settlement agreement.

F

Lowery also argues that the district court abused its discretion by approving *cy pres* recipients who had a "significant prior affiliation" with defense counsel and class counsel. In particular, he argues that one of the recipients, EPIC, "supported plaintiffs in an earlier appeal in this case," that four other *cy pres* recipients "previously received Google *cy pres* money" in unrelated cases, that "[m]any of the recipients had received *cy pres* funds from other class actions involving big tech firms," and that the ACLU "had a pre-existing relationship with class counsel." These arguments are unconvincing. We have never held that merely having previously received *cy pres* funds from a defendant, let alone other defendants in unrelated

cases, disqualifies a proposed recipient for all future cases. Moreover, we have affirmed *cy pres* provisions involving much closer relationships between recipients and parties than anything Lowery alleges here.

In *Lane*, the district court approved a settlement agreement that included a *cy pres* payment of approximately $6.5 million to "a new entity whose sole purpose was to designate fund recipients consistent with [the] mission to promote the interests of online privacy and security." 696 F.3d at 817. This entity "would be run by a three-member board of directors," one of whom was Facebook's own Director of Public Policy, as well as a "Board of Legal Advisors," which "consist[ed] of counsel for both the plaintiff class and Facebook." *Id.* at 817–18. Several objectors challenged the settlement agreement, arguing that the presence of a high-level Facebook employee on the foundation's board of directors "creates an unacceptable conflict of interest" and that "the settling parties' decision to disburse settlement funds through an organization with such structural conflicts does not provide the 'next best distribution' of those funds and thus is categorically an improper use of the *cy pres* remedy." *Id.* at 820. We disagreed, explaining:

> We do not require as part of [the *cy pres*] doctrine that settling parties select a *cy pres* recipient that the court or class members would find ideal. On the contrary, such an intrusion into the private parties' negotiations would be improper and disruptive to the settlement process. The statement . . . in our case law that a *cy pres* remedy must be the "next best distribution" of settlement funds means only that a

> district court should not approve a *cy pres* distribution unless it bears a substantial nexus to the interests of the class members . . . .

Id. at 820–21.

Lowery argues that *Lane* only dealt with conflicts between defendants and *cy pres* recipients, and that it "has no bearing on a distribution that raises conflicts between class counsel and the recipient." This assertion is incorrect, as the *cy pres* arrangement in Lane also provided for class counsel to sit on the recipient's board of legal advisors. *Id.* at 817–18.

Citing the American Law Institute's Principles of the Law of Aggregate Litigation and out-of-circuit authority, Lowery argues that "[t]he correct legal standard" for approving a proposed *cy pres* recipient is whether "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." But we have never adopted Lowery's expansive proposed test, and Lowery cites no binding authority that would have precluded the district court from approving the *cy pres* recipients here.

Lowery cites *Radcliffe v. Experian Information Solutions Inc.*, 715 F.3d 1157 (9th Cir. 2013), to argue that there existed a "potential conflict of interest of class counsel in favoring a former client and co-counsel" (apparently EPIC and the ACLU) over class members. But *Radcliffe* is entirely inapposite. We held in that case, relying on California law governing attorney ethics, that "conditional incentive awards" to class representatives "caused the interests of the class representatives to diverge from the

interests of the class because the settlement agreement told class representatives that they would not receive incentive awards unless they supported the settlement." *Id.* at 1161. Lowery points to no such improper incentives here.

He also cites *Nachshin*, 663 F.3d at 1039, but nothing in that decision suggests the sort of scrutiny that Lowery argues we should apply to the *cy pres* settlement here. In *Nachshin*, we explained that "[w]hen selection *of cy pres* beneficiaries is not tethered to the nature of the lawsuit and the interests of the silent class members, the selection process may answer to the whims and self interests of the parties, their counsel, or the court." *Id.*; *see id.* ("To remedy some of these concerns, we held in *Six Mexican Workers* that *cy pres* distribution must be guided by (1) the objectives of the underlying statute(s) and (2) the interests of the silent class members."). The district court's approval of the *cy pres* recipients comported with those standards, and we find no abuse of discretion.

G

Lowery argues that the district court abused its discretion by "blindly apply[ing]" a 25% benchmark for attorneys' fees without regard for the actual benefit the settlement conferred on the class. We disagree.

The district court devoted several pages of analysis to the issue of attorneys' fees, correctly beginning with the premise that "in the Ninth Circuit, the 'benchmark' fee award is 25%, which can be adjusted upward or downward based on the circumstances of the case." *See Fischel v. Equitable Life Assurance Soc'y of U.S.*, 307 F.3d 997, 1006

(9th Cir. 2002) ("We have established a 25 percent 'benchmark' in percentage-of-the-fund cases that can be 'adjusted upward or downward to account for any unusual circumstances involved in [the] case.'" (alteration in original) (citation omitted)). It found that "the overall result and benefit to the class from the litigation supports the requested percentage" of 25% because the *cy pres* relief "benefits the class members by serving the goals of this litigation and the [Electronic Communications Privacy Act]."

The district court specifically considered Lowery's argument that the benchmark should be reduced to reflect the lack of direct monetary payments to class members. It rejected this argument, reasoning that "where the settlement fund is non-distributable, counsel should not be penalized for fashioning a *cy pres*-only settlement that stands to accomplish some good." The district court noted several other factors supporting a 25% benchmark: that the case "required skill and expertise," "involved novel issues," took "nearly ten years of work," and was "risky" for counsel to take on. The court also conducted a lodestar analysis and determined that the benchmark-based award would be lower than a lodestar-based award, "strongly suggest[ing] the reasonableness of the requested fee."

The district court's reasoning makes clear that this was not a "blind" application of a benchmark to the circumstances of the case. And Lowery does not challenge any of the district court's specific factual findings supporting its fee award. Instead, he urges us to hold as a general matter that "it [is] inappropriate to value *cy pres* on a dollar-for-dollar basis" equivalent to direct monetary relief to class members. *See In re Heartland Payment Sys., Inc. Customer Data Sec. Breach Litig.*, 851 F. Supp. 2d 1040,

1077 (S.D. Tex. 2012). Certainly, a district court must consider a settlement's benefit to the class in determining appropriate attorneys' fees, and thus, attorneys' fees are not solely a function of the size of a settlement fund. *See e.g.*, *In re HP Inkjet Printer Litig.*, 716 F.3d 1173, 1182, 1185–87 (9th Cir. 2013) ("Plaintiffs attorneys don't get paid simply for working; they get paid for obtaining results."); *In re Baby Prods. Antitrust Litig.*, 708 F.3d 163, 170 (3d Cir. 2013) ("[W]e confirm that courts need to consider the level of direct benefit provided to the class in calculating attorneys' fees.").

But there is no uniform rule that district courts must discount the value of any *cy pres* relief, regardless of the feasibility of distribution to class members or other relevant circumstances. Indeed, we have repeatedly approved attorneys' fees for *cy pres* settlements in proportions similar to the award here. *See Google Referrer*, 869 F.3d at 747–48 (affirming fee award of 25% of *cy pres* settlement); *Lane*, 696 F.3d at 818, 823–24 (affirming lodestar-based fee award of 24.89% of total *cy pres* settlement); *see also Campbell*, 951 F.3d at 1115, 1126–27 (rejecting argument that $3.89 million fee award was excessive when settlement provided only injunctive relief). Other circuits have similarly declined to adopt such a rule. *See Baby Prods.*, 708 F.3d at 178 ("We think it unwise to impose . . . a rule requiring district courts to discount attorneys' fees when a portion of an award will be distributed *cy pres*.").

Lowery argues that by failing to decrease the benchmark given the lack of direct payments to class members, we would permit "perverse incentives [that] will

result in a disproportionate number of *cy pres*-only settlements." But our approach does not "make[] class counsel financially indifferent between a settlement that awards cash directly to class members and a *cy pres*-only settlement," as Lowery warns, because it does take into account the benefit to class members. And, "[o]f course, the percentage may be adjusted to account for any unusual circumstances." *Williams v. MGM-Pathe Commc'ns Co.*, 129 F.3d 1026, 1027 (9th Cir. 1997). Thus, if class counsel fails "to seek an award that adequately prioritizes direct benefit to the class," it might be "appropriate for the court to decrease the fee award." *Baby Prods.*, 708 F.3d at 178. Doing so might also be appropriate when "a *cy pres* . . . settlement . . . has a tenuous relationship to the class allegedly damaged by the conduct in question," or when it appears that the settlement "serves only the 'self-interests' of the attorneys and the parties, and not the class." *Dennis v. Kellogg Co.*, 697 F.3d 858, 868 (9th Cir. 2012). But here, the district court properly considered all relevant circumstances, including the value to the class members, and concluded that a 25% benchmark was appropriate. We affirm the district court's fee award.

H

Finally, Lowery argues that class certification was inappropriate because, by deciding to settle, class counsel and the class representatives breached their fiduciary duties. *See* Fed. R. Civ. P. 23(a)(4) (conditioning class certification on a finding that "the representative parties will fairly and adequately protect the interests of the class"); *id.* 23(g)(4) ("Class counsel must fairly and adequately represent the interests of the class."). Lowery asserts that

under these fiduciary duties, class counsel and representatives cannot "agree[] to accept excessive fees and costs to the detriment of [absent] class plaintiffs." *See Lobatz v. U.S. W. Cellular of Cal.*, Inc., 222 F.3d 1142, 1147 (9th Cir. 2000).

Lowery's fiduciary duty arguments are simply a repackaging of his other arguments against the settlement: he asserts that "class counsel structure[d] a settlement to benefit third parties over any single absent class member," that the settlement included excessive attorneys' fees and lacked "any benefit for the class," and that counsel should have advised "absent class members of the superiority of opting out en masse." Because we affirm the district court's finding that the settlement *does* provide adequate value to the class, and because there is no indication that counsel accepted excessive attorneys' fees or favored third parties over class members, we hold that class counsel and class representatives did not breach their fiduciary duties by entering the settlement.

V

We **AFFIRM** the district court's order certifying the class, approving the settlement agreement, and awarding attorneys' fees.

BADE, Circuit Judge, concurring:

The district court correctly applied our circuit's law and did not err in certifying the class for settlement purposes or approving the proposed settlement agreement.

Indeed, in varying contexts, we have upheld class action settlements that provided *cy pres* awards to third parties in lieu of damages for the class members. *See In re Google Referrer Header Priv. Litig.*, 869 F.3d 737 (9th Cir. 2017), *vacated and remanded on other grounds*, *Frank v. Gaos*, 139 S. Ct. 1041 (2019); *Lane v. Facebook, Inc.*, 696 F.3d 811 (9th Cir. 2012). And we have implicitly approved the use of *cy pres* awards even when rejecting settlements on other grounds. *See Nachshin v. AOL, LLC*, 663 F.3d 1034 (9th Cir. 2011); *Six (6) Mexican Workers v. Ariz. Citrus Growers*, 904 F.2d 1301 (9th Cir. 1990). Because I am constrained to follow these precedents, I authored and joined the majority opinion.

But as Chief Justice Roberts has noted, "fundamental" questions about "the use of [*cy pres*] remedies in class action litigation" remain unanswered. *See Marek v. Lane*, 134 S. Ct. 8, 9 (2013) (Roberts, C.J., respecting the denial of certiorari) (explaining that, among other questions, the Court has not yet addressed "when, if ever, such relief should be considered" and "how to assess its fairness as a general matter"). Therefore, I write separately to express some general concerns about *cy pres* awards.

First, I recognize that "federal courts frequently use the *cy pres* doctrine 'in the settlement of class actions where the proof of individual claims would be burdensome or distribution of damages costly.'" *Nachshin*, 663 F.3d at 1038 (quoting *Six Mexican Workers*, 904 F.2d at 1305); *see also* A.L.I., Principles of the Law of Aggregate Litigation § 3.07(c) (2010) (approving *cy pres* settlement provisions "[i]f the court finds that individual distributions are not viable"); William B. Rubenstein, *4 Newberg on Class Actions* § 12:26 (5th ed. 2011) [hereinafter Newberg] (same).

I also recognize that *cy pres* awards present a practical solution for settling cases "[w]hen a class action involves a large number of class members but only a small individual recovery, [and] the cost of separately proving and distributing each class member's damages may so outweigh the potential recovery that the class action becomes unfeasible." *Six Mexican Workers*, 904 F.2d at 1305. I question, however, whether we have allowed these practical advantages to inappropriately displace other concerns implicated by *cy pres* awards.

Such concerns, which have been ably identified by jurists and commentators, include: conflicts of interest between class counsel and absent class members, *Keepseagle v. Perdue*, 856 F.3d 1039, 1060 (D.C. Cir. 2017) (Brown, J., dissenting); *In re Baby Prods. Antitrust Litig.*, 708 F.3d 163, 173 (3d Cir. 2013); Jay Tidmarsh, *Cy Pres and the Optimal Class Action*, 82 Geo. Wash. L. Rev. 767, 772, 782 (2014); incentives for collusion between defendants and class counsel, *Lane*, 696 F.3d at 829–30 (Kleinfeld, J., dissenting); the role of the court and the parties in shaping a *cy pres* remedy and the potential appearance of impropriety, *S.E.C. v. Bear, Stearns & Co.*, 626 F. Supp. 2d 402, 415 (S.D.N.Y. 2009); Goutam U. Jois, *The Cy Pres Problem and the Role of Damages in Tort Law*, 16 Va. J. Soc. Pol'y & L. 258, 265–66 (2008); the use of Rule 23 of the Federal Rules of Civil Procedure, "a wholly procedural device," to shape substantive rights, arguably in violation of Article III, the Rules Enabling Act,[1] and the separation of

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[1] In *Wal-Mart Stores, Inc. v. Dukes*, the Court cautioned that "the Rules Enabling Act forbids interpreting Rule 23 to 'abridge, enlarge or modify any substantive right.'" 564 U.S. 338, 367 (2011)

powers doctrine, *Klier v. Elf Atochem N. Am., Inc.*, 658 F.3d 468, 481 (5th Cir. 2011) (Jones, J., concurring) (citing 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, 623, 641 (2010)); "whether a *cy pres* award can ever be used as a substitute for actual damages," *Molski v. Gleich*, 318 F.3d 937, 954 (9th Cir. 2003), *overruled on other grounds by Dukes v. Wal-Mart Stores, Inc.*, 603 F.3d 571, 617 (9th Cir. 2010) (en banc); the propriety of importing a doctrine originating in trust law into the context of class action litigation, *Klier*, 658 F.3d at 480 (Jones, J., concurring); *In re Pet Food Prods. Liab. Litig.*, 629 F.3d 333, 363 (3d Cir. 2010) (Weis, J., concurring in part and dissenting in part); Redish, *supra*, at 630; and whether class action litigation is superior to other methods of adjudication if parties must resort to *cy pres* relief, *Frank*, 139 S. Ct. at 1047 (Thomas, J., dissenting). I do not expand on those justified concerns here. Instead, I focus on the predicate of *cy pres* settlement provisions—the theory of indirect benefit to the class members.

Courts have upheld *cy pres* awards based on the premise that they provide an indirect benefit to the class when a direct monetary payment is not feasible. *See Lane*,

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(quoting 28 U.S.C. § 2072(b)); *see also Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 408 (2010) ("A class action, no less than traditional joinder (of which it is a species), merely enables a federal court to adjudicate claims of multiple parties at once, instead of in separate suits. And like traditional joinder, it leaves the parties' legal rights and duties intact and the rules of decision unchanged.").

696 F.3d at 819; *Nachshin*, 663 F.3d at 1038; *Six Mexican Workers*, 904 F.2d at 1305; *Klier*, 658 F.3d at 475. Institutional commentators and treatises have also embraced this theory of indirect benefit. *See* A.L.I., *supra*, at § 3.07 cmt. b ("Cy pres is preferable to other options available to a court when direct distributions are not viable."); *Newberg*, *supra*, at § 12:26 ("*[C]y pres* distributions provide indirect compensation to the plaintiff class by funding activities that are in the class's interest.").

But there is an increasing skepticism about whether *cy pres* provisions actually provide an indirect benefit to class members. *See Frank*, 139 S. Ct. at 1047 (Thomas, J., dissenting) ("[*C*]*y pres* payments are not a form of relief to the absent class members and should not be treated as such . . . ."); *Lane*, 696 F.3d at 830 (Kleinfeld, J., dissenting) ("It is hard to imagine a real client saying to his lawyer, 'I have no objection to the defendant paying you a lot of money in exchange for agreement to seek nothing for me.'"); *Molski*, 318 F.3d at 954 (stating that "it seems somewhat distasteful to allow a corporation to fulfill its legal and equitable obligations through tax-deductible donations to third parties"); *In re Baby Prods. Litig.*, 708 F.3d at 173 (concluding that *cy pres* settlements are permissible, but noting that they substitute "an indirect benefit that is at best attenuated and at worse illusory" for compensatory damages); *Klier*, 658 F.3d at 482 (Jones, J., concurring) ("Our adversarial system should not effectuate transfers of funds from defendants beyond what they owe to the parties in judgments or settlements."); *Mirfasihi v. Fleet Mortg. Corp.*, 356 F.3d 781, 784 (7th Cir. 2004) (explaining that in *cy pres* settlements "[t]here is no indirect benefit to the class from the defendant's giving the money to someone else"); *Six Mexican Workers*, 904

F.2d at 1312 (Fernandez, J., concurring) ("[*Cy pres*] is a very troublesome doctrine, which runs the risk of being a vehicle to punish defendants in the name of social policy, without conferring any particular benefit upon any particular wronged person."); Redish, *supra*, at 623 ("Cy pres creates the illusion of class compensation. It is employed when—and only when—absent its use, the class proceeding would be little more than a mockery."). And, despite the acceptance of the theory of indirect benefit, there is, in my view, a compelling argument that class members receive no benefit at all from a settlement that extinguishes their claims without awarding them any damages, and instead directs money to groups whose interests are purportedly aligned with the class members, but whom they have likely never heard of or may even oppose.

Moreover, even if we accept the premise that *cy pres* awards provide value to the public at large, there is practical appeal in the argument that such settlements provide no unique consideration to class members because they receive the same generalized benefits as non-class-members and opt-outs. Indeed, *cy pres* settlements arguably benefit opt-outs more than class members because opt-outs reap any positive externalities of the settlement provisions while retaining the value of the claims that the settlement extinguished for class members.[2]

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[2] In cases where a class settlement provides injunctive and *cy pres* relief, but no damages for class members, the concern that non-classmembers and opt-outs fare better than class members could be mitigated by certifying injunctive and declaratory relief classes under Rule 23(b)(2), without *cy pres* awards and without requiring class

I am therefore not convinced that *cy pres* awards to uninjured third parties should qualify as an indirect benefit to injured class members, and I am concerned that "the '*cy pres*' remedy . . . is purely punitive," *Mirfasihi*, 356 F.3d at 784, with defendants paying millions of dollars in what are essentially civil fines to class counsel and third parties while providing no compensation to injured class members. *See Klier*, 658 F.3d at 481 (Jones, J., concurring) (citing Redish, *supra*, at 623); *see also Six Mexican Workers*, 904 F.2d at 1312 (Fernandez, J., concurring) ("[*Cy pres*'] use may well amount to little more than an exercise in social engineering by a judge, who finds it offensive that defendants have profited by some wrongdoing, but who has no legitimate plaintiff to give the money to."); Newberg, *supra*, at § 12:26 (stating that one purpose of *cy pres* distributions is to "ensure that the defendant is disgorged of a sum certain, even if that money does not compensate class members directly").

I further question whether *cy pres* awards are inherently unfair when the class receives no meaningful relief in exchange for their claims, *see* Fed. R. Civ. P. 23(e)(2), and whether such awards can be justified given the serious ethical, procedural, and constitutional problems that others have identified. Therefore, I respectfully

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members to release damages claims, rather than damages classes under Rule 23(b)(3). *Cf. Campbell v. Facebook, Inc.*, 951 F.3d 1106, 1113–15, 1124 (9th Cir. 2020) (affirming approval of injunctive-relief-only class settlement that did not release class members' damages claims).

submit that it is time we reconsider the practice of *cy pres* awards.

Appendix B

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

IN RE GOOGLE LLC STREET VIEW ELECTRONIC COMMUNICATIONS LITIGATION	Case No. 10-md-02184-CRB **ORDER GRANTING FINAL APPROVAL OF CLASS ACTION SETTLEMENT, GRANTING ATTORNEYS' FEES, AND ENTERING FINAL JUDGMENT**

The Court must now assess the settlement of a case in which a vast but nonetheless difficult-to-identify class of people suffered intangible injury, and minimal damages. Specifically, this suit arises under the Electronic Communications Privacy Act of 1986 ("ECPA"), see Transfer Order (dkt. 1), and Plaintiffs allege that between 2007 and 2010, Google used its Street View vehicles to intentionally intercept and store electronic communications transmitted by class members over unencrypted wireless internet connections, see CAC (dkt. 54) ¶¶ 1–4. After almost a decade of litigation, the parties reached a settlement. See generally Agreement (dkt. 166-1) Ex. A. The settlement provides for injunctive relief and a $13 million Settlement Fund, which (after deducting attorneys' fees and expenses, service awards for the named plaintiffs, and

notice and settlement expenses) the parties have agreed will be used to fund Court-approved cy pres awards to organizations that address consumer privacy issues. Mot. (dkt. 184) at 3–4. The Court preliminarily approved the settlement in October 2019. See Order on Prelim. Approval (dkt. 178).

Class Counsel now moves for final approval of the settlement. See generally Mot. The Court held a motion hearing on Friday, February 28, 2020. See Motion Hearing (dkt. 204). The Court has considered the record, the Settlement Agreement, and the briefing on this motion, including the objections and comments it received, and the arguments at the hearing. In adjudicating this motion, the Court bears in mind its responsibility to absent class members. Particularly when a settlement takes place before formal class certification, the Court must "scrutinize the proceedings to discern whether" Class Counsel and the named plaintiffs "have sacrificed the interests of absent class members for their own benefit." See 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);[1] Lane v. Facebook, Inc., 696 F.3d 811, 819 (9th Cir. 2012). But the Court is also mindful that its job is not to create policy about the cy pres doctrine generally, or even to fashion the settlement agreement that it might most prefer in this case. Rather, it is to decide, given the circumstances of this case, whether the

[1] Because Google Referrer is a recent Ninth Circuit case containing an extensive discussion of cy pres-only settlement agreements, the Court finds it instructive as to the Ninth Circuit's view of such settlements; the Court recognizes, nevertheless, that the case has been vacated.

settlement the parties have reached is "'fair, adequate, and free from collusion.'" See Lane, 696 F.3d at 819 (quoting Hanlon v. Chrysler Corp., 150 F.3d 1011, 1026 (9th Cir. 1998), overruled on other grounds by Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338 (2011)).

IT IS THEREFORE HEREBY ORDERED, ADJUDGED, AND DECREED as follows:

I. DEFINED TERMS

Unless otherwise defined herein, all terms that are capitalized herein shall have the meanings ascribed to those terms in the Settlement Agreement.

II. JURISDICTION

This Court has jurisdiction over the subject matter of this Action, all parties to the Action, and all Class Members.

III. STANDING

Courts considering class action settlements must "assure [them]selves of litigants' standing under Article III." Gaos, 139 S. Ct. at 1046 (quoting DaimlerChrysler Corp. v. Cuno, 547 U.S. 332, 340 (2006)). Moreover, "named plaintiffs who represent a class 'must allege and show that they personally have been injured.'" Spokeo, Inc. v. Robins, 136 S. Ct. 1540, 1547 n.6 (quoting Simon v. Eastern Ky. Welfare Rights Org., 426 U.S. 26, 40 n.20 (1976)). The Class Representatives' standing here was not a foregone conclusion.

Plaintiffs allege that Google willfully intercepted and stored their private electronic communications in violation of Title III of the Omnibus Crime Control and Safe Streets Act of 1968, as amended by the ECPA, 18 U.S.C. §§ 2510, et seq. (together "the Wiretap Act"). See CAC (dkt. 54). Plaintiffs further alleged that Google's Street View vehicles "surreptitiously collected, decoded, and stored data from [their] WiFi connection, including payload data," and that they "did not know that Google collected [t]his data, nor did [they] give permission for Google to do so." Id. ¶¶ 18–38.

Given these allegations, the parties engaged a Special Master to conduct intensive discovery on the issue of standing. See Case Management Conference – Further (dkt. 108). The Special Master conducted complex technical searches on data collected by Google "to determine whether any Plaintiff's communications were acquired by Google." Order Regarding Jurisdictional Discovery (dkt. 121-1) at 2. The Special Master was provided with three billion frames of wireless raw data, of which about 300 million contained "Payload Data"—the kind of frames that could contain communications. See Joint Decl. (dkt. 186) ¶ 19. It took a year for the Special Master to organize the data into a searchable database, and another two years for the Special Master to design and conduct the searches, during which time the parties and Special Master met regularly to confer on the process. Id. Eighteen Named Plaintiffs "produced personal information and forensic evidence of their wireless network equipment (including MAC addresses, email addresses, and SSIDs) to the Special Master to facilitate this targeted discovery." Id.

After the Special Master issued his report, Joint Mot. to File Under Seal (dkt. 138), the Court stayed these

proceedings pending the Supreme Court's consideration of Gaos, see Stay Order (dkt. 155). Although the Supreme Court in Gaos had granted certiorari to review the issue of cy pres-only settlements, it did not reach that issue, concluding that "there remain[ed] substantial questions about whether any of the named plaintiffs ha[d] standing" in light of Spokeo, 136 S. Ct. 1540. The holdings of Gaos and Spokeo guide this Court's standing analysis.

The district court in Gaos had found that Gaos established standing by alleging that the defendant violated the Stored Communications Act, which provides a private right of action. See Gaos, 139 S. Ct. at 1044. While the Ninth Circuit was considering an appeal of Gaos's class action settlement, the Supreme Court decided Spokeo. See Gaos, 139 S. Ct. at 1045. In Spokeo, the Court explained that standing consists of having "(1) suffered an injury in fact; (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision." 136 S. Ct. at 1547 (citing Lujan v. Defenders of Wildlife, 504 U.S. 555, 560–61 (1992)). The Court explained that an injury in fact requires "a plaintiff [to] show that he or she suffered 'an invasion of a legally protected interest' that is 'concrete and particularized' and 'actual or imminent, not conjectural or hypothetical.'" Id. at 1548. "Particularized" means that the injury "'must affect the plaintiff in a personal and individual way,'" while "concrete" means that the injury "must actually exist." Id. (quoting Lujan, 504 U.S. at 560 n.1). The Court noted that "intangible injuries can be concrete," and that "in determining whether an intangible harm constitutes an injury in fact, both history and the judgment of Congress play important roles." Id. at 1549.

The Court found it instructive "to consider whether an alleged intangible harm has a close relationship to a harm that has traditionally been regarded as providing a basis for a lawsuit in English or American courts." Id. Merely "alleg[ing] a bare procedural violation, divorced from any concrete harm," does not satisfy the injury-in-fact requirement. Id. Plaintiffs must allege concrete harm, the Court explained, "even in the context of a statutory violation." Id. Because the Ninth Circuit had affirmed Gaos's class action settlement without reexamining standing, the Supreme Court remanded the case to the Ninth Circuit to consider Gaos's standing in light of Spokeo. Gaos, 139 S. Ct. at 1045–46.[2]

Because the Plaintiffs here have alleged an intangible injury that stems from a statutory violation, the Court considers Congress's judgment in "identifying and elevating intangible harms" and the relationship between the intangible injury and "harm that has traditionally been regarded as providing a basis for a lawsuit." See Spokeo, 136 S. Ct. at 1549. In enacting the ECPA, Congress sought to protect the concrete privacy interests of individuals in avoiding unwanted interception of their electronic communications. See Konop v. Hawaiian Airlines, Inc., 302 F.3d 868, 874 (9th Cir. 2002) (ECPA "was intended to afford privacy protection to electronic communications."). The prohibition in the statute, and its accompanying private right of action, reflect Congress's judgment that intentional, nonconsensual interception of

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[2] Importantly, the Ninth Circuit opinion that Gaos vacated and remanded was Google Referrer, 869 F.3d 737, vacated on other grounds by Gaos, 139 S. Ct. at 1044. 4

private communications is an invasion of an individual's right to privacy. See S. Rep. No. 99-541 at 5 (1986), as reprinted in 1986 U.S.C.C.A.N. 3555, 3559 ("[T]he law must advance with the technology to ensure the continued vitality of the fourth amendment. Privacy cannot be left to depend solely on physical protection, or it will gradually erode as technology advances."). This congressional judgment is "instructive and important" in establishing a concrete injury under Article III. See Spokeo, 136 S. Ct. at 1549. Moreover, the injury at issue here—having one's electronic communication intentionally intercepted—bears a close relationship to a traditional violation of the right to privacy.

In so holding, the Court follows the guidance of Campbell v. Facebook, No. 17-16873, slip op. (9th Cir. Mar. 3, 2020), which weeks ago approved the settlement of a class action brought under the ECPA and the California Invasion of Privacy Act. The Circuit explained that 'Violations of the right to privacy have long been actionable at common law.'" Id. at 17 (quoting Eichenberger v. ESPN, Inc., 876 F.3d 979, 983–84 (9th Cir. 2017)). It explained, in addition, that "under the privacy torts that form the backdrop for these modern statutes, '[t]he intrusion itself makes the defendant subject to liability.'" Id. (quoting Restatement (Second) of Torts § 652B cmt. b). The Circuit also held that "The reasons articulated by the legislature[] that enacted ECPA . . . further indicate that the provisions at issue in this case reflect statutory modernizations of the privacy protections available at common law." Id. at 18. It concluded that the plaintiffs there "identified a concrete injury by claiming that Facebook violated the ECPA . . . when it intercepted, catalogued, and used without consent URLs they had shared in private messages." Id. at 20.

Another court in this district also recently applied Spokeo to a Wiretap Act claim, and reached the same conclusion. In Matera v. Google, Inc., No. 15-cv-04062, 2016 WL 5339806, at *8–14 (N.D. Cal. Sept. 23, 2016), Judge Koh concluded that a plaintiff who alleged that Google violated the Wiretap Act, "without claiming any additional harm," had nonetheless alleged injury sufficient to confer standing. First, the court concluded that Wiretap Act violations resemble invasion of privacy claims at common law "in both their substantive prohibitions and their purpose." Id. at *10 (citing Restatement (Second) of Torts §§ 652A-I regarding right to privacy). Even though the elements that establish a Wiretap Act violation are not identical to those that establish a common law invasion of privacy, the court found that the harms share a close relationship. Id. at *11. Second, Judge Koh noted that when courts determine whether Congress intended to make an alleged statutory violation an injury in fact, they often "place[] dispositive weight on whether a plaintiff alleges the violation of a substantive, rather than procedural, statutory right." Id. at *12 (citing Cour v. Life360, Inc., No. 16-cv-00805-TEH, 2016 WL 4039279, at *2 (N.D. Cal. July 28, 2016)). The court found that Congress "create[d] substantive rights to privacy in one's communications" when it enacted the Wiretap Act. Id. at *13. Judge Koh concluded, therefore, that the relationship between Wiretap Act violations and privacy torts, as well as Congress's judgment that plaintiffs who allege Wiretap Act violations should have a right to legal relief, meant that an alleged Wiretap Act violation "constitute[s] concrete injury in fact." Id. at *14.

Numerous other courts have also concluded that violations of the ECPA cause concrete and particularized

harms that give rise to Article III standing. See, e.g., In re Nickelodeon Consumer Privacy Litig., 827 F.3d 262, 273–74 (3d Cir. 2016); Rackemann v. LISNR, Inc., No. 1:17-cv-00624-TWP-MJD, 2017 WL 4340349, at *3–5 (S.D. Ind. Sept. 29, 2017); Cooper v. Slice Techs., Inc., No. 17-cv-7102 (JPO), 2018 WL 2727888, at *2–5 (S.D.N.Y. June 6, 2018); In re Facebook Internet Tracking Litig., 263 F. Supp. 3d 836, 841–42, 844–45 (N.D. Cal. 2017).

The Court now finds and concludes that the Class Representatives, who have alleged that Google intercepted the private communications transmitted in their payload data, have standing under Article III of the United States Constitution. The invasions of privacy involved here are concrete and particularized injuries-in-fact to rights defined and protected by statute, and they fall well within the courts' traditional sphere of authority. See Matera, 2016 WL 5339806, at *10, 14. The alleged injuries are fairly traceable to the challenged conduct of the defendant and are redressable by the Court. See Spokeo, 136 S. Ct. at 1547.

IV. CERTIFICATION OF RULE 23(B)(3) CLASS FOR SETTLEMENT PURPOSES

Plaintiffs seek to certify a single nationwide class under Federal Rule of Civil Procedure 23(a) and Rule 23(b)(3). See Mot. at 9–13.

A. Rule 23(a) Requirements

Under the first Rule 23(a) factor, the class must be "so numerous that joinder of all members is impracticable." Fed. R. Civ. P. 23(a)(1). Some courts have held that numerosity may be presumed when the class comprises

forty or more members. See Krzesniak v. Cendant Corp., No. C 05-05156 MEJ, 2007 WL 1795703, at *7 (N.D. Cal. June 20, 2007). Whether joinder is impracticable depends on the facts and circumstances of each case. See id. Here, Class Counsel estimate that the class has approximately 60 million members. Reply Decl. (dkt. 198-1) ¶ 3.[3] Plaintiffs have therefore satisfied Rule 23(a)(1).

Under the second Rule 23(a) factor, the class must share common questions of law or fact. Fed. R. Civ. P. 23(a)(2). Not all questions of law or fact must be common: "[t]he existence of shared legal issues with divergent factual predicates is sufficient." See Hanlon, 150 F.3d at 1019. Here, class members' claims share questions of law and fact, such as whether Google intentionally intercepted electronic communications, in violation of the Wiretap Act. See CAC ¶ 122. Plaintiffs have satisfied Rule 23(a)(2).

Under the third Rule 23(a) factor, a representative party's claims or defenses must be "typical of the claims or defenses of the class." Fed. R. Civ. P. 23(a)(3). "The purpose of the typicality requirement is to assure that the interest of the named representative aligns with the interest of the class." Hanon v. Dataproducts Corp., 976 F.2d 497, 508 (9th Cir. 1992) (citing Weinberger v. Thornton,

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[3] While this is only an estimate, Class Counsel explained by way of declaration that it reached that number based on the three hundred million payload data frames in this case, as well as the related investigation done by the Canadian government. Id. It discussed its reasoning further at the motion hearing. Counsel for Google echoed at the motion hearing that the estimate appeared valid and that the exact class size is unknown. The Court accepts that the class size is approximately 60 million people.

114 F.R.D. 599, 603 (S.D. Cal. 1986)). Courts consider whether the named plaintiffs and unnamed class members share "the same or similar injury" and whether the alleged wrongful conduct is "not unique to the named plaintiffs." Id. (quoting Schwartz v. Harp, 108 F.R.D. 279, 282 (C.D. Cal. 1985)). Here, Plaintiffs and the unnamed class members have the same alleged injury—that Google's Street View vehicles collected their electronic communications, without consent, from unencrypted Wi-Fi networks. See CAC ¶ 123. Plaintiffs have therefore satisfied Rule 23(a)(3).

Under the final Rule 23(a) factor, the representative party must "fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a)(4). Representative parties are required to protect the interests of the class by (1) retaining qualified counsel who will prosecute the case vigorously, and (2) ensuring they do not have any conflicts of interest with the proposed class. See Hanlon, 150 F.3d at 1020. Class Counsel, Spector Roseman & Kodroff PC, Cohen Milstein Sellers & Toll PLLC, and Lieff Cabraser Heimann & Bernstein LLP, are qualified and competent and have extensive experience in these kinds of cases. Kodroff Prelim. Approval Decl. (dkt. 166- 1) ¶ 28, Exs. K, L; Joint Decl. ¶ 64, Exs. D, E. The Court has observed their vigorous and capable advocacy since it took over this case. The Court is not aware of any conflicts with the proposed class, and finds that "each potential plaintiff has the same problem"—that Google allegedly intercepted their payload data. See Hanlon, 150 F.3d at 1021.

Objector Lowery argues that Plaintiffs cannot meet Rule 23(a)(4) and Rule 23(g)(4) ("Class counsel must fairly and adequately represent the interests of the class"), because Class Counsel is supposed to "maximize

class recovery," and not sacrifice class recovery for counsel's own "red carpet treatment on fees." Lowery Obj. (dkt. 188) at 17. He argues that "the cy pres-only settlement combined with a sizable clear-sailing attorneys' fee, sizable incentive awards, and a donation to a charity working class counsel,[4] combine to indicate inadequate representation." Id. at 18. This argument fails because it assumes, wrongly, that the cy pres settlement is not a benefit to the class, see Lane, 696 F.3d at 819 (explaining that cy pres remedy is one in which "class members receive an indirect benefit (usually through defendant donations to a third party) rather than a direct monetary payment"); 4 Newberg on Class Actions § 12:32 (5th ed. 2019 update) ("by sending money to charities that work in the class's interest, it is arguably compensatory, albeit indirectly so. The class benefits from a cy pres distribution as it realizes the gains that its charitable contribution can accomplish."), and because it assumes, wrongly, that the attorneys' fees in this case are some kind of windfall for Class Counsel, who are seeking a negative lodestar multiplier after spending nearly a decade on this case, see Fees Mot. (dkt. 185) at 17. Plaintiffs have satisfied Rule 23(a)(4).

B. Rule 23(b) Requirements

Plaintiffs seek to certify the class under Rule 23(b)(3). See Mot. at 17. To be certified under Rule 23(b)(3), the proposed class must meet two requirements:

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[4] It is unclear what this means; to the extent that Objector Lowery is objecting to the alleged relationship between the parties and the cy pres recipients, the Court has examined the relationships here and does not find them problematic.

(1) common questions of law and fact must predominate over individual claims, and (2) the litigation as a class action suit must be superior to other methods of resolving the controversy. Fed. R. Civ. P. 23(b)(3).

Common questions of law and fact predominate over individual claims when the common questions "present a significant aspect of the case and they can be resolved for all members of the class in a single adjudication. . . ." Hanlon, 150 F.3d at 1022 (internal quotation marks omitted). The predominance requirement is "readily met" where the class is a "cohesive group of individuals [who] suffered the same harm in the same way because of the [defendant's] conduct." In re Hyundai & Kia Fuel Economy Litig., 926 F.3d 539, 559 (9th Cir. 2019). Here, Plaintiffs have alleged that Google's alleged collection of payload data by its Street View vehicles uniformly injured the class. See Mot. at 11; CAC ¶ 126. The central facts (what was Google's conduct, and was it intentional) and the key questions of law (did such conduct violate the ECPA) are common to the class. Plaintiffs meet the predominance requirement.

In determining whether a class action is superior to other methods of resolving claims, courts consider whether the class action "will reduce litigation costs and promote greater efficiency." Valentino v. Carter-Wallace, Inc., 97 F.3d 1227, 1234 (9th Cir. 1996). A class action is also superior to other methods when it is the only realistic method of adjudicating class members' claims. Id. at 1234–35. Here, because the proposed class likely includes sixty million people, there is no realistic alternative to a class action. In addition, because individual claims for damages would likely be capped at $10,000, and might be zero, see 18 U.S.C. § 2520(c)(2); Campbell v. Facebook, Inc., 315

F.R.D. 250, 268 (N.D. Cal. 2016) ("court 'may' award damages"), class members might find the cost of litigating individual claims prohibitive. See also Local Joint Executive Bc. of Culinary/Bartender Trust Fund v. Las Vegas Sands, Inc., 244 F.3d 1152, 1163 (9th Cir. 2001) (explaining that "the disparity between [class members'] litigation costs and what they hope to recover" may favor consolidating individual claims in a class action). Individual lawsuits also risk "the possibility of inconsistent rulings and results." In re Volkswagen "Clean Diesel" Mktg., Sales Practices, and Prods. Liab. Litig., MDL No. 2672 CRB (JSC), 2017 WL 672727, at *14 (N.D. Cal. Feb. 16, 2017). For these reasons, the Court is inclined to conclude that a class action is the superior method of resolving this controversy.

Objector Lowery, however, argues that "[i]f a settlement certification 'serves only as a vehicle through which to extinguish the absent class members' claims without providing them any relief' because it would be too impractical to distribute the settlement funds to class members, then a class action is not a superior means to adjudicating this controversy." Lowery Obj. at 19 (quoting Gaos, 139 S. Ct. at 1047 (Thomas, J., dissenting). But the Court does not agree that this settlement is only a vehicle for extinguishing class claims. This settlement has yielded some amount of injunctive relief as well as a meaningful settlement fund[5] that can benefit the class by serving the class's interest in protecting internet privacy. See Mot. at 3–4; Hughes v. Kore of Indiana Enterprise, Inc.,

[5] Counsel for Lowery acknowledged at the motion hearing that he does not contest the adequacy of the $13 million fund.

731 F.3d 672, 676 (7th Cir. 2013) ("Payment of $10,000 to a charity whose mission coincided with, or at least overlapped, the interest of the class (such as a foundation concerned with consumer protection) would amplify the effect of the modest damages in protecting consumers. A foundation that receives $10,000 can use the money to do something to minimize violations of the Electronic Funds Transfer Act; as a practical matter, class members each given $3.57 cannot."). Objector Lowery's assertion that a class action is not superior because absent class members receive no compensation, Lowery Obj. at 20, is unpersuasive given the Circuit's approval of a cy-pres only settlement in Lane, 696 F.3d 811. The Court therefore agrees with Google Referrer, 869 F.3d at 742, which "easily reject[ed] Objectors' argument that if the settlement fund was non-distributable, then a class action cannot be the superior means of adjudicating this controversy under Rule 23(b)(3)."

The Court further rejects Objector Lowery's argument that, because there is no efficient means of identifying class members, then the class cannot be certified. Lowery Obj. at 20–21. The Circuit in Briseno v. ConAgra Foods, Inc., 844 F.3d 1121, 1133 (9th Cir. 2017), held 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." Moreover, Briseno cautioned against a stand-alone ascertainability requirement, which "would often be outcome determinative for cases like this one, in which administrative feasibility would be difficult to demonstrate but in which there may be no realistic alternative to class treatment." Id. at 1128. The class here is ascertainable under

the implied ascertainability requirement of Rule 23 because its membership is defined objectively as "all persons who used a wireless network device from which Acquired Payload Data was obtained," see Mot. at 3 (class definition), and because whether a class member used such a device from which Google acquired Payload Data within the class period is also an objective question. The difficulty that any one individual would have in demonstrating membership in the class, requiring a process akin to the three-year process undertaken by the Special Master, is all the more reason that class treatment is superior to an individual lawsuit, or a slew of individual lawsuits. See also Google Referrer, 869 F.3d at 742 ("Not surprisingly, there is a relationship between the superiority requirement and the appropriateness of a cy pres-only settlement.").

Because Plaintiffs' proposed class meets the requirements of Rule 23(a) and Rule 23(b)(3), the Court CERTIFIES the classes for settlement purposes under Rule 23(b)(3).

V. APPOINTMENT OF CLASS COUNSEL

The Court confirms its appointment of Spector Roseman & Kodroff, P.C. and Cohen Milstein Sellers & Toll PLLC as Co-Lead Class Counsel for the class, and of Lieff Cabraser Heimann & Bernstein LLP as Liaison Counsel for Class under Rule 23(g).

VI. ATTORNEYS' FEES AND EXPENSES

Plaintiffs move for attorneys' fees, litigation expenses, and service awards. See Fees Mot. (dkt. 185). They seek out of the Settlement Fund (A) attorneys' fees amounting to 25% of the $13,000,000 Settlement Fund

($3,250,000), (B) $750,000 in litigation expenses, and (C) Service Awards totaling $91,500 for twenty-one Class Representatives. Id. at 1. The Court has carefully considered the filings in connection with this motion, as well as the record in this matter, and it GRANTS the motion, as modified herein.

A. Attorneys' Fees

The Court finds that Class Counsel are entitled to reasonable attorneys' fees pursuant to the common fund doctrine, In re Wash. Pub. Power Supply Sys. Sec. Litig., 19 F. 3d 1291, 1300 (9th Cir. 1994), and under the fee-shifting provision for a prevailing party under the ECPA, 18 U.S.C. § 2520(b)(3); see also Barrios v. Cal. Interscholastic Fed'n, 277 F.3d 1128, 1134 (9th Cir. 2002) (quoting Fischer v. SJB–P.D. Inc., 214 F.3d 1115, 1118 (9th Cir. 2000)) ("[A] plaintiff 'prevails' when he or she enters into a legally enforceable settlement agreement against the defendant . . . [such that] 'the plaintiff can force the defendant to do something he otherwise would not have to do.'").

The Court finds that the percentage-of-recovery method of determining reasonable attorneys' fees is appropriate here, as the settlement creates a common fund. The Court exercises its discretion to analyze the fee request using that method. See In re Hyundai, 926 F.3d at 570; Vizcaino v. Microsoft Corp., 290 F.3d 1043, 1047 (9th Cir. 2002); In re Bluetooth Headset Prods. Liab. Litig., 654 F.3d 935, 942 (9th Cir. 2011). The Court will also conduct a lodestar-based analysis as a cross-check on the reasonableness of the requested fee. See In re Lithium Ion Batteries Antitrust Litig., No. 4:13-md-02420-YGR (MDL), 2019 WL 3856413, at *7 (N.D. Cal. Aug. 16, 2019).

The Court recognizes that in the Ninth Circuit, the "benchmark" fee award is 25%, which can be adjusted upward or downward based on the circumstances of the case. Paul, Johnson, Alston & Hunt v. Graulty, 886 F.2d 268, 272 (9th Cir. 1989). Class Counsel request fees of 25%. See generally Fees Mot. While the Court finds Class Counsel's fee request of 25% entirely reasonable in terms of the non-exhaustive factors set forth in Vizcaino, 290 F.3d 1043, discussed below, the Court parts ways with Class Counsel in one respect. This Court does not calculate the 25% fee award based on the gross settlement fund of $13 million, but the net fund, after subtracting the litigation and Service Awards.

It is not an abuse of discretion to calculate fees based on the gross fund. See Powers v. Eichen, 229 F.3d 1249, 1258 (9th Cir. 2000) ("choice of whether to base an attorneys' fee award on either net or gross recovery should not make a difference so long as the end result is reasonable"). But the Court is not required to use the gross, and has a longstanding preference for using the net. See also Redman v. Radioshack Corp., 768 F.3d 622, 633 (7th Cir. 2014) ("the central consideration is what class counsel achieved for the members of the class rather than how much effort class counsel invested in the litigation"); In re Wells Fargo Secs. Litig., 157 F.R.D. 467, 471 (N.D. Cal. 1994) ("If an attorney risks losing some portion of his fee award for each additional dollar in expenses he incurs, the attorney is sure to minimize expenses"); Miles v. AlliedBarton Security Svcs., LLC, No. 12–5761 JD, 2014 WL 6065602, at *5 (N.D. Cal. Nov. 12, 2014) ("the fees paid to the settlement administrator—do[] not constitute a benefit to the class members"). Twenty-five percent of the net

is entirely appropriate, as none of the Vizcaino factors warrant a downward adjustment from the benchmark.

First, the overall result and benefit to the class from the litigation supports the requested percentage. The monetary component of the settlement benefits the class members by serving the goals of this litigation and the ECPA. The injunctive relief component is modest but nonetheless works a benefit, reducing the chance that similar invasions of the class's privacy recur, and helping Class Members protect against future privacy violations.[6]

Second, this case required skill and expertise, which Class Counsel amply demonstrated over nearly ten years of work. The case involved novel issues, including whether the ECPA applied to wireless networks that the

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[6] The Court hereby rejects Objector Lowery's hyperbolic argument that because the cy pres does not benefit the class, the appropriate fee award is zero. See Lowery Obj. at 22. The Court further rejects his argument that in calculating attorneys' fees, the Court should discount the Settlement Fund to reflect that the money is going to cy pres organizations rather than to class members. Id. at 24 ("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 agree to the cy pres arrangement and unnamed class members will be permanently left out in the cold."). Currently, cy pres-only settlements are permissible in the Ninth Circuit. See Lane, 696 F.3d 811. That has not meant that every class action settlement has resulted in a cy-pres only settlement. This Court would not find a cy pres-only settlement fair, reasonable, and adequate in many circumstances. But where the settlement fund is non-distributable, counsel should not be penalized for fashioning a cy pres-only settlement that stands to accomplish some good.

owners had failed to encrypt. Class Counsel represented the class well, advocating on behalf of consumers' right to privacy in their wireless network communications, taking on a multinational corporation, and ultimately resolving the case favorably to the class.

Third, this was a risky case. It was uncertain whether Google's conduct violated the ECPA, whether data transmitted over unencrypted wireless networks is "readily accessible to the general public," and whether, even if Plaintiffs won, the Court would exercise its discretion under the ECPA by awarding full statutory damages per class member, or no statutory damages at all. See Campbell, 315 F.R.D. at 268. This case was made more challenging because of, among other things, the standing issue raised in Spokeo and Gaos; the immense class size but the minimal damages each class member suffered; the technical challenges involved in demonstrating that any one individual class member's privacy was violated; and, arguably, the AVC, which in 2013 granted significant injunctive relief but also stated that "[t]he Payload Data collection occurred without the knowledge of Google executives." See Pltf. Resp. (dkt. 199) at 4. Class Counsel devoted substantial time to the case—over 8,000 hours—on a purely contingent basis. Joint Decl. ¶¶ 3, 40. There was no guarantee that Plaintiffs' claims would survive a motion to dismiss and subsequent appeals, or that the class would see substantial damages.

The Court has also conducted a lodestar-based analysis, and finds that the requested percent is reasonable under the lodestar approach. See Vizcaino, 290 F.3d at 1050.

Class Counsel's billing summaries comply with this Court's guidelines for class action attorneys' fees requests and contain sufficient detail for the Court to conduct a lodestar-based assessment of the fee request. These summaries show that Class Counsel's lodestar for work on this case through October 31, 2019 is $5,469,030.20, representing 8,083.2 hours of attorney and staff time, and representing a negative multiplier of 0.59 on Class Counsel's actual fee request. A negative lodestar multiplier "strongly suggests the reasonableness" of the requested fee. See Rosado v. Ebay Inc., No. 12-04005-EJD, 2016 WL 3401987, at *8 (N.D. Cal. June 21, 2016) (collecting cases).

The Court finds that the hours and rates that Class Counsel used to calculate the lodestar are also reasonable. First, the Court finds that the time Class Counsel spent on the case was reasonable. Class Counsel devoted more than nine years to this challenging litigation, which involved novel facts and legal issues. Class Counsel have also attested that they reviewed the hours expended in this action, and that the lodestar submitted to the Court excludes time that was removed in the exercise of billing discretion. Second, the Court finds that the rates Class Counsel used to calculate their lodestar are reasonable. The rates of all three Class Counsel firms are supported by a description of the qualifications of the attorneys and staff who worked on this case. Moreover, each firm's standard billing have been approved multiple times in this District.

The Court leaves it to Co-Lead Class Counsel, in the first instance, to allocate appropriate amounts of the attorneys' fees awarded to Class Counsel both among Class Counsel and among the additional law firms that

have reported time in this MDL to Co-Lead Class Counsel. If there are disagreements among Counsel, the Court will determine whether Co-Lead Class Counsel's allocation is reasonable.

For the reasons discussed above, the Court concludes that the requested percentage is reasonable, and the Court GRANTS attorneys' fees as calculated below.

B. Expenses

The Court finds that Class Counsel are entitled to the reimbursement of reasonable litigation expenses under the common fund doctrine and the ECPA. See Paul, Johnson, Alston & Hunt, 886 F.2d at 271; 18 U.S.C. § 2520(b)(3). The Court finds that the expenses incurred in this litigation (dominated by the cost of the Special Master) were necessary to the effective representation of the class and would normally be charged to a fee-paying client.

The Court therefore GRANTS Plaintiffs' motion for litigation expenses in the amount of $750,000.

C. Service Awards

The Court finds that the requested service awards for Named Plaintiffs are reasonable and appropriate. Such awards are "intended to compensate class representatives for work done on behalf of the class [and] make up for financial or reputational risk undertaken in bringing the action." Rodriguez v. W. Publ'g Corp., 563 F.3d 948, 958 (9th Cir. 2009); Van Vranken v. Atl. Ritchfield Co., 901 F. Supp. 294, 299–300 (N.D. Cal. 1995). "The Ninth Circuit has repeatedly held that $5,000 is a reasonable amount for an incentive award." Congdon v. Uber Techs., Inc., No.

16-02499, 2019 WL 2327922, at *9 (N.D. Cal. May 31, 2019) (collecting cases).

All of the plaintiffs named as class representatives have expended substantial time and effort in assisting Class Counsel with the prosecution of the class's claims. The eighteen plaintiffs for whom $5,000 service awards are requested undertook additional burdens by providing evidence and personal information to the Special Master for the jurisdictional discovery in this action. This level of time and effort justifies a service award of $5,000. The Court also finds that the request for Service Awards of $500 for the three named plaintiffs who did not participate in jurisdictional discovery is reasonable.

The Court also finds that the total amount requested for service awards ($91,500) compares favorably to the size of the Settlement Fund.

For the reasons discussed above, the Court concludes that the requested service awards are reasonable, and GRANTS the requested service awards.

D. Calculation of Fees

The Court calculates attorneys' fees based on a percentage of the net Settlement Fund. That represents the Settlement Fund of $13,000,000, minus expenses of $750,000, minus service awards of $91,500—a net of $12,158,500—to which Class Counsel is entitled to 25%, or $3,039,625. The Court therefore GRANTS Fees to Class Counsel in the amount of $3,039,625.

VII. FINAL APPROVAL OF SETTLEMENT AS FAIR, REASONABLE, AND ADEQUATE

Under Federal Rule of Civil Procedure 23(e)(2), the Court may approve the settlement "only after a hearing and only on finding that it is fair, reasonable, and adequate." Fed. R. Civ. Proc. 23(e)(2). The Court is to consider

> the strength of the plaintiffs' case; the risk, expense, complexity, and likely duration of further litigation; the risk of maintaining class action status throughout the trial; the amount offered in settlement; the extent of discovery completed and the stage of the proceedings; the experience and views of counsel; the presence of a governmental participant; and the reaction of the class members to the proposed settlement.

Hanlon, 150 F.3d at 1026. The Court has considered these items. Where the settlement takes place before class certification, settlement approval requires an even "higher standard of fairness" in order to protect unnamed plaintiffs. See Lane, 696 F.3d at 819. However, the Court's role is not to determine "whether the settlement is perfect in [its] estimation"—but to determine if it is fair. Id. (citing Hanlon, 150 F.3d at 1027).

A. Adequate Representation

Rule 23(e)(2)(A) requires the Court to consider whether "the class representatives and class counsel have adequately represented the class." As the Court explained above, Plaintiffs have vigorously represented the class,

providing information and evidence such as their electronic devices. Counsel are experienced class action litigators. They spent thousands of hours on motion practice and discovery, which enabled them to assess the benefits of settlement relative to the risks of further litigation. The views of counsel favor final approval here. See In re Bluetooth, 654 F.3d at 946.

B. Arm's Length Negotiation

Rule 23(e)(2)(B) requires the Court to consider whether "the proposal was negotiated at arm's length." Counsel declare that it was. See Joint Decl. ¶ 21. Counsel also acknowledge that a cy pres-only recovery "may 'present a particular danger' that 'incentives favoring pursuit of self-interest rather than the class's interests in fact influenced the outcome of negotiations." Mot. at 15 (quoting Lane, 696 F.3d at 833 (Kleinfeld, J., dissenting)). The Court is nonetheless satisfied that the settlement was negotiated at arm's length. First, the settlement represents a substantial recovery for the class. The cy pres mechanism is appropriate in light of the difficulty and expense of identifying Class Members, the minimal harm suffered by each Class Member, and the very low percentage of the Settlement Fund that any one Class Member could recover in light of the massive class size. Second, it is a sign of collusion if "counsel receive a disproportionate distribution of the settlement," see In re Bluetooth, 654 F.3d at 947, but as discussed above, the 25% fees sought are reasonable. The Settlement Agreement leaves the fees and service awards to the discretion of the Court, and none of the funds will revert to Google. See Agreement ¶¶ 16, 24, 53. Finally, the parties agreed upon a settlement after years of litigation and five months of settlement negotiations. The parties reached their agreement in principle in

a mediation, with full briefing, and with the assistance of an experienced and respected mediator. See Joint Decl. ¶ 20.

C. Adequate Relief

Rule 23(e)(2)(C) requires the Court to consider whether "the relief provided for the class is adequate" in light of four enumerated factors. The first factor is the "costs, risks and delay of trial and appeal." Fed. R. Civ. Proc. 23(e)(2)(C)(i). As discussed above, this case was risky because it remained unresolved whether Google's conduct violated the ECPA, whether Plaintiffs' data was "readily accessible to the general public," and whether, even if Plaintiffs won, the Court would award statutory damages. Further litigation would add years to a case that had already proceeded for almost a decade, with an uncertain outcome. Moreover, every year that passes makes it increasingly likely that class members would replace and dispose of the Wi-Fi routers they used between 2007 and 2010, which are critical to demonstrating that Google actually intercepted their data. The third factor is the terms of attorneys' fees, which the Court has already concluded are reasonable. See Fed. R. Civ. Proc. 23(e)(2)(C)(iii). The fourth factor requires the Court to consider related agreements pursuant to Rule 23(e)(3); there are none here. See Fed. R. Civ. Proc. 23(e)(2)(C)(iv). The second factor, of great significance here, is whether the relief is adequate in light of "the effectiveness of distributing relief to the class, including the method of processing class-member claims." Fed. R. Civ. P. 23(e)(2)(C)(ii).

1. Non-Distributable Settlement Fund

Plaintiffs argue that the relief is adequate, and that the proposed cy pres awards are the most efficient way to benefit the class, because the Settlement Fund is non-distributable. Mot. at 18–21. Indeed, the Ninth Circuit recognizes that some settlement funds are "non-distributable," explaining that "[f]or purposes of the cy pres doctrine, a class-action settlement fund is 'non-distributable' when 'the proof of individual claims would be burdensome or distribution of damages costly.'" Lane, 696 F.3d at 819 (quoting Nachshin v. AOL, LLC, 663 F.3d 1034, 1036 (9th Cir. 2011)); see also Six (6) Mexican Workers v. Arizona Citrus Growers, 904 F.2d 1301, 1305 (9th Cir. 1990) (cy pres distribution "frequently approved" "where the proof of individual claims would be burdensome or distribution of damages costly."). Given the 60 million person class size and the $13 million Settlement Fund, "the settlement would provide only an estimated $0.22 per class member even absent any attorneys' fees, expenses, or even mailing costs." Reply (dkt. 198) at 2. Moreover, it is unusually difficult and expensive to identify class members in this case, as discussed below. This appears, therefore, a prime example of a non-distributable Settlement Fund.

Objector Lowery disagrees. First, he argues that "[c]y pres is improper when it is feasible to make distributions to class members." Lowery Obj. at 7. He maintained at the motion hearing that "courts have distributed less than twenty cents" per class member in the past. When the Court commented that "it's been done before" was not a compelling argument, Objector Lowery shifted to an alternative position: that it would not really be a twenty-two cent distribution, because less than 1% of the class would make claims. See also Lowery Obj. at 8 (noting that "[a]

well-respected settlement administration company conducted a wide-ranging survey that concluded 'settlements with little or no direct mail notice will almost always have a claims rate of less than one percent (1%).'"). Given a 1% claims rate, approximately 600,000 class members would divide up the Settlement Fund (here, the initial Settlement Fund of $13,000,000, minus the $3,881,125 the Court is awarding in fees, expenses, and service awards, or $9,118,875), yielding about $15 per class member, not calculating the costs of administering payments to those 600,000 class members. At the motion hearing, Amicus Arizona Attorney General's Office made a similar point with slightly different math, asserting that even if two million class members got about five dollars each, it would be a meaningful award, because everyone would have had a chance to file a claim.

Plaintiffs are quick to point out that the Circuit does not calculate feasibility based on whether some money can be paid to some small fraction of the class, but whether it is feasible to distribute the fund to the class as a whole. Indeed, in Google Referrer, 869 F.3d at 742, the Circuit explained:

> In Lane, we deemed direct monetary payments "infeasible" where each class member's individual recovery would have been "de minimis" because the remaining settlement fund was approximately $6.5 million and there were over 3.6 million class members. Id. at 817–18, 820–21. The gap between the fund and a miniscule award is even more dramatic here. The remaining settlement fund was approximately $5.3 million, but there were an estimated 129 million class members, so each class

> member was entitled to a paltry 4 cents in recovery—a de minimis amount if ever there was one.

The court did not calculate feasibility based on the likely number of class members to file claims. See also In re Netflix Privacy Litig., No. 5:11-cv-00379 EJD, 2013 U.S. Dist. LEXIS 37286, at *19–20 (N.D. Cal. 2013) (relying on Lane, concluding where settlement fund was $9 million and class size was over 62 million people that "each Class member would receive a de minimus payment," which "would likely prove to be nullified by distribution costs.").

Plaintiffs also dispute that a claims-made process would work. Lowery argues that class members can self-identify in order to claim settlement funds. See Lowery Obj. at 6–7, 8–9. He asserts that, in order to assert their own standing, Plaintiffs do not rely on the Special Master's report at all but rely solely on the complaint's allegations. Id. at 8. And he contends that "[a]ll absent class members who can, like Lowery, aver the same facts as the named plaintiffs should be permitted to self-identify and file a claim for a portion of the settlement fund on that basis." Id. at 9. But Plaintiffs argue that "The only way to identify prospective Class Members would involve combing through nearly 300 million frames of collected payload data and trying to associate it with individual Class Members." Mot. at 19. Indeed, Plaintiffs detailed—and the Court observed firsthand—the painstaking, three-year process that the Special Master undertook just as to eighteen named plaintiffs. See id. at 2–3. At the motion hearing, the parties shed further light on the question of self-identifying. 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. While it is in Google's possession, making sense of it requires a lengthy process, akin to the Special Master's process, and it requires class members to have retained possession of the Wi-Fi router they used between 2007 and 2010. As Google put it at the hearing, the only way to make a claims process administratively feasible is to allow people to self-identify who cannot really know if they are able to self-identify.

Even assuming that a self-identifying claim process would work, Plaintiffs argue that it is not necessarily desirable. The Court agrees. 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. See Google Referrer, 869 F.3d at 742 ("Objectors . . . ask us to impose a mechanism that would permit a miniscule portion of the class to receive direct payments, eschewing a class settlement that benefits members through programs on privacy and data protection instituted by the cy pres

recipients.").[7] Class Counsel have an obligation to the class as a whole—not just to the 1% of the class that is able to file a claim. See Rodriguez v. West Publ'g Corp., 563 F.3d 948, 968 (9th Cir. 2009) ("class counsel's fiduciary duty is to the class as a whole"). A settlement that would leave 99% of the class with no benefit from the Settlement Fund is a rather unsatisfying settlement. Moreover, there is something perverse in asking Class Counsel to reach a settlement that only works if there is a small claims rate. Cf. Roes, 1–2 v. SFBSC Mgmt., LLC, 944 F.3d 1035, 1058 (9th Cir. 2019) (noting, regarding a reversionary clause, that there was a "perverse incentive[]" "to ensure as low a claims rate as possible"). "That a high claims rate, ordinarily a measure of success, would diminish the success of Lowery's plan suggests it is a bad plan." Reply at 6.

The cy pres award, on the other hand, is a reasonable alternative in light of the infeasibility of making direct payments to every class member. See Lane, 696 F.3d

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[7] Interestingly, in his brief before the Supreme Court in Frank v Gaos, counsel for Lowery characterized claims-made settlements in which only 1% of class members file claims and "most class members go totally uncompensated because they don't file a claim" as an option that "create[s] an illusion of relief." See Brief for Petitioners in Frank v. Gaos, 2018 WL 3374998, at *25–28 (U.S. July 9, 2018) (Appellate Brief). That hypothetical also involved unclaimed funds reverting to the defendant, which Frank is not advocating here. But his observation that "most class members go totally uncompensated" applies in either instance.

at 819.[8] The cy-pres award "'put[s] the unclaimed fund to its next best compensation use, e.g., for the aggregate, indirect, prospective benefit of the class.'" Nachshin, 663 F.3d at 1038 (quoting Masters v. Wilhelmina Model Agency, Inc., 473 F.3d 423, 436 (2d Cir. 2007)). "[L]arge multimillion dollar contributions to charities related to the plaintiffs' causes of action arguably do more good for the plaintiffs than would a miniscule sum of money distributed directly to them." Newberg § 12:26. The cy pres recipients here are some of the most effective advocates for internet privacy in the country; the award would increase the funding for their work and likely yield actual improvements to internet privacy. See Hughes, 731 F.3d at 676 ("A foundation that receives $10,000 can use the money to do something to minimize violations of the Electronic Funds Transfer Act; as a practical matter, class members each given $3.57 cannot.").

The Court is of course aware that the Supreme Court has expressed interest in the issue of cy pres-only settlements, and might soon provide further guidance to the lower courts. See, e.g., Gaos, 139 S. Ct. at 1043 ("We granted certiorari to review whether such cy pres settlements satisfy the requirement that class settlements be 'fair, reasonable, and adequate.'" Fed. Rule Civ. Proc. 23(e)(2)."); Marek v. Lane, 134 S. Ct. 8, 9 (2013) (Roberts, J., statement respecting denial of cert.) ("Granting review

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[8] This is the Court's answer to Objector David Franco, who argues that the cy pres recipients "should not receive a single penny" and that "[t]he funds should only go directly to the individuals that were directly affected." See Franco Obj. (dkt. 192).

of this case might not have afforded the Court an opportunity to address more fundamental concerns surrounding the use of such remedies in class action litigation, including when, if ever, such relief should be considered."). But as of today, the Court is aware of no controlling authority holding that settlements providing direct payments to class members are always preferable to cy pres-only settlements. Indeed, controlling authority holds to the contrary. See, e.g., Lane, 696 F.3d at 819–25 (holding that cy pres-only settlement was fundamentally fair)[9]; Nachshin, 663 F.3d at 1038 ("We have recognized that federal courts frequently use the cy pres doctrine 'in the settlement of class actions where the proof of individual claims would be burdensome or distribution of damages costly.'"). See also In re Google Cookie Placement Consumer Privacy Litig., 934 F.3d 316, 327–28 (3d Cir. 2019) (rejecting proposition that "cy pres awards should never be preferred over direct distributions to class members.").

Objector Lowery points to cases in which courts have required the parties to re-work their settlements in order to incorporate a direct payment component. See Lowery Obj. at 7–8. But the Court is unconvinced that it is necessary to do so here, or that doing so would enhance the overall fairness of the settlement. Objector Lowery touts the outcome in Fraley v. Facebook, Inc., 966 F. Supp. 2d 939, 943 (N.D. Cal. 2013), see Lowery Obj. at 7,

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[9] See also Google Referrer, 869 F.3d at 742 ("Objectors would have us jettison the teachings of Lane. Objectors would also have us ignore our prior endorsement of cy pres awards that go to uses consistent with the nature of the underlying action.") (citing Nachshin, 663 F.3d at 1039–40).

where Judge Seeborg initially rejected a cy pres-only settlement and later approved a settlement that distributed some funds directly to class members and sent the remainder to cy pres. But in that case, "so few persons . . . filed claims" that each class member received $15, prompting the court to remark that "In a sense, adding a direct payment component to the settlement[] did very little to buttress its overall fairness." Fraley, 966 F. Supp. 2d at 943. Nor does the Court accept that a lottery system, see Lowery Obj. at 10, is any more fair or necessary.

Accordingly, the Court concludes that the Settlement Fund is non-distributable, and that the cy pres-only award is adequate in this case. See Fed. R. Civ. P. 23(e)(2)(C)(ii).[10]

2. Injunctive Relief

The injunctive relief is also adequate, if not the main benefit to the class. The Settlement requires Google to destroy acquired Payload Data within 45 days (subject to preservation obligations to Excluded Class Members). See Agreement at ¶ 33. While the Court observed at the motion hearing that Google cannot destroy the data twice (and had already committed to destroying it in the AVC),

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10 The Court rejects Objector Lowery's additional argument that the cy pres award is compelled speech in violation of the First Amendment. See Lowery Obj. at 12–14. The settlement agreement between the parties is not state action, see In re Motor Fuel Temp. Sales Practices Litig., 872 F.3d 1094, 1113–14 (10th Cir. 2017), and class members had the opportunity to exclude themselves from the settlement, see Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 811–12 (1985).

Google made the valid point that this settlement pertains to conduct from 2007 to 2010, that the conduct has ceased, and that the AVC was in 2013—so the idea that there is a lot more that can be done in terms of retroactive injunctive relief is flawed.

The Settlement Agreement more meaningfully provides that Google will "not collect and store for use in any product or service Payload Data via Street View vehicles, except with notice and consent" and will comply with the privacy program and other parts of the AVC. Id. at ¶¶ 34– 35. The Settlement Agreement extends Google's compliance with the AVC by about two years. Joint Decl. Ex. F ¶¶ II-2. Plaintiffs' counsel explained at the motion hearing that the AVC terminates in 2023; this settlement is for five years, and so if it begins this year, it would run through 2025, and if there is an appeal, it could extend longer. Google will also "host and maintain educational webpages that instruct users on the configuration of wireless security modes and the value of encrypting a wireless network." Agreement ¶¶ 36–37. Google asserted at the hearing that there are changes to the website that it would not have made without the settlement. It also noted that there were meaningful changes to the disclosures. Plaintiffs' counsel added that Google committed in the Settlement to reporting to Plaintiffs on a yearly basis, and that the Court maintains jurisdiction over the injunctive relief to make sure it is complied with.

While Amicus Arizona Attorney General's Office is probably correct that the injunctive relief is not as significant in 2020 as it would have been in 2013 (given consumers' sophistication about privacy issues), that does not mean that the relief does not have some value to the class, and the rest of the public, now. See Campbell, slip op. at

*11 ("a year-long requirement to make [a disclosure on Facebook's Help Center page] has value: it provides information to users about Facebook's message monitoring practices, making it less likely that users will unwittingly divulge private information to Facebook or third parties in the course of using Facebook's messaging platform."). Accordingly, the Court finds that the injunctive relief in the Settlement is adequate. See Fed. R. Civ. P. 23(e)(2)(C)(ii).

D. Class Members Treated Equitably

Rule 23(e)(2)(D) requires the Court to consider whether "the proposal treats class members equitably relative to each other." The class consists of individuals who are similarly situated as to their claims, their potential recoveries, and the difficulties they would face in establishing their membership in the class. They each receive identical injunctive relief and enjoy the benefits conferred by the cy pres recipients in furthering their interest in protecting internet privacy.

E. Nexus Requirement

The Court finds and concludes that the cy pres distributions ordered herein are tethered to the nature of the lawsuit, the objectives of the Wiretap Act, and the interests of absent Class Members. The cy pres distributions are limited to independent organizations with a track record of addressing consumer privacy concerns, who will commit to use the funds to promote the protection of Internet privacy. See Agreement at ¶¶ 29–30. The awards ordered below serve the compensatory and deterrent goals of the Wiretap Act better than any available alternative method of redress for Class Members.

The Court has scrutinized the Settlement closely for signs that the selection of cy pres recipients may "answer to the whims and self-interests of the parties, their counsel, or the court." See Nachshin, 663 F.3d at 1039. The Court finds no relationship between proposed recipients and Class Counsel, Google, or the Court that undermines the fairness of the Settlement to Class Members.[11]

Further, the Court has reviewed the proposals submitted by the proposed cy pres recipients, as well as the applications of the Electronic Privacy Information Center ("EPIC"), and finds that the awards to the recipients are appropriate and will best serve the objectives of the Wiretap Act and the interests of Absent Class Members. Accordingly, the Court awards that the net Settlement Fund be divided equally[12] between: (1) Center on Privacy & Technology at Georgetown Law; (2) Center for Digital Democracy; (3) MIT Internet Policy Research Initiative; (4) World Privacy Forum; (5) Public Knowledge; (6) Ameri-

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[11] Moreover, the organizations present fewer ethical hurdles than the organization approved in Lane. See Lane, 696 F.3d at 817 (cy pres award went to defendant Facebook "to set up a new charity organization"), 821 ("That Facebook retained and will use its say in how cy pres funds will be distributed so as to ensure that the funds will not be used in a way that harms Facebook is the unremarkable result of the parties' give-and-take negotiations.").

[12] The equal distribution of the funds differs from the awards proposed in Plaintiffs' Motion. See Mot. at 6.

can Civil Liberties Union Foundation; (7) Consumer Reports; (8) EPIC[13]; and (9) Rose Foundation for Communities and the Environment.

F. Reaction of Class Members

In addition to the enumerated fairness factors of Rule 23(e)(2), courts within the Ninth Circuit typically consider "the reaction of the class members [to] the proposed settlement." See In re Bluetooth, 654 F.3d at 946. Here, following an extensive notice program, only one potential class member asked to be excluded from the settlement, see Young Decl. ¶¶ 11–12, and two have objected, see Lowery Obj.; Franco Obj. This reaction strongly favors approval of the settlement.

VIII. NOTICE

The Court finds that the forms, content, and methods of disseminating notice to the class Members previously approved and directed by the Court have been implemented by the Parties and (1) comply with Rule 23(c)(2) of the Federal Rules of Civil Procedure as they are the best practicable notice under the circumstances and are reasonably calculated, under all the circumstances, to apprise the Class Members of the pendency of this Action, the terms of the Settlement, and their right to object to the settlement; (2) comply with Rule 23(e) as they are reasonably calculated, under the circumstances, to apprise the Class Members of the pendency of the Action,

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[13] The proposal to add EPIC was posted on the Settlement Website. See Young Decl. (dkt. 184-1) ¶ 6. EPIC was also included in the long form notice. See id. Ex. 1.

the terms of the proposed settlement, and their rights under the proposed settlement, including, but not limited to, their right to object to, or opt out of, the proposed Settlement and other rights under the terms of the Settlement Agreement; (3) comply with Rule 23(h) as they are reasonably calculated, under the circumstances, to apprise the Class Members of any motion by Class Counsel for reasonable attorney's fees and nontaxable costs, and their right to object to any such motion; (4) constitute due, adequate, and sufficient notice to all Class Members and other persons entitled to receive notice; and (5) meet all applicable requirements of law, including, but not limited to, 28 U.S.C. § 1715, Fed. R. Civ. P. 23(c), (e), and (h), and the Due Process Clause of the United States Constitution.

The Court finds that Google properly notified the appropriate state and federal officials of the Settlement, pursuant to the Class Action Fairness Act, 28 U.S.C. § 1715.

IX. CONSUMMATION OF THE SETTLEMENT

Accordingly, the Court directs the Parties to consummate the Settlement according to its terms, as follows:

A. Injunctive Relief

Pursuant to the Settlement, Google shall destroy, if it has not already done so, all Acquired Payload Data, including the disks containing such data, within forty-five (45) days of this Order, subject to any preservation obligations Google may have with respect to any Excluded Class Member. Google shall report via counsel to Class Counsel upon the expiration of the forty-five (45) days whether it has destroyed the Acquired Payload Data. If Google does

not destroy the Acquired Payload Data within the forty-fine (45) days because of ongoing preservation obligations, it will report this to Class Counsel. When the Acquired Payload Data are destroyed, Google will report via counsel the fact of destruction to Class Counsel.

Pursuant to the Settlement, Google shall not collect and store for use in any product or service Payload Data via Street View Vehicles, except with notice and consent.

Pursuant to the Settlement, Google shall comply with all aspects of the Privacy Program described in Paragraph 16 of Section I of the AVC and with the prohibitive and affirmative conduct described in Paragraphs 1 through 5 of the AVC. Through counsel, Google shall confirm to Class Counsel, in writing and on an annual basis, that it remains in compliance.

Pursuant to the Settlement, Google shall 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 demonstrating how users can encrypt their networks and instructions on how to remove a wireless network from inclusion in Google's location services.

Google's Injunctive Relief obligations shall terminate five years after the date of Final Approval of this Settlement (as defined in the Settlement Agreement ¶ 14).

B. Cy Pres Distribution

Pursuant to the Settlement, Class Counsel shall direct equal distributions from the Escrow Account (as defined in the Settlement Agreement) to the cy pres

recipients identified herein. The Court approves and orders such distributions. The Escrow Agent shall arrange such distributions according to Class Counsel's instructions.

X. RELEASE OF CLAIMS

The Parties and Class Members are bound by the terms and conditions of the Settlement. As of the date of Final Approval of this Settlement (as defined in the Settlement Agreement ¶ 14), Releasors shall be deemed to have fully, finally, and forever released and discharged Releasees from the Released Claims, as those terms are defined in the Settlement Agreement. The full terms of the release described in this paragraph are set forth in Paragraphs 46 through 48 of the Agreement. The Court expressly adopts and incorporates by reference Paragraphs 46 through 48 of the Agreement.

The parties are to bear their own costs, except as awarded by this Court in this Final Order.

The benefits described above are the only consideration Google shall be obligated to give to the Class Members, with the exception of the service awards to be paid to the Class Representatives as directed by the Court.

The Court reserves the exclusive and continuing jurisdiction over the Action, the Class Representatives, the Class Members, and Google for the purposes of supervising the implementation, enforcement, construction, administration and consummation of the Settlement Agreement and this Judgment.

XI. FINAL JUDGMENT AND DISMISSAL WITH PREJUDICE

By operation of this Order, this Action is hereby dismissed with prejudice. Under Rule 54(b) of the Federal Rules of Civil Procedure, no just reason exists for delay in entering final judgment. The Court accordingly directs the Clerk to enter final judgment pursuant to Rule 58 of the Federal Rules of Civil Procedure.

IT IS SO ORDERED.

Dated: March 18, 2020

/s/Charles R. Breyer
CHARLES R. BREYER
United States District Judge

Appendix C

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

IN RE GOOGLE LLC STREET VIEW ELECTRONIC COMMUNICATIONS LITIGATION	Case No. 10-md-02184-CRB **ORDER GRANTING PLAINTIFFS' MOTION FOR LEAVE TO PAY SETTLEMENT ADMINISTRATION EXPENSES**

Before the Court is Plaintiffs' Administrative Motion for Leave to Pay Settlement Administration Expenses. The Motion is unopposed by Defendants. Good cause appearing, Plaintiffs' Motion is **GRANTED** and **IT IS HEREBY ORDERED** that Class Counsel shall direct payment from the Escrow Account (as defined in the Settlement Agreement) in the amount of $158,000 to A.B. Data, the Court-Appointed Notice Administrator.

Previously, the Court awarded fees to Class Counsel in the amount of $3,039,625. Order Granting Final Approval of Class Action Settlement at 16, ECF No. 211. That figure was awarded based on a percentage of the Settlement Fund less expenses. In accordance with the reasoning of the prior decision, the Court hereby reduces that award $39,500 to $3,000,125 (that is, 25% of the $13 million

Settlement Fund, less $750,000 in expenses, $91,500 in Service Awards, and $158,000 in Notice expenses).

IT IS SO ORDERED.

Dated: March 27, 2020
/s/Charles R. Breyer
THE HONORABLE CHARLES R. BREYER
United States District Judge

Appendix D

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

In re: GOOGLE INC. STREET VIEW ELECTRONIC COMMUNICATIONS LITIGATION, ——————————— BENJAMIN JOFFE; et al., Plaintiffs-Appellees, DAVID LOWERY, Objector-Appellant, v. GOOGLE, INC., Defendant-Appellee.	No. 20-15616 D.C. No. 3:10-md-02184-CRB Northern District of California, San Francisco ORDER

Before: BERZON, CHRISTEN, and BADE, Circuit Judges.

The panel has voted to deny the petition for panel rehearing. Judge Berzon and Judge Christen have voted to deny the petition for rehearing en banc. Judge Bade has voted to grant the petition for rehearing en banc. The full court has been advised of the petition for rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for panel rehearing and the petition for rehearing en banc are DENIED.

Appendix E

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

IN RE GOOGLE LLC STREET VIEW ELECTRONIC COMMUNICATIONS LITIGATION	Case No. 10-md-02184-CRB

SETTLEMENT AGREEMENT

This agreement ("Settlement Agreement" or "Agreement") is made and entered into this 11th day of June, 2018 (the "Execution Date"), by and between Google LLC ("Google" or "Defendant") and Plaintiffs Dean Bastilla, Ric Benitti, Matthew Berlage, David Binkley, James Blackwell, Stephanie & Russell Carter, Jeffrey Colman, Bertha Davis, James Fairbanks, Wesley Hartline, Benjamin Joffe, Pat Keyes, Aaron Linsky, Lilla Marigza, Eric Myhre, John Redstone, Danielle Reyas, Karl Schulz, Jason Taylor, and Vicki Van Valin (collectively, "Plaintiffs," and with Google, the "Parties"), individually and on behalf of the Class, as defined below.

WHEREAS, Plaintiffs brought suit on behalf of themselves and all others similarly situated for damages and declaratory and injunctive relief under Title III of the Omnibus Crime Control and Safe Streets Act of 1968 ("the Wiretap Act"), as amended by the Electronic Communications Privacy Act of 1986, 18 U.S.C. §§ 2510, et seq., various state wiretap statutes, and the California Business and Professions Code §§ 17200, et seq. against Google,

pending in the Northern District of California and captioned *In re: Google LLC Street View Electronic Communications Litigation*, Case No. 10-md-2184 (the "Action"); and

WHEREAS, on June 29, 2011, the Court denied Google's motion to dismiss Plaintiffs' federal Wiretap Act claims (while dismissing Plaintiffs' state wiretap statute and California Business and Professions Code § 17200 claims), a decision that was subsequently affirmed by the Ninth Circuit on December 27, 2013 (as amended); and

WHEREAS, on September 19, 2014, the Court entered an Order Regarding Jurisdictional Discovery, setting forth a process for the review of data acquired by Google's Street View vehicles by a Special Master appointed by the Court; and

WHEREAS, the Court subsequently appointed Douglas Brush as the Special Master, and on December 14, 2017 the Parties filed the Report of the Special Master called for by Section 4 of the Order Regarding Jurisdictional Discovery; and

WHEREAS, arm's-length settlement negotiations have taken place between Plaintiffs' Co-Lead Counsel and counsel for Google, including a mediation with Greg Lindstrom of Phillips ADR Enterprises P.C., and this Settlement Agreement has been reached as a result of those negotiations; and

WHEREAS, Plaintiffs have conducted a meaningful investigation and analyzed and evaluated the merits of the claims made in the Action against Google, including with the benefit of the Court's ruling on Google's motion

to dismiss, evaluation of the Report of the Special Master and the results of Jurisdictional Discovery, and the impact of this Settlement Agreement on the Class, and based upon that analysis, and recognizing the substantial risks of continued litigation, have concluded that a settlement with Google on the terms set forth below is fair, reasonable, and adequate and in the best interest of the members of the Class; and

WHEREAS, Google believes that it is not liable for the claims asserted and has good defenses to Plaintiffs' claims, but nevertheless has decided to enter into this Settlement Agreement in order to avoid further expense, inconvenience, and the distraction of burdensome and protracted litigation and to obtain the releases, orders and judgment contemplated by this Settlement Agreement, and to put to rest with finality all Released Claims, as defined below; and

NOW, THEREFORE, in consideration of the agreements and releases set forth herein and other good and valuable consideration, and intending to be legally bound, it is agreed by and between Google and the Plaintiffs that the Action be settled, compromised, and dismissed with prejudice, without costs to Plaintiffs, the Class Members, or Google except as provided for herein, subject to the approval of the Court, on the following terms and conditions:

A. Definitions

The following terms, as used in this Settlement Agreement, have the following meanings:

1. "802.11 Wireless Standard" means the family of specifications developed by the Institute of Electrical and Electronics Engineers (IEEE) for wireless LAN (WLAN) technology and assigned the 802.11 number.

2. "Acquired Payload Data" means the Payload Data acquired from unencrypted wireless networks by Google's Street View vehicles operating in the United States from January 1, 2007 through May 15, 2010.

3. "Affiliates," with respect to a party, shall mean (i) all entities now or in the future controlling, controlled by or under common control with that party; (ii) all entities in the past controlling, controlled by or under common control with that party, for the period of time that such control exists or existed; and (iii) predecessors, successors, or successors in interest thereof, including all entities formed or acquired by that party in the future that come to be controlled by that party. For purposes of this definition, "control" means possession directly or indirectly of the power to direct or cause the direction of management or policies of a company or entity through the ownership of voting securities, contract, or otherwise, and "entities" includes all persons, companies, partnerships, corporations, associations, organizations, and other entities.

4. "Assurance of Voluntary Compliance" means the Assurance of Voluntary Compliance entered into by Google and the Attorneys General of the States of Alaska, Arizona, Arkansas, California, Colorado, Connecticut, Delaware, District of Columbia, Florida, Hawaii, Illinois, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Mississippi, Missouri, Montana, Nebraska, Nevada, New Jersey, New Mexico, New

York, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Rhode Island, South Carolina, Tennessee, Texas, Vermont, Virginia, and Washington in March 2013 regarding Google's collection of Wi-Fi information with its Street View vehicles.

5. "Class" means all persons who used a wireless network device from which Acquired Payload Data was obtained.

6. "Class Administrator" means a third-party class action settlement administrator to be selected by Plaintiffs with the approval of the Court. Under the supervision of Co-Lead Counsel (as defined below), the Class Administrator shall oversee and implement the Notice Plan, receive any requests for exclusion from the Class, establish, maintain and post materials on a Settlement website, and complete and file any required tax forms and pay any tax liabilities in connection with Escrow Account (as defined below).

7. "Class Member" means any person within the definition of the Class, excluding (a) any Releasee; (b) any judicial officer presiding over the Action, or any member of his or her immediate family or of his or her judicial staff; and (c) any Excluded Class Member.

8. "Excluded Class Member" means any person meeting the Class definition who has timely exercised his or her right to be excluded from the Class.

9. "Co-Lead Counsel" means the following law firms:

Cohen Milstein Sellers & Toll PLLC

1100 New York Ave., N.W., Suite 500 Washington, DC 20005

Spector Roseman & Kodroff, P.C.

1818 Market Street, Suite 2500 Philadelphia, PA 19103

10. "Court" means the United States District Court for the Northern District of California.

11. "Approved Cy Pres Recipient" means an organization approved by the Court to receive cy pres funds from this Settlement, as described in Section B.b.

12. "Proposed Cy Pres Recipient" means an organization proposed by Co-Lead Counsel to the Court to receive cy pres funds from this Settlement, as described in Section B.b.

13. "Data Frames" means data frames under the 802.11 Wireless Standard, consisting of (1) a header, containing network identifying information (such as a MAC Address or SSID) ("Data Frame Headers"); and (2) a body that may contain the content of communications being transmitted over the network ("Payload Data").

14. "Final Approval" means that (a) the Court has entered (i) a final judgment order approving the Settlement set forth in this Settlement Agreement under Rule 23(e) of the Federal Rules of Civil Procedure and (ii) a final judgment dismissing the Action with prejudice and without costs (except as specified in this Agreement); and (b) the time for appeal or to seek permission to appeal from the Court's approval of the Settlement and the entry of a final judgment has expired or, if appealed, approval of the

Settlement and the final judgment have been affirmed in their entirety by the Court of last resort to which such appeal has been taken and such affirmance is no longer subject to further appeal or review. Neither the provisions of Federal Rule of Civil Procedure 60 nor the All Writs Act, 28 U.S.C. § 1651, shall be taken into account in determining the above-stated times.

15. "Google Affiliates" shall mean all Affiliates of Google. For purposes of this Agreement, Google Affiliates shall not include Google Capital or any entities that otherwise would be deemed an Affiliate of Google as a result of an investment in Google Capital or GV (formerly Google Ventures), even where such investment may afford Google Capital or GV some level of control over the entity.

16. "Net Settlement Fund" means the Settlement Fund less all amounts approved by the Court for distribution to any person or entity other than the Approved Cy Pres Recipients, including amounts approved by the Court for attorneys' fees, reimbursement of expenses, Plaintiff service awards, class notice, Class Administrator charges, Escrow Account charges, and Escrow Account tax liabilities.

17. "Released Claims" means any and all claims, complaints, demands, damages, debts, liabilities, actions, proceedings, remedies, causes of actions or suits, known or unknown, of whatever kind or nature, including but not limited to whether in law or in equity, under contract, tort or any other subject area, or under any statute, rule, regulation, order, or law, asserted or not asserted, arising out of or related to the allegations in the Consolidated Amended Complaint, including but not limited to the claims arising out of or related to the allegations in the

Consolidated Amended Complaint that have been asserted or could have been asserted by Releasors in the Consolidated Amended Complaint. Released Claims do not include any claims arising out of the enforcement of this Settlement Agreement.

18. "Releasees" means Google; Google Affiliates, and their respective officers, directors, employees, members, agents, attorneys, administrators, representatives, insurers, beneficiaries, trustees, shareholders, investors, contractors, joint venturers, predecessors, successors, assigns, transferees, and all other individuals and entities acting on Google's behalf in connection with the Released Claims.

19. "Releasors" means Plaintiffs and the other Class Members; their current and former parents; their predecessors, affiliates, successors, and subsidiaries; and their officers, directors, attorneys, representatives, and employees; and assignees of any Released Claims.

20. "Settlement" means the settlement of the Action contemplated by this Agreement.

21. "Settlement Amount" means $13,000,000.00 in United States currency.

22. "Settlement Fund" has the meaning provided in paragraph 23, below.

B. <u>Relief</u>

a. Settlement Fund

23. Within twenty (20) business days of the later of (1) an entry of an order preliminarily approving the Settlement or (2) the date upon which Co-Lead Counsel causes the necessary W9 statement and payment information to be made available to Google, Google shall pay or cause to be paid the Settlement Amount into an escrow account designated by Co-Lead Counsel (the "Escrow Account"). This amount, along with any interest earned thereon, shall be held in escrow and constitutes the Settlement Fund. The Escrow Account and Settlement Fund shall be administered in accordance with the provisions of this Settlement Agreement. The Escrow Account shall be established as a "qualified settlement fund" as defined in Section 1.468B-1(a) of the U.S. Treasury Regulations.

24. The Net Settlement Fund shall be distributed to one or more Approved Cy Pres Recipients.

25. Google represents that the Settlement Amount is in addition to Google's charitable donations and that but for this Settlement, Google would not have expended these funds for charitable purposes.

26. Google shall not have any responsibility, financial obligation, or liability whatsoever with respect to the investment, distribution, use, or administration of the Settlement Fund, including, but not limited to, the costs and expenses of such investment, distribution, use or administration, except as expressly otherwise provided in this Settlement Agreement.

27. In no event shall Google's liability with respect to the Settlement exceed $13,000,000.

28. No disbursements shall be made from the Settlement Fund except as authorized by the Court.

b. Cy Pres

29. Plaintiffs shall identify one or more Proposed Cy Pres Recipient(s) to recommend to the Court for approval. The Proposed Cy Pres Recipient(s) shall be independent organizations with a track record of addressing consumer privacy concerns on the Internet and/or in connection with the transmission of information via wireless networks, directly or through grants, and such organization(s), as a condition of receiving settlement funds, shall commit to use the funds to promote the protection of Internet privacy. Before submitting their Proposed Cy Pres Recipient(s) to the Court, Plaintiffs agree to disclose them to Google and consult with Google in good faith regarding any concerns Google may have.

30. Each Proposed Cy Pres Recipient shall agree that, if approved by the Court, it shall commit to use the funds to promote the protection of Internet privacy, and that until such time as the funds allocated to it are exhausted, it shall provide a report to the Court and the parties every six months informing them of how it has used the cy pres funds since the previous report and how it intends to use any remaining funds. Plaintiffs shall be responsible for ensuring that such reports are posted on an Internet website dedicated to the Settlement.

31. Google shall not exercise any control or influence over any Approved Cy Pres Recipient's expenditure of the cy pres funds.

32. In the event Plaintiffs identify more than one Proposed Cy Pres Recipient, Plaintiffs shall propose to the Court the amount or percentage of the Net Settlement Fund for each Proposed Cy Pres Recipient to receive.

c. Injunctive Relief

33. Google shall destroy all Acquired Payload Data, including the disks containing such data, within forty-five (45) days of Final Approval, subject to any preservation obligations Google may have with respect to any Excluded Class Member. Google shall report via counsel to Co-Lead Counsel upon the expiration of the forty-five (45) days whether it has destroyed the Acquired Payload Data. If Google does not destroy the Acquired Payload Data within the forty-five (45) days because of ongoing preservation obligations, it will report accordingly to Co-Lead Counsel. When the Acquired Payload Data is destroyed, Google will report via counsel the fact of that destruction to Co-Lead Counsel.

34. Google shall not collect and store for use in any product or service Payload Data via Street View vehicles, except with notice and consent.

35. Google shall comply with all aspects of the Privacy Program described in paragraph 16 of Section I of the Assurance of Voluntary Compliance and with the prohibitive and affirmative conduct described in paragraphs 1-5 of the Assurance of Voluntary Compliance. Through counsel, Google shall confirm to Plaintiffs in writing on an annual basis that it remains in compliance.

36. Google agrees 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 demonstrating how users can encrypt their networks and instructions on how to remove a wireless network from inclusion in Google's location services. Google agrees to use its best efforts to have the webpages operational by the time the class notice is first disseminated.

37. Google's obligations in this "Injunctive Relief" subsection shall terminate five years after Final Approval.

C. Preliminary Approval of the Settlement

38. The Parties agree to use their best efforts to effectuate this Settlement Agreement, including, but not limited to, seeking the Court's approval of procedures (including the giving of class notice under Federal Rules of Civil Procedure 23(c) and (e), and scheduling a final fairness hearing) to obtain Final Approval of the Settlement and the final dismissal with prejudice of the Action.

39. Plaintiffs shall submit to the Court a motion requesting that the Court preliminarily approve the Settlement and authorize notice to the Class (the "Preliminary Approval Motion"). The Preliminary Approval Motion shall include: (a) a proposed form of order preliminarily approving the Settlement; (b) a proposed form of, and method for, dissemination of notice to the Class; and (c) a proposed form of a final order approving the Settlement and dismissing the Action with prejudice, all of which shall be furnished to Google for review and prior approval, which is not to be unreasonably withheld. The Preliminary

Approval Motion shall also identify the Proposed Cy Pres Recipient(s).

40. Within ten calendar days after the filing with the Court of this Settlement Agreement and the Preliminary Approval Motion, Google shall (at its own expense) cause notice of the Settlement Agreement to be served upon appropriate State and Federal officials as provided in the Class Action Fairness Act, 28 U.S.C. § 1715.

D. Notice to the Class, Objections, and Requests for Exclusion

41. After preliminary approval of the Settlement, Co-Lead Counsel may utilize up to $500,000 from the Settlement Fund to implement the notice plan approved by the Court. The amount spent or incurred for notice and notice administration is not refundable to Google in the event the Settlement Agreement is disapproved, rescinded, or otherwise fails to become effective.

42. The Class Administrator shall oversee and implement the notice plan approved by the Court. All costs associated with the notice plan shall be paid from the Settlement Fund.

43. The notice shall contain instructions and a deadline for persons within the Class definition to request exclusion from the Class or object to the Settlement.

E. Final Approval of the Settlement and Dismissal of the Action

44. If the Settlement is preliminarily approved by the Court, Plaintiffs shall, pursuant to the schedule set by the

preliminary approval order, seek final approval of the Settlement and entry of a final order and judgment:

a. granting final approval of the Settlement as fair, reasonable, and adequate within the meaning of Rule 23(e) of the Federal Rules of Civil Procedure and directing the consummation of the Settlement according to its terms;

b. specifying one or more Approved Cy Pres Recipients for receipt of the Net Settlement Fund;

c. directing that the Action be dismissed with prejudice and, except as provided for by the Settlement Agreement, without costs;

d. reserving exclusive jurisdiction over the Settlement and this Settlement Agreement, including the administration and consummation of this Settlement, to the United States District Court for the Northern District of California; and

e. determining under Federal Rule of Civil Procedure 54(b) that there is no just reason for delay and directing entry of final judgment.

45. This Settlement Agreement shall become effective only upon Final Approval of the Settlement.

F. <u>Releases, Discharge, and Covenant Not to Sue</u>

46. Upon Final Approval and in consideration of payment of the Settlement Amount, Releasees shall be fully, finally and forever released and discharged by the Releasors from the Released Claims. Releasors shall not, after Final Approval, seek to recover from any Releasee

based, in whole or in part, upon any of the Released Claims.

47. In addition, Releasors hereby expressly waive and release, upon Final Approval of this Settlement Agreement, any and all provisions, rights, and benefits conferred by Section 1542 of the California Civil Code, and all other similar provisions of law, to the extent such provision may be applicable to this release. California Civil Code § 1542 states:

> CERTAIN CLAIMS NOT AFFECTED BY GENERAL RELEASE. A GENERAL RELEASE DOES NOT EXTEND TO CLAIMS WHICH THE CREDITOR DOES NOT KNOW OR SUSPECT TO EXIST IN HIS FAVOR AT THE TIME OF EXECUTING THE RELEASE, WHICH IF KNOWN BY HIM MUST HAVE MATERIALLY AFFECTED HIS SETTLEMENT WITH THE DEBTOR.

The Releasors shall, by operation of the final judgment and Final Approval, be deemed to assume the risk that facts additional, different, or contrary to the facts which each believes or understands to exist, may now exist, or may be discovered after the release set forth in this Agreement becomes effective, and the Releasors shall be deemed to have agreed that any such additional, different, or contrary facts shall not limit, waive, or reduce the foregoing releases.

48. Upon Final Approval, Google shall be deemed to have fully released Releasors from any claims relating to the institution or prosecution of the Action.

G. Recission or Termination

49. If the Court does not approve this Settlement Agreement or any material part hereof, or if it is set aside on appeal, then this Settlement Agreement will be deemed terminated. A modification or reversal on appeal of any award from the Settlement Fund granted by the Court to pay service awards or attorneys' fees, or to pay or reimburse expenses, shall not be deemed to disapprove or modify all or a part of the terms of this Settlement Agreement and shall not be grounds for termination.

50. If the number of persons within the Class definition who request exclusion from the Class exceeds 5,000, then Google shall have the option to rescind this Settlement Agreement in its entirety (except as hereafter provided in this Section) by written notice to the District Court and to counsel for the Plaintiffs filed and served within ten business days of the date that the Class Administrator informs Google the total number of requests for exclusion that have been received.

51. If the Settlement Agreement is terminated or rescinded as provided for in this Section, then the balance of the Settlement Fund shall be returned to Google, but only after payment from the Settlement Fund of all expenses incurred with Court approval. No Court-approved expenses paid from the Settlement Fund shall be returned to Google.

52. If the Settlement Agreement is terminated or rescinded as provided for in this Section, then the Parties shall be restored to their respective positions in the Action as of the Execution Date. In that event, the Action shall proceed as if this Settlement Agreement had never been

executed and this Settlement Agreement, and representations made in conjunction with this Settlement Agreement, may not be used in the Action or otherwise for any purpose. Google and Plaintiffs expressly reserve all rights if the Settlement Agreement does not become effective or if it is terminated or rescinded pursuant to this Section.

53. Other than via termination or rescission as described in this Section, in no event shall any portion of the Settlement Fund revert to Google.

H. Taxes

54. Co-Lead Counsel, through the Class Administrator, shall be solely responsible for filing all informational and other tax returns necessary to report any net taxable income earned by the Settlement Fund and shall be solely responsible for taking out of the Settlement Fund, as and when legally required, any tax payments, including interest and penalties due on income earned by the Settlement Fund. All taxes (including any interest and penalties) due with respect to the income earned by the Settlement Fund shall be paid from the Settlement Fund. Google shall have no responsibility to make any tax filings relating to the Settlement Fund and shall have no responsibility to pay tax on any income earned by the Settlement Fund unless the Settlement Fund (or a portion thereof) is returned to Google pursuant to the terms of the Settlement Agreement. In the event any funds in the Settlement Fund, including interest or other income, are returned to Google, Google shall be responsible for the payment of all taxes (including any interest or penalties), if any, on said interest or other income.

I. Miscellaneous

55. Google represents that it has complied with paragraph 16 of Section I of the Assurance of Voluntary Compliance (as defined above) and with the prohibitive and affirmative conduct described in paragraphs 1-5 of Section II of the Assurance of Voluntary Compliance. An asserted violation of this provision may be reported to any of the Attorneys General identified in paragraph 4 above, but an asserted violation of this provision shall not be a basis for recission of this Agreement.

56. This Settlement Agreement constitutes the entire agreement among Plaintiffs and Google pertaining to the Settlement of the Action against Google. This Settlement Agreement may be modified or amended only by a writing executed by Plaintiffs and Google.

57. Neither this Settlement Agreement nor any negotiations or proceedings connected with it shall be deemed or construed to be an admission by any party or any Releasee of any wrongdoing or liability or evidence of any violation by Google of any federal or state statute or law either in the Action or in any related action or proceedings, and evidence thereof shall not be discoverable or used, directly or indirectly, in any way, except in a proceeding to interpret or enforce this Settlement Agreement. This Settlement Agreement represents the settlement of disputed claims and does not constitute, nor shall it be construed as, an admission or disparagement of the correctness of any position asserted by any party, or an admission of liability or lack of liability or of any wrongdoing or lack of any wrongdoing by any party, or as an admission of any strengths or weaknesses of the Plaintiffs'

claims or Google's defenses. Google specifically denies any wrongdoing or liability by any of the Releasees.

58. This Settlement Agreement may be executed in counterparts by Plaintiffs and Google, and a facsimile or scanned signature shall be deemed an original signature for purposes of executing this Settlement Agreement.

59. Neither Plaintiffs nor Google shall be considered the drafter of this Settlement Agreement or any of its provisions for the purpose of any statute, the common law, or rule of interpretation that would or might cause any provision of this Settlement Agreement to be construed against the drafter.

60. The provisions of this Settlement Agreement shall, where possible, be interpreted in a manner to sustain their legality and enforceability.

61. The Court shall retain jurisdiction over the implementation and enforcement of this Settlement.

62. Any disputes between Plaintiffs and Google concerning this Settlement Agreement shall, if they cannot be resolved by the parties, be submitted to the United States District Court for Northern District of California.

63. This Settlement Agreement shall be governed and interpreted according to the laws of the State of California, without regard to its choice of law or conflict of law principles.

64. Until such time as all Parties execute this Agreement and Plaintiffs present it to the Court with a motion seeking preliminary approval of the Settlement, the Par-

ties agree that all terms of this Agreement shall be confidential and neither Party will disclose the terms of this Agreement or any communications, documents or negotiations that led to it, except:

a. As reasonably necessitated by any law, statute, rule, regulation, order, discovery request, subpoena or other governmental requirement (including public reporting requirements), provided that, to the extent permitted by applicable law, the disclosing Party must first notify the other Party and give the other Party a reasonable opportunity to seek a protective order or other appropriate remedy prior to such disclosure, except that Google is not required to provide notice in the case of disclosure to a government regulator or government entity or pursuant to any other governmental requirement (including public reporting requirements);

b. To such Party's Affiliates, accountants, auditors, attorneys, financial advisors, insurers, indemnitors, and other professionals engaged by such Party, as reasonably required for their performance of services for such Party, provided such persons or entities (i) have a need to know such information to exercise their professional duties to the Party, (ii) are informed of the confidentiality of such information, and (iii) agree to maintain the confidentiality of such information;

c. As reasonably required for due diligence in connection with any transaction involving Google or a Google Affiliate;

d. A Party may disclose any information that becomes part of the public domain without a breach of this Section by the disclosing Party;

e. With the prior written consent of the other Party;

f. Plaintiffs may disclose the terms of this Agreement to the extent necessary to identify Proposed Cy Pres Recipients, to retain a Settlement Administrator, to obtain advice on the Notice Plan, to obtain advice on the forms of class notice, to open the Escrow Account, and to take any other measures needed to prepare the Preliminary Approval Motion, provided that any such parties agree to maintain the confidentiality of such information;

g. Both Parties may disclose that "the dispute between the parties has been resolved"; and

h. Both Parties may disclose in the course of any legal proceeding to support any claim or defense, provided that, to the extent permitted by applicable law, the disclosing Party must first notify the other Party and give the other Party a reasonable opportunity to seek a protective order or other appropriate remedy prior to such disclosure.

This Paragraph 64 is not a bar to a claim, complaint, action, proceeding, or remedy for breach of this Agreement, but the Parties must take appropriate steps to preserve the confidentiality required by this Paragraph 64.

65. Each party acknowledges that it has been and is being fully advised by competent legal counsel of such party's own choice and fully understands the terms and conditions of this Settlement Agreement, and the meaning and import thereof, and that such party's execution of this Settlement Agreement is with the advice of such party's

counsel and of such party's own free will. Each party represents and warrants that it has sufficient information regarding the transaction and the other parties to reach an informed decision and has, independently and without relying upon the other parties, and based on such information as it has deemed appropriate, made its own decision to enter into this Settlement Agreement and was not fraudulently or otherwise wrongfully induced to enter into this Settlement Agreement.

66. Each of the undersigned attorneys represents that he or she is fully authorized to enter into the terms and conditions of, and to execute, this Settlement Agreement.

/s/(illegible)
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David A. Young
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Appendix F

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

IN RE GOOGLE LLC STREET VIEW ELECTRONIC COMMUNICATIONS LITIGATION	Case No. 3:10-md-02184-CRB **OBJECTION OF DAVID LOWERY**
DAVID LOWERY, Objector.	Time: 10:00 A.M. Date: February 28, 2020 Judge: Hon. Charles R. Breyer Courtroom: 6, 17th Floor

INTRODUCTION

Whether from the "vista view" or the Google Street View, "this case is not pretty." *In re Google Inc. Cookie Placement Consumer Privacy Litig.*, 934 F.3d 316, 331 (3d Cir. 2019) ("*Google Cookie*"). Plaintiffs filed complaints in this case alleging statutory and punitive damages for privacy violations, liabilities that would amount to billions of dollars, and then settled the case for $13 million, of which the class members will not see one penny. Instead, the entire net settlement fund will go to third-party "*cy pres*" recipients, even though it would be practicable to allow class members to recover through a claims-made process after making the same averments that the named plaintiffs made and now rely on. Moreover, several of the proposed *cy pres* recipients have prior relationship with class counsel or defendants. Preexisting relationships with the defendant undermine the value of the settlement to the class. Preexisting relationships with class counsel qualify as improper conflicts of interest. Even more fundamentally, *cy pres* without the affirmative consent of class members constitutes compelled speech in contravention of the First Amendment. These defects render the settlement substantively unfair.

Lane v. Facebook does not require settlement approval. In *Lane*, objectors never contended that distribution to the class was feasible. Lowery does. As the Theodore H. Frank declaration demonstrates, distribution to some class members is feasible in this case; distribution regularly occurs in settlements with millions of unknown unnamed class members and a settlement fund

of less than a dollar per class member through a claims process. Class counsel owes a fiduciary duty to the absent class members to put their interests ahead of third-party charities. And when courts create the incentives for class counsel to put their clients first, attorneys respond. In cases where Lowery's counsel has objected to *cy pres*, class members have received tens of millions of dollars more that class counsel previously claimed was infeasible to distribute.

Moreover, it is either inequitable or inefficient for class members' money to go instead to wealthy charities. Money is fungible. If the program purportedly funded by the *cy pres* in this case was worthwhile, an MIT—with an endowment of $17.4 billion, more than is owned by virtually every (and perhaps every) class member—would fund itself, and the *cy pres* money will simply be diverted to other programs or MIT's already-full pockets. And if MIT was not going to engage in the program in the absence of the *cy pres* award's artificial requirements, then it is simply a misallocation of resources. Similarly, Georgetown has an endowment of over a billion dollars; the ACLU's two-year *profits* from April 1, 2016 to March 31, 2018 were over $124 million.

Beyond the settlement's fairness, class certification may be untenable. If in fact distributions to class members are impossible, then either a class action is not superior to other methods of adjudicating the dispute, the class's representation is not adequate, or the class definition is not sufficiently ascertainable.

Finally, in the alternative, if the Court overrules all the above objections, the Rule 23(h) request is excessive and should be reduced.

I. Objector Lowery is a member of the settlement class.

Objector David Lowery, during the class period, owned and used multiple unencrypted wireless networks. *See* Declaration of David Lowery, ¶ 3 (attached). On information and belief, Google acquired his payload data from those networks. *Id.* Lowery is not within any of the classes of persons excluded from the settlement. *Id.* ¶ 4. He is therefore a class member. His full name is David Charles Lowery, his current address and email address is documented in his declaration. *Id.* ¶ 2.

Hamilton Lincoln Law Institute's Center for Class Action Fairness ("CCAF") represents Lowery *pro bono*, and CCAF attorney Theodore H. Frank intends to appear at the fairness hearing on his behalf. CCAF represents class members *pro bono* where class counsel employs unfair procedures, including the misuse of *cy pres*, to benefit themselves at the expense of the class. *See generally* Declaration of Theodore H. Frank ¶¶ 14-17. Since it was founded in 2009, CCAF has recouped more than $200 million for class members by driving settling parties to reach an improved bargain or by reducing outsized fee awards. *See* Andrea Estes, *Critics hit law firms' bills after class-action lawsuits*, BOSTON GLOBE (Dec. 17, 2017) (more than $100 million at time); Frank Decl ¶ 17. Lowery brings this objection through CCAF in good faith to protect the interests of the class. Lowery Decl. ¶ 7. His objection applies to the entire class; he adopts any objections not inconsistent with this one.

II. The district court has a fiduciary duty to the unnamed class members and there is no presumption in favor of settlement approval

"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." *Pampers*, 724 F.3d at 715. Unlike ordinary settlements, "class-action settlements affect not only the interests of the parties and counsel who negotiate them, but also the interests of unnamed class members who by definition are not present during the negotiations." *Id.* "[T]hus, there is always the danger that the parties and counsel will bargain away the interests of unnamed class members in order to maximize their own." *Id.*

To guard against this danger, a district court must act as a "fiduciary for the class . . . with a jealous regard" for the rights and interests of absent class members. *In re Mercury Interactive Corp. Sec. Litig.*, 618 F.3d 988, 994 (9th Cir. 2010) (cleaned up). It "must remain alert to the possibility that some class counsel may urge a class settlement at a low figure or on a less-than-optimal basis in exchange for red-carpet treatment on fees." *In re HP Inkjet Printer Litig.* ("*Inkjet*"), 716 F.3d 1173, 1178 (9th Cir. 2013) (cleaned up). And it must not "assume the passive role" that is appropriate for an unopposed motion in ordinary bilateral litigation. *Redman v. RadioShack Corp.*, 768 F.3d 622, 629 (7th Cir. 2014). In particular, settlement value "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 v. Kellogg Co.*, 697 F.3d 858, 868 (9th Cir. 2012). It is error to exalt fictions over "economic reality." *Allen v. Bedolla*, 787 F.3d 1218, 1224 (9th Cir. 2015).

"Where the parties negotiate a settlement agreement before the class has been certified, settlement approval requires a higher standard of fairness and a more probing inquiry than may normally be required under Rule 23(e)." *Roes v. SFBSC Mgmt., LLC*, __F.3d__, 2019 U.S. App. LEXIS 36638, at *28 (9th Cir. Dec. 11, 2019) (cleaned up); *accord Dennis*, 697 F.3d at 867 (*quoting Staton v. Boeing*, 327 F.3d 938, 960 (9th Cir. 2003)). In such circumstances, consideration of the eight *Churchill Village*[1] factors "alone is not enough to survive appellate review." *In re Bluetooth Headset Prod. Liab. Litig.*, 654 F.3d 935 (9th Cir. 2011) ("*Bluetooth*"). "This more exacting review is warranted to ensure that class representatives and their counsel do not secure a disproportionate benefit at the expense of the unnamed plaintiffs who class counsel had a duty to represent." *Roes*, 2019 U.S. App. LEXIS 36638, at *28 (internal quotations omitted).

It is "insufficient" that the settlement happened to be at "arm's length" without "secret cabals" or express collusion of the settling parties. *Id.* at *31 n.13 (internal quotation omitted). Because of the danger of conflicts of interest endemic to class action procedure, third parties must monitor the reasonableness of the settlement as well. *Bluetooth*, 654 F.3d at 948 (*quoting Staton*, 327 F.3d at

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[1] *Churchill Vill., L.L.C. v. Gen. Elec.*, 361 F.3d 566, 575 (9th Cir. 2004).

960). Courts "must be particularly vigilant not only for explicit collusion, but also for more subtle signs that class counsel have allowed pursuit of their own self-interests … to infect the negotiations." *In re Dry Max Pampers*, 724 F.3d 713, 718 (6th Cir. 2013) (quoting *Dennis*, 697 F.3d at 864).

There is no presumption in favor of settlement approval: the proponents of a settlement bear the burden of proving its fairness. *Roes*, 2019 U.S. App. LEXIS 36638, at *30 & n.12; *accord Koby v. ARS Nat'l Servs.*, 846 F.3d 1071, 1079 (9th Cir. 2017). Any such presumption would be "inconsistent with [the] probing inquiry" required in this Circuit. *Retta v. Millennium Prods.*, No. CV 15-1801 PSG, 2016 WL 6520138, at *4 (C.D. Cal. Sept. 21, 2016) (citing *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1026 (9th Cir. 1998)). "The court cannot accept a settlement that the proponents have not shown to be fair, reasonable and adequate." *In re GMC Pick-Up Truck Fuel Tank Prod. Liab. Litig.* ("*GMC Pick-Up*"), 55 F.3d 768, 785 (3d. Cir. 1995) (internal quotation and alteration omitted).

III. The settlement improperly favors third-party charities over class members through its *cy pres* provision.

The legal construct of *cy pres* (from the French "*cy pres comme possible*"—"as near as possible") has its origins in trust law as a vehicle to realize the intent of a settlor whose trust cannot be implemented according to its literal terms. *Nachshin v. AOL*, 663 F.3d 1034, 1038 (9th Cir. 2011). A classic example of *cy pres* comes from a 19th-century case where a court repurposed a trust that had been created to abolish slavery in the United States to instead provide charity to poor African-Americans. *Jackson*

v. Phillips, 96 Mass. 539 (1867). Imported to the class-action context, it has become an increasingly popular method of distributing settlement funds to non-class third parties—a "growing feature" that raises "fundamental concerns." *Marek v. Lane*, 571 U.S. 1003, 1006 (2013) (Roberts, C.J., respecting the denial of certiorari).

Non-compensatory *cy pres* distributions, disfavored among both courts and commentators alike, remain an inferior avenue of last resort. *See e.g.*, *In re BankAmerica Corp. Secs. Litig.*, 775 F.3d 1060 (8th Cir. 2015) ("*BankAmerica*") (many courts have "criticized and severely restricted" *cy pres*); *Pearson v. NBTY, Inc.*, 772 F.3d 778, 784 (7th Cir. 2014) ("A *cy pres* award is supposed to be limited to money that can't feasibly be awarded to…the class members"); *Klier v. Elf Atochem N. Am., Inc.*, 658 F.3d 468, 475 (5th Cir. 2011) ("[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."). Even the Ninth Circuit warns of the dangers of *cy pres*. *Dennis v. Kellogg Co.*, 697 F.3d 858, 868 (9th Cir. 2012) (warning that *cy pres* settlements can easily become a "paper tiger"); *Nachshin v. AOL, LLC*, 663 F.3d 1034, 1038 (9th Cir. 2011) ("the *cy pres* doctrine…poses many nascent dangers to the fairness of the distribution process"). Put simply, no class complaint includes a request for *cy pres* in its prayer for relief, it is "not a form of relief to the absent class members and should not be treated as such." *Frank v. Gaos*, 139 S. Ct. 1041, 1047 (2019) (Thomas, J., dissenting).

"*Cy pres* distributions also present a potential conflict of interest between class counsel and their clients because 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. Antitrust Litig.*., 708 F.3d 163, 173 (3d Cir. 2013) ("*Baby Products*"). Commentators have observed these same defects. *See e.g.*, 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); Theodore H. Frank, Statement before the House Judiciary Committee Subcommittee on the Constitution and Civil Justice, *Examination of Litigation Abuse* (Mar. 13, 2013), *available at* https://cei.org/sites/default/files/Testimony%20-%20Cy%20Pres.pdf.

Ex ante cy pres is defined as an award "that was designated as part of a settlement agreement…where: (1) an amount *and* at least one charity was named as a recipient of part of the fund from the outset and the charity's receipt of the award was not contingent on there being remaining/unclaimed funds in the settlement fund, or (2) the entire award was given to at least one charity with no attempt to compensate the absent class members." Redish et al., 62 FLA. L. REV. at 657 n.171. The relief here is a clear example of the latter. Settlement ¶24 provides that the entire net settlement fund will be disbursed to non-

class member charities, with no payments to individual class members.[2]

As compared with *ex post cy pres*—third-party awards made only after class members fail to cash checks that are distributed—*ex ante cy pres* stands on even shakier footing. *See Koby*, 846 F.3d 1071 (rejecting all-*cy pres* settlement); *Molski v. Gleich*, 318 F.3d 937, 954-55 (9th Cir. 2003) (same); *Graff v. United Collection Bureau, Inc.*, 132 F. Supp. 3d 470, 485-486 (E.D.N.Y. 2016) (same); *Zepeda v. Paypal*, No. C 10-2500 SBA, 2014 U.S. Dist LEXIS 24388, at *21 (N.D. Cal. Feb. 24, 2014) (same); *Fraley v. Facebook*, No. C 11-1726 RS, 2012 WL 5835366, 2012 U.S. Dist. LEXIS 116526, at *4-*7 (N.D. Cal. Aug. 17, 2012) ("*Fraley I*") (same); *Zimmerman v. Zwicker & Assocs., P.C.*, 2011 WL 65912, 2011 U.S. Dist. LEXIS 2161 (D.N.J. Jan. 10, 2011) (same). "This form of *cy pres* stands on the weakest ground because *cy pres* is no longer a last-resort solution for a problem of claims administration. The concern for compensating victims is ignored (at least unless the indirect benefits of the *cy pres* award flow primarily to the victims)." Jay Tidmarsh, *Cy Pres and the Optimal Class Action*, 82 GEO. WASH. L. REV. 767, 770-71 (2013). Such settlements "whose only monetary distributions are to class counsel, class representatives, and *cy*

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[2] Although it is perhaps the case that some stakeholders of the *cy pres* recipients are class members, there is no legitimate reason to favor those recipients in an uncertified subclass over other class members. *Dugan v. Lloyds Tsb Bank*, 2013 WL 1703375, 2013 U.S. Dist. LEXIS 56617, at *10 (N.D. Cal. Apr. 19, 2013) (adequate representatives may not "take positions that favor [one absent class member] to the detriment of other absent class members").

pres recipients, as in this case, present[] the risk of a still greater misalignment of interests." *Google Cookie*, 934 F.3d at 327.

Preferring non-compensatory *cy pres* might be acceptable if the class were a free-floating entity, existing only to permit class counsel to operate as a private attorney general. But Rule 23 is not a substantive bounty-hunting provision; Rule 23 is a procedural joinder device that aggregates real individuals with real claims into a class if certain prerequisites are satisfied. *Shady Grove Orthopedic Assocs., P.A., v. Allstate Ins. Co.*, 559 U.S. 393, 408 (2010) (class action is a "species" of joinder). Thus, the plaintiff-class itself as a legal entity "is not the client. Rather, the class attorney continues to have responsibilities to each individual member of the class even when negotiating a settlement." *Mandujano v. Basic Vegetable Prods., Inc.*, 541 F.2d 832, 834-35 (9th Cir. 1976) (cleaned up). Counsel's duty to their client works hand in glove with the proper role of the judiciary—namely, "provid[ing] 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). By proposing an *ex ante cy pres* settlement, the settling parties have lost sight of the very underpinnings of Article III.

Lane v. Facebook, the only extant Ninth Circuit precedent that plaintiffs proffer on the issue, is not to the contrary. 696 F.3d 811 (9th Cir. 2012). The objectors in *Lane* "concede[d] that direct monetary payments to the class of remaining settlement funds would be infeasible" and so the opinion operated from that premise without reaching the question of whether *cy pres* could be offered

instead of feasible class distribution. *Id.* at 821. And Lowery contends that distribution is feasible in this case, which is no different than dozens of other class-action settlements with millions of class members who are required to self-identify to claim settlement funds worth less than a dollar per class member.[3]

A. The settlement resorts to *cy pres* prematurely.

Cy pres is improper when it is feasible to make distributions to class members, at least where there is no other compelling reason for preferring non-class members. This "last-resort rule" is a well-recognized principle of law. *See Pearson*, 772 F.3d at 784 (*cy pres* permissible "only if it's infeasible to provide that compensation to the victims"). §3.07(a) of the ALI *Principles of the Law of Aggregate Litigation* succinctly states the limitation: "If individual class members can be identified through reasonable effort, and the distributions are sufficiently large to make individual distributions economically viable, settlement proceeds should be distributed directly to individual class members." The last-resort rule follows from the precept that "[t]he settlement-fund proceeds, generated by the value of the class members' claims, belong

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[3] *In re Google Referrer Header Litigation*, 869 F.3d 737 (9th Cir. 2017) did determine that a *per capita* entitlement of $0.04 qualifies as *de minimis* and justifies a *cy pres*-only settlement regardless of the feasibility of a claims process, but this decision, which split with every other appellate circuit to consider the question, is no longer good law, having been vacated by *Frank v. Gaos*, 139 S. Ct. 1041 (2019).

solely to the class members." *Klier*, 658 F.3d at 474 (citing ALI Principles §3.07 cmt. (b)).

The relevant question then is whether it would be practicable to distribute the available $13 million settlement fund to self-identifying class members through a claims-made process. And the answer is indisputably yes. In *Fraley v. Facebook, Inc.*, the class of Facebook users numbered over one hundred million, and the parties initially proposed a *cy pres*-only settlement to the court alleging that class distributions "[are] simply not practicable in this case, given the size of the class." *Fraley I*, 2012 U.S. Dist. LEXIS 116526, at *6. Judge Seeborg refused to accept the proposal because "[m]erely 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. After the court denied approval, the agreement was then restructured as a claims-made settlement disbursing cash directly to class members. 966 F. Supp. 2d. 939 (N.D. Cal. 2013) ("*Fraley II*"). Claimants under the amended agreement were so few in fact that the court would have been able to double the baseline $10 awards and did actually augment the awards by 50%. *Id.* at 944.

Similarly, in *Zepeda v. Paypal*, after Judge Armstrong rejected a proposed *cy pres*-only settlement as unfair, the settling parties returned to the court with an approvable common fund structure that distributed no less than $1.8 million directly to class members. *Compare Zepeda*, 2014 U.S. Dist LEXIS 24388, at *21 (N.D. Cal. Feb. 24, 2014), *with Zepeda*, 2017 U.S. Dist. LEXIS 43672, 2017 WL 1113293 (N.D. Cal. Mar. 24, 2017) (granting final approval of amended settlement). Frank's declaration

documents myriad other settlements that demonstrate the feasibility of a claims process with $13 million available and millions of class members. Frank Decl. ¶¶10-13.

Because the percentage of class members that will submit claims in these types of settlements is invariably low, a claims-made settlement would not be economically infeasible. A well-respected settlement administration company conducted a wide-ranging survey that concluded "settlements with little or no direct mail notice will almost always have a claims rate of less than one percent (1%)." *Poertner v. The Gillette Co*., No. 6:12-v-00803-GAP-DAB (S.D. Fla.), Declaration of Deborah McComb re Settlement Claims (Dkt. 156) ¶5. Recent data points reveal that this is true in low-stakes internet consumer settlements with or without direct notice. *In re Carrier iQ, Inc., Consumer Privacy Litig*., 2016 WL 4474366, 2016 U.S. Dist. LEXIS 114235, at *28 (N.D. Cal. Aug. 25, 2016) (0.14% claims rate with direct notice component); *In re Livingsocial Mktg. and Sales Practices Litig*., 298 F.R.D. 1, 19 (D.D.C. 2013) (0.25% claims rate with direct email notice); *Lagarde v. Support.com, Inc*., 2013 WL 1994703, 2013 U.S. Dist. LEXIS 67875, at *7 (N.D. Cal. May 13, 2013) (0.18% of class claiming $10); *In re Sony VAIO Computer Notebook Trackpad Litig*., No. 09-cv-2109, Dkt. 378 (S.D. Cal. Aug. 7, 2017) (0.44% of class claiming either $5 or $25 without proof of purchase). *Fraley* is the best evidence; even where a class numbers over one hundred million, a claims-made device is feasible.

Notably, plaintiffs do not contend that class distributions are economically infeasible given the class size and the settlement fund size here. Rather, they merely suggest that a *cy pres* distribution is "the most effective

means of providing benefit to the class" because there is no "effective and efficient means of identifying Class Members." Plaintiffs' Motion for Final Approval of Class Action Settlement, Dkt. 184 at 25-26. But plaintiffs undercut their own theory by relying entirely on self-averments to prove their Article III standing. Dkt. 184 at 14-16. Yes, the settling parties engaged in lengthy jurisdictional discovery to assess whether Google had obtained the named plaintiffs' payload data, culminating in a sealed report available to neither absent class members nor the general public. Yet, to demonstrate named plaintiffs' standing, the plaintiffs do not rely on that report at all; rather they rely solely on the complaint's allegations. Dkt. 184 at 14-15 & n.7. On that basis, each of the eighteen plaintiffs seeks a $5,000 individual award. Plaintiffs' Motion for Attorneys' Fees, Reimbursement of Expenses, and Plaintiff Service Awards, Dkt. 185. What is good enough for the named-plaintiffs goose is good enough for the absent-class-members gander who will be getting a small fraction of that $5,000. All absent class members who can, like Lowery, aver the same facts as the named plaintiffs should be permitted to self-identify and file a claim for a portion of the settlement fund on that basis.

Indeed, it is one of the few advantages of a claims-made process that otherwise-unknown absent class members are able to self-identify. *See Rubio-Delgado v. Aerotek, Inc.*, 2015 WL 1503436, 2015 U.S. Dist. LEXIS 43871, at *7 (N.D. Cal. Apr. 1, 2015) (observing that claim forms can permit identification of those "difficult to identify"). The nature of representational litigation under Rule 23 and the Due Process Clause of the Constitution necessitates prioritizing class relief even in situations where it is not the "most efficient" use of settlement funds. It would

always be more efficient to distribute settlement proceeds to a select group of charities for then the settling parties can eliminate the bulk of the administrative overhead costs. Maximizing efficiency cannot be the sufficient justification for a *cy pres* heavy settlement required by courts. In their final approval memorandum, plaintiffs envision that the only alternative is a claims process that would require information from long-discarded routers and a cost-intensive verification process that would leave only *de minimis* payments for class members. Dkt. 184 at 27. But again, if the named plaintiffs may rely on general allegations to prove their standing to consummate the class settlement and claim $5000 service awards, then class members must be permitted to rely on the same averments to claim a share of the settlement fund. By no means would this standard claims-made procedure be impracticable or otherwise result in *de minimis* payments. *See* Frank Decl. ¶¶10-13.

Nor does Rule 23 allow counsel the discretion to deem anything other than class distributions the "best way" (Dkt. 184 at 27) 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). The fact that Google has previously paid $7 million to various state attorneys general offers no support

for the propriety of *cy pres* here. This civil penalty was paid to governmental entities in settlement of enforcement actions; "[t]he private causes of action aggregated in this class action—as in many others—were created by Congress to allow plaintiffs to recover compensatory damages for their injuries." *Baby Prods.*, 708 F.3d at 173.

Even if it were not possible to distribute $13 million through a claims-made process because of the implausible chance settlement claims would be oversubscribed, there is no legitimate reason why the parties could not randomly sample the class and/or accept claims submission, and then make payouts on a lottery basis to those individuals class membership can be confirmed. *See* Shay Levie, *Reverse Sampling: Holding Lotteries to Allocate the Proceeds of Small-Claims Class Actions*, 79 GEO. WASH. L. REV. 1065 (2011). (A lottery need not be for "$13 million," but can be, for example, a double-digit percentage of claiming class members for a two- or three-digit sum. Class members would prefer the opportunity to have a 20% chance of obtaining $20 to a 100% chance of receiving zero.) Which alternate method the parties elect is not crucial; what matters is that non-compensatory *cy pres* remains the last resort. Direct payment matters. "Class members are 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; id. at 178-79 (counsel has "responsibility to seek an award that adequately prioritizes direct benefit to the class" and fees should reflect that fact). "Barring sufficient justification, *cy pres* awards should generally represent a small percentage of total settlement funds." *Id.* at 174. If *cy pres* is an excessive share of the total relative to direct class re-

covery, a district court should "urge the parties to implement a settlement structure that attempts to maintain an appropriate balance between payments to the class and *cy pres* awards." *Id.*

Where there is a will, there is a way. When courts demand more of settling parties on behalf of class members, they get more. For example, after *Baby Products* rejected a settlement that would pay class counsel $14 million, charities about $15 million, and class members under $3 million, class counsel on remand, appropriately incentivized to avoid a fee reduction, restructured the settlement to eliminate superfluous *cy pres* in favor of direct class distributions. This constituted a class improvement of nearly $15 million. *McDonough v. Toys "R" Us*, 80 F. Supp. 3d 626 (E.D. Pa. 2015). *Fraley* and *Zepeda*, both discussed above, are similar examples; so is the Eighth Circuit case of *BankAmerica* and the Seventh Circuit case of *Pearson*.

But here class counsel did not negotiate for using the fund to compensate class members, either on a claims-made, lottery, or some combination thereof basis. Rather, in dereliction of their fiduciary obligations, class counsel proposes to give that money away to non-class entities. The bare legitimacy of *cy pres* in the class action context is controvertible with good reason. *See, e.g., Klier*, 658 F.3d at 480-82 (Jones J., concurring); *In re Thornburg Mortg., Inc. Secs. Litig.*, 885 F. Supp. 2d 1097, 1105-12 (D.N.M. 2012) (collecting sources); Redish *et al.*, *supra*. Although *cy pres* has been given a narrow berth in the Ninth Circuit, *Lane* does not dictate approval of this scenario, and the law of every other circuit to consider the

question requires that this application of *cy pres* be rejected for the foregoing reasons.

The settling parties may respond by pointing to the settlement's supposed injunctive benefits. Settlement ¶¶ 33-37. This "relief" is illusion; merely duplicating preexisting obligations imposed on Google by the 2013 consent decree that resolved dozens of state enforcement actions against Google. *See* Assurance of Voluntary Compliance, Ex. F to Joint Declaration of Class Counsel in support of Final Approval, Dkt. 186 at 78-90. Settlement paragraph 33 obligates Google to destroy acquired payload data (subject to preservations for litigation purposes). Google is already so obligated. Assurance § II.4, Dkt. 186 at 82. Settlement paragraph 34 enjoins Google from collecting or storing for use payload data in Google Street View vehicles except with notice and consent. Google is already so enjoined. Assurance § II.1, Dkt. 186 at 82. Settlement paragraph 35 explicitly orders Google to comply with the Privacy Program provided for in the consent decree. Although plaintiffs emphasize that the Settlement's injunction will "extend the duration" of the privacy program "by nearly two years," in reality there is no indication that

Google has any plans to change a program that has been in place for more than half a decade.[4]

Settlement relief that replicates the *status quo ante* is not valuable consideration for the waiver of class members' claims. *Koby*, 846 F.3d at 1080; *Pampers*, 724 F.3d at 719; *Staton v. Boeing Co.*, 327 F.3d 938, 961 (9th Cir. 2003). "Allowing private counsel to receive fees based on the benefits created by public agencies would undermine the equitable principles which underlie the concept of the common fund…" *In re Prudential Ins. Co. Am. Sales Practice Litig. Agent Actions*, 148 F.3d 283, 337 (3d Cir. 1998) (internal quotation omitted). Any reliance of this inert injunctive relief to justify the settlement and fee award would only demonstrate why the Ninth Circuit has cautioned that injunctive relief is "easily manipulable by overreaching lawyers." *Staton*, 327 F.3d at 974.

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[4] Paragraph 36 requires Google to host and maintain educational webpages instructing users how to encrypt their networks and on the value of encryption. Regardless of whether Google already maintains such webpages, innumerable such how-to videos already exist on the internet. In 2020 the value of an encrypted network is well-understood, and there's no shortage of people advocating the value of using secured networks, from the local cable company technician to the Federal Trade Commission to the Department of Homeland Security. *See* Federal Trade Commission, *Securing Your Wireless Network*, https://www.consumer.ftc.gov/articles/0013-securing-your-wireless-network (last visited Jan. 10, 2010); Department of Homeland Security, *Security Tip (ST05-003): Securing Wireless Networks*, https://www.us-cert.gov/ncas/tips/ST05-003 (last visited Jan. 10, 2020). In any event, injunctive relief that treats class members identically with non-class members and opt-outs cannot be valid consideration for the release of damages claims.

B. Without class members' affirmative election, *cy pres* constitutes compelled speech 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"). "First Amendment values are at serious risk if the government can compel a particular citizen, or a discrete group of citizens, to pay special subsidies for speech on the side that it favors." *United States v. United Foods, Inc.*, 533 U.S. 405, 411 (2001); *see also Keller v. State Bar of California*, 496 U.S. 1 (1990) (attorney bar dues cannot be used for political or ideological purposes); *Wooley v. Maynard*, 430 U.S. 705, 715 (1977) (recognizing the right of an individual to reject a state measure that forces him "as a part of his daily life … to be an instrument for fostering public adherence to an ideological point of view he finds unacceptable"). In articulating this right, the Supreme Court has acknowledged Thomas Jefferson's view that "to compel a man to furnish contributions of money for the propagation

of opinions which he disbelieves[] is sinful and tyrannical." *Janus*, 138 S. Ct. at 2464 (quoting *A Bill for Establishing Religious Freedom*, *in* 2 PAPERS OF THOMAS JEFFERSON 545 (J. Boyd ed., 1950)).

These principles render unconsented-to class action third-party awards (at least those awards like this one that will be reserved for organizations that advance policy positions and seek to influence the direction of the law) unconstitutional. Three premises support this conclusion. First, "[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 (citing *ALI Principles* § 3.07 cmt. (b)). Though each class members' 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). Second, a third-party donation is an expression of support, association, and endorsement of the third party's agenda and activities. *See, e.g.*, *Buckley v. Valeo*, 424 U.S. 1 (1976); *In re Asbestos Sch. Litig.*, 46 F.3d 1284, 1294 (3d Cir. 1994) (Alito, J.) ("Joining organizations that participate in public debate, making contributions to them, and attending their meetings are activities that enjoy substantial First Amendment protection.). "[C]ompelled funding of the speech of other private speakers or groups presents the same dangers as compelled speech." *Harris*, 573 U.S. at 647 (internal quotation omitted). Third, absent class members are being compelled into participating in the donations pursuant to the Court's order disbursing the funds to the *cy pres* recipients. It is not enough that class members may exclude themselves from the class; silence is not consent and a waiver of First Amendment rights "cannot be presumed." *Janus*, 138 S.

Ct. at 2486.[5] "Unless [individuals] clearly and affirmatively consent before any money is taken from them, this standard cannot be met." *Id.*; *see generally* Christopher R. Leslie, *The Significance of Silence: Collective Action Problems and Class Action Settlements*, 59 FLA. L. REV. 71, 73 (2007). Although reaching a satisfactory private class settlement is a laudable goal, it does not rise to the level of a critical or "compelling" governmental interest, and does not justify an infringement on absent class members' rights. *Davis v. East Baton Rouge Parish Sch. Bd.*, 78 F.3d 920, 929 n.8 (5th Cir. 1996) (the possibility of "lengthen[ing] the process" of settlement does not justify infringing First Amendment rights); *cf. also Amchem Prods., Inc. v. Windsor,* 521 U.S. 591, 620-21 (1997) (interest in settlement does not override procedural safeguards of Rule 23).

Worse still, the proposed recipients are self-described advocacy groups that advance contentious public policy positions with which at least some class members, including Lowery, disagree. *See* Lowery Decl. ¶ 9. Lowery objects to organizations that work against his interests being subsidized, even to work on different issues: as discussed in the introduction, money is fungible, even when

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[5] Anyway, the settlement's "opt out" right is not an opportunity to merely abstain from the charitable donation, it is simply the right to exit the class action entirely. This is a Hobson's choice, not a true opt-out. *See Keller*, 496 U.S. at 10; *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).

it is earmarked for a specific cause. "In simple terms, the First Amendment does not permit the government to compel a person to pay for another party's speech just because the government thinks that the speech furthers the interests of the person who does not want to pay." *Janus*, 138 S. Ct. at 2467. Approving the settlement's *cy pres* provision would violate the First Amendment.[6]

C. The Court must consider the pre-existing relationships between the *cy pres* recipients, class counsel and the defendant.

"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 cmt. (b); *accord Google Cookie*, 934 F.3d at 331 (adopting §3.07 cmt. b standard); *Google Referrer*, 869 F.3d at 749 (Wallace, J., dissenting) (advocating the adoption of same). "[A] growing number of scholars and courts have observed, the cy pres doctrine…poses many nascent dangers to the fairness of the distribution process." *Nachshin*, 663 F.3d at 1038 (citing authorities).

For example, a defendant could steer distributions to a favored charity with which it already does business, or use the *cy pres* distribution to achieve business ends.

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[6] In *Perkins v. LinkedIn Corp.*, a district court overruled a First Amendment challenge to a *cy pres* provision due to its novelty. No. 13-CV-04303-LHK, 2016 U.S. Dist. LEXIS 18649, at *39 n.9 (N.D. Cal. Feb. 16, 2016).

Dennis, 697 F.3d at 867-68 (ruminating on these issues); *SEC v. Bear, Stearns & Co. Inc.*, 626 F. Supp. 2d 402, 415 (S.D.N.Y. 2009); Roger Parloff, *Google and Facebook's new tactic in the tech wars*, FORTUNE (Jul. 30, 2012) (noting criticism of Google Buzz settlement that steered *cy pres* to organizations that are currently paid by Google to lobby for or to consult for the company). In one infamous example, Microsoft sought to donate numerous licenses for Windows software to schools as part of an antitrust class action settlement, essentially using the *cy pres* as a marketing tool that would have frozen out its competitors. *In re Microsoft Corp. Antitrust Litig.*, 185 F. Supp. 2d 519 (D. Md. 2002).

Conversely, if the *cy pres* recipient is related to plaintiffs' counsel, class counsel would be double-compensated: the attorney indirectly benefits both from the cy pres distribution, and then makes a claim for attorneys' fees based upon the size of the cy pres. *Bear, Stearns*, 626 F. Supp. 2d at 415; Redish, 62 FLA. L. REV. at 661 (*cy pres* awards "can also increase the likelihood and absolute amount of attorneys' fees awarded without directly, or even indirectly, benefitting the plaintiff"); Adam Liptak, *Doling Out Other People's Money*, N.Y. TIMES (Nov. 26, 2007).

Here, the parties have proposed 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, and Consumer Reports as the *cy pres* recipients. Dkt. 184 at 13. Where, as here, lead class counsel has a

history of litigating cases with a *cy pres* recipient and its affiliates, there is the unacceptable appearance of divided loyalties of class counsel. And where defendant is already an established donor to several of the *cy pres* recipients, the value of the settlement will be less beneficial to the class than it would appear.

1. *Cy pres* beneficiaries should not have a preexisting relationship with class counsel.

"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).

Here, as plaintiffs disclosed under this Court's Procedural Guidance for Class Action Settlement, 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); *cf. also Spotswood v. Hertz Corp.,* 2019 WL 498822, 2019 U.S. Dist.

LEXIS 20536, at *36-*38 (D. Md. Feb. 7, 2019) (determining that attorney who co-counseled with putative class counsel on other matters could not adequately represent the class's interests as named plaintiff). "Setting a precedent of regularly returning *cy pres* funds to litigating entities would provide no incentive for counsel…to negotiate class action settlements in a manner to maximize actual award of claims to class member[s]." *Mateo-Evangelio v. Triple J Produce, Inc.*, 2017 WL 3669527, 2017 U.S. Dist. LEXIS 135580, at **16-17 (E.D.N.C. 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). *See* Section § IV.A below.

2. Pre-existing relationships between the defendant and the *cy pres* recipients undermine the theoretical value of the settlement.

As the Ninth Circuit has warned, "[t]he issue of the valuation of [the cy pres] aspect of a settlement 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. Google is already a donor to Public Knowledge, World Privacy Forum, and the ACLU. *See* Frank Decl. ¶¶6-8. Google and other large tech firms routinely settle class action cases with *cy pres* donations to these entities. *See,* Dkt. 166-1 at 61-62 (World Privacy Forum, citing *cy pres* from Google and Netflix); *id* at 45 (Center for Digital Democracy, citing *cy pres* from Netflix); *id.* at 76 (Public Knowledge, citing *cy pres* from Sirius XM); *id.* at 85 (Rose Foundation, citing

cy pres from Symantec); *id.* at 99 (ACLU, citing *cy pres* from Google and Facebook). *Cy pres* donations can grow to constitute a sizable portion of a non-profit's annual budget. *See* Roger Parloff, *Google and Facebook's new tactic in the tech wars*, FORTUNE (Jul. 30, 2012). One can reasonably fear that large tech firms can use the carrot of *cy pres* to ingratiate themselves to those organizations who would otherwise serve independent watchdog roles. Even without consciously compromising their missions, nonprofits might reflexively be less likely to step on Google's toes, lest they cause Google to exercise its veto power over their *cy pres* funding in future cases. *See* Declaration of Brian R. Strange in Support of Class Plaintiffs' Response to Objection of Theodore H. Frank, *In re Google Inc. Cookie Placement Consumer Privacy Litig.*, No. 12-md-2358, Dkt. 172-2 at 3 (D. Del. Jan. 4, 2017) (describing how Google vetoed four of ten proposed *cy pres* recipients, as allowed under the class settlement). Here Google reserved to itself the right to consult during the selection process. Settlement ¶29. And although class counsel aver that they "made no changes to their selection in response to Google's views," they declined to describe what views Google expressed. Dkt. 186 at 10; *compare Google Cookie*, 934 F.3d at 331 (describing the "scrupulous" findings of that district court is obligated to make regarding the relationship between defendant, class counsel and the proposed *cy pres* recipients).

When the defendant is already a regular contributor to a proposed *cy pres* recipient, there is no demonstrable value added by the defendant's agreement to give money to that institution. *See Dennis*, 697 F.3d at 867-68. Agreeing to do something that the defendant is already doing is not a cognizable class benefit. *Koby*, 846 F.3d at

1080; *see also Reynolds v. Beneficial Nat'l Bank*, 288 F.3d 277, 286 (7th Cir. 2002) (it is the "incremental benefits" that matter); *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 the status quo). Although the settlement attempts to surmount the fungibility problem by asserting that the *cy pres* "is in addition" to Google's other charitable contributions and that "but for this Settlement, Google would not have expended these funds for charitable purposes," these representations are toothless in economic reality. Settlement ¶25. Though these *cy pres* payments are "in addition" to those made previously, nothing prevents Google from offsetting future donations that otherwise would have been made. The point is not that "these funds" would have been used for donations, it's that other fungible funds might have been. An agreement for Google to shift accounting entries is of no incremental value to the class.

At the very least, the preexisting relationships between Google and the *cy pres* recipients necessitate discounting the putative value of the settlement.

IV. In the alternative, if there is no practicable way to afford relief to individual class members, then the putative class cannot be certified.

A. Representatives who propose a plenary class release in exchange for a zero-recovery settlement are not adequately representing the class.

Rule 23(a)(4) conditions class certification upon a demonstration that "the representative parties will fairly

and adequately protect the interests of the class." 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." American Law Institute, *Principles of the Law of Aggregate Litig.* § 1.05, cmt. f (2010). Class counsel must maximize class recovery; they "cannot agree to accept excessive fees and costs to the detriment of class plaintiffs"[7] or sacrifice class recovery for "red-carpet treatment on fees."[8] "[I]t is unfathomable that the class's lawyer would try to sabotage the recovery of some of his clients." *Pierce v. Visteon Corp.*, 791 F.3d 782, 787 (7th Cir. 2015). When class counsel is "motivated by a desire to grab attorney's fees instead of a desire to secure the best settlement possible for the class, it violate[s] its ethical duty to the class." *Tech. Training Assocs., Inc. v. Buccaneers Ltd. P'ship.*, 874 F.3d 692, 694 (11th Cir. 2017). 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

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[7] *Lobatz v. U.S. West Cellular of Cal., Inc.*, 222 F.3d 1142, 1147 (9th Cir. 2000).

[8] *Pampers*, 724 F.3d at 718 (quoting *Weinberger v. Great N. Nekoosa Corp.*, 925 F.2d 518, 524 (1st Cir. 1991)).

to satisfy Rule 23(a)(4)." *Radcliffe*, 715 F.3d at 1165 (cleaned up).

As a bedrock principle, the specifications of (a)(4) "demand undiluted, even heightened, attention in the settlement context." *Amchem Prods., Inc., v. Windsor*, 521 U.S. 591, 620 (1997). Here, the *cy pres*-only settlement combined with a sizable clear-sailing attorneys' fee, sizable incentive awards, and a donation to a charity working class counsel, combine to indicate inadequate representation. *See, e.g., Pampers*, 724 F.3d at 721; *Molski*, 318 F.3d at 956. "No one should have to give a release and covenant not to sue in exchange for zero (or virtually zero) dollars." *Daniels v. Aeropostale West*, No. C 12-05755 WHA, 2014 U.S. Dist. LEXIS 74081, at *8 (N.D. Cal. May 29, 2014); *accord Koby*, 846 F.3d at 1080. "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). Worse still, "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." *Id.*

"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; 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.

If plaintiffs are correct that no actual class relief is possible, then they cannot demonstrate that the class representation satisfies either (a)(4) or (g)(4).

B. If distributions to individual class members are impracticable, then a class action is not superior to other available methods of adjudicating the controversy.

Another 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 settlement class certification "serves only as a vehicle through which to extinguish the absent class members' claims without providing them any relief" because it would be too impractical to distribute the settlement funds to class members, then a class action is not a superior means of adjudicating this controversy. *Frank*, 139 S. Ct. at 1047 (Thomas, J., dissenting); *see also Supler v. FKAACS, Inc.*, No.. 5-11-CV-00229-FL, 2012 U.S. Dist. LEXIS 159210, at *10-*11 (E.D.N.C. Nov. 6, 2012) (holding that because "benefits to putative class members" from *cy pres* payments "are attenuated and insignificant, class certification does not promote judicial efficiency.") (cleaned up). The Ninth Circuit came to a similar conclusion in *In re Hotel Tel. Charges*, 500 F.2d 86 (9th Cir. 1974). There, the court reasoned that "[w]henever the principal, if not the only, beneficiaries to the class action are…not the individual class members, a costly and time-consuming class action is hardly the superior method for resolving the dispute," and that, "[w]hen, as here, there is no realistic possibility that the class members will

in fact receive compensation, then monolithic class actions raising mind-boggling manageability problems should be rejected." *Id.* at 91-92. In this case, the proposed settlement falls into that category. It provides at most an indirect and attenuated benefit to the class, justified on the grounds that individual distributions would "be impossible for many Class Members and too expensive to implement for the few who could be identified." Dkt. 184 at 23.[9]

If true, then these claims should proceed as individual actions. Under such actions, class members can seek statutory damages of up to $10,000. 18 U.S.C. § 2520(c)(2)(B) (authorizing statutory damages for violations of the Electronic Communications Privacy Act). Regardless how slim the possibility of attaining such damages, that possibility is superior to releasing those claims for no compensation. *See Brown v. Wells Fargo & Co.*, No. 11-1362 (JRT/JJG), 2013 U.S. Dist. LEXIS 181262, at *16-*17 (D. Minn. Dec. 30, 2013) (concluding that superiority was not satisfied where individuals would be "entitled to between $100 and $1,000 dollars in statutory damages" in successful individual litigation, but only

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[9] On similar facts *Google Referrer* declined to apply *Hotel Telephone Charges*. 869 F.3d at 743 n.3. Again, *Google Referrer* has since been vacated by *Frank* and its reasoning is not persuasive. The fact that *Hotel Telephone Charges* involved "fluid recovery" rather than "*cy pres*" is only a distinction in semantics: the two are "related remed[ies]" and the ALI §3.07 "uses the term cy pres broadly to refer to both remedies." §3.07 cmt. a. Nor does the fact *Hotel Telephone Charges* involved a litigation—rather than a settlement—class make any difference, for neither in settlement nor in litigation may the class attorneys make themselves the foremost beneficiary of the class proceeding. *E.g. Bluetooth*.

$55 as a class member); *Sonmore v. CheckRite Recovery Servs.*, 206 F.R.D. 257, 265-66 (D. Minn. 2001) (holding that the discrepancy between the $25 that class members could recover and the $1000 in statutory damages they could recover individually meant that a class action was not superior); *cf. also Kline v. Coldwell, Banker & Co.*, 508 F.2d 226, 234 n.5 (9th Cir. 1974) (finding no superiority where individual recoveries could have amounted to $1,875 and attorneys' fees and costs were statutorily recoverable); *Bateman v. Am. Multi-Cinema, Inc.*, 623 F.3d 708, 716 (9th Cir. 2010) ("We think it clear that the Rule 23(b)(3) superiority analysis must be consistent with the congressional intent in enacting a particular statutory damages provision.").

Superiority must be contemplated from the perspective of putative absent class members, among other angles. *Frank*, 139 S. Ct. at 1047 (Thomas, J., dissenting); *Bateman*, 623 F.3d at 713 (*quoting Kamm v. California City Development Co.*, 509 F.2d 205, 212 (9th Cir. 1975)). What is best for them? This settlement intends to release their rights in exchange for no compensatory relief. From the perspective of a class member, that cannot be a superior method of adjudicating this controversy. *Cf. Daniels v. Aeropostale West*, No. C 12-05755 WHA, 2014 U.S. Dist. LEXIS 74081, at *8 (N.D. Cal. May 29, 2014) ("The collective-action opt ins would be better off simply walking away from this lawsuit with their rights to sue still intact."). A *cy pres* settlement, in which many of the beneficiaries are already receiving donations from the defendant, is not be superior in either fairness or efficiency to other methods of adjudication.

C. If it is impracticable or impossible to ascertain whether individuals are members of the putative class, class certification should be denied.

This Court preliminarily approved for settlement purposes a class comprising "all persons who used a wireless network device from which Acquired Payload Data was obtained." Dkt. 178 at 2. According to plaintiffs there is no "effective and efficient means of identifying Class Members" and indeed no method at all for the many class members who do not have information from their wireless routers in use more than a decade ago. Dkt. 184 at 26-27. If plaintiffs are right that absent class members cannot self-identify as class members, nor can the settling parties identify individuals as such, then what they ask this Court to endorse is a not a class capable of certification at all.

"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.*

Lowery recognizes that in *Briseno v. ConAgra Foods, Inc.*, the Ninth Circuit conspicuously eschewed the question of whether or not to adopt an "ascertainability" standard under Rule 23. 844 F.3d 1121, 1124 nn. 3 & 4 (9th Cir. 2017). To the extent that *Briseno* means to eliminate wholesale any ascertainability prerequisite to Rule 23 classes, that would constitute a circuit split with almost every other Court of Appeals, and Lowery would preserve that issue for further appeal. Lowery, however, reads *Briseno* as merely rejecting the heightened "administrative feasibility" standard adopted by the Third Circuit in *Carrera v. Bayer Corp.*, 727 F.3d 300 (3d Cir. 2013). In *Briseno*, as in *Noel*, and as in *Mullins*, the court confronted one particular issue: whether classes of consumers who had purchased discrete products within fixed time periods were nonetheless unascertainable because there was no way to corroborate those purchases using documentary evidence. In each of those three cases self-identification by affidavit was possible. Here, conversely, the issue is whether Rule 23 and the Constitution allow a class definition that prevents absent class members from self-identifying as class members. If they can self-identify through declaration, then distribution is feasible, and the *cy pres* is inappropriate. If they cannot self-identify through declaration, then class certification is inappropriate.

The Supreme Court itself has even "recognize[d] 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." *Amchem*, 521 U.S. at 628. Although the class definition here is couched in objective terms, that is not sufficient for an ascertainable class. "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." *Brecher v. Republic of Argentina*, 806 F.3d 22, 25 (2d Cir. 2015).

V. If the Court approves the certification and settlement, it should decline to grant the $4 million attorneys' award request.

For several reasons, the settlement is substantively unfair (*see supra* § III), and possibly premised on an untenable class certification (see *supra* § IV). Nevertheless, if this Court disagrees with each of those propositions, it should still deem unreasonable the $4 million attorneys' award requested by plaintiffs. *See* Dkt. 185, Plaintiffs' Motion for Attorneys' Fees, Reimbursement of Expenses and Plaintiff Service Awards. The Court's fiduciary role remains vital to protect the class at the fee-setting stage. "[C]ourts have an independent obligation to ensure the award, like the settlement itself, is reasonable, even if the parties have already agreed to an amount." *Bluetooth*, 654 F.3d at 941; *see also In re Mercury Interactive Corp. Sec. Litig.*, 618 F.3d 988, 994 (9th Cir. 2010) (instructing lower courts to act with a "jealous regard to the rights of those who are interested in the fund"). "Active judicial involvement in measuring fee awards is singularly important to the proper operation of the class action process." Advisory Committee Notes on 2003 Amendments to Rule 23.

A. *Cy pres* is not a direct benefit to the class, and the appropriate attorney-fee award is zero

Cy pres should not be counted as a benefit to the class for purposes of attorneys' fees. *Pearson*, 772 F.3d at

784. Because class counsel has achieved no direct benefit for the class, any attorney-fee award from this settlement would be impermissibly disproportionate under *Pearson* and *Bluetooth*.

B. In any event, an above-benchmark request of 30% is excessive.

There are two basic flaws with the substance of class counsel's fee request: 1) 30% exceeds the bounds of a reasonable percentage award in a typical case; 2) 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. In particular, plaintiffs sought billions of dollars—$10,000 per class member plus punitive damages—and settled for less than a dollar per class member. It is inequitable for class counsel to waive virtually 100% of a class's claims, yet be paid as if they had won, and not only that, but be paid above the benchmark rate.

First, the percentage-of-recovery method prevails in this Circuit because it aligns the incentives of class counsel and the class much better than does the competing lodestar method. *E.g., In re Anthem Inc. Data Breach Litig.*, 2018 U.S. Dist. LEXIS 140137,2018 WL 3960068, at *5 (N.D. Cal. Aug. 17, 2018); *see also In re Apple Iphone/Ipod Warranty Litig.*, 40 F. Supp. 3d 1176, 1180 (N.D. Cal. 2014) (outlining flaws with lodestar method); *see generally* Charles Silver, *Due Process and The Lodestar Method: You Can't Get There From Here*, 74 TUL. L. REV. 1809 (2000) (observing "solid consensus that the contingent approach minimizes conflicts more efficiently than the lodestar"). "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). In the ordinary common fund case, a proportionate attorney award adheres to the 25% of the fund benchmark established in this Circuit and followed by courts nationwide. *See, e.g., Bluetooth*, 654 F.3d at 942. Class counsel seek $4 million of the $13 million gross settlement (*i.e.* 30.7%).

A district court must supply reasons for deviating from the 25% benchmark. *E.g. Powers v. Eichen*, 229 F.3d 1249, 1256-57 (9th Cir. 2000). "That contingency fee litigation doesn't always result in a recovery as large as plaintiff's counsel originally estimated is not a 'special consideration'—it's the nature of the beast." *Keirsey v. eBay, Inc.*, 2014 WL 644738, at *3 (N.D. Cal. Feb. 18, 2014) (refusing to deviate from 25% to the requested 31% even though it would provide only a .23 multiplier on class counsel's lodestar); *Hawthorne v. Umpqua Bank*, 2015 WL 1927342 (N.D. Cal. Apr. 28, 2015) (refusing to deviate upward to 33% even where the fee request was less than lodestar, and class recovery was 38% of potential recovery); *Zepeda v. Paypal, Inc.*, 2017 WL 1113293, at *20-*23 (refusing to deviate upward to 28% even where 28% was less than full lodestar); *Roe v. Frito-Lay, Inc.*, 2017 WL 1315626 (N.D. Cal. Apr. 7, 2017) (declining to award more than 25% even though lodestar was almost double 25% award); *In re Uber FCRA Litig.*, 2018 WL 2047362 (N.D. Cal. May 2, 2018) (refusing to deviate upward to 33% even where that request was less than 80% of lodestar, focusing on the "very modest result"); *Fishman v. Tiger Nat. Gas Inc.*, 2019 WL 2548665 (N.D. Cal. Jun. 20, 2019) (determining that 27% of the net fund is "too high"; awarding

25%, even though 27% was only half of counsel's claimed lodestar).[10]

But even 25% of the settlement here would be far excessive because "class counsel has not met its responsibility to seek an award that adequately prioritizes direct benefit to the class." *Baby Prods.*, 708 F.3d at 178. Thus, it is "appropriate for the court to decrease the award." *Id.* at 178; *accord* Rhonda Wasserman, *Cy Pres in Class Action Settlements*, 88 U.S.C. L. REV. 97, 135-46 (2014) (advocating for "presumptive reduction of attorneys' fees" where settlement includes significant *cy pres* component). Although obligating Google to donate to third parties may impose a cost on Google (to the extent those donations are not merely a change in accounting entries), compensable settlement value "is not how much money a company

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[10] Class counsel proclaim (Dkt. 185 at 7, 14, 15) that they are merely seeking a 25% benchmark fee award, but that pretends that their $750,000 expense reimbursement request does not exist. But courts can, should and do compare the entire 23(h) request to the 25% benchmark. *E.g., Dennis*, 697 F.3d 858 (treating the "fees and costs" award jointly); *Moore v. Verizon Comms., Inc.*, 2014 WL 588035, at *16 (N.D. Cal. Feb. 13, 2014).

At the very least, if litigation expenses are going to be removed from the numerator, they sould also be removed from the denominator such that class counsel does not collect a commission on top of the litigation costs. *In re Transpacific Passenger Air Transportation Antitrust Litig.*, 2015 U.S. Dist. Lexis 67904 (N.D. Cal. May. 26, 2015) (Breyer, J.) (explaining the Court's "longstanding preference" for awarding fees from the net, rather than the gross settlement fund); *Morris v. Fid. Invs.*, 2019 WL 4040069 (N.D. Cal. Aug. 26, 2019) (awarding 25% net of litigation expenses).

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)).

A dollar that goes to *cy pres* is less valuable than a dollar that goes directly to a class member. District courts awarding fees often recognize this reality. *E.g., In re Heartland Payment Sys., Inc.*, 851 F. Supp. 2d 1040, 1077 (S.D. Tex. 2012) (discounting cy pres by 50% for purposes of awarding fees); *In re Livingsocial Mktg. & Sales Practice Litig.*, 298 F.R.D. 1, 19, 22 (D.D.C. 2013) (cutting fees to 18% in consideration of "proportion of the award that is going to cy pres."); *Weeks v. Kellogg Co.*, No. CV 09-08102 (MMM) (RZx), 2011 U.S. Dist. LEXIS 155472, at *111 (C.D. Cal. Nov. 23, 2011) (reducing to 16.2%); *Perry v. FleetBoston Fin. Corp.*, 229 F.R.D. 105, 123 n.9 (E.D. Pa. 2005) (excluding *cy pres* and non-economic injunctive relief benefits entirely).

The percentage of recovery approach is the prevailing Ninth Circuit fee methodology because it aligns the interests of counsel and its client class much better than does the competing lodestar method. 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 agree to the *cy pres* arrangement and unnamed class members will be permanently left out in the cold. Defendants will prefer to make payments to third parties to whom they are already donating money rather than payments to absent class members. Donations may engender corporate good will, and often merely replace or supplement donations that are already in the pipeline: in

the latter case, the "relief" merely reflects a shift in accounting entries. Coupled with the class counsel's financial indifference, the defendant's preference for charitable donations means that the easy way of reaching settlement will be agreeing to *cy pres*-only settlements.[11]

Ultimately, "courts need to consider the level of direct benefit provided to the class in calculating attorneys' fees." *Baby Prods.*, 708 F.3d at 170. If the court it inclined to approve the settlement and certification, to comply with Rule 23(h), it should reduce the fee award to no more than 10% of the $13 million *cy pres* fund.[12] It would be appropriate to cut fees to zero, because *cy pres* is not a direct benefit to the class. *Pearson v. NBTY, Inc.*, 772 F.3d 778 (7th Cir. 2014); *Frank v. Gaos*, 139 S. Ct. at 1047 (Thomas, J., dissenting).

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[11] Class counsel will themselves often prefer a feel-good ceremony with an oversized check and prominent members of the community to anonymous small-dollar payments to relatively ungrateful involuntary clients. *See, e.g.,* Chasin, *supra*, 163 U. PENN. L. REV. at 1484 ("Many law firms tout their cy pres victories as public service," citing example of self-promotional website of law firm with their *cy pres* recipients).

[12] Although Lowery has not closely inspected class counsel's declared lodestar, their blended rate of $676.60/hour seems likely to be excessive. The "average blended billing rate for forty approved class action settlements in the Northern District of California in 2016 and 2017" was $528.11/hour. *In re Lithium Ion Batteries Antitrust Litig.*, 2019 WL 3856413, 2019 U.S. Dist. LEXIS 139327, at *53 (N.D. Cal. Aug. 16, 2019) (approving blended rate of $467.10/hour) (overlapping class counsel with this case).

CONCLUSION

The court should deny final approval of the settlement, either because the settlement is unfair because distribution is feasible, or because class certification is inappropriate. If the settlement is approved, class counsel is not entitled to fees, and certainly not entitled to the 30% it has requested.

Dated: January 20, 2020

Respectfully submitted,
/s/ Theodore H. Frank
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Attorneys for Objector David Lowery

I am the objector and I have authorized my attorney to file this objection.

/s/David Lowery
David Lowery

Appendix G

Fed. R. Civ. P. 23

Rule 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 interest 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 the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy. The matters pertinent to these findings include:

(A) the class members' interest in individually controlling the prosecution or defense of separate actions.

(B) the extent and nature of any litigation concerning the controversy already begun by or against class members;

> (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and
>
> (D) the likely difficulties in managing a class action.

…

(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:
>
> > (A) the class representative and class counsel have adequately represented the class;
> >
> > (B) the proposal was negotiated at arm's length;
> >
> > (C) the relief provide for the class is adequate, taking into account:

(i) the costs, risks, and delay of trial and appeal;

(ii) the effectiveness of any proposed method of distributing relief to the class, including the method of processing class-member claims;

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

(iv) any agreement required to be identified under Rule 23(e)(3); and

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

…