No. 17-961

IN THE

Supreme Court of the United States

THEODORE H. FRANK, ET AL.,
Petitioners,
v.
PALOMA GAOS, ET AL.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

JOINT APPENDIX

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Joint Appendix Materials

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Petition Appendix Materials

*The following opinions, decisions, judgments, and orders have been omitted in printing the joint appendix because they appear on the following pages to the Petition for Writ of Certiorari:

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF CALIFORNIA,
SAN JOSE DIVISION

No. 5:10-CV-04809-EJD

IN RE GOOGLE REFERRER HEADER
PRIVACY LITIGATION

RELEVANT DOCKET ENTRIES

DATE	NO.	PROCEEDINGS
10/25/2010	1	Complaint (summons issued) jury demand against Google Inc. *** Filed by Paloma Gaos. ***
02/10/2011	19	Motion to Dismiss Plaintiff's Complaint Pursuant to Rules 12(b)(1) and 12(b)(6) filed by Google Inc. ***
02/10/2011	20	Declaration of Jean B. Niehaus in Support of 19 Motion to Dismiss Plaintiff's Complaint *** filed by Google Inc. ***
03/21/2011	22	Response (re 19 Motion to Dismiss Plaintiff's Complaint ***) filed by Paloma Gaos.
03/28/2011	23	Reply (re 19 Motion to Dismiss Plaintiff's Complaint ***) filed by Google Inc. ***

DATE	NO.	PROCEEDINGS
04/07/2011	24	Order Granting 19 Motion to Dismiss. The Court GRANTS Defendant's Motion to Dismiss Plaintiff's Complaint without prejudice. ***
04/25/2011	25	Order Reassigning Case. Case reassigned to Judge Edward J. Davila for all further proceedings. Judge James Ware no longer assigned to the case. ***
05/02/2011	26	First Amended Complaint against Google Inc. Filed by Paloma Gaos. ***
05/06/2011	27	Joint Case Management Statement filed by Paloma Gaos. ***
05/06/2011	28	Joint Case Management Statement (attorney name spelling corrected) by Paloma Gaos. ***
05/16/2011	29	Motion to Dismiss First Amended Complaint Pursuant to Rules 12(b)(1) and 12(b)(6) filed by Google Inc. ***
05/16/2011	30	Declaration of Jean B. Niehaus in Support of 29 Motion to Dismiss First Amended Complaint *** filed by Google Inc. ***
10/07/2011	32	Response (re 29 Motion to Dismiss First Amended Complaint ***) filed by Paloma Gaos. ***
10/07/2011	33	Declaration of Kassra P. Nassiri in Support of 32 Opposition/Response to Motion, filed by Paloma Gaos. ***

DATE	NO.	PROCEEDINGS
10/14/2011	34	Reply (re 29 Motion to Dismiss First Amended Complaint ***) filed by Google Inc. ***
10/28/2011	35	Minute Entry: Motion Hearing held on 10/28/2011 before Judge Edward J. Davila re 29 Motion to Dismiss First Amended Complaint Pursuant to Rules 12(b)(1) and 12(b)(6) *** The Court took the motion under submission after oral argument. The Court to issue further Order following hearing. ***
11/16/2011	36	Statement of Recent Decision pursuant to Civil Local Rule 7–3.d filed by Google Inc. ***
12/06/2011	37	Transcript of Proceedings held on 10/28/2011, before Judge Edward J. Davila. ***
03/29/2012	38	Order by Hon. Edward J. Davila Granting in Part and Denying in Part 29 Motion to Dismiss. with leave to amend as to all other claims. ***
05/01/2012	39	Amended Complaint (Second) against All Defendants. Filed by Paloma Gaos. ***
06/15/2012	44	Motion to Dismiss / Plaintiffs' Second Amended Complaint Pursuant to Rules 12(b)(1) and 12(b)(6) filed by Google Inc. *** (Attachments: # 1 Declaration of Randall W. Edwards in Support of Motion to Dismiss ***) ***

DATE	NO.	PROCEEDINGS
07/19/2012	45	Response (re 44 Motion to Dismiss / Plaintiffs' Second Amended Complaint ***) filed by Paloma Gaos. ***
08/02/2012	46	Reply Reply in Support of Google Inc.'s 44 Motion to Dismiss Plaintiffs' Second Amended Complaint*** filed by Google Inc. ***
09/19/2012	47	Clerks Notice Taking Motion Under Submission Without Oral Argument. The Motion to Dismiss (Docket Item No. 44) before Judge Edward J. Davila previously noticed for 9/21/2012 at 9:00 AM has been taken under submission without oral argument pursuant to Civ. L.R. 7–1(b). ***
03/20/2013	48	Motion to Relate Case (Administrative) filed by Paloma Gaos. ***
03/27/2013	49	Clerks Notice. The court has reviewed the motion and determined that no cases are related and no reassignments shall occur. ***
04/26/2013	50	Stipulation With Proposed Order for Consolidation of Class Actions filed by Paloma Gaos. ***
04/30/2013	51	Order as Modified by the Court Granting 50 Stipulation of Class Actions. Before consolidation, the clerk shall relate case numbers 5:10–cv–04809 EJD and 5:13–cv–00093 LHK and reassign the latter to the undersigned. The clerk shall

DATE	NO.	PROCEEDINGS
		then administratively close case number 5:13–cv–00093 once reassigned. The pending motion to dismiss filed in case number 5:10–cv–04809 EJD (Docket Item No. 44) is Terminated as Moot in light of the forthcoming consolidated complaint. ***
07/19/2013	52	Motion for Settlement (Preliminary Approval) filed by Paloma Gaos. *** (Attachments: # 1 Exhibit Declaration – Aschenbrener, # 2 Exhibit Declaration – Chorowsky, # 3 Exhibit Settlement Agreement, # 4 Exhibit Declaration – Simmons, # 5 Exhibit Declaration – Nassiri, # 6 Exhibit Proposed Order) ***
08/21/2013	53	Declaration of Michael Aschenbrener in Support of 52 Motion for Settlement (Preliminary Approval) filed by Paloma Gaos. ***
08/23/2013	55	Minute Entry: Motion Hearing held on 8/23/2013 before Edward J. Davila (Date Filed: 8/23/2013) re 52 Motion for Settlement (Preliminary Approval) filed by Paloma Gaos. The Court requested revised proposed order and forms submitted by September 6, 2013. Matter submitted on September 6, 2013. ***
08/27/2013	57	Transcript of Proceedings held on 08/23/2013, before Judge Davila. ***

DATE	NO.	PROCEEDINGS
09/03/2013	58	Received Document Letter by Electronic Privacy Information Center dated 8/28/13. ***
09/06/2013	59	Stipulation With Proposed Order / Stipulated Request for Extension of Deadline to File Supplemental Materials filed by Google Inc.. ***
09/10/2013	60	Order Granting 59 Stipulation for Extension to File Supplemental Materials. The deadline to file the supplemental information requested at the August 23, 2013 Preliminary Approval Hearing is extended until September 13, 2013. ***
09/13/2013	61	Declaration of Kassra P. Nassiri in Support of 52 Motion for Settlement (Preliminary Approval), *** filed by Paloma Gaos. ***
09/16/2013	62	Received Letter from Marc Rotenberg Executive Director Electronic Privacy Information Center. ***
03/26/2014	63	Order granting 52 Motion for Preliminary Approval of Class Action Settlement. A hearing on the final approval of class action settlement shall be held on August 29, 2014 at 9:00 a.m. ***
05/05/2014	64	Status Report by Paloma Gaos. (Attachments: # 1 Declaration of Kassra P. Nassiri, # 2 Declaration of Randall W. Edwards) ***

DATE	NO.	PROCEEDINGS
07/25/2014	65	Motion for Settlement (Final Approval) filed by Paloma Gaos. *** (Attachments: # 1 Declaration Aschenbrener Declaration, # 2 Declaration Nassiri Declaration, # 3 Declaration Chorowsky Declaration, # 4 Declaration Class Admin Declaration, # 5 Proposed Order Proposed Order Granting Final Approval and Fees, # 6 Proposed Order Proposed Final Judgment Order) ***
07/25/2014	66	Motion for Attorney Fees Expenses and Costs filed by Paloma Gaos. *** (Attachments: # 1 Declaration Aschenbrener, # 2 Declaration Nassiri, # 3 Declaration Chorowsky, # 4 Declaration Class Admin, # 5 Declaration Dore, # 6 Declaration Gaos, # 7 Declaration Italiano, # 8 Declaration Priyev, # 9 Proposed Order for Final Approval and Fees, # 10 Proposed Order Final Judgment) ***
08/05/2014	67	Objections to 65 Notice of Motion for Preliminary Approval of Class Action Settlement by Kim Morrison. ***
08/05/2014	68	Objections to 65 Proposed Class Action Settlement by David Weiner. ***

DATE	NO.	PROCEEDINGS
08/08/2014	69	Notice of Appearance by Theodore Harold Frank on behalf of Objectors Melissa Holyoak and Theodore H. Frank ***
08/08/2014	70	Objection (re 65 Motion for Settlement (Final Approval), 66 Motion for Attorney Fees Expenses and Costs filed by Theodore H Frank, Melissa Holyoak. (Attachments: # 1 Declaration of Melissa Holyoak, # 2 Declaration of Theodore H. Frank) ***
08/15/2014	71	Objections to re 65 Motion for Settlement (Final Approval) by Cameron Jan. ***
08/22/2014	75	Reply (re 65 Motion for Settlement (Final Approval), 66 Motion for Attorney Fees Expenses and Costs) filed by Paloma Gaos. (Attachments: # 1 Declaration Aschenbrener, # 2 Declaration Nassiri, # 3 Declaration Class Admin, # 4 Proposed Order Final Approval & Fees, # 5 Proposed Order Final Judgment) ***
08/29/2014	80	Minute Entry: Motion Hearing held on 8/29/2014 before Judge Edward J. Davila *** re 65 Motion for Settlement (Final Approval) filed by Paloma Gaos, 66 Motion for Attorney Fees Expenses and Costs filed by Paloma Gaos. Matter submitted. The Court to issue written order. ***

DATE	NO.	PROCEEDINGS
09/08/2014	82	Transcript of Proceedings held on 08/29/2014, before Judge Davila. ***
03/31/2015	85	Order granting 65 Motion for Final Approval of Class Action Settlement; granting 66 Motion for Attorney Fees, Costs and Incentive Awards. The Clerk shall close this file upon entry of Judgment. ***
04/02/2015	86	Final Judgment and order of Dismissal with Prejudice. ***
04/27/2015	87	Notice of Appeal to the 9th Circuit Court of Appeals filed by Theodore H Frank, Melissa Holyoak. ***
04/29/2015	88	USCA Case Number 15–15858 9th Circuit Court of Appeals for 87 Notice of Appeal, filed by Theodore H Frank, Melissa Holyoak. ***
10/08/2015	90	Certificate of Interested Entities by Google Inc. identifying Corporate Parent Alphabet Inc. for Google Inc. ***
08/22/2017	91	Opinion of USCA - Affirmed ***
10/05/2017	92	Order of USCA The petition for panel rehearing and the petition for rehearing en banc are DENIED. ***
10/13/2017	93	Mandate of USCA as to 87 Notice of Appeal ***
10/13/2017	94	Clerk's Letter Spreading Mandate to Counsel ***

DATE	NO.	PROCEEDINGS
01/11/2018	95	Supreme Court Case Info Case number: 17-961 Filed on: 01/03/2018 Cert Petition Action 1: Pending ***
05/03/2018	96	The petition for a writ of certiorari is granted. re 87 Notice of Appeal ***

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 15-15858

IN RE GOOGLE REFERRER HEADER
PRIVACY LITIGATION

PALOMA GAOS, ET AL.,

Plaintiffs-Appellees,

v.

MELISSA ANN HOLYOAK; THEODORE H. FRANK

Objectors-Appellants,

v.

GOOGLE, INC.,

Defendants-Appellee.

RELEVANT DOCKET ENTRIES

DATE	NO.	PROCEEDINGS
04/28/2015	1	DOCKETED CAUSE AND ENTERED APPEARANCES OF COUNSEL. ***
09/04/2015	10	Submitted (ECF) excerpts of record. Submitted by Appellants Theodore H. Frank and Melissa Ann Holyoak. ***

DATE	NO.	PROCEEDINGS
09/04/2015	11	Submitted (ECF) Opening Brief for review. Submitted by Appellants Theodore H. Frank and Melissa Ann Holyoak. ***
12/04/2015	25	Submitted (ECF) Answering Brief for review. Submitted by Appellees Paloma Gaos, Anthony Italiano and Gabriel Priyev. ***
12/04/2015	26	Submitted (ECF) Answering Brief for review. Submitted by Appellee Google, Inc. ***
12/04/2015	27	Submitted (ECF) supplemental excerpts of record. Submitted by Appellees Paloma Gaos, Anthony Italiano and Gabriel Priyev. ***
12/04/2015	28	Filed (ECF) Appellees Paloma Gaos, Anthony Italiano and Gabriel Priyev Motion to take judicial notice of settlement website, page thereon titled "Proposed Cy Pres Recipients and Allocations," the citation to that page to the District Court, the 6 specific cy pres proposals linked from that page, and the District Court's review of the cy pres proposals. ***
01/11/2016	37	Filed (ECF) Appellee Google, Inc. citation of supplemental authorities. ***
01/15/2016	38	Submitted (ECF) Reply Brief for review. Submitted by Appellants

DATE	NO.	PROCEEDINGS
		Theodore H. Frank and Melissa Ann Holyoak. ***
05/25/2016	41	Filed (ECF) Appellee Google, Inc. citation of supplemental authorities. ***
03/01/2017	47	Filed (ECF) Appellee Google, Inc. citation of supplemental authorities. ***
03/06/2017	48	Filed (ECF) Appellants Theodore H. Frank and Melissa Ann Holyoak citation of supplemental authorities. ***
03/06/2017	49	Filed (ECF) Appellants Theodore H. Frank and Melissa Ann Holyoak citation of supplemental authorities. ***
03/06/2017	50	Filed (ECF) Appellees Paloma Gaos, Anthony Italiano and Gabriel Priyev citation of supplemental authorities. ***
03/13/2017	51	ARGUED AND SUBMITTED TO J. CLIFFORD WALLACE, M. MARGARET MCKEOWN and JAY S. BYBEE. ***
03/13/2017	52	Filed (ECF) Appellants Theodore H. Frank and Melissa Ann Holyoak citation of supplemental authorities. ***
03/13/2017	53	Filed Audio recording of oral argument. ***

DATE	NO.	PROCEEDINGS
03/14/2017	54	Filed (ECF) Appellees Paloma Gaos, Anthony Italiano and Gabriel Priyev citation of supplemental authorities. ***
03/17/2017	55	Filed (ECF) Appellee Google, Inc. citation of supplemental authorities. Date of service: 03/17/2017. ***
08/22/2017	56	Filed order (J. CLIFFORD WALLACE, M. MARGARET MCKEOWN and JAY S. BYBEE) Appellees' motion to take judicial notice, [28], is denied as unnecessary. ***
08/22/2017	57	FILED OPINION (J. CLIFFORD WALLACE, M. MARGARET MCKEOWN and JAY S. BYBEE) AFFIRMED. Judge: JCW Concurring & dissenting, Judge: MMM Authoring. FILED AND ENTERED JUDGMENT. ***
09/05/2017	58	Filed (ECF) Appellants Theodore H. Frank and Melissa Ann Holyoak petition for panel rehearing and petition for rehearing en banc ***
10/05/2017	60	Filed order (J. CLIFFORD WALLACE, M. MARGARET MCKEOWN and JAY S. BYBEE): The panel has voted to deny the petition for panel rehearing. Judge McKeown and Judge Bybee vote to deny the petition for rehearing en banc. Judge Wallace

DATE	NO.	PROCEEDINGS
		recommends granting the petition for rehearing en banc. The full court has been advised of the petition for rehearing and rehearing en banc, and no active 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. ***
10/13/2017	61	MANDATE ISSUED. ***
01/11/2018	62	Supreme Court Case Info Case number: 17-961 Cert Petition Action 1: Pending ***
05/03/2018	63	Supreme Court Case Info Case number: 17-961 Cert Petition Action 1: Granted, 04/30/2018 ***

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

No. C 10-04809 JW

PALOMA GAOS,

Plaintiff,

v.

GOOGLE, INC.,

Defendant

ORDER GRANTING DEFENDANT'S MOTION TO DISMISS WITH LEAVE TO AMEND

Presently before the Court is Defendant's Motion to Dismiss Plaintiff's Complaint. (hereafter, "Motion," Docket Item No. 19.) The Court finds it appropriate to take the Motion under submission without oral argument. *See* Civ. L.R. 7-1(b). Based on the papers submitted to date, the Court GRANTS Defendants' Motion to Dismiss.

A. Background

In a Complaint[1] filed on October 25, 2010, Plaintiff alleges as follows:

Plaintiff is a resident of San Francisco County, California. (Complaint ¶ 6.) Defendant is a Delaware corporation that maintains its headquarters in Mountain View, California. *(Id.)* Defendant conducts business throughout California and the nation. *(Id.)*

---

[1] (Class Action Complaint, herafter, "Complaint," Docket Item No. 1.)

Defendant's primary business enterprise centers on its proprietary search engine. (Complaint ¶ 13.) Defendant runs millions of servers around the world and processes over one billion user-generated search requests every day. *(Id.)* Defendant generates substantial profits from selling advertising. (*Id.*) Defendant is able to operate its search engine more efficiently by analyzing user search data and Defendant benefits from Search Engine Optimization ("SEO") companies who also use this data to better target their websites to particular user search terms. (*Id.* ¶ 16.)

Since the launch of Defendant's search service, and continuing until the present, Defendant's search engine has intentionally included the search terms in the URL of the search results page. (Complaint ¶¶ 37, 41.) Neither Defendant's search technology nor the technological architecture of the Internet requires Defendant divulge these search terms. (*Id.*) As a result of the search terms being included in the URL, when a user of Defendant's search service clicks on a link from Defendant's search results page, the owner of the website that the user clicks on will receive the user's search terms in the Referrer Header from Defendant. *(Id.)* Several web analytics services parse the search query information from web server logs, or otherwise collect the search query from the Referrer Header transmitted by each visitor's web browser. (*Id.* ¶ 39.) Defendant's own analytics products provide webmasters with this information in the aggregate. (*Id.*)

Search terms could be linked together with the identity of the user through the process of "reidentification," either by linking the terms with the user's IP address, which is also sometimes released

with the clicked link; with any cookies stored on the user's computer; or with "vanity searches," where the user searches for their own name. (Complaint ¶¶ 31, 70-73.)

On the basis of the allegations outlined above, Plaintiff alleges seven causes of action: (1) Violation of the Electronic Communications Privacy Act ("ECPA"), 18 U.S.C. § 2510; (2) Violation of the Consumers Legal Remedies Act, Cal. Civ. Code §§ 1750, *et seq.*; (3) Violation of Cal. Bus. & Prof. Code §§ 17500, *et seq.*; (4) Violation of Cal. Bus. & Prof. Code §§ 17500, *et seq.*; (5) Public Disclosure of Private Facts; (6) Violation of Cal. Civ. Code §§ 1572, 1573; and (7) Unjust Enrichment. *(See* Complaint.)

B. Standards

Rule 12(b)(1) of the Federal Rules of Civil Procedure provides for a motion to dismiss for lack of subject-matter jurisdiction. A Rule 12(b)(1) motion may be either facial, where the inquiry is confined to the allegations in the complaint, or factual, where the court is permitted to look beyond the complaint to extrinsic evidence. *Wolfe v. Strankman*, 392 F.3d 358, 362 (9th Cir. 2004). On a facial challenge, all material allegations in the complaint are assumed true, and the question for the court is whether the lack of federal jurisdiction appears from the face of the pleading itself. *See Wolfe*, 392 F.3d at 362; *Thornhill Publishing Co. v. General Telephone Electronics*, 594 F.2d 730, 733 (9th Cir. 1979). When a defendant makes a factual challenge "by presenting affidavits or other evidence properly brought before the court, the party opposing the motion must furnish affidavits or other evidence necessary to satisfy its burden of establishing subject-matter jurisdiction." *Safe Air For Everyone v. Meyer*, 373 F.3d 1035, 1039 (9th Cir. 2004). The court need

not presume the truthfulness of the plaintiff's allegations under a factual attack. *White v. Lee*, 227 F.3d 1214, 1242 (9th Cir. 2000); *Augustine v. United States*, 704 F.2d 1074, 1077 (9th Cir. 1983). However, in the absence of a full-fledged evidentiary hearing, disputes in the facts pertinent to subject-matter are viewed in the light most favorable to the opposing party. *Dreier v. United States*, 106 F.3d 844, 847 (9th Cir. 1996). The disputed facts related to subject-matter jurisdiction should be treated in the same way as one would adjudicate a motion for summary judgment. *Id.*

C. Discussion

Defendant moves to dismiss Plaintiff's Complaint on the grounds that: (1) Plaintiff fails to allege injury-in-fact sufficient to establish Article III standing; (2) Plaintiff's state law claims are preempted by the Stored Communications Act ("SCA"); (3) Plaintiff's Consumer Legal Remedies Claim ("CLRC") is inapplicable as the alleged transaction does not involve the "sale or lease of goods to any consumer," as required by Cal. Civ. Code § 1770(a); (4) Plaintiff fails to allege facts sufficient to meet the stringent standing requirements of her Unfair Competition Laws ("UCL") and False Advertising Laws ("FAL"), further Plaintiff fails to state a claim under these statutes; (5) Plaintiff fails to plead public disclosure of private facts sufficient to state a claim for common law violation of privacy; (6) Plaintiff's cause of action for Unjust Enrichment fails as there is no such cause of action under California law. (Motion at 5-22.) Plaintiff responds that dismissal is improper as: (1) alleging violation of Plaintiff's statutory rights under the SCA is sufficient to establish Article III standing; (2) Plaintiff has alleged actual harm through the

disclosure of her private information sufficient to convey standing for her state law claims; (3) Defendant's citation to a provision of the SCA as an express preemption clause misinterprets the provision, which is solely intended to address the exclusionary rule; (4) Plaintiff pleads her fraud claims with sufficient particularity to satisfy Rule 9(b); (5) Plaintiff alleges that Defendant disclosed her private search queries, which is sufficient to state a claim for common law privacy violation; (6) California law does, in fact, recognize a cause of action for unjust enrichment. (Opp'n at 6-20.)

Because the issue of whether Plaintiff's allegations are sufficient to convey Article III standing may be dispositive, the Court addresses it first.

To satisfy the standing requirements of Article III, a plaintiff must show that she has suffered an "injury in fact" that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical. *Gest v. Bradbury*, 443 F.3d 1177, 1181 (9th Cir. 2006) (citing *Friends of the Earth v. Laidlaw Environmental Services (TOC), Inc.*, 528 U.S. 167, 180-81 (2000)). The injury required by Article III can exist solely by virtue of "statutes creating legal rights, the invasion of which creates standing." *Edwards v. First Am. Corp.*, 610 F.3d 514, 517 (9th Cir. 2010) (quoting *Warth v. Seldin*, 422 U.S. 490, 500 (1975)). In such cases, the "standing question . . . is whether the constitutional or statutory provision on which the claim rests properly can be understood as granting persons in the plaintiff's position a right to judicial relief." *Id.* (quoting *Warth*, 422 U.S. at 500)). However, the requirements of Article III remain: "the plaintiff must still allege a distinct and palpable injury to himself, even if it is

an injury shared by a large class of other possible litigants." *Warth*, 422 U.S. at 500.

Here, Plaintiff alleges in pertinent part:

> Plaintiff has at all material times been a user of Google's search engine services and has conducted "vanity searches," including searches for her actual name and the names of her family members and has clicked on links contained in Google's search results.
>
> (Complaint ¶ 6.) As alleged herein, Google has knowingly divulged the contents of communications of Plaintiff and members of the Class while those communications were in electronic storage on its service, in violation of 18 U.S.C. § 2702(a)(1). (*Id.* ¶ 93.) Plaintiff and members of the Class have suffered harm as a result of Google's violations of 18 U.S.C. § 2702. (*Id.* ¶ 95.)

Based on the allegations above, the Court finds that Plaintiff has failed to plead facts sufficient to establish Article III standing. While a plaintiff may establish standing through allegations of violation of a statutory right, Plaintiff has failed to plead facts sufficient to support a claim for violation of her statutory rights. In particular, Plaintiff failed to plead that she clicked on a link from the Google search page during the same time period that Defendant allegedly released search terms via referrer headers. Rather, Plaintiff's Complaint alleges that, at numerous times during the putative class period, Defendant ceased the practice of allowing search terms to pass through referrer headers either because of the implementation of a new technology or mere error. (Complaint ¶¶ 43-57.) Further, Plaintiff's conclusory allegations of disclo-

sures of communications resulting in unspecified harm in violation of the ECPA, not supported by any facts, are insufficient to allege violation of Plaintiff's statutory rights. Thus, the Court finds that Plaintiff lacks Article III standing to assert her claims.

Accordingly, the Court GRANTS Defendant's Motion to Dismiss Plaintiff's Complaint without prejudice to Plaintiff to amend to add facts sufficient to establish Article III standing.

C. Conclusion

The Court GRANTS Defendant's Motion to Dismiss Plaintiff's Complaint without prejudice. On or before **May 2, 2011,** Plaintiff shall file an Amended Complaint consistent with the terms of this Order.

Dated: April 7, 2011

/s/ James Ware
JAMES WARE
United States District Chief Judge

* * *

UNITED STATES DISTRICT COURT NORTHERN DISTRICT OF CALIFORNIA SAN JOSE DIVISION

Case No.: 5:10-CV-4809 EJD

PALOMA GAOS,

Plaintiff,

v.

GOOGLE INC.,

Defendant.

ORDER GRANTING-IN-PART AND DENYING-IN-PART MOTION TO DISMISS (Re: Docket No. 29)

Pending before the court is Defendant Google Inc.'s ("Google") motion to dismiss the First Amended Complaint ("FAC"). On May 16, 2011, Google filed this motion to dismiss. The court heard oral argument on October 28, 2011. For the reasons discussed below, Google's motion is GRANTED IN PART as to claims 2-7 and DENIED IN PART as to claim 1.

I. BACKGROUND

On October 25, 2010, Plaintiff Paloma Gaos ("Gaos") filed the Complaint initiating this action. On April 7, 2011, Chief Judge Ware granted Google's motion to dismiss the Complaint with leave to amend because Gaos had failed to allege an "injury in fact" sufficient to establish Article III standing. *See* ECF No. 24. On May 2, 2011, Gaos filed the FAC. In the FAC, Gaos makes the following allegations:

Gaos is a resident of San Francisco County, California. FAC ¶ 6. Google is a Delaware corporation

that maintains its headquarters in Mountain View, California. *Id.* ¶ 7. Defendant conducts business throughout California and the nation. *Id.*

Defendant's primary business enterprise centers on its proprietary search engine. *Id*. ¶ 13. Defendant runs millions of servers around the world and processes over one billion user-generated search requests every day. *Id*. Defendant generates substantial profits from selling advertising. *Id*. ¶ 14. Defendant is able to operate its search engine more efficiently by analyzing user search data and Defendant benefits from Search Engine Optimization ("SEO") companies who also use this data to better target their websites to particular user search terms. *Id*. ¶ 17.

Since the launch of Defendant's search service, and continuing until the present, Defendant's search engine has intentionally included the search terms in the URL of the search results page. *Id*. ¶ 39. Neither Defendant's search technology nor the technological architecture of the Internet requires Defendant divulge these search terms. *Id*. ¶ 43. As a result of the search terms being included in the URL, when a user of Defendant's search service clicks on a link from Defendant's search results page, the owner of the website that the user clicks on will receive the user's search terms in the Referrer Header from Defendant. *Id*. ¶ 40. Several web analytics services parse the search query information from web server logs, or otherwise collect the search query from the Referrer Header transmitted by each visitor's web browser. *Id*. ¶ 41. Defendant's own analytics products provide webmasters with this information in the aggregate. *Id*.

Search terms could be linked together with the identity of the user through the process of "reidentification," either by linking the terms with the user's IP address, which is also sometimes released with the clicked link; with any cookies stored on the user's computer; or with "vanity searches," where the user searches for their own name. *Id*. ¶¶ 32, 60-63.

On the basis of the allegations outlined above, Plaintiff brings seven causes of action: (1) Violation of the Electronic Communications Privacy Act, 18 U.S.C. § 2510, specifically of the Stored Communications Act ("SCA"), 18 U.S.C. § 2701; (2) Fraudulent Misrepresentation; (3) Negligent Misrepresentation; (4) Public Disclosure of Private Facts; (5) Actual and Constructive Fraud; (6) Breach of Contract; and (7) Unjust Enrichment.

On May 16, 2011, Google filed this motion to dismiss arguing that this court lacks subject matter jurisdiction because Gaos has again failed to establish that she has standing under Article III of the United States Constitution because she has not alleged she suffered an injury in fact. In the alternative, Google argues that the FAC should be dismissed because Gaos has failed to state a claim upon which relief can be granted as to her privacy claim, breach of contract claim, fraud-based claims, and unjust enrichment claim. Additionally, Google argues that all the state-law claims are preempted by the SCA.

II. LEGAL STANDARDS

An Article III federal court must ask whether a plaintiff has suffered sufficient injury to satisfy the "case or controversy" requirement of Article III of the U.S. Constitution. To satisfy Article III standing, plaintiff must allege: (1) an injury in fact that is

concrete and particularized, as well as actual and imminent; (2) that the injury is fairly traceable to the challenged action of the defendant; and (3) that it is likely (not merely speculative) that injury will be redressed by a favorable decision. *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 180-81 (2000); *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561-62 (1992). A suit brought by a plaintiff without Article III standing is not a "case or controversy," and an Article III federal court therefore lacks subject matter jurisdiction over the suit. *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 101 (1998). In that event, the suit should be dismissed under Rule 12(b)(1). *See id.* at 109-110. At least one named plaintiff must have suffered an injury in fact. *See Lierboe v. State Farm Mut. Auto. Ins. Co.*, 350 F.3d 1018, 1022 (9th Cir. 2003) ("[I]f none of the named plaintiffs purporting to represent a class establishes the requisite of a case or controversy with the defendants, none may seek relief on behalf of himself or any other member of the class.").

III. DISCUSSION

A. Claims 2-7

Google argues that Gaos has failed to allege that she has suffered an injury in fact that is concrete and particularized as well as actual and imminent. As the sole named plaintiff in this action, Gaos alleged she "has suffered actual harm in the form of Google's unauthorized and unlawful dissemination of Plaintiff's search queries, which contained sensitive personal information, to third parties." FAC ¶ 80. Gaos does not identify what injury resulted from this dissemination. Additionally, the FAC states only that Gaos searched for her name and her family's names.

FAC ¶ 77. Thus, the FAC does not plead facts sufficient to show that the disseminated information is of a nature that places her in imminent danger of harm. C*f. Doe I v. AOL, LLC*, 719 F. Supp. 2d 1102 (N.D. Cal. 2010) (finding injury in fact where database of search queries was posted online containing AOL members' names, social security numbers, addresses, telephone numbers, user names, passwords, and bank account information which could be matched to specific AOL members); *Krottner v. Starbucks Corp.*, 628 F.3d 1139, 1140 (9th Cir. 2010) (finding injury in fact where a laptop containing names, address, and social security numbers of Starbucks employees was stolen putting employees at risk of future identity theft). Thus, Gaos has not alleged injury sufficient for Article III standing with respect to her non-statutory causes of action, claims 2–7.[1]

Accordingly, Google's motion to dismiss is GRANTED with leave to amend as to claims 2–7.

B. Claim 1: Violation of the SCA

The injury required by Article III, however, can exist solely by virtue of "statutes creating legal rights, the invasion of which creates standing." *Edwards v. First Am. Corp*., 610 F.3d 514, 517 (9th Cir. 2010) (quoting *Warth v. Seldin*, 422 U.S. 490, 500 (1975)). In such cases, the "standing question . . . is whether the constitutional or statutory provision on which the claim rests properly can be understood as granting persons in the plaintiff's position a right to judicial relief." *Id*. (quoting *Warth*, 422 U.S. at 500). Although "Congress

[1] Because the court finds that Gaos has failed to establish Article III standing for her state-law claims, it need not address Defendant's alternative arguments that Plaintiff's claims fail under Fed. R. Civ. P. 12(b)(6) or are preempted.

cannot erase Article III's standing requirements by statutorily granting the right to sue to a plaintiff who would not otherwise have standing," *Raines v. Byrd*, 521 U.S. 811, 820 n.3 (1997), a plaintiff may be able to establish constitutional injury in fact by pleading a violation of a right conferred by statute so long as she can allege that the injury she suffered was specific to her, *see Warth*, 422 U.S. at 501.

Gaos argues she has alleged an injury in fact based on a violation of her rights under the SCA, which prohibits an electronic communication service from divulging the contents of a communication in electronic storage, 18 U.S.C. § 2702(a)(1), and prohibits a remote computing service from divulging the contents of communications carried or maintained on that service, 18 U.S.C. § 2702(a)(2).[2] Google offers two arguments that Gaos lacks standing to bring this SCA claim.

First, Google argues that Gaos has failed to allege any injury resulting from the SCA violation. Google, however, has not cited any authority supporting its argument that injury beyond a violation of the SCA itself is required to allege a concrete injury. The court finds that the SCA creates a right to be free from the unlawful disclosure of communications as prohibited by the statute. The SCA explicitly creates a private

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[2] On November 16, 2011, Google submitted a Statement of Recent Decision regarding the Order Granting Defendant's Motion To Dismiss in *Low v. LinkedIn Corp*., 2011 WL 5509848, Case No. 11-CV-1467-LHK (N.D. Cal. Nov. 11, 2011). This order, however, specifically states that it does not address whether the creation of a statutory right by the SCA is sufficient to confer standing on Plaintiff. *See Low*, 2011 WL 5509848, at *6 n.1. Thus, the decision is not instructive on the issue of injury based on a statutory right.

right of action for persons aggrieved by a disclosure of their communications in violation of the statute. 18 U.S.C. § 2702(a) (providing that "any . . . person aggrieved by any violation of this chapter" may maintain a civil action if the violation was done knowingly or intentionally). Google's argument fails because the SCA provides a right to judicial relief based only on a violation of the statute without additional injury. Thus, a violation of one's statutory rights under the SCA is a concrete injury. *See Jewel v. National Sec. Agency*, 2011 WL 6848406, at *4 (9th Cir. 2011) (finding violation of the SCA to be a concrete injury).

Gaos must also allege that the injury she suffered was particularized to her. "The critical question is whether she 'has alleged such a personal stake in the outcome of the controversy as to warrant . . . invocation of federal court jurisdiction.'" *Id*. (citing *Summers v. Earth Island Inst*., 555 U.S. 488, 493 (2009)). In pertinent part, the FAC states that Gaos conducted numerous searches, including searches for her name and her family members' names, and clicked on links on her Google search results pages. The FAC further alleges that Google sent the URLs containing her search queries to third party websites that appeared in the Google search results page, and that this transmission was unlawful and unauthorized. FAC. ¶¶ 76-80. In sum, Gaos alleges that her search queries were disclosed without her authorization, provides examples of those queries, and explains how and by whom that disclosure was made. Because Gaos's alleged injuries were to *her* rights under the SCA, rather than some generalized right, Gaos's injuries are sufficiently particularized—even if many other people were similarly injured. *See Jewel* at *7 ("[T]he fact that a harm is widely shared does not necessarily render it a generalized grievance.").

Additionally, Google argues that Gaos failed to correct the deficiencies identified by Chief Judge Ware in the order dismissing the original complaint. Specifically, Google argues that the FAC still includes "conclusory allegations of disclosures of communications resulting in unspecified harm in violation of the ECPA, not supported by any facts, [which] are insufficient to allege violation of [Gaos's] statutory rights." Google Inc.'s Mot. to Dismiss at 6, ECF No. 29 (quoting Order Granting Defs.' Mot. To Dismiss at 5, ECF No. 24). Gaos argues the FAC remedied the problems identified by Chief Judge Ware by adding allegations about the disclosure of her own search queries. Google does not identify any element of an SCA claim that it argues has been pleaded in a conclusory or otherwise insufficient manner in the FAC.[3] Rather, Google's argument focuses on Gaos's failure to allege facts sufficient to specify harm resulting from the disclosure. As discussed above, a violation of the SCA itself is injury sufficient to allege an SCA claim. It is unclear whether Google objects to the pleadings on any other basis.[4]

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[3] Google argues for the first time in its reply brief that Gaos failed to allege her own lack of knowledge and consent to the disclosure. The court will not address this argument because it was raised after Gaos's opposition was filed.

[4] The court notes that although Gaos has alleged sufficient injury for standing based on a violation of the SCA, this finding does not mean Gaos has properly stated a claim for relief under the SCA. *See Fraley v. Facebook, Inc*., Case No. 11-CV-01726-LHK, 2011 WL 6303898, at *12 (N.D. Cal. Dec. 16, 2011) ("That Plaintiffs have satisfied the injury-in-fact requirement for constitutional standing does not necessarily mean they have properly stated a claim for relief."); *In re Facebook Privacy Litigation*, 791 F. Supp. 2d 705, 712-13 (N.D. Cal. 2011) (finding that plaintiffs had alleged the injury required for Article III standing based on a violation of their statutory rights under the Wiretap Act while

The court finds that Gaos has alleged a concrete and particularized injury in fact as a result of the alleged violation of her statutory rights under the SCA. Accordingly, Google's motion to dismiss is DENIED as to Gaos's SCA claim.

IV. CONCLUSION

Google's motion to dismiss is DENIED IN PART as to Gaos's SCA claim and GRANTED IN PART with leave to amend as to all other claims. Gaos may file any amended complaint no later than May 1, 2012.

IT IS SO ORDERED.

/s/ Edward J. Davila
EDWARD J. DAVILA
United States District Judge

Dated: March 29, 2012

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also finding that plaintiffs' allegations did not state a claim under the Wiretap Act). Google's motion does not place this latter issue before the court. Thus, the court does not address whether Gaos's allegations state a claim for relief under the SCA in this order.

[1] UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

Case No. CV-10-4809-EJD

IN RE: GOOGLE REFERRER HEADER PRIVACY LITIGATION

SAN JOSE, CALIFORNIA
AUGUST 23, 2013
PAGES 1 – 49

TRANSCRIPT OF PROCEEDINGS BEFORE
THE HONORABLE EDWARD J. DAVILA
UNITED STATES DISTRICT JUDGE

APPEARANCES

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* * *

(Appearances continued on the next page.)

Official Court Reporter:

Irene L. Rodriguez, Csr, Crr
Certificate Number 8074

Proceedings recorded by mechanical stenography, transcript produced with computer.

[2] APPEARANCES: (CONT'D)

FOR THE DEFENDANTS:
Mayer Brown
By: Edward D. Johnson
* * *

O'Melveny & Myers
By: Randall W. Edwards
* * *

* * *

[4] * * *

THE COURT: So I wanted to go through some of the aspects of this settlement here. And I guess it looks like this is an overview, and I'll invite counsel to tell me about this in a couple of minutes. It sounds like because of the size of the class actual remuneration, if you will, to an individual class member is virtually impossible. It can't happen even if you sent them one cent, a penny. The cost of administration of that would dwarf any possible settlement.

* * *

[5] * * *

MR. NASSIRI: Thank you for the opportunity. This is, as Your Honor noted, an interesting lawsuit and it seems to be kind of subject matter that is of greater and greater interest.

The lawsuit is – technically it's about the disclosure of search queries to third parties.

More broadly speaking it's kind of about some of the privacy concerns in general and the innovations in technology that have been occurring at a tremendous pace that makes things that just five years ago disclosures of information and data that just five years ago seemed pretty innocuous like it is anonymized has turned it into something else completely and it has been reidentified and because of advances in computer science and all of the money and attention that has been given to these efforts privacy is really at issue now in almost everything we do on line.

THE COURT: That's why you filed this lawsuit on behalf of your clients I presume because you felt there was an invasion of their privacy, they felt there was an invasion of their privacy and they seek remedies in the court. That's what it was about, right?

MR. NASSIRI: That's right, Your Honor.

THE COURT: Okay.

MR. NASSIRI: And every time the nature of the [6] science is that any piece of information, whether it seems anonymous or not on its own, when you start aggregating data it gets possible to reidentify information and to create pretty detailed profiles. The information never goes away. The storage is practically free, and you have this giant database in the sky.

And I have to say, Your Honor, when we filed this case and I would talk to people about it, they would look at me like where is your tinfoil hat to prevent the rays, you know, they're hacking into your brain.

But I think now people are starting to realize that this is real stuff. And every little bit of data that is

released about people and is associated with people, whether is seems anonymous or not, whether it's associated with an IP address or associated with an ISP server, if there's any information in the search query at all, it can be connected to something else that will eventually lead you back to the individual person.

So that was kind of the basis and in a very general way for why we filed the lawsuit.

THE COURT: And you felt that, and you tell me if I'm wrong here, but you felt, as your clients felt, that this was wrong, and it needed to be corrected?

MR. NASSIRI: That's right, Your Honor. It needed to be addressed particularly at the time and still today.

THE COURT: There's a difference between addressing [7] it and correcting it.

MR. NASSIRI: And it needed to be corrected. And one of the – and particularly what we focussed on in the lawsuit and in our claims and in particular that 2702 claim under the stored communications act was this idea of consent, that people needed to know – it's not necessarily illegal or wrong for Google or anybody else to do what they do with people's data. And there are certainly a lot of benefits to the work that they're doing.

But what we felt was wrong and needed to be addressed was that people needed to know, and they needed to opt in. They needed to understand, hey, when I use Google and I type my name or anything into a search query box, there's a good chance that somebody is going to know it was me that did that and am I okay with that or not?

And so this issue of consent and informed consent is one that we believe is very important.

This shouldn't be taking place kind of without the knowledge of the people who are using the services.

And part of our efforts in structuring the settlement to create real value and benefit for the class was aimed at that kind of an issue, education, transparency, accountability, and making sure that people have an idea that when they use these kinds of services and they submit their personal information, whether they think it's anonymous or not, that, hey, there's a [8] good chance that this is going to be attached to me down the road.

THE COURT: So the lawsuit was not designed to stop the practice because the settlement doesn't.

MR. NASSIRI: It is not designed to stop the practice, Your Honor.

THE COURT: The settlement says they can keep going and they are going to keep doing what they're doing, but as I stand here as champion of my clients, what we have done for you, as you speak to those stadiums up and down the Bay Area where your clients are situated in loud speakers sufficient so they can all hear you, what we have done for you is we have been able – you now know that this is what Google does and this is what we have done for you in this lawsuit.

Is that in essence what is happening here?

MR. NASSIRI: That's not the extent of it. That's a major piece of it because, as you pointed out, Your Honor, this is not something – only Congress could legislate to stop the practice and say consent or no consent, Google, you cannot do this.

That's not for us. For us we believe that we can and do have the tools and have the desire to make sure that

people consented because that is the law under the stored communications act.

These things cannot be disclosed without consent. Consent [9] was lacking.

THE COURT: So consent is providing information to your clients, to the public?

MR. NASSIRI: Yes.

* * *

[10] * * *

MR. NASSIRI: * * *

And in particular the question that you ask that is directly relevant here is do people know that when they type their search queries into Google, that those search queries may end up being associated with them in the future? I would say anecdotally probably not for most people.

THE COURT: And you think that this lawsuit would cure that lack of knowledge?

MR. NASSIRI: I wish I could be –

THE COURT: Your colleague is nodding his head up and down which is a universal sign for agreement I think.

[11] MR. NASSIRI: Yes. Well, Your Honor, that certainly is the goal and I think we are putting together a really good program to do that, and I think we're going to go a long ways in doing that.

THE COURT: And the piece that accomplishes that, I guess it's specific to Google is the FAQ that they're going to add, I suppose?

MR. NASSIRI: Specific to Google, Your Honor, yes, in terms of the business practice change.

As we already discussed, they're not going to change their practices per se, and we don't believe that that would be appropriate from the scope of the claims that we brought.

But they are going to make their disclosures more robust and more prominent and that in conjunction with the notice program and the cy pres efforts and generally the climate in the media these days I think will go a long way in kind of really qualitatively increasing the public's awareness.

* * *

[14] * * *

THE COURT: And the thought occurs to me, well, okay, but don't we really need to educate the corporate world of Googles and whoever does this that this is wrong? Isn't that what your premise is?

MR. NASSIRI: Well, that's a loaded question.

THE COURT: That's why I asked it.

MR. NASSIRI: We wanted to stay within the confines of the lawsuit. And, I mean, there are a lot of answers to that, and I'm not sure exactly how to structure my response.

But one is that that seems a little bit beyond the scope of what we're doing here. Again, our primary concern is making sure that people are informed and give informed consent.

Also that is – by the way, Your Honor, I think one of the – may I briefly explain what we're doing with cy pres so that –

THE COURT: Sure, sure.

MR. NASSIRI: It's relevant to your question.

THE COURT: Please. Thank you.

MR. NASSIRI: I believe we're doing something new here and some of the critiques are misinformed about what we're doing.

We are raising the bar, and I think raising the bar for [15] all cy pres settlements like this to follow.

We're treating the cy pres allocation more like a grant making organization would treat grant – prospective grant recipients.

THE COURT: Isn't that what they tried to do in Lane?

MR. NASSIRI: It's what they tried to do, but I think we're taking it further.

And so – and I don't want to make – or I don't want to have my mouth write checks that we can't cash ultimately, but I think we'll get there.

The money will to specific projects. This money that goes to cy pres recipients is not going to disappear into their general overhead. And not only will the money go to specific projects, those projects are being vetted by us very carefully before we even present them to the court and the class to make sure that they kind of are within the confines of the lawsuit and meet some of the objectives that we have framed by the lawsuit.

One of them that may or may not end up before you, Your Honor, is an initiative by the Berkman Center at Harvard Law School to bring together –

THE COURT: It's your alma mater.

MR. NASSIRI: It is my alma mater and some people have raised an objection to that, and I'm happy to discuss [16] that.

* * *

[18] * * *

THE COURT: * * *

Do you have a white book of people that you would like to consult or cy pres recipients that you look to for these issues?

MR. NASSIRI: In this case in particular, Your Honor?

THE COURT: Yes.

MR. NASSIRI: Well – so in this case in particular we did – so Chris Soghoian who provided a lot of the information for the complaint, he's a well-known privacy advocate who works with a lot of the institutions that typically receive cy pres funding, he weighed in on this and he talked about kind of some of the people that he thought would [19] be really useful for us to speak with and the universe of kind of known institutions who do this kind of work is not that large.

So we had a kind of universe, a white book, if you will, Your Honor, but also this was – there was a negotiating aspect to this. We had to reach agreement between all parties, between the plaintiffs and Google.

THE COURT: With the recipients or as to the recipients?

MR. NASSIRI: About, about – that's right. Now, I want to be clear, Your Honor, while Google did – we did have to agree on the potential pool of recipients, Google's involvement goes no further than that.

So there's no situation here in which, you know, like in some of the prior class actions, cy pres settlements where people will criticize them because the defendants kind of sat on the boards or were somehow closely affiliated with the receiving institutions.

That's not the case here, Your Honor.

* * *

[20] * * *

THE COURT: I'm sure someone keeps records and someone keep notes about what institution receives what and what they have done with those monies.

MR. NASSIRI: Well, in the class action context certainly, Your Honor, it's all a matter of record because they're class actions.

And to the extent that there is kind of less public funding going on with these institutions, we are requiring them to provide us with that information so we can present to the court and the class so that Your Honor and the class can make their own judgment about whether these are independent institutions that can be relied upon to use the money objectively.

* * *

[21] * * *

MR. NASSIRI: But beyond that, these – the entities that we've selected and more well-known established entities, they can do more not just because of the money but because of their experience, their connections, their track record.

[22] THE COURT: No doubt about it. I understand.

MR. NASSIRI: And even, you know, for example, having Stanford cis on the list, you know, those people

are very well connected and are – I think that they stand a better chance, within the tech world, and – but they still have – their interests are in the right place and their mission.

* * *

[23] * * *

THE COURT: * * *

I'm looking at the settlement agreement. I'm looking at – yes, 3.1 is the relief paragraph, pages 6 and 7. And I'm just looking at my notes. I think you have answered the

Question here and my notes ask myself, does this mean – I'm [24] looking on page 7, the last sentence – this tells us then that this policy, this practice will not change, the current practice will not change; is that right?

MR. NASSIRI: In terms of what Google decides to do with search queries, that's right. Now, to give it some context, Your Honor, I don't remember the exact date now, but right around the time that the second motion to dismiss was filed in this case Google did make some changes, important changes. Whether or not our lawsuit had anything to do with it, I don't know.

But Google changed its policy on disclosing search queries so that for Google accountholders who are signed in and do searches, so long as they don't click on paid advertisements, their search queries are no longer disclosed.

* * *

[25] * * *

THE COURT: Sure. So somebody's 72 young great aunt who lives in Grinnell, Iowa in a lovely ranch

house and she gets internet for the first time and she has this lovely 486 computer that her grandson, perhaps, gave her and said, no, no, let me update you and let me get you something new and all you have to do is push the button and she gets this and clicks on it, she's not going to go to an FAQ.

MR. NASSIRI: She might not, Your Honor. But, again, some of the proposals we're looking at will target people who are less likely to receive the message through other [26] channels. So young people and older people is who I'm referring to.

THE COURT: AARP, that's why AARP is in there.

MR. NASSIRI: I'm not actually not talking to AARP. We've kind of divided. So I'm not sure of all of the proposals that they have put on the table.

But, yeah, even Harvard or the Berkman Center has done some work that is aimed at those demographics.

* * *

[27] THE COURT: Okay. Thank you. And I'm turning to page 4 under paragraph 3, why is there a settlement?

MR. NASSIRI: Uh-huh.

THE COURT: The last sentence there describes costs, I guess. That way they avoid the costs and risks of a trial and the class will receive relief when the settlement is final rather than years from now, if at all.

Is that kind of misleading?

MR. NASSIRI: No.

THE COURT: "The class will receive relief," I read that and at first blush I thought, and I'm trying to put

myself like a great aunt who lives in Grinnell or something like that.

Well, am I going to get relief from this? Is there something in the agreement that says you will not receive anything, but what you will receive is access to an enhanced FAQ? Not in that language I'm certain but –

MR. NASSIRI: Well, Your Honor, so there's nothing in here that says that you will not receive direct remuneration.

THE COURT: Is that something that you think the class should know?

MR. NASSIRI: Yes, it is.

THE COURT: I thought so. It seemed to me that to be a full notice, maybe a class member should know that I'm not going to receive anything as a class member. However, for the [28] greater good, the cy pres is receiving this amount and this is what is hopefully will happen from those recipients.

But as an individual member, as an individual plaintiff I'm not going to receive anything. I won't get remuneration, and unless, and I'll hear from Mr. Johnson about this, unless perhaps one of the measures of settlement is that Google has an epiphany and said you know what, we're going to either stop doing this or we'll stop doing this for six months. And that's the next settlement agreement.

I'm not trying to mess with your deal. I'm just trying to suggest that that is something else that might come up.

But they should know, shouldn't they?

MR. NASSIRI: I can think of a lot of things that I would like them to do.

THE COURT: I'm talking about your clients,

Shouldn't they know that they're not going to receive anything specifically?

MR. NASSIRI: Well, it's here because the – where that is disclosed is in the next section of the settlement benefits.

THE COURT: Right.

MR. NASSIRI: So I believe what you're saying, Your Honor, is that it should be kind of simpler and kind of stated more directly.

THE COURT: I think so, I think so. Just in, you [29] know, kind of language that a layperson might grasp.

* * *

[33] * * *

THE COURT: So let's talk about the notice first and the thought occurred to me that the best form of notice for [34] this, shouldn't that be for Google to put it on their, whatever it is, their home page, click here for information about exciting lawsuit that you may be a party to?

MR. JOHNSON: Well, Your Honor, I think that there are – there would be many competing, you know, interest groups who would love to do that.

I think that the question before the court and that the question that the parties negotiated at least how can we let people know about this?

And it's not just the FAQ section and it's not just the key term, but there's an elaborate advertising campaign with banner ads on the most popular websites

that are designed to let people know, and exactly the way that the people are using the internet and searching the internet, where are they likely to be. And it wouldn't even be just Google, and it's going to be on a variety, if they're taking out advertising on a variety of sites, to let people know about the settlement.

* * *

[35] * * *

THE COURT: So you think that the – what you're telling us, Mr. Johnson, what you have negotiated with counsel is fair notice and it provides fair notice and captures the widest possible universes that you can?

Mr. Johnson: Yeah, it's designed – I mean, the heart of their lawsuit, Your Honor, and since we're here to talk about settlement, I won't go into the merits, but the heart of their lawsuit is that these referrer headers, which are visible, the search queries which are visible and the terms are visible in the little white line, you know, that that wasn't disclosed, that people didn't know that when they were clicking that the page that they clicked to could see it.

This settlement process, not to mention all of the publicity associated with the lawsuit, is designed to accomplish that, to let people know.

THE COURT: So it's a notice lawsuit from your perspective?

Mr. Johnson: Yes, Your Honor.

THE COURT: That is what it is about?

Mr. Johnson: And they say that. You know, aside from, you know, questions of harm, I don't think anyone is alleging economic harm.

* * *

[37] * * *

THE COURT: * * *

Let's see, and the estimate for this notice is up to a million dollars; is that right?

MR. JOHNSON: I believe that's what the administrator provided.

THE COURT: And is that a – do you know anything about that figure? Is that a hard figure or is that kind of a [38] mushy figure? I mean, a million dollars for notice?

MR. JOHNSON: It was prepared by professionals who were in the business of engaging in these kinds of notices.

It's my understanding that it was a well vetted figure and we'll accomplish their 200 million impressions goal.

THE COURT: Okay.

MR. EDWARDS: Your Honor, I apologize for interrupting but I just wanted to comment.

THE COURT: No problem at all.

MR. EDWARDS: In exhibit 4(c) of the submission that the plaintiffs made on the motion for a preliminary approval, there's an itemization of how that figure is derived and

Mr. Aschenbrener has had the most close communications with the notice administrator about that.

I believe the million dollar figure in the settlement agreement itself is sort of an initial funding by Google because it will cover the projected cost of notice and some other administrative issues.

And so we just wanted to clarify that point, there is some backup. And to the extent that there are really detailed questions, I think Mr. Aschenbrener can probably address them.

THE COURT: Great. Okay. All right. Thank you. Thank you for that.

Anything else, Mr. Johnson, you would like me to know in support of this? [39] Mr. Johnson: no, Your Honor. I think other than the fact that we – that it was the product of a heavily negotiated settlement which we had the assistance of randy wolf, who I believe the court is familiar with, who believed under the circumstances this was the fair proposal.

THE COURT: Yes, I think – and I neglected to mention that at the outset how you got here.

And the lawsuit was filed, and I know there was some motion practice, and then as you suggest, you met with a professional mediator.

MR. JOHNSON: Yes, Your Honor. Yes, Your Honor.

THE COURT: And you hashed out the issues and you have come to this resolution and what you're asking the court to find as fair, adequate, and reasonable?

MR. JOHNSON: Absolutely, Your Honor.

THE COURT: And I think you indicated in your pleadings the risk for both sides as to the lawsuit progressing and going forward and members of the community might go one way or the other as they sat as a jury and listened to both sides and both of you felt

that it was and in both of your best interests to resolve the case as you have brought to the court here this morning.

MR. JOHNSON: Yes, Your Honor, given the uncertainties and the issues of first impression that are mentioned in the papers, yes, Your Honor.

* * *

[40] * * *

THE COURT: * * *

And what I'd like you to do is I'd like some more information about the selection process and the identification of the pool of cy pres recipients.

And what is it specifically, as specific as you can, can you tell me what is it that they're going to do?

You've talked about the different conferences, perhaps, or whatever there was going to be, meetings with groups.

If you could be more specific for me to give me guidance as to what the public and I can expect the work product to be.

And, of course, in these cases we can't police them and I don't sit here as a professor to have them come in here and [41] grade their work.

But I think it is appropriate for me to, when I look, or when I look at this settlement, to specifically look at the task that they're going to accomplish, or look at the goals that this settlement sets for them. I think that's appropriate for me to look at. I know you put it in your pleadings.

MR. NASSIRI: Well, I have something to say about that now, Your Honor.

THE COURT: Okay.

MR. NASSIRI: A few things. First, with respect to grading them, I actually think that what we're doing will move you a big step closer, and everybody else, closer to grading them both in making a decision about whether or not to give them the money and then down the road how they did with it.

I don't know if Your Honor is aware that like maybe

Six months ago there was a lot of press about certain charities that were wasting money that was given to them and there

Were – there were these charity watchdog foundations that published statistics saying that charity x for every dollar you give them, only six cents of it actually goes to the target community.

So starting on that trail I kind of took a look at those watchdogs, and they have done some really good work in coming up with criteria for increasing transparency and accountability with respect to charities. It's perfectly applicable here. We [42] have sent, and I'll be happy to share with the court in a supplemental filing, we have sent kind of a template. It's not actually a template.

But we have sent our requirements to all of the proposed recipients and said we want a written proposal from you that addresses these points. And included in what we are expecting to get back and have already started to get back, Your Honor, are detailed descriptions of exactly what they're going to do, who is on staff, and how the budget will be allocated within the project.

We have also asked for these entities to give us a set of metrics that they can use to measure the success of

the program, and we are going to require them to publish to the class and to the court down the road the results.

So this is kind of tracking perfectly what some of the forward thinkers in these charity watchdogs are doing.

So that will bring you a lot closer and everybody else to actually grading them.

And it will, kind of over the bigger picture, not just this lawsuit but for the next lawsuit, you'll have something to look at.

* * *

[44] * * *

MR. NASSIRI: * * *

I have described to you what the process is. I think it goes far beyond what has ever been done before, and we're going to present more information to the court and the class for final approval that has ever been done before.

* * *

[45] * * *

THE COURT: So when we look at a pure cy pres, and if we follow that logic then, there will always be the usual suspects.

MR. NASSIRI: Well, no, Your Honor. People are entering the space more and more. There is more interest in funding for it. And we have a few new players, like I said, Chicago-Kent and the World Privacy Organization, those are new players.

* * *

[47] * * *

THE COURT: * * *

If you could, in an additional pleading just, you know, let me know what you did in that regard and why these folks were identified. I think some of these are perhaps self-identifying, you know, as you say.

MR. NASSIRI: They're somewhat obvious choices. THE COURT: thank you.

MR. NASSIRI: And I don't want to overstate the innovation I think we have got here. The fact that any concern that these are kind of, you know, the usual guys and people just throw money at them and maybe we should be more thoughtful, I really believe that, one, the fact that we're requiring them to spend the money on specific projects and not letting them decide after they get the money how they're going to spend the money is a big difference between what has been done in the past and what is going to be done now.

And that by itself I think would alleviate some concerns about, hey, you're just giving money to the usual suspects.

THE COURT: No. This is a creative look at it and treatment of it and I appreciate it.

* * *

EXHIBIT C

Promoting online privacy via research and education at Carnegie Mellon University

Lujo Bauer, Alessandro Acquisti, Nicolas Christin, Lorrie Cranor, Anupam Datta

This document briefly describes the technical and societal impact of Carnegie Mellon research and educational efforts on online privacy, and proposes additional efforts that will be of benefit to both class members and society.

Carnegie Mellon University Carnegie Mellon hosts one of the largest academic security and privacy research centers in the world (CyLab), with over 50 faculty and 100 graduate students working on all facets of computer and information security and privacy, ranging from public policy to software design, network measurements, and behavioral research. To achieve high-impact research, inter-disciplinary collaborations between very different fields (e.g., psychology, economics, and computer science) are not merely encouraged: they are the norm rather than the exception.

CyLab researchers have a strong track record in privacy research, outreach, and education. Our privacy research regularly appears in top peer-reviewed conferences and journals and has been recognized with prestigious awards. CyLab faculty have testified at privacy-related hearings on Capitol Hill; our research papers are frequently cited in similar settings. CyLab faculty are regularly invited to present their research findings at companies such as Google, Facebook, PARC, and Microsoft. Finally, our privacy research is frequently mentioned in the popular press.

CyLab researchers regularly teach privacy-related courses at the undergraduate and graduate level. In addition, Carnegie Mellon has recently launched the world's first masters degree program in privacy engineering. We expect that graduates of this is program will be uniquely well qualified to work for companies where they can help address privacy issues in products and services.

Proposed research Carnegie Mellon proposes to use a potential donation to conduct new and expand current research to improve user privacy, focusing on three areas: (1) furthering our understanding of users' privacy behaviors and online threats to users' privacy; (2) developing new interfaces and technologies to help users understand and control threats to their privacy; and (3) developing computational mechanisms to help ensure that systems and organizations adhere to privacy regulations or policies. These efforts will advance the field of privacy research and result in tools that will benefit class members and other computer users.

In the first area, we propose a series of behavioral experiments to explore the influence that stimuli from the physical world, often processed unconsciously, can have over security and privacy behavior in cyberspace. This research is predicated around an evolutionary conjecture: Humans have evolved to react to threats in their physical environment. In cyberspace, those stimuli often are subdued or deliberately manipulated by attackers. We aim to investigate this conjecture and its implications, studying the evolutionary roots of privacy and security behavior and using this knowledge to improve privacy and security in cyberspace.

Also in this category, we propose to empirically study how private information leaks can impact users. For instance, we have observed through several studies

that an increasing number of websites is compromised by attackers who take advantage of features meant to help personalize the user experience. Users searching for prescription drugs may unknowingly land on such compromised websites, which take them to unlicensed online pharmacies, rather than vetted outfits. This mode of illicit advertising has become increasingly sophisticated. We propose to systematically evaluate how adversaries can abuse personalization information and to design countermeasures that will benefit members of the class as well as the general public.

In the second area, we will focus on user authentication and smartphone privacy. Authentication is a key aspect of the online experience; online banking, email, and other transactions require users to first authenticate to a computer system. Poor authentication mechanisms can increase the chance of lost or stolen passwords leading to compromised accounts; more sophisticated ones, such as using an online identity provider to sign into a service like USA Today may result in undesired leaks of personal information from the identity provider to the service provider. We propose to study both issues: We will extend our studies of passwords to encompass longer, simpler passwords, which appear promising for both security and usability; we will investigate effects of using different data-entry interfaces, such as on mobile phones and Internet-connected TVs; and we will develop privacy-preserving fail-over mechanisms to help reset lost passwords. We will also develop more user-friendly interfaces to give class members and other users more insight into and control over the privacy they may be giving up when using single sign-on.

Also in this category, we will study smartphones and other mobile devices, as they are an increasingly

popular way to interact with the online environment. Building on our past research on privacy decision making and risk communication, we propose to conduct research to improve communication about privacy between smartphone app developers and users, specifically with regards to data collection, use, and sharing.

In the third category, we will express privacy-related laws and corporate online privacy policies (e.g., as used by Facebook and Google) in a computer-readable form and develop computational mechanisms to enforce them. In prior work, we have formalized privacy policies that prescribe and proscribe flows (disclosures) of personal information as well as those that place restrictions on the purposes for which a governed entity may use personal information (e.g., HIPAA, GLBA). Recognizing that traditional preventive mechanisms are inadequate for enforcing such privacy policies, we have developed principled audit and accountability mechanisms that encourage policy-compliant behavior by detecting policy violations, assigning blame, and punishing violators. Our research along these lines is directly relevant to improving compliance of web search engines with their privacy policies. A central challenge that we will address is to enable this form of checking even when the checker does not have access to a web service's software systems. This setting is particularly important because it will enable class members and other users, privacy advocacy groups, and government organizations to check that a web search engine's practices respect users' privacy even though they will typically not have access to the search engine's internal systems (e.g., to check that certain types of personal information do not influence displayed advertisements or flow to third party data aggregators).

Benefits of proposed research Our research results will include an improved understanding of threats to users' privacy and ways to mitigate these threats. Our proposed effort will also result in the design of specific interfaces and tools that improve privacy for class members and other users; as well as algorithms that could be used by Google, privacy advocacy groups, and regulators to measure the privacy compliance of various web-based systems, including search engines. We will generally make our designs and code open-source and freely available for download.

We will additionally disseminate the results of our research through scientific papers and talks, through our regular interactions with the popular press and companies like Google and Microsoft, and through CyLab's corporate partners program. When appropriate, results will be integrated into our curriculum and passed on to the next generation of privacy engineers.

EXHIBIT D

Executive Summary of Stanford Law School Center for Internet and Society's Proposal For Distribution of *Cy Pres* Funds

To aid the Court in its consideration of the distribution of *cy pres* funds in *In re: Google Referrer Header Privacy Litigation*, Case No. 10-cv-04809 EJD, the Stanford Law School Center for Internet and Society ("CIS") hereby submits the following summary of its Proposal for Distribution.

Our Mission. CIS is a public interest technology law and policy program within the Law, Science and Technology Program at Stanford Law School and an international thought leader in privacy. CIS's goal is to improve technology law and policy through ongoing interdisciplinary study, analysis, research and discussion. CIS strives to inform the design of technology and law in furtherance of important public policy goals such as privacy, free speech, innovation and scientific inquiry. CIS's research in consumer privacy has forged a direct path from scholarship to positive changes for Internet users. To continue and expand our consumer privacy work, CIS requests funds to conduct four projects over the next three years, including required personnel.

Project One: Mobile Privacy Notice Research. Effective notice is a precursor to effective privacy choice. The Class members alleged that they were given neither notice nor choice about how Google would relay their search queries to third parties. As Internet users, including Class members, migrate to mobile devices, providing effective notice will directly improve their ability to control the flow of information about them. CIS has been a leader in finding innovative ways to meaningfully conveying privacy

practices to consumers. We propose expanding this work to the context of mobile devices and other small screens. We would: (1) research how best to present privacy information and publish our results; (2) promote adoption of this research by app developers; (3) help policy makers understand and use our research; and (4) host a training event for up to 100 app developers on how create improved privacy notice.

Success metrics: We anticipate that our work will improve mobile privacy notice. Our metrics are whether (1) our central insights are implemented; (2) app developers improve their notices after training; (3) policy makers encourage adoption of our insights.

Project Two: Privacy Legislation Analysis. When companies are unwilling to voluntarily limit online data collection and use, legislation can be an important recourse to protect privacy interests. In 2012, the California legislature introduced nearly two dozen privacy bills. Many of these are well-intentioned bills that would benefit from better understanding of technology. The legislature risks passing laws that are impossible to implement. California online privacy laws apply to all companies with customers in California, and thus become de facto national laws. If crafted well, pending bills and amendments regarding data transfer to third parties could have the intended effect of protecting Class members' and others' privacy. CIS's interdisciplinary approach puts us in a unique position to help inform the legislature. We propose (1) researching and publishing at least three white papers responsive to privacy issues under active consideration by state lawmakers. In addition to (2) informal meetings with policy makers, we would (3) hold a major event in cooperation with the California Assembly Select Committee on Privacy (or other appropriate

partner) to bring together experts in privacy scholarship and legislative staff, with knowledge transfer in both directions.

> **Success metrics:** (1) Legislative directors and policy makers attending the Stanford event will leave with greater technical understanding. (2) We will create a briefing book containing the biographies of participants, allowing ongoing contact over time. (3) We will successfully work with legislators to introduce privacy protecting bills that are technologically astute.

Project Three: Cookie Clearinghouse. Unwanted disclosure of information to third parties is a privacy problem. We created the Cookie Clearinghouse in response. The Cookie Clearinghouse publishes Accept and Block lists to manage cookies. This makes it easier for Class members to control third party tracking and to learn what is tracked. Enhanced control of data flows to third parties is directly relevant to the issues in this litigation, and is the core of the Cookie Clearinghouse tool. We would: (1) perform ongoing technical analysis of cookies; (2) produce and advertise online materials to help web developers understand the Cookie Clearinghouse; (3) hold a video-recorded developer workshop; (4) educate the public about the Cookie Clearinghouse.

> **Success metrics:** Success requires the Cookie Clearinghouse operate effectively as a n anti-tracking tool for users who wish to opt out: (1) Cookie Clearinghouse Accept and Block lists are available in browsers; (2) reach 100,000 users by 2016.

Project Four: Speaker Series. Education is a key aspect in putting users in control of the data they transmit. CIS has a popular lunchtime and evening

Speaker Series. Our Speaker Series events can address the need for more education about privacy practices, rights and self-help by educating users who are able to attend the speaker series in person, and reaching a geographically remote audience online. CIS would host three additional events specifically about consumer privacy online. Topics relevant to the Class include: (1) how to make effective online choices for privacy (2) how third party tracking and advertising practices work (3) how seemingly anonymous data can re-identify people.

> **Success metrics:** (1) At least 300 people in attendance across all evening events, (2) at least three different top-notch speakers, (3) at least 100 remote attendees and downloads within a year of the event.

Necessary Personnel. To accomplish these Projects, as well as other relevant research that would directly benefit the privacy interest of Class members in controlling the use and dissemination of their personal information, CIS would make the position of Director of Privacy permanent. We also request funds for a portion of the salaries of existing staff members who perform tasks directly relevant to this *cy pres* request.

CIS thanks the Court for the opportunity to submit a Proposal for consideration in the proposed settlement of this litigation.

EXHIBIT E

WORLD PRIVACY FORUM

September 04, 2013

Pam Dixon, Executive Director
World Privacy Forum
3108 Fifth Avenue, Suite B
San Diego, CA 92103

Executive Summary of World Privacy Forum Cy Pres Distribution Proposal

The World Privacy Forum[1] is pleased to submit a proposal for this online privacy-focused Cy Pres distribution. The World Privacy Forum has developed two focused, relevant and impactful projects to provide direct relief and support for class members in this cy pres. We are uniquely poised in expertise, experience, and in our core mission and function to assist the class members.

About the World Privacy Forum

The World Privacy Forum is a non-profit, non-partisan 501(c)(3) public interest research and consumer education group focused on conducting in-depth research and consumer education in the area of privacy, with a focus on topics relating to privacy and technology. Our core mission is to provide substantive research and consumer information that documents and analyzes critically important privacy issues and to provide consumer information and educational support in the

[1] The World Privacy Forum is a non-profit public interest and consumer education research group. Our work focuses on consumer privacy and security issues in the areas of technology, health care, finance, and the Internet. WPF is national in scope and impact. Please see <http://www.worldprivacyforum.org>.

area of privacy. We also provide direct support to consumers.

The World Privacy Forum fills a unique need for unbiased, in-depth public interest research with a focus on consumer privacy and education. Our work is focused on benefitting and educating consumers of all ages. The Forum was founded in 2003, and is incorporated and based in California. The Forum has achieved measurable and consistent success in its work, and receives consistent, high-profile press coverage of its activities, reports, and other work as well as consistently high praise from regulators, legislators, academics, and consumers. The New York Times, Wall Street Journal, Time, Business Week, Los Angeles Times, the Economist, San Francisco Chronicle, CNN, NBC, CBS, ABC, and many others have covered World Privacy Forum's activities and materials.

WPF has long experience in researching, documenting, and educating consumers about new and existing areas of privacy inquiry. WPF has testified before Congress regarding online and offline consumer privacy issues, as well as before many Federal agencies, including the Federal Trade Commission, FDA, HHS, the Department of Commerce, and others.

Proposed Use of Funding

Should we receive funding from this cy pres, we are proposing that all of the funds go towards two substantive consumer online privacy projects directly benefiting the class and relating directly to the underlying litigation.

The projects the World Privacy Forum is proposing focus on direct consumer support, research, education, and materials created specifically for consumers who may have typed a search query into a search box; these

projects will greatly assist this class of consumers by protecting and enhancing their privacy and by arming them with increased privacy knowledge. All projects will be conducted with a national scope to reach a national class of consumers. The projects are three-year projects, which will run concurrently. The projects are based on our extensive expertise and effectiveness in consumer privacy research, education, and support. The projects include substantial online components.

To facilitate measurable results and the transparency of outcomes, we are incorporating consumer interviews, surveys, benchmarking, and pre-and post project testing to measure our success. We will report our findings to the court and/or to class representatives at regular intervals post-funding. Another measure of our success will be the completion and availability of the multiple deliverables such as videos, consumer education materials, workshops, reports, and other materials. In our full project proposal we have outlined substantial, detailed, and measurable deliverables for each project.

Project Description

Key Project 1: Research, consumer education, and direct consumer support around online search boxes and referral headers that lead to privacy mischief (data brokers)

Most consumers begin their web browsing with a search box of some sort, and then continue typing in queries across web site search boxes as they read information, shop, communicate, and explore. Unknown to many if not most of these consumers typing in search queries, a significant number of search boxes lead back to online data brokers and their many unnamed affiliates. This is where a great deal of

privacy mischief and outright consumer harm is occurring. There are an astounding variety of these types of data brokers, and they are nearly undocumented online in any meaningful way.

This proposed project would fund two in-depth research reports about data brokers, online people finders, and consumer list brokers and the specific online and policy issues related to their activities relating to consumers. The reports will tease out the facts and details of these sites, which have not been heretofore documented. The project will also fund a very significant national consumer education campaign around these online consumer privacy issues, with online and offline education that includes education through multiple channels, including video, direct consumer support and education, e-books, workshops, and a variety of online materials.

This project meets the needs of the class members by providing vital and currently non-existent research, consumer education, outreach, and support in this critical area. No materials around search queries, search boxes, and problematic referral headers exist at this time, yet literally tens of thousands of these search boxes populate the Internet, with a percentage of these data broker search query boxes having some prominence. WPF is the leading privacy group in the area of online privacy and data brokers, and is uniquely positioned to conduct this project successfully.

Key Project 2: Consumer privacy education around critical online privacy topics for teens, minority and under-served populations, seniors, and disabled consumers

A substantial gap in online consumer privacy education and outreach for teens, seniors, minority, and

under-served populations such as disabled adults exists right now. This gap specifically includes members of this cy pres class.

The gap is twofold. First, focused, online-privacy-specific materials sensitive to this cy pres class are currently unavailable. General online safety materials exist, but specific materials assistive to the actual problems and challenges experienced by the class do not. Second, the class members this project is focused on are the least likely to be touched by the currently available general Internet safety education that is conducted primarily online, most typically through outreach and education directed toward individuals with pre-existing baseline sets of computer and online privacy knowledge.

This project will fund a multi-faceted national consumer online privacy educational campaign that closes the gaps with appropriate educational materials and effective delivery methods for the content. The first aspect of the project is crafting appropriate and focused educational materials, which will range from video to print to curricula to online tips and other items, and will be specifically crafted for each segment of consumers we are working to reach. The second aspect of the project is to provide direct consumer support and education to class members. The vision is for an inclusive approach, with focused, consumer privacy-specific materials reaching new audiences online and off, and collaboration with teachers and senior and other community center directors to ensure vital, appropriate, specific, and helpful online privacy messaging reaches these class members. Our deep and long privacy expertise and consumer assistance expertise combined with our ability and knowledge of executing national

educational campaigns is an invaluable and significant asset in this work.

We are sensitive to meeting the specific needs of this class. WPF receives many consumer phone calls. Most of them are from people who are online, but who did not realize some of their actions online had the possibility of bringing them harm. This project would provide funding to facilitate reaching more consumers with better targeted privacy information. The deliverables for this project will be measurable, robust, and substantial, and we will be able to sustain an educational effort over time in order to allow for adequate penetration of the privacy messaging.

EXHIBIT F

A National Initiative to Fight Online Fraud A Proposal from AARP Foundation and AARP Executive Summary

AARP Foundation, through its network of staff and volunteers around the country, has a long history of delivering effective fraud prevention to older Americans, their families, caregivers and support networks. This proposal describes how AARP Foundation, with the support of AARP, and state and local partners, could significantly scale its fraud prevention efforts, focusing on reaching a minimum of one million older adults with information and tools to help them prevent being victimized by internet fraud.

The Growing Internet Fraud Problem

Government agencies are reporting that not only is consumer fraud on the rise, but much of it is being committed online. The Federal Trade Commission's Consumer Sentinel program reports that the number of fraud complaints it receives increased 60% between 2009 and 2012.[1] A 2013 FTC study found that over the past five years, the percentage of consumers scammed over the internet doubled and is now 40% of all fraud being reported.[2] At the same time that online fraud is skyrocketing, there is evidence that many of these victims are older persons. A 2011 AARP Foundation study found that the average fraud victim is 69 years

[1] FTC Consumer Sentinel Data Book, 2012.

[2] Consumer Fraud in the United States, 2013.

old.[3] Other studies have found similar trends of older persons being targeted by scammers.[4]

AARP Foundation and AARP have been fighting fraud in the trenches for many years. And there is evidence that these efforts have had significant impact. An example is AARP Foundation's regional Fraud Prevention Call Center operations that utilize trained volunteers to counsel vulnerable older persons about how to avoid fraud. Numerous studies have found that these peer counseling interventions dramatically increase vulnerable consumers' resistance to fraud.[5] A 2011 study by Stanford University found that AARP Foundation's peer counseling program even works to inoculate the most vulnerable consumers, increasing resistance among chronic lottery fraud victims.[6] While these Call Centers have repeatedly proven effective, they are not currently operating on a scale that is capable of putting a dent in the growing online fraud problem.

The Proposal – A National Initiative to Reach One Million Consumers

This proposal outlines a way to utilize cy pres funding to dramatically expand the scope and scale of AARP Foundation ElderWatch and Fraud Prevention programs so that many more vulnerable adults can avoid being victimized by online fraud. AARP Foundation proposes to develop an integrated national initiative with the support of AARP and other national and local

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[3] AARP Foundation National Victim Profiling Study, 2011.

[4] Finra Foundation, 2006;

[5] US Department of Justice, 2003.

[6] Stanford University, Forewarned is forearmed, 2011.

partners that will reach a minimum of one million consumers over a three-year period.

AARP Foundation will accomplish this goal by providing ready and immediate access to relevant, timely, actionable, and credible information and resources for older adults, their caregivers and support network focused on online fraud and scams.

- **Objective 1: Expand and scale AARP Foundation's existing and multi-tiered consumer fraud call center operations** and ensure that relevant and timely information is provided to older adults and their families about cyber safety and avoiding scams and fraud through highly trained and empathic staff and volunteers
- **Objective 2: Build local fraud prevention capacity.** AARP Foundation will help national, state and local organizations and AARP state offices build capacity to fight fraud by utilizing its expertise in online fraud prevention to develop "train-the-trainer" toolkits and materials for local education activities.
- **Objective 3: Build an unprecedented National Fraud Alert Database.** Adapt AARP's existing database management system to create an "early warning system" that tracks online fraud trends that can help Call Centers and law enforcement warn the public. This database will be one of the largest collections of fraud complaints from older adults in the country and will give the Foundation the ability to know what frauds are trending and how to target education and outreach to prevent them.

- **Objective 4: Build strategic partnerships with local, state and national law enforcement.** As part of this effort to ramp up the national online fraud prevention effort, AARP Foundation and AARP will continue to build strong partnerships with local state attorneys general, police, postal inspectors, the Federal Trade Commission, FBI and State Securities regulators.
- **Objective 5: Develop research-based profiles of online fraud victims.** AARP will conduct a national study of online fraud victims in order to identify psychological, behavioral and demographic factors that may lead to victimization. This will enable the Call Centers to better target outreach and messages to those most vulnerable to online fraud.

AARP Foundation is uniquely qualified to administer this program. As a charitable arm of AARP, AARP Foundation helps Americans 50 years of age and older meet their basic needs, and achieve and maintain independence and dignity. AARP is the leading, national expert on people 50+, with access to data and research regarding each socio-economic segment of the population. With a presence in all 50 states, AARP is well-positioned to assist the Foundation in reaching older adults and their caregivers where they live and are able to impact local issues that are either of concern to older adults.

EXHIBIT G

Chicago-Kent
College of Law
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Michael J. Aschenbrener
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Re: Gaos and Italiano v. Google (N.D. Cal.)

Dear Michael and Kassra:

We hope you share our excitement in our proposed PRIVACY PREPAREDNESS project – we welcome the opportunity to educate consumers about the privacy risks attendant upon life in the online world. I have enclosed an executive summary.

Please let me know if you have any questions. Once again, we are thrilled with the opportunity to carry forward plaintiffs' goal of ensuring greater understanding of the privacy pitfalls in using the web, and

we are committed to continuing the project even after the cy pres funding has lapsed.

Sincerely,

/s/ Harold J. Krent
Harold J. Krent
Dean and Professor of Law
IIT Chicago-Kent College of Law

PRIVACY PREPAREDNESS PROJECT

The Center for Information, Society and Policy (CISP) at IIT Chicago-Kent College of Law proposes to devote funds from the cy pres award over the next three years to undertake a PRIVACY PREPAREDNESS initiative – a combination of academic research. public education. and outreach to safeguard consumers' online privacy. The centerpiece of the project is an online interactive Privacy Preparedness Guide to help people, if they so choose, implement privacy protections when they interact with the web.

The guide will alert people to the ways in which their privacy may be compromised on the web and offer them a range of choices about the level of privacy protection they can pursue. Through an interactive website and regular blog, it will offer advice about the privacy protections offered by various operating systems, browsers, add-ons. social networks. encryption tools, and risk assessment tools (to determine the safety of websites). For example, what are the relative merits of Twitter vs. Facebook in terms of the company's commitment to privacy? Android vs. Apple iOS in terms of allowing people to control what happens to their online data? What is NoScript, under what circumstances might I use it, and what are the steps to install it? No constantly-updated, comprehensive source exists that provides comparisons among the tools

along with easy-to-understand instructions about how to use them. There is no guide that puts the issue in the context of the choice of whether to block web tracking with step-by-step, up to date instructions that can be used by anyone. Simply put, no one has broken this complex problem down into understandable parts and then updated it as necessary to adapt to the constantly evolving nature of the Internet.

The class of people represented in the litigation that gave rise to this cy pres award will be benefitted by the following efforts:

- An online, interactive **Privacy Preparedness Guide** with hyperlinks an the CISP Privacy Project website. The project will keep track of the number of times the final guide and the privacy blog entries have been accessed online, downloaded or shared through social media, mentioned in the press or used by policymakers.
- **Videos** on the website that show the risks to privacy online and demonstrate the ways to deal with them and a dedicated **Blog** and dedicated **Twitter account** that contain updated information about online privacy. Visitors and downloads will be tracked.
- **In-person training** and **train the trainers** sessions. The project will provide national outreach, This will include reporters, high school teachers (who can then train their students), judges, lawyers, leaders of nonprofit organizations, community groups, and policymakers. Project representatives will administer two surveys at the events. The first survey will assess the knowledge base of program participants before the trainings commence. The second

survey will assess the program participants' knowledge at the completion of the trainings. The second survey will also ask questions regarding the effectiveness of the training format and whether the program participants found the information helpful and applicable. (We have used this method with respect to outreach trainings in the context of a *cy* pres award in a different field of law.)

- **Annual Conferences** will be held, focusing on strategies to protect privacy, vulnerable populations, medical apps, and emerging technologies to safeguard privacy. The effectiveness of the conferences at reaching people can be assessed based on the number of attendees and on the traditional surveys IIT Chicago-Kent distributes to attendees for evaluation after each of its conferences. These surveys were developed to comply with the requirements of state bars for the evaluation of continuing legal education.

Why *CISP*

CBI' faculty have advised a variety of institutions and groups on issues of internet privacy, including national legal groups, reporters, medical groups, forensic organizations, prosecutors and defense attorneys, the National Organization of Bar Counsel, computer scientists, universities, and government agencies in the United States and abroad. They have given keynote speeches on the topic in the United States, Asia, Central America, and Eastern Europe. They are regularly quoted in the media on issues of Internet privacy. Project Director **Lori Andrews** is a Distinguished Professor of Law at IIT Chicago-Kent College of Law and the author of *I Know Who You Are and I Saw What You Did: Social Networks and the Death of*

Internet Privacy. She developed a Social Network Constitution. accessible at www.socialnetworkconstitution.com. She blogs regularly on the issues of internet privacy and has written articles on internet privacy for *The New York Times* and other publications CISP has received funding from the Greenwall Foundation and is the recipient of prior cy pres awards.

CISP also will continue to tap the expertise of professors at the parent university. Illinois Institute of Technology, who similarly have been engaged in academic study of internet privacy. Previously, for example, CISP faculty instituted a project with IIT faculty and engineering students for which children's apps were downloaded and their code analyzed to see what type of information (including geolocation information) was being collected about the children when they used the apps. This allowed CISP researchers to provide data at the request of members of the U.S. Congress and help devise proposed policy to protect children's online privacy.

C1SP has gained a national reputation for exploring issues relating to internet privacy. On March 23, 2012, CISP hosted a conference on "Internet Privacy, Social Networks and Data Aggregation." Leaders in the fields of computer science, engineering, law, and Internet security discussed how social networks blur the lines between socializing and advertising, how data are collected and used, what legal remedies have been most effective and what the future holds for consumers. Over 150 people attended. On October 5, 2012. CISP hosted a conference "Under Watchful Eyes: Privacy and the Technologies That Track." The conference analyzed the legal. privacy, and ethical issues surrounding the collection and use of geolocation data.

Again, over 150 people attended. On September 10, 2013, CISP will co-host an international conference on the use of surveillance technologies in the investigation and prosecution of financial crimes—and the privacy implications of gathering and storing that data, with over 200 attendees already registered.

EXHIBIT H

BERKMAN

The Berkman Center for Internet & Society at Harvard University

Cy Pres Proposal (Google Referrer Header Privacy Litigation)

Executive Summary

The Berkman Center for Internet & Society at Harvard University proposes a research-based multi-stakeholder law and policy initiative aimed at formulating concrete proposals for how Internet privacy can be safeguarded more effectively, via legal and policy reform, company action, technological innovation, targeted educational efforts, and user engagement. With a focus on the changing landscape of online search, this initiative will build upon the Berkman Center's long interest, scholarship, and advocacy regarding privacy and new technologies with an eye towards practically informing policy debates and decision-making processes. Importantly, it will identify critical areas where users, especially youth, may require more information about how search tools work—that is, how their data is being processed and shared—in order to inform practical alternatives or solutions. This project will seek to lay the groundwork for on ongoing multi-stakeholder effort focused on core issues related to privacy on the Internet, in anticipation of emerging search technologies and business practices.

We will begin with an analysis of recent privacy cases and incidents where user search data has been shared with third parties without their knowledge or consent. Based on these findings, and in partnership with relevant stakeholders, we will map and investigate

existing legal and regulatory frameworks and critically evaluate to what extent they succeed or fail in protecting consumer privacy in the evolving online search ecosystem. As part of this effort, we will create connections with a diverse group of individuals and organizations that are experimenting with mechanisms to enhance and impact user privacy—from creative educational materials to technological interventions. A range of outputs will emerge from these working group meetings, including a blueprint that demonstrates how users who are engaged in online search can be better protected in the future, in addition to a set of specific recommendations targeted at lawmakers and regulators.

Most critically, this initiative will bring together and strengthen a community of practitioners, users, company representatives, advocates, and technologists who are interested in collaboratively examining these issues and thinking about opportunities to influence company behavior, strategically educate policymakers about not only the risks, but also the technologies themselves, and provide users with materials, resources, and tools that can enable them to make informed choices about their data. A priority for outreach will be the inclusion of groups who are innovating at the edges of privacy-focused policy, research, and advocacy, in order to ensure that emerging models and experimental approaches are featured prominently in our analysis and among our collaborators. The cultivation of this strong human network will enable us to identify, analyze, and respond to privacy challenges in ways that are based on an understanding of critical gaps in existing legal and policy frameworks.

The proposed initiative benefits the Class directly and in at least three ways. First, it creates a solid knowledge base about current and future privacy threats related to search online, while offering a critical assessment of gaps and limitations the current legal and regulatory framework, including enforcement regimes. This assessment will include an analysis of user expectations and attitudes, and seek to inform consumers and policy makers about the technologies they use (and regulate), in order to position them to take preventive measures as desirable. Second, the initiative will result in a blueprint that includes practical recommendations for lawmakers and regulators aimed at increasing the future level of privacy protection for the users of online search technologies—including the Class members. As such, it seeks to protect the Class from future wrongful conduct which plaintiffs complain. Finally, based on findings emerging from a collaborative, networked process with key actors in the field, the Class will benefit from creative educational materials designed to respond to gaps in knowledge regarding privacy risks. These outputs will ideally complement ongoing efforts to raise awareness and help users and policymakers understand the more complex elements of search technologies, and therefore make informed choices about the products they use.

The outcomes and effectiveness of the proposed initiative will be reported in one midterm and one final report, available to the Class and the public at large through a project website on the Berkman Center's homepage. The reports will be structured in a manner similar to the narrative portion of a grant report. Moreover, all findings and materials resulting from the initiative— including, for instance, the summaries of the multi-stakeholder working meetings as well as

the typology of search-related privacy threats and challenges, in addition to educational materials— will be shared online and presented in such ways that they are accessible to a broader audience, including the Class, in addition to policymakers and companies. Each draft deliverable will be subject to a peer-review, shared among the members of the multi-stakeholder working group, which includes search engine users, and will be part of an open consultation process, in which the Class can participate and provide feedback.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

Case No. 5:10-cv-04809 EJD

IN RE GOOGLE REFERRER HEADER PRIVACY LITIGATION

ORDER GRANTING PLAINTIFFS' MOTION FOR PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT

Presently before the court in this consolidated internet privacy litigation is the unopposed Motion for Preliminary Approval of Class Action Settlement filed by representative Plaintiffs Paloma Gaos, Anthony Italiano and Gabriel Priyev ("Plaintiffs"). *See* Docket Item No. 52. Federal jurisdiction arises pursuant to 28 U.S.C. § 1331. Having carefully considered Plaintiffs' motion and additional filings as well as the arguments of counsel at the hearing on this matter, the court has determined the motion should be granted for the reasons stated below.

I. FACTUAL AND PROCEDURAL BACKGROUND

According to the Consolidated Class Action Complaint ("CCAC"), "searching" is one of the "most basic activities performed in the Internet," and Defendant Google, Inc.'s ("Defendant") website offers the most-used search engine in the world." *See* CCAC, Docket Item No. 50, at ¶¶ 15, 16. This case focuses on that proprietary search engine. Plaintiffs allege Defendant operated the search engine in such a manner that violated their

Internet privacy rights by disclosing personal information to third parties.

Specifically, Plaintiffs allege that Defendant's search engine intentionally and by default included the user's search terms in the resulting URL of the search results page. *Id.* at ¶ 56. Thus, when a user of Defendant's search engine clicked on a link from the search results page, the owner of the website subject to the click received the user's search terms in the "referrer header"[1] from Defendant. *Id.* at ¶ 57. Several web analytics services parse the search query information from web server logs, or otherwise collect the search query from the referrer header transmitted by each user's web browser. *Id.* at ¶ 58. Indeed, Defendant's own analytics product provide webmasters with this information in the aggregate. *Id.*

According to Plaintiffs, the problem with Google's disclosure of search information to these third parties is that the referrer header – which displays the user's search terms – can sometimes contain certain personal information often subject to search queries, including:

> users' real names, street addresses, phone numbers, credit card numbers, social security numbers, financial account numbers and more, all of which increases the risk of identity theft. User search queries can also contain highly-personal and sensitive issues, such as confidential medical information, racial or ethnic origins, political or religious beliefs or

[1] In the simplest of terms, the "referrer" or referring page is the URL of the previous webpage from which a link was followed. HTTP referer, Wikipedia, http://en.wikipedia.org/wiki/HTTP_referer (last visited Mar. 24, 2013).

> sexuality, which are often tied to the user's personal information.

Id. at ¶ 3.

Based on these allegations, Plaintiffs assert the following causes of action: (1) violation of the Stored Communications Act ("SCA"), 18 U.S.C. § 2701; (2) breach of contract; (3) breach of the covenant of good faith and fair dealing; (4) breach of implied contract; (5) unjust enrichment; and (6) declaratory and injunctive relief. They seek to represent the following proposed class:

> All persons in the United States who submitted a search query to Google at any time between October 25, 2006 and the date of notice to the class of certification. Excluded from the Class are Google, its officers and directors, legal representatives, successors or assigns, any entity in which Google has or had a controlling interest, any judge before whom this case is assigned and the judge's immediate family.

As to the relevant procedural history, Gaos initiated the action in this court on October 25, 2010. *See* Docket Item No. 1. Judge James Ware granted Defendant's Motion to Dismiss the original complaint with leave to amend on April 7, 2011. *See* Docket Item No. 24. The case was then reassigned to the undersigned on April 25, 2011, and Defendant's second Motion to Dismiss was granted with leave to amend on March 29, 2012. *See* Docket Item Nos. 25, 38. Gaos filed a Second Amended Complaint on May 1, 2012, adding Italiano as an additional representative plaintiff and which Defendant, once again, moved to dismiss. *See* Docket Item Nos. 39, 44.

Meanwhile, Priyev filed his action on February 29, 2012, in the Northern District of Illinois. *See* Docket Item No. 1 in Case No. 5:13-cv-00093 EJD. That court transferred the action to this district on January 8, 2013. *See* Docket Item No. 48 in Case No. 5:13-cv-00093 EJD. On April 30, 2013, the undersigned granted the parties' stipulation to relate and consolidate the actions for the purpose of settlement proceedings. *See* Docket Item No. 51. This motion followed.

II. LEGAL STANDARD

A class action may not be settled without court approval. Fed. R. Civ. P. 23(e). When the parties to a putative class action reach a settlement agreement prior to class certification, "courts must peruse the proposed compromise to ratify both the propriety of the certification and the fairness of the settlement." *Staton v. Boeing Co.*, 327 F.3d 938, 952 (9th Cir. 2003). At the preliminary stage, the court must first assess whether a class exists. *Id.* (citing *Amchem Prods. Inc. v. Windsor*, 521 U.S. 591, 620 (1997)). Second, the court must determine whether the proposed settlement "is fundamentally fair, adequate, and reasonable." *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1026 (9th Cir. 1998). If the court preliminarily certifies the class and finds the proposed settlement fair to its members, the court schedules a fairness hearing where it will make a final determination of the class settlement. *Okudan v. Volkswagen Credit, Inc.*, No. 09-CV-2293-H (JMA), 2011 U.S. Dist. LEXIS 84567, at *6 (S.D. Cal. Aug. 1, 2011).

III. DISCUSSION

A. Class Certification

The court first examines whether this action is appropriate for class treatment keeping in mind the rules that control such an inquiry. The Federal Rules of Civil Procedure describe four preliminary requirements for class certification: (1) numerosity; (2) commonality; (3) typicality; and (4) adequacy of representation. *See* Fed. R. Civ. P. 23(a)(1)-(4). If these are satisfied, the court must then examine whether the requirements of Rule 23(b)(1), (b)(2), or (b)(3) are satisfied. *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2548-49 (2011).

The Rule 23 requirements are more than "a mere pleading standard." *Id.* The class representations are subjected to a "rigorous analysis" which compels the moving party to "affirmatively demonstrate . . . compliance with the rule – that is, he must be prepared to prove that there are in fact sufficiently numerous parties, common questions of law or fact, etc." *Id.*

1. Rule 23(a)

As to the issue of numerosity, Rule 23(a)(1) provides that a class action may be maintained only if "the class is so numerous that joinder of all parties is impracticable." Fed. R. Civ. P. 23(a)(1). In this context, "impracticability" is not equated with impossibility; it is only an apparent difficulty or inconvenience from joining all members of the class. *Harris v. Palm Springs Alpine Estates, Inc.*, 329 F.2d 909, 913-14 (9th Cir. 1964). Moreover, satisfaction of the numerosity requirement is not dependent upon any specific number of proposed class members, but "where the number of class members exceeds forty, and particularly where

class members number in excess of one hundred, the numerosity requirement will generally be found to be met." *Int'l Molders' & Allied Workers' Local 164 v. Nelson*, 102 F.R.D. 457, 461 (N.D. Cal. 1983).

In their motion, Plaintiffs are unable to provide an exact estimate of the size of the purported class. But that does not necessarily defeat a favorable determination of numerosity. "Where the exact size of the class is unknown but general knowledge and common sense indicate that it is large, the numerosity requirement is satisfied." *Orantes-Hernandez v. Smith*, 541 F. Supp. 351, 370 (C.D. Cal. 1982). Indeed, it is often the case that "[t]he sheer number of potential class members justifies [a] Court's finding" of numerosity. *Tchoboian v. Parking Concepts, Inc.*, No. SACV 09-422 JVS (ANX), 2009 U.S. Dist. LEXIS 62122, at *13, 2009 WL 2169883 (C.D. Cal. July 16, 2009). Here, that "sheer number" supports satisfaction of the numerosity requirement since Plaintiffs represent that notice of this settlement will be potentially communicated to over 129 million visitors of Defendant's website.[2] Based on that representation, the court finds that Plaintiffs have made an adequate showing of numerosity.

Turning to Rule 23(a)(2), this section requires there be "questions of law or fact common to the class." Fed.

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[2] This estimation is based on information obtained from comScore, which Plaintiffs describe as a "global Internet information provider" that "maintains a proprietary database capturing more than 1 trillion transactions monthly, equal to almost 40% of the monthly page views of the entire internet." *See* Decl. of Richard W. Simmons, Docket Item No. 52, at ¶ 22 n. 6. Information from comScore revealed that 129,979,000 individuals visited Defendant's search website in the six months preceding the filing of this motion. *Id.* at ¶ 24.

R. Civ. P. 23(a)(2). In the wake of *Wal-Mart*, commonality now requires "the plaintiff to demonstrate that the class members 'have suffered the same injury.'" *Wal-Mart*, 131 S. Ct. at 2551 (quoting *Gen. Tel. Co. of the Southwest v. Falcon*, 457 U.S. 147, 157 (1982)). The claims of all class members "must depend on a common contention . . . of such a nature that it is capable of classwide resolution – which means the determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke." *Id.*

Here, Plaintiffs contend the commonality requirement is met because the claims of all class members arise from one critical allegation: that Defendant's system-wide practice and policy of storage and disclosure of their search query information was unlawful. The court agrees, since confirmation of this allegation would resolve an issue essential to the validity of all causes of action for all members of the class. Thus, having considered the issue in light of *Wal-Mart*, the court finds this case meets the commonality requirement of Rule 23(a)(2).

Rule 23(a)(3) requires that the representative party's claim be "typical of the claim . . . of the class." Fed. R. Civ. P. 23(a)(3). "Under this rule's permissive standards, representative claims are typical if they are reasonably co-extensive with those absent class members; they need not be substantially identical." *Hanlon,* 150 F.3d at 1020. Here, Plaintiffs' personal claims are similar, if not identical, to those of any and all absent class members since Plaintiffs were subjected to Defendant's storage and disclosure policies as users of Defendant's search engine. These policies applied to anyone who conducted a search on Defendant's website, and the ensuing damage to all

class members flows from this uniform application. For this reason, Plaintiffs have satisfied the typicality requirement.

Finally, Rule 23(a)(4) requires a showing that "the representative parties will fairly and adequately protect the interests of the class." Fed. R. Civ. Proc. 23(a)(4). Constitutional due process is central to this determination. "[A]bsent class members must be afforded adequate representation before entry of judgment which binds them." *Hanlon*, 150 F.3d at 1020 (citing *Hansberry v. Lee*, 311 U.S. 32, 42-43 (1940)). Two questions must therefore be resolved by the court: "(1) do the named plaintiffs and their counsel have any conflicts of interest with other class members, and (2) will the named plaintiffs and their counsel prosecute the action vigorously on behalf of the class?" *Id.* Based on the information presented, the court answers the first question in the negative, since Plaintiffs share the desire of all class members to be compensated for the violations alleged in the CCAC. As to the second question, the court is satisfied that Plaintiffs' counsel has and will continue to pursue this action vigorously on behalf of the class considering counsel's reputation and qualifications in the area of complex internet privacy litigation.

2. Rule 23(b)

Under subsection (b)(3) of Rule 23, the court must find "that 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." Fed. R. Civ. P. 23(b)(3). "The predominance inquiry focuses on the relationship between the common and individual issues and tests whether the proposed class [is]

sufficiently cohesive to warrant adjudication by representation." *Vinole v. Countrywide Home Loans, Inc.*, 571 F.3d 935, 944 (9th Cir. 2009) (internal citations omitted).

As already discussed with regard to the Rule 23(a)(2) commonality requirement, the fact that the claims of all proposed class members arise from an allegation based on a uniform policy applied to all users of Defendant's search engine weighs in favor of a finding that common issues will predominate over individual issues. *See Gutierrez v. Wells Fargo Bank, N.A.*, No. C 07-05923 WHA, 2008 U.S. Dist. LEXIS 70124, at *48, 2008 WL 4279550 (N.D. Cal. Sept. 11, 2008) (finding predominance when "[t]he challenged practice is a standardized one applied on a routine basis to all customers."). Accordingly, the court finds the predominance requirement satisfied.

For superiority, the court must consider "whether maintenance of this litigation as a class action is efficient and whether it is fair," such that litigating this case as a class action is superior to other methods of adjudicating the controversy. *Wolin v. Jaguar Land Rover N. Am., LLC*, 617 F.3d 1168, 1175-76 (9th Cir. 2010). As Plaintiffs note, the alternatives to class certification are either millions of separate, individual proceedings, which would certainly be time-consuming and inefficient, or an abandonment of claims by most class members since the amount of individual recovery could be relatively small – an outcome which is certainly not desirable. Moreover, it is fair to allow this case to proceed as a class action because Defendant's policy was directed at all of its users as whole, rather than at particular users of its search engine. For these reasons, the court finds that a class action is the

superior method of resolving the claims of all class members. This requirement is therefore satisfied.

Since a sufficient showing has been made as to all of the requirements contained in Federal Rule of Civil Procedure 23, the class will be conditionally certified for the purposes of settlement.

B. Preliminary Fairness Determination

The court now examines the fairness of the proposed settlement, beginning with the major terms of the parties' agreement. Here, the parties propose a settlement consisting purely of payments to cy pres recipients without direct payments to the class members. It contains the following components:

- Defendant will pay the total amount of $8.5 million, which will constitute the entirety of the settlement fund. All payments will be made from this fund, including: (1) distributions to cy pres recipients, (2) attorney fees and costs awards, (3) incentive awards to named plaintiffs, and (4) administration costs, including the costs due to the claims administrator.
- Cy pres recipients will receive proportional payments of the amount of the fund that remains after all other payments have been made. As a condition of receiving payment, all cy pres recipients must agree to devote the funds to protecting privacy on the internet.
- The parties have proposed the following entities as potential cy pres recipients: World Privacy Forum; Carnegie-Mellon; Chicago-Kent College of Law Center for Information, Society and Policy; Berkman Center for Internet and

Society at Harvard University; Stanford Center for Internet and Society; and AARP, Inc.[3]

- As to particular payments, incentive awards the representative plaintiffs have been capped at $5,000 each, subject to court approval. The parties have allotted up to $1 million as costs to the Claims Administrator for the notice plan.
- In addition, Defendant will maintain information on its website under the "FAQs" to advise search users of its conduct and policies so that users can make an informed choice about whether and how to use Defendant's search engine.

As previously noted, the details of this settlement are scrutinized to ensure they are "fair, reasonable, and adequate." Fed. R. Civ. P. 23(e)(1)(C). The burden to demonstrate fairness falls upon the proponents of the settlement. *Staton,* 327 F.3d at 959; *see also Officers for Justice v. Civil Svc. Comm'n. of the City and Cnty. of San Francisco*, 688 F.2d 615, 625 (9th Cir. 1982). The relevant factors for consideration include: the strength of the plaintiff's 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; the stage of the proceedings; and the experience and views of counsel. *Staton*, 327 F.3d at 959.

When, as here, settlement occurs before formal class certification, settlement approval requires a higher

[3] This takes into account the decision of the MacArthur Foundation to withdraw from cy pres consideration after this motion was filed. *See* Supplemental Decl., Docket Item No. 53, at ¶ 2.

standard of fairness in order to ensure that class representatives and their counsel do not secure a disproportionate benefit at the expense of the class. *Lane v. Facebook, Inc.*, 696 F.3d 811, 819 (9th Cir. 2012).

The court has carefully reviewed the settlement agreement and the circumstances leading up to it and finds several characteristics support a finding of fairness. First, the settlement was reached after an extensive amount of motion practice and document exchange; thus, this case was not at an early stage when a compromise was reached. Second, the parties engaged the services of an experienced private mediator to assist them in their efforts to resolve this action at arms-length, a fact which undermines any possible collusion between Plaintiffs' counsel and Defendant. Third, Plaintiffs' counsel – as experienced class action litigators – support the settlement. Fourth, it is apparent the parties thoughtfully considered the risk, expense and complexity of further litigation in reaching a compromise. Indeed, as Plaintiffs point out, Defendant's arguments and affirmative defenses in opposition to liability were viable and presented issues of first impression for the Ninth Circuit. Thus, it was entirely possible that Defendant could ultimately prevail at some point, if not on the next motion to dismiss which was pending at the time this motion was filed, which would have resulted in further time and expense to obtain final resolution for the class. Moreover, full compensation for the class would be unlikely even if Plaintiffs received a favorable verdict at trial.[4] Settlement at this point avoids an adverse

[4] On that note, Plaintiffs point out that the full amount of statutory damages available through the CCAC is likely in the trillions of dollars considering the size of the class. This is an

result and saves both parties the burden of funding what could very well have been protracted litigation for many years.

At the same time, there are certain aspects of the settlement which could weigh against a finding of fairness. Most importantly, the court observes that Defendant's challenged practices will not change as a result of this settlement. Instead, Defendant will be obligated to make certain "agreed-upon disclosures," or changes to certain portions of its website, which better informs users how their search terms could be disclosed to third parties through a referrer header. This disclosure, as Plaintiffs indicate, will allow potential users of Defendant's search engine to know in advance how their search terms might be provided to third parties. This is not the best result when compared to the injunctive relief sought in the CCAC since such an order would have required Defendant to stop disclosing users' search terms for profit.[5] But class action settlements do not need to embody the best result for preliminary approval. At this point, the court's role is to determine whether the settlement terms fall within a reasonable range of possible settlements, with "proper deference to the private consensual decision of the parties" to reach an agreement rather than to continue litigating. *Hanlon*, 150 F.3d at 1027; *see also In re Tableware Antitrust Litig.*, 484 F. Supp. 2d 1078, 1079 (N.D. Cal. 2007).

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amount in excess of what Defendant could ever pay considering it is much more than it's value as a company.

[5] "As a result of [Defendant's] above-described conduct in violation of applicable law, Plaintiffs and the Class are also entitled to an order requiring [Defendant] not to use or store preexisting Web History for purposes of profiting by transmitting their information to third parties." *See* CCAC, at ¶ 171.

Considering all of the circumstances which led to a compromise here, the relief obtained for the class does fall within a reasonable range of possible settlements since it was entirely possible that nothing would be obtained if the case were dismissed or if Defendant received a favorable verdict at trial – two entirely possible scenarios that would have allowed Defendant to continue its practice without any further comment. Under this settlement, that results is avoided by providing a means for future users of Defendant's website to know the disclosure practices before conducting a search.

The court must also be mindful of the Ninth Circuit's recent direction concerning pure cy pres settlements like this one. In *Lane v. Facebook, Inc.*, the Court clarified that the cy pres distribution must be the "next best" remedy to direct payments to the class either because proof of individual claims would be burdensome or distribution of damages too costly. 696 F.3d at 819 (citing *Six Mexican Workers v. Ariz. Citrus Growers*, 904 F.2d 1301, 1305 (9th Cir. 1990)). The Court further advised that the district court "should not find the settlement fair, adequate, and reasonable unless the cy pres remedy 'accounts for the nature of the plaintiffs' lawsuit, the objectives of the underlying statutes, and the interests of the silent class members.'" *Id.* at 821 (quoting *Nachshin v. AOL, LLC*, 663 F.3d 1034, 1036 (9th Cir. 2011)).

In this case, a settlement providing for cy pres payments rather than direct payments to class members is the "next best" remedy for both reasons identified in *Lane*. Since the amount of potential class members exceeds one hundred million individuals, requiring proofs of claim from this many people would impose a significant burden to distribute, review and then

verify. Similarly, the cost of sending out what would likely be very small payments to millions of class members would exceed the total monetary benefit obtained by the class.

Furthermore, Plaintiffs have demonstrated how distributing settlement funds to the proposed cy pres recipients accounts for the nature of this suit, meets the objectives of the SCA claim,[6] and furthers the interests of class members. All of the cy pres recipients were chosen only after they met certain qualifying criteria[7] tailored to the claims in this case and submitted detailed proposals aimed at resolving issues in the area of Internet privacy. The executive summaries

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[6] "The SCA was enacted because the advent of the Internet presented a host of potential privacy breaches that the Fourth Amendment does not address." *Quon v. Arch Wireless Operating Co., Inc.*, 529 F.3d 892, 900 (9th Cir. 2008), rev'd on other grounds by *City of Ontario v. Quon*, 560 U.S. 746 (2010). "Generally, the SCA prevents 'providers' of communication services from divulging private communications to certain entities and/or individuals." *Id.*

[7] According to Plaintiffs' counsel, cy pres recipients had to (1) be independent and free from conflict; (2) be qualified organizations with exemplary service records, and they must promote public awareness and education, and/or support research, development and initiatives related to protecting privacy on the Internet, with an emphasis on consumer-facing efforts; (3) reach and target internet users of all demographics across the country; (4) be willing to provide detailed proposals to the court and the class; and (5) be capable of using the funds to educate the class about risks attendant with disclosing personal information to internet service providers; or inform policy makers about the challenges associated with internet privacy and possible solutions; or develop tools allowing consumers to understand and control the flow of their personal information to third parties; or develop tools to prevent third parties from exploiting consumer data. *See* Supplemental Decl., Docket Item No. 61, at ¶ 21.

submitted after the hearing on this motion confirm that the proposed cy pres recipients certainly have the capabilities to carry out Plaintiffs' goals. The court therefore finds, for the purposes of preliminary approval,[8] that the proposed cy pres distribution "bears a substantial nexus to the interests of the class members," as required by *Lane. Id.*

On balance, the factors favoring approval of the settlement outweigh those that could support a finding to the contrary. Accordingly, for the reasons described, the court will approve the settlement terms as fair, reasonable and adequate.

C. Class Notices and Settlement Administration

Rule 23(c)(2)(B) requires "the best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort." However, individual notice is not always practical. When that is the case, publication or something similar is sufficient to provide notice to the individuals that will be bound by the judgment. *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 315 (1950).

As to the content of the notice, it must explain in easily understood language the nature of the action, definition of the class, class claims, issues and defenses, ability to appear through individual counsel, procedure to request exclusion, and the binding nature of a class judgment. Fed. R. Civ. P. 23(c)(2)(B).

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[8] It is important to emphasize that the court may reach another conclusion when determining whether to finally approve this settlement since, by that time, the detailed proposals of the cy pres recipients will have been released for comment.

This case is somewhat unique in that the size and nature of the class renders it nearly impossible to determine exactly who may qualify as a class member. In fact, due to popularity of Defendant's search engine and its rather ubiquitous position in American culture, this class potentially covers all internet users in the United States. That being the case, direct notice to class members by mail, e-mail or other electronic individualized means is impractical.

Faced with similar circumstances, other courts have approved indirect notice to potential class members in a manner similar to notice by publication. *See In re MetLife Demutualization Litig.*, 262 F.R.D. 205, 208 (E.D.N.Y. 2009) ("The best practicable notice under the circumstances is notice by publication in newspapers. In view of the millions of members of the class, notice to class members by individual postal mail, email, or radio or television advertisements, is neither necessary nor appropriate."). That is what the parties propose here. The plan includes four media channels: (1) internet-based notice using paid banner ads targeted at potential class members (in English and in Spanish on Spanish-language websites); (2) notice via "earned media" or, in other words, through articles in the press; (3) a website decided solely to the settlement (in English and Spanish versions); and (4) a toll-free telephone number where class members can obtain additional information and request a class notice. There will also be a dedicated post office box for class members to correspond with the settlement administrator. Plaintiffs approximate this advertising campaign will reach approximately 73.1% of likely class members. In light of the size of the class, the court finds that this plan meets the goals Rule 23(c)(2)(B).

Plaintiffs have also included copies of the class notice, request for exclusion and objection form, each of which have been amended to account for the concerns identified by the court at the hearing. The court has reviewed these documents and approves them as amended.[9]

IV. ORDER

In light of the preceding discussion, the Motion for Preliminary Approval of Class Settlement (Docket Item No. 52) is GRANTED as follows:

1. This action is certified as a class action for settlement purposes only pursuant to subsections (a) and (b)(3) of Federal Rule of Civil Procedure 23 and 29 U.S.C. § 216(b).

2. The settlement agreement and release is preliminarily approved as fair, reasonable, and adequate pursuant to Federal Rule of Civil Procedure 23(e).

3. Named plaintiffs Paloma Gaos, Anthony Italiano and Gabriel Priyev are appointed as adequate class representatives for settlement purposes only.

4. Kassra Nassiri of Nassiri & Jung, LLP, Michael Aschenbrenner of Aschenbrenner Law, P.C. and Ilan Chorowsky of Progressive Law Group LLC are appointed as co-lead counsel for the settlement class pursuant to Federal Rule of Civil Procedure 23(g).

5. The Notice Plan and the content and form of Notice to the Settlement Class as set forth in Plaintiffs' Motion for Preliminary Approval of Class Action Settlement and the Supplemental Declaration filed September 13, 2013, are approved.

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[9] Although it raised the issue at the hearing, the court declines to impose a page limit on written objections.

6. A hearing on the final approval of class action settlement shall be held before this court on **August 29, 2014 at 9:00 a.m.**, at the United States District Court, Northern District of California, San Jose Division, 280 South 1st Street, Courtroom 4, 5th Floor, San Jose, California 95113. Class Counsel may file brief(s) requesting final approval of the Settlement Agreement, Fee Award, and Incentive Award, no later than 35 calendar days before the final approval hearing. Objections must be filed no later than **August 8, 2014.** All other applicable dates shall be established by the Settlement Agreement and Plaintiffs' Motion for Preliminary Approval of Class Action Settlement.

IT IS SO ORDERED.

Dated: March 26, 2014

/s/ Edward J. Davila
EDWARD J. DAVILA
United States District Judge

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

Case No. 5:10-cv-04809-EJD

In re GOOGLE REFERRER HEADER PRIVACY LITIGATION

This Document Relates To: All Actions

CLASS ACTION

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* * *

PLAINTIFFS' REPLY MEMORANDUM IN SUPPORT OF MOTION FOR FINAL APPROVAL OF CLASS ACTION SETTLEMENT AND AWARD OF ATTORNEYS' FEES, EXPENSES, AND INCENTIVE AWARDS

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II. ARGUMENT

A. The Proposed *Cy Pres* Distributions Meet Ninth Circuit Criteria For Final Approval.

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3. There Is No Improper Relationship Amongst The* Cy Pres *Recipients, Class Counsel, And Defendant Google.

Objector Frank argues that because Class Counsel attended school at Harvard, Stanford, and Chicago-Kent, distributing *cy pres* money to any of these organizations is de facto improper. (Dkt. 70 at 9-10.) Objector Jan joins in this objection, and also claims the relationship is improper based upon Defendant's counsel Eric Evans having obtained his J.D. from Harvard.[4] (Dkt. 71 at 10.) However, neither Frank nor Jan claim that Class Counsel (or Mr. Evans) have any relationships with the *cy pres* organizations beyond having attended these respected institutions. (*Id*.)

Being an *alma mater* of a *cy pres* recipient, without more, does not create an appearance of impropriety. In *In re EasySaver Rewards Litigation*, objectors to a class action settlement alleged that there was an appearance of impropriety where class counsel proposed giving *cy pres* money to USD Law School, a school three of the attorneys involved in the settlement had attended. *In re EasySaver Rewards Litig.*, 921 F. Supp. 2d 1040, 1050-51 (S.D. Cal. 2013). The court held that where the law school was not entitled to any greater award than the others, where there were "no suggestions that counsel [had] any further relationship with the school than simply graduating from there, and where there was a "rational connection between the chosen recipients and the nature of the settlement," it was not improper to grant *cy pres* money to an *alma mater* school. *Id*. In fact, the court noted that "simply by virtue of it being a law school, USD Law School may be in the best position to develop

[4] In addition to being irrelevant, this statement is incorrect. Mr. Evans obtained his A.B. (1993) and A.M. (1997) from Harvard, but received his J.D. at the University of Michigan in 2004. http://www.mayerbrown.com/people/eric-b-evans/ (last accessed August 22, 2014).

and research the legal issues associated with internet privacy and security underlying Plaintiffs' claims." *Id*. at 1051.

Here, the proposed proportional amounts to be distributed are: Carnegie Mellon (21%), World Privacy Forum (17%), Stanford Center for Internet and Society (16%), Chicago-Kent College of Law Center for Information, Society, and Policy (16%), AARP, Inc (15%), and Berkman Center for Internet and Society at Harvard University (15%).[5] As shown, two of the three non-*alma mater* proposed recipients would receive the largest proportions under the Settlement. Additionally, Class Counsel Kassra Nassiri and Michael Aschenbrener have no affiliation with Harvard's Berkman Center ("Berkman Center"), Stanford's Center for Internet and Society ("CIS"), or Chicago-Kent's Center for Information, Society and Policy ("CISP") other than obtaining degrees from the institutions housing these centers. (Declaration of Michael Aschenbrener ("Asch. Decl."), attached hereto as Exhibit A, at ¶ 5); (Declaration of Kassra Nassiri ("Nassiri Decl.), attached hereto as Exhibit B, at ¶ 4.)

Furthermore, as the court noted in *In re EasySaver Rewards*, law schools by their very natures are often best situated to research legal issues related to the matters here, including the legality and adequacy of online privacy disclosures. The Berkman Center, as part of its mission, researches, teaches, and encourages engagement revolving around risks to privacy and

[5] http://www.googlesearchsettlement.com/hc/en-us/articles/202372170-Proposed-Cy-Pres-Recipients-and-Allocations (last accessed August 21, 2014).

reputation online.[6] CIS similarly "works in the public interest to empower and support user choice online."[7] Finally, CISP "promotes interdisciplinary research about privacy and information security issues raised by developing information technologies."[8] The aims of each of these proposed *cy pres* recipients fit squarely within Plaintiffs' underlying claims and meet the criteria for receiving funds from this Settlement.

Frank cites the Ninth Circuit's decision in *Naschin v. AOL* to support his criticism of *cy pres* donations to the *alma maters* of Class Counsel. *Nachsin v. AOL, LLC*, 663 F.3d 1034, 1039 (9th Cir. 2012). However, the problems with the *cy pres* awards in *Naschin* are not present in the instant case. In *Naschin*, the Ninth Circuit held that the proposed donations did not satisfy any of the guiding standards outlined in *Six (6) Mexican Workers v. Arizona Citrus Growers,* 904 F.2d. 103 (9th Cir. 1990). 663 F.3d at 1040. Because the proposed donations in *Naschin* were focused primarily on Los Angeles recipients in a national class action and because the donations were made to local charities (e.g. the Boys and Girls Club of Los Angeles) that had no relationship to the underlying claims of breach of electronic communications privacy, unjust enrichment and breach of contract, the Ninth Circuit refused to uphold the rewards. *Id*.

In contrast here, the proposed *cy pres* recipients are geographically diverse, serving the interests of a

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[6] http://p2.zdassets.com/hc/theme_assets/512007/200043500/Berkman_Center_at_Harvard.pdf (last visited Aug. 14, 2014).

[7] http://p2.zdassets.com/hc/theme_assets/512007/200043500/Stanford_CIS.pdf, (last visited Aug. 14, 2014).

[8] http://p2.zdassets.com/hc/theme_assets/512007/200043500/Chicago-Kent.pdf (last visited Aug. 14, 2014).

nationwide class.[9] This geographical diversity favors, rather than detracts, from the attractiveness of these recipients. *Compare Naschin*, 663 F.3d at 1036 (*cy pres* distributions not appropriate where recipients geographically isolated and substantively unrelated to underlying claims). And, as detailed above, the mission statements of the *cy pres* recipients align squarely with Plaintiffs' claims in conformity with the guiding principles in *Six Mexican Workers*, 904 F.2d at 1037 ("The district court's choice among distribution options should be guided by the objectives of the underlying statute and the interests of the silent class members.").

Objector Frank also takes issue with the proposed *cy pres* donations to the Berkman Center, CIS, CISP, and AARP because Frank claims Google "is already a regular contributor." (Dkt. 70 at 11.) While Google has apparently donated to these institutions previously, Google has never provided funding for the specific proposals submitted by the *cy pres* recipients. Thus, Frank's conjecture that "Google is agreeing to do something that it was in all likelihood going to do anyway" is incorrect and misplaced.[10] (Dkt. 70 at 11.)

Objector Jan also offers a variety of other organizations that he believes are "better aligned with the interests of the Class members." (Dkt. 71 at 12.) Jan offers no specifics about the use of the funds by his preferred recipients, however, or any criticism of the

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[9] The proposed *cy pres* recipients in this case are located in California, Illinois, Pennsylvania, Massachusetts, and Washington, D.C.

[10] In fact, this district has approved proposed *cy pres* donations to the Berkman Center in previous class action litigation against Google. *In re Google Buzz Privacy Litig.*, 2011 WL 7460099 at *3 (N.D. Cal. June 2, 2011) (order approving $500,000 *cy pres* donation to Berkman Center).

proposed use by the actually selected proposed recipients. More fundamentally, where the proposed *cy pres* recipients already meet the standards under *Lane*, the question is not whether the Settlement could be better, but whether the Settlement is fair, adequate, and reasonable. *See Hanlon* 150 F. 3d at 1027.

* * *

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

Case No. 5:10-cv-04809-EJD

In re GOOGLE REFERRER HEADER PRIVACY LITIGATION

This Document Relates To: All Actions

CLASS ACTION

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* * *

DECLARATION OF MICHAEL J. ASCHENBRENER IN SUPPORT OF PLAINTIFFS' REPLY MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION FOR FEES AND FINAL APPROVAL OF CLASS ACTION SETTLEMENT

Pursuant to 28 U.S.C. § 1746, I hereby declare and state as follows:

1. I am an attorney admitted to practice in the States of California, Illinois, and Minnesota, and represent Plaintiffs in the above-titled action. I am over the age of eighteen and am fully competent to make this declaration. This declaration is based upon my personal knowledge, except where expressly noted otherwise.

2. I am the Managing Principal of Aschenbrener Law, P.C., which has been appointed Class Counsel in this matter.

3. As Class Counsel, I am familiar with (i) the claims, evidence, and legal arguments involved in this settlement; (ii) the terms of the settlement; and (iii) the relevant defenses, evidence, and legal arguments made to date.

4. I obtained my law degree from Chicago-Kent College of Law in May 2007.

5. I have no affiliation with the Berkman Center at Harvard, the Center for Internet and Society at Stanford, or the Center for Information, Society and Policy at Chicago-Kent.

* * *

ASCHENBRENER LAW, P.C.

s/ Michael Aschenbrener
Michael Aschenbrener

Dated: August 22, 2014

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

Case No. 5:10-cv-04809-EJD

In re GOOGLE REFERRER HEADER PRIVACY LITIGATION

This Document Relates To: All Actions

CLASS ACTION

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* * *

DECLARATION OF KASSRA P. NASSIRI IN SUPPORT OF PLAINTIFFS' REPLY MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION FOR FEES AND FINAL APPROVAL OF CLASS ACTION SETTLEMENT

Pursuant to 28 U.S.C. § 1746, I, Kassra P. Nassiri, hereby declare and state as follows:

1. I make this declaration of my own personal knowledge, except for those matters stated on information and belief. If called to testify, I could and would do so competently about the matters stated herein.

2. I am an attorney admitted to practice in the State of California. I am a principal in the firm Nassiri & Jung LLP and represent Plaintiffs as co-lead counsel in this matter.

3. I am a 2001 graduate of Harvard Law School, and have been a licensed attorney since that year.

4. I have no affiliation with the Berkman Center at Harvard, the Center for Internet and Society at Stanford, or the Center for Information, Society and Policy at Chicago-Kent.

5. I declare under penalty of perjury that the foregoing is true and correct.

NASSIRI & JUNG LLP

s/ Kassra P. Nassiri
Kassra P. Nassiri

Dated: August 22, 2014

[1] UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

Case No. CV-10-04809-EJD

IN RE GOOGLE REFERRER HEADER PRIVACY LITIGATION

SAN JOSE, CALIFORNIA

AUGUST 29, 2014

PAGES 1 – 68

TRANSCRIPT OF PROCEEDINGS BEFORE
THE HONORABLE EDWARD J. DAVILA
UNITED STATES DISTRICT JUDGE

APPEARANCES

FOR THE PLAINTIFFS:

Aschenbrener Law, P.C.
By: Michael Aschenbrener
* * *

Nassiri & Jung LLP
By: Kassra Nassiri
* * *

Progressive Law Group, LLC
By: Ilan Chorowsky
Alex Stepick
* * *

(Appearances continued on the next page.)

Official Court Reporter:

Irene L. Rodriguez, Csr, Crr
Certificate Number 8074

Proceedings recorded by mechanical stenography, transcript produced with computer.

[2] APPEARANCES: (CONT'D)

FOR THE DEFENDANTS:

O'Melveny & Myers
By: Randall W. Edwards
* * *

Mayer Brown
By: Edward Johnson
* * *

ALSO PRESENT:

CCAF
By: Theodore H. Frank
* * *

[3] SAN JOSE, CALIFORNIA

AUGUST 29, 2014

PROCEEDINGS

(COURT CONVENED.)

THE CLERK: Calling case number 10-4809, In Re Google Referrer Header Privacy Litigation.

On for motion for class action settlement and motion for attorney's fees.

Counsel, please come forward and state your appearances.

MR. JOHNSON: Good morning, Your Honor. Ward Johnson for Google.

THE COURT: Thank you. Good morning.

MR. EDWARDS: Good morning, Your Honor. Randall Edwards also for Google.

THE COURT: Thank you. Good morning.

MR. ASCHENBRENER: Good morning, Your Honor. Michael Aschenbrener on behalf of plaintiffs and the class.

THE COURT: Thank you.

MR. CHOROWSKY: Ilan Chorowsky for the plaintiff and the class.

THE COURT: Good morning.

MR. NASSIRI: Good morning, Your Honor. Kassra Nassiri for plaintiffs.

THE COURT: Thank you. Good morning.

MR. STEPICK: Good morning, Your Honor. Alan [4] Stepick for the plaintiffs.

THE COURT: Thank you very much.

MR. FRANK: And Theodore H. Frank for the objector.

THE COURT: Thank you. Thank you for being here, all of you. I appreciate that. I have read your filings and thank you for those. Those have been very helpful.

This is on today for final approval, and I note that – are there any other objectors present? I see or hear no response.

And I do have plaintiffs' reply memorandum, and this is Doc 75 in support of the final approval. This is on for final approval.

Let me ask you counsel, are there any changes, additions, deletions, augmentations to your filings in regards to final approval?

MR. NASSIRI: No, Your Honor.

MR. ASCHENBRENER: No, Your Honor.

THE COURT: Nothing from the defense?

MR. EDWARDS: Correct, Your Honor.

THE COURT: Okay. Anything from the objector? Anything additional to your –

MR. FRANK: I think our papers describe our position.

THE COURT: Okay. Thank you. Well, I will hear from the parties here as well as any objectors that are present [5] that wish to place objections.

Why don't I, why don't I give the floor to the objector, Mr. Frank, if I could for a moment. Let's hear from him first, please. Thank you.

MR. FRANK: Thank you, Your Honor.

THE COURT: You're welcome.

MR. FRANK: Our papers describe the position. In our view, Lane, the Supreme Court's denial of certiorari, Justice Roberts's decision, respecting denial of certiorari pointed out that the court was concerned about cy pres issues and a variety of factors relating to cy pres issues.

And I think this settlement presents exactly the sort of problems that the court was concerned about. This is a $0 settlement to the class where all of the money goes to cy pres and most, and perhaps even all of the cy pres recipients, are recipients that Google has already given money to.

In fact, several of them prominently say we're supported by Google on their website. So this is not even a new benefit to the class. It's a change of accounting entries to justify the attorney's fees.

So there are two possibilities here, either it's feasible to distribute money to the class, and we contend that it is feasible to distribute money to the class.

THE COURT: How would that work with the sheer size of the class?

[6] MR. FRANK: Well, obviously you can't just mail a check for $0.06 to every class member, but if you have a claims process, the reality is 0.5 percent of members of the class file claims on average, maybe less.

The Fraley versus Facebook settlement, it's very similar to this one, gigantic class of over 100 million people, they just said, okay, we'll have a claims process and see who files claims and we'll give everybody $10. And so few people file claims that they ended up giving everybody $15.

We have $6 and a half million here that could be distributed, maybe even more if the attorney's fees –

THE COURT: What is the class size here?

MR. FRANK: The papers say over a hundred million. It's not clear from what I understand.

THE COURT: But let's say it's 90 million.

MR. FRANK: Well, even if it is 100 million, at a 1 percent claims rate, and we never see 1 percent claims rate in a settlement like this, it's still feasible to distribute $6 million to a million class members and what is more likely is a half a million class members.

THE COURT: What if there is an aberration that when we see 10 percent, 15 percent response?

MR. FRANK: Well, that would be close to unprecedented for a consumer settlement.

THE COURT: There's always a first, isn't there?

[7] MR. FRANK: There's always a first. And at that point the parties can come back and say, well, this is not feasible and it would be more expensive to distribute and then at that point cy pres may be appropriate, though the cy pres would need to be something that isn't already affiliated with Google if it's actually going to be a class benefit and that's Dennis versus Kellog, that's section 3.07 and that's what the Court implies in Marek versus Lane.

THE COURT: Would that be a situation where if Google was generous and donated to just about every charitable organization in the world, wouldn't it mean that all of those people would be conflicted out? It's much like a client going to talk with all of the high powered lawyers who specialize in a particular field and they conflict out those lawyers?

MR. FRANK: Well, I think Google's model is Don't Be Evil and so maybe they are giving to every charity in the world. They're not giving to me and so I am charity.

THE COURT: Are you a 501(c)3.

MR. FRANK: I'm a 501(c)3.

THE COURT: I see.

MR. FRANK: But we wouldn't take cy pres money any way. But in any event, there are two possibilities. So it either is feasible to give money to the class through some sort of claims process in which case cy

pres is appropriate or let's say that it is infeasible to give money to the class, at which [8] point, well, why is this a class action then.

The point – a class action, before it can be certified, has to be superior to other means of adjudication, and with other means of adjudication class members get nothing. With this means of adjudication, class members get nothing. That's not superior. That's the same.

The only beneficiary are the attorneys who get $2 million and Google, which gets a waiver, the class gets nothing.

They point to the injunctive relief, but, again, there's one of two things happening here, either Google is doing something illegal in which case this is being settled for far too little, or Google is doing something illegal, and in which case why are the attorneys collecting $2 million for a change in the business practices that is meaningless?

THE COURT: How would you value the damage issue in this case?

MR. FRANK: Well, I think that's certainly a problem in bringing the litigation, and that's why it's settling for so little.

But, you know, we don't contest that Google has the right to settle this for very little money but if – once you realize that the 6 million bulk of the settlement fund is just a change in accounting entries, Google was going to give money to the Harvard Berkman Center or to Stanford and it's now attributing it to the class action settlement rather than to their normal [9] outflow of charitable funds, the attorneys are collecting the entire benefit.

THE COURT: But what would, what would the – getting back to my question, what is the damage to the class?

MR. FRANK: Again, that's up for the plaintiffs to justify why they haven't violated rule 11 in bringing this lawsuit.

Again, we're not saying Google has to settle this for $100 million or Google has to settle this for $200 million.

Google can settled this for basically what is $2 million, but we protest that these attorneys are getting all of that $2 million and nobody else is getting anything.

THE COURT: Which gets back to my question is how much, I suppose, should – I'm asking you to be the jury, I suppose, in the trial.

MR. FRANK: I'm not saying that Google cannot settle this for very little money. If the parties in an arm's length negotiation say that this is how much the settlement is worth, we're not challenging that, we're not privacy experts. We're class action people.

And what we're saying is, is that the bulk of the settlement funds are going to the class counsel and there is this illusory $6 million that the change in accounting entries to justify the 2 million fee.

Maybe the proper relief to the class is a peppercorn and [10] Google is over paying, but if Google is overpaying, the class is entitled to the proportionate share of the overpaying.

THE COURT: It sounds like you take a little bit of an issue with the attorney's fees portion of the settlement? Is that an understatement?

MR. FRANK: Well, that's generally a problem with class action litigation as discussed in cases like Eubank – I apologize. I'm talking way too fast. Eubank versus Pella Corporation, 753 F. 3d 718 and a number of other cases that talk about the inherent conflict of interest in class action settlements.

The optimal settlements when class members are absent from the table is something that pays the attorneys a lot and the class members very little and you structure the settlement to create the illusion of relief to justify the attorney's fees, to justify the defendant getting out of the case.

And everybody is happy and except for, perhaps, the class members who are frozen out but don't have the incentive to come forward and object because they have too little at stake.

THE COURT: Uh-huh. It's interesting you being a student and academic of class actions, I'm sure you have done a historical view of class action litigation and it's changed, hasn't it?

Perhaps because of the electronic frontier that we now live on. Class actions in the past were suing, perhaps, an [11] automobile manufacturer because the door lock didn't operate correctly. And I'm sure there are still those lawsuits, but you could identify who bought a Ford Fairlane – and I'm not picking on Ford or anything, and I'm just using them as an example here – and that's a pretty identifiable class and there was cy pres, but it really wasn't, historically I'm talking about, and you can please correct me here and you can teach me this morning about this analysis, but there wasn't a – cy pres really wasn't that big of an issue because you could usually identify your class.

And, of course, there were some people who moved from Ford to General Motors and they didn't care anymore, perhaps. So there was some remainder. And it wasn't that, that big of a deal, to put it that way, inelegantly.

Now, however, when you have got people who are using Google and all of these other type of internet type of companies and things worldwide, classes, it's no longer limited to the people who bought a Ford Fairlane in 1968. It's now just hundreds of millions of people.

And the law has to – class action law, you know, you get those size of classes, and it's my goodness, how do you – which is back to my point again, how do you, how do you structure something that allows for consumer recovery under rule 23 in a class action lawsuit?

It's a challenge, isn't it?

[12] MR. FRANK: Well, either the case is meritorious and in which case you have a large class and you have large damages or the case isn't meritorious in which case why are the attorneys collecting so much of what the settlement benefit is?

THE COURT: Have you been engaged in a trial and seen a trial involving 100 million individuals in a class action?

MR. FRANK: Again, I never contested the idea that a class can be large. And, again, we're not contesting that Google and the plaintiffs can agree that this case isn't worth very much.

What we're contesting is the creation of the illusion of relief calling what is really a $2 million settlement an $8 and a half million settlement and having the attorneys collect all of that $2 million and having

Google change its accounting entries to rationalize the attorney's fees without the class getting any additional benefit.

THE COURT: Okay. Thank you. What else would you like me to know, sir?

MR. FRANK: If you have any questions for anything that is in our papers, I think we have acquitted ourselves well.

THE COURT: Thank you for being here. I appreciate you being here. Your input is always important, always important for the court to have as much information as possible [13] when it rules on a final approval of the class, any class action. They're all important.

So I appreciate you being here. I'm sincere in that. I appreciate your papers. I appreciate the time you took in filing your papers. They have been helpful, and I think they have been helpful to all of us here.

MR. FRANK: Thank you very much, and I'll see you in a month in another case.

THE COURT: Oh. Well, thank you for the heads up.

All right. Counsel, why don't I hear from plaintiffs as to your thoughts on whether or not the court should approve this.

MR. NASSIRI: Thank you, Your Honor. It is an interesting discussion about how class actions have changed and these mega class actions have changed the landscape, and, frankly, changed the mechanics of how these settlements work.

We worked very – the $6 and a half million that we're proposing for cy pres here is not illusory.

The proposals, I think, we took measures to make sure that the proposed recipients, which we did it like a grant proposal and we tried to implement best practices and transparency, and we have over 100 pages of detailed proposals from each of these recipients, or potential recipients and these projects are impressive and should result in substantial relief for consumers going forward on privacy issues.

[14] You know, if we were able to distribute money to the class here, it would be something under a dollar per class member, and I don't know what that is worth in today's world anyway.

THE COURT: Is it worth $2 million of attorney's fees?

MR. NASSIRI: Yes, Your Honor, it is. I mean, what we're asking for here is the common fund. We're asking for a Ninth Circuit benchmark. It's up to the court to use it's discretion and judgment.

You know, with respect to attorney's fees, there are no signs of collusion here. We didn't have a clear sailing agreement, and we leave it to the court's discretion to determine whether or not we brought value to the class.

THE COURT: So let me – I interrupted you, and I apologize for that. Let me go back. You were talking about the cy pres recipients and your process, and I do have some questions about that.

My first question was going to be whether or not you have considered direct payment to the class, and I think you just touched on that and you suggested maybe it would be a dollar or something like that.

MR. NASSIRI: Or less, Your Honor. There's no evidence before the court here that the claims rate would be low enough to make direct payments feasible.

And when thinking about this ex ante and how we were going [15] to reach a settlement with the defendant and design a claims or settlement process, this – we followed in the footsteps of some cases before us, Netflix and Beacon and Buzz and others, and given the tremendous size of the class here, it's just not feasible under any reasonable circumstances to make a direct payment.

THE COURT: Okay. Well, I appreciate your investigation into that topic. I think that's, perhaps, one of the first reviews that a court should make same as fiduciary for the class as to what is the benefit, the real benefit for the class and can they have some direct benefit.

And you have talked about the sheer numbers here, and what you're telling me is that you have done thorough investigation on that issue and in your opinion you feel like it would be just de minimus.

MR. NASSIRI: Yes, Your Honor.

THE COURT: Okay. Well, let's move to the next of the cy pres that you were talking about as well. You talked about –

MR. NASSIRI: Your Honor, is it cy pres or is it cypress? Because I have been told it's cy pres.

THE COURT: Well, in this courtroom here I'm saying cy pres.

MR. NASSIRI: That is what it is here today.

THE COURT: That's how my civil procedure professor [16] drilled it into my head and god forbid he should walk in and hear me say something else.

So let's talk about that. You did tell me, you did tell me – let's see, that was in August, wasn't it?

MR. NASSIRI: Almost a year ago.

THE COURT: Yeah, yeah. We all aged well.

MR. NASSIRI: Thank you.

THE COURT: And you told me back then that you were raising the bar in regards to cy pres recipients and you said I'm raising the bar, I think, raising the bar for all cy pres settlements like this to follow.

I remember those words, and I asked staff to get the transcript to see if I had it incorrectly or not. And you said, as you just did, we're treating this cy pres allocation like a grant proposal or a grant making organization, prospective grant.

And I have looked at some of the proposals and they do, they do speak as to an application for a grant.

And I guess my threshold question is what was the process for – what was your process used to publicize the grant proposals?

What did you do to raise that bar to publicize to get people to respond to this grant proposal?

MR. NASSIRI: Well, to clarify, Your Honor, the very first step in the process was not like a grant proposal. We [17] didn't publish a general request for proposal like you might in a grant proposal because we couldn't here, Your Honor.

It was a matter – the potential cy pres recipients were subject to agreement between the parties.

And I believe we briefed up and our preliminary approval papers generally describe the process by which we decided on the final proposed recipients, which, you know, at this point we're calling proposed recipients.

We had to go through a process with the defendants of narrowing down potential cy pres recipients. So that aspect of the process was not like a grant making proposal.

THE COURT: Is that transparent anywhere in the papers, that process, that negotiation with the defendant here identifying those?

MR. NASSIRI: Yes, Your Honor, provided that some details were withheld because this was in the context of a confidential mediation, and I believe Your Honor said that you didn't want to know too much about the actual like who was considered and who was rejected and that kind of thing.

But we did generally describe the number of recipients proposed or potential recipients that were considered in route to narrowing it down to the six and now five proposed recipients.

THE COURT: And these are the same ones that you mentioned in August?

[18] MR. NASSIRI: That's right, Your Honor.

THE COURT: So it begs the question, what has changed in the year? We stayed the same with our youthful appearance, but what has changed as far as the identification, these people that you've – you told me about them in August and you went through this process that is going to raise the bar for this case and all cases in the future.

MR. NASSIRI: Oh, I see, Your Honor.

THE COURT: And it's the same individuals. What has changed?

MR. NASSIRI: The process was the process of getting these proposals together, making sure that the proposals meet the criteria set by the Ninth Circuit in Lane and just generally constitutional requirements for a cy pres recipient for spending the cy pres funds.

So what we focussed on was getting these proposals in final form. So we worked carefully. Again, we did not dictate what these projects were going to be there. They are the privacy experts. We're not. They're academics research institutions and technology developers. But what we did was we guided them to make sure they met certain criteria that we believe are important for a cy pres recipient.

THE COURT: And so how were they selected? I mean, the elephant in the room, of course, is that many of these are law schools that you attended.

[19] MR. NASSIRI: Your Honor, we – there is a – there is kind of a short list of entities, organizations that do this kind of work. Law schools are prominent in that list as are organizations that are not affiliated with law schools.

And we did – we conducted independent research. It was based on our experience and our knowledge of the space and ultimately out of a list – and forgive me, Your Honor, I didn't know this was going to come up again – but I think we had 40 proposed recipients on the table and we ultimately narrowed it down to 6, and it was a matter of what we could agree to, what 6 we could agree to.

THE COURT: You and Google?

MR. NASSIRI: That's correct.

THE COURT: You talk about the issue of – I don't want to use the word "collusion" but perhaps conflict of interest with the law schools being law schools that you all graduated from. And you point me to, I think it was, what was it an EZ Pay case in San Diego?

MR. ASCHENBRENER: Easysaver, Your Honor.

THE COURT: Yes, Easysaver, thank you. And where the good judge there suggested the recipients, and there wasn't anything untoward about that, but particularly where the recipients didn't receive any less than the greater share.

And I look at your pleading, document number 75, page 5, your page 5, page 9 on the ECF calendar, and you break down the [20] percentages, don't you, about the recipients?

And you have Carnegie Mellon at 21 percent; and the World Privacy Forum at 17 percent; and then the alumni recipients, if you will, Stanford, Center for Internet and Society, 16 percent; Chicago Kent, College of Law Center for Information Society and Policy, 16 percent; AARP, 15; and the Berkman Center, 15 percent.

So you're about four points, five points below.

It looks like it was intentionally created –

MR. NASSIRI: I can explain how.

THE COURT: – to stay under and stay within the EZ case in San Diego.

I just tell you that it gives that blush like, you know, I tell you, I remember a phrase, and forgive me and maybe I shouldn't use the phrase, but you remember the old basketball scandals about point shaving.

MR. NASSIRI: Yes.

THE COURT: It looks like, was this – it had to be calculated to keep those percentages under the mark like the good judge in San Diego did.

MR. NASSIRI: It was not, Your Honor.

THE COURT: Okay.

MR. NASSIRI: I'll tell you exactly how we arrived, and we thought about different ways to – different methods for proposing the allocation.

[21] In the end what we did was we asked these recipients to give us a budget and we – these numbers are exactly pro rata against the budgets that they requested without any input from us.

So Carnegie Mellon is getting the most because they asked for the most, and Harvard is getting the least because they asked for the least. It was that simple. It was very objective.

All of these proposals we're impressed with, and we believe that that was the most efficient, equitable way to allocate the money.

THE COURT: So you told these people that you had a certain pool of money available?

MR. NASSIRI: Correct.

THE COURT: And Carnegie Mellon said we would like $1,249,656.34?

MR. NASSIRI: To the penny.

THE COURT: The $0.34 is important to us. Chicago Kent college said we need 949,875 and no cents; and, Berkman said we need $935,000; and, Stanford said we would like $971,400; and, the World Privacy Forum said we would like $1,020,000.

MR. NASSIRI: Correct.

THE COURT: In those figures?

MR. NASSIRI: Exactly those figures. We added them [22] up, and these are the proposed allocations based on the requested amounts, which also the other reason we did it this way is because more or less money may be available and it will scale up easily as percentage points.

But this is directly derived from what they requested in their budgets.

THE COURT: And, again, getting back to my transparency question, was the information, the invitation to the grant, was that something that you worked out with Google as well?

MR. NASSIRI: We did not, Your Honor. And I believe I attached either to our supplemental declaration in support of the preliminary approval or the preliminary approval motion e-mails that we sent to these potential recipients laying out what the requirements were for being considered.

THE COURT: You know, I think I talked you and I used the word perhaps too colloquial, but I think I used the phrase "usual suspects."

MR. NASSIRI: Yes, Your Honor.

THE COURT: And I don't mean and I did not mean at that point and at that time, and I don't today mean to disparage at all the good work that any of these identified cy pres recipients do.

I think, and I hope you appreciate the spirit of my comment was, because these issues were so important, as you [23] have told me, should we cast a wider net to capture, perhaps, additional research from other individuals?

And that's what – when you talked to me about setting the bar higher for this case and others to follow, I'll be very candid with you, I'll be very candid, that's what I thought you were going to do.

I'll tell you candidly again that I'm disappointed that the usual suspects are still usual.

You point out, I think, on page 7 of document 75, your page 7, in footnote 10 you tell me that, in fact, Berkman Center has been received before so you should approve it again. I suppose that's why you put that footnote there.

You remind me that in Google Buzz Privacy Litigation, a $500,000 cy pres donation or cy pres allocation was made there, which I think, if you'll pardon me, supports my view of usual suspects.

And I think I tried in some cumbersome way at that time to say, you know, they're doing good work and I know this is a moving target again, and it's a fluid issue, but if their job is to get notice out and to inform people about how best to protect, either their literature is not being read or it's being ignored in some fashion.

And, again, I'm not being critical of their good works. Perhaps it's just the state of the affairs in this regard and there is a certain apathy that exists in the public regarding [24] these issues, I don't know, which then gets to the value of the settlement, doesn't it?

MR. NASSIRI: You know what is interesting, Your Honor, is that in Lane in the dissent – you know, there's no clear guidance from the courts on this issue, but I would say that the consensus seems to be that the institutions receiving the money should have a

track record. And, you know, the dissent in Lane highlighted this very clearly.

We do have a relative newcomer in Chicago Kent, and AARP is not necessarily a usual suspect in this kind of a case, but the other proposed recipients, they do fantastic work.

THE COURT: Oh, I am not – and I agree. I agree. I absolutely agree.

And it's not for me to tell you I want you to identify this person or that person. I'm not going to do that.

But I guess I think between the Pacific ocean and the Atlantic, you know, these individuals are identified, and as you point out, Berkman has received a lot. I just scratch my head and think, aren't there other – aren't there other institutions in the Bay Area? Isn't there a law school on the other side on the east bay somewhere? Isn't there a law school about ten miles from here? Isn't there a law school about 394 miles in southern California? And there's a lot of them down there. There's one on the coast.

So I scratch my head a little bit, you know? There's [25] around the Great Lakes, I think there's a couple of law schools there that are accredited.

Your colleague is eager to speak.

MR. NASSIRI: He is eager to speak, and I'm just hogging the podium.

MR. ASCHENBRENER: Your Honor, there are a couple of points to be made there. One, Mr. Nassiri is right that the guidance from case law suggests that it is good that recipients have a track record. And it's a bit of a double edge sword.

THE COURT: It is.

MR. ASCHENBRENER: To put forward potential recipients without track records then we would potentially be attacked on that basis.

And in terms of geography, it's a good point Your Honor makes because some of the guidance I believe in Easysaver suggests that it's a problem where the recipients are not geographically diverse and here AARP and the World Privacy Forum are national in scope. We have the Center for Internet and Society at Stanford on the west coast. We have the Center for Internet – or Information Society and Policy in Chicago. We have Carnegie Mellon in Pennsylvania. We have Berkman Center in Massachusetts.

THE COURT: You didn't say Pittsburgh. Do you have something against Pittsburgh.

MR. ASCHENBRENER: I have nothing against [26] Pittsburgh. I do not have experience in Pittsburgh one way or the other.

So we have geographic diversity there and I believe we also have demographic diversity, which is important, especially with the inclusion of AARP. And that leads really to what Mr. Nassiri was speaking to a year ago before the court in terms of what we feel is raising the bar and understanding that there is some misunderstanding there as to what we meant.

But what is different here, what has happened in the last year, to answer that question, Your Honor, is that the proposals were made. And instead what we have seen in prior class action settlements of this nature are, well, here are recipients that generally do this kind of work and they will use it for this purpose, but here the public – there's complete transparency. The class, the court, and the public gets to see exactly

how the dollars will be spent and what the deliverables will be.

THE COURT: I appreciate the transparency. And in that regard you have that before us.

I guess the lack of transparency is the selection process.

MR. ASCHENBRENER: And that was a negotiated point in the settlement process.

THE COURT: I appreciate that. And that raises, you know, candidly, it raises a red flag, and I won't say a banner, but I will say a flag, to me in that it speaks, perhaps, to [27] something that Mr. Frank talked about. It just – when I looked at that, and I'm being very candid with you, and I'm not being critical, you understand that, I'm being candid with you, when I look at the lack of transparency, I understand this was a mediated process and that's protected and that's sacrosanct and we can't get into that, but you add that fact that that's not public information. And then I look at it and I say, okay, and the public sees that all of the affiliates – not all, pardon me – but a number of the affiliates are alum, nothing wrong with that as Easysaver tells us and other cases tell us when the amounts are not greater than anyone else. And I looked at the percentages here and they just, you know, I'm trying to squeeze a size 9 and a half into a size 9 shoe and it fits comfortably, and I can do that.

It just looks, honestly, it just gives me – it doesn't pass the smell test I guess is the easiest way for me to say that.

MR. ASCHENBRENER: Your Honor, the court and the Ninth Circuit in Lane addressed much of that very concern that the court has today.

And what the Ninth Circuit said in regard to that and the specific context in Lane versus Facebook to this point was that where the recipients of funds in that case, where actually the board would be held, positions on the board would be held by members of Facebook.

[28] THE COURT: Sure.

MR. ASCHENBRENER: And, of course, that settlement was affirmed by the Ninth Circuit and rehearing en banc was denied and cert petition was denied.

But what the court said was that it's okay if when a settlement is the product of negotiation, as it always is, of course it's going to serve the party's prospective interest to some degree or another.

And so even though members of Facebook would be on the board of that, that's acceptable, that is fair, adequate, and reasonable because the settlement necessarily is going to serve the interest of the parties.

And so here we have – we're at least one step, and I believe multiple steps removed from that factual scenario. There are no members of Google on any boards and counsel is not on any boards in any of this proposed recipients.

The alma mater institutions – what is important here on multiple levels is that there are no affiliations with the actual centers receiving money.

And Mr. Frank has objected within the institution's housing centers, the Berkman Center, for example, or the center for information society and policy at Chicago Kent.

As I stated in my declaration, I have no affiliation with that.

Mr. Frank has attempted to couch this that this is just an [29] accounting change for Google. One, I take issue with that. I think that's incorrect. Even if true, and it's not, but even if true, under the guidance in Lane, that's probably not a problem.

But fortunately we do not have that issue here today. These are specific proposals. The money will be used for specific purposes, which means that it's not just an accounting change.

THE COURT: I appreciate that.

MR. NASSIRI: Your Honor, may I say one thing?

THE COURT: I guess I'm returning to, you know, my expectations raised as was the bar promised to be raised and that's where I have some disappointment, I guess, where I look at it as the song with the phrase going "the same as it ever was."

MR. NASSIRI: Well, I believe the transparency that you have already acknowledged, and I'm happy to note that you have acknowledged it, I believe that raises the bar in a substantial way.

But I want to just say one more thing at the risk of saying too much, Your Honor. To some degree I have to draw on my experience in order to propose cy pres recipients.

And I saw what the Berkman Center did firsthand, and I knew some of the people who founded it, and Charlie Nesson was my torts professor and John Zittrain taught my first internet [30] and society classes at 2L.

So I can't – I mean, I think of them as leaders, smart people who do good work and care and who have interests that are aligned with what is underpinning this lawsuit.

And the fact that I went there shouldn't disqualify them from my mind as someone who could do great good with the money here.

So it's not really surprising that I might think of my alma mater and the work they do there at the Berkman Center. And just to clarify on the record, I don't have any affiliation and I have never had any affiliation with Berkman Center or with Harvard since leaving. I simply got my law degree there, and that's simply the end of it.

MR. ASCHENBRENER: And, Your Honor, to bring it back to your central concern, the appearance of this and whether the bar was raised, we certainly think it was, but regardless, the standard, of course, for final approval is whether the settlement is fair, adequate, and reasonable. It's not whether the parties or the plaintiffs raise the bar.

So whether we did or did not is not the standard for approval. The Ninth Circuit has made clear that the standard –

THE COURT: You're telling me everything I have talked about this morning doesn't matter?

MR. ASCHENBRENER: No, Your Honor, I don't think [31] that's true.

THE COURT: That's what I hear you saying. Judge, I appreciate your concerns, you have raised them, and it's good, and it's a nice conversation for a Friday before a three-day weekend, but it doesn't matter, judge, because the court says if it's fair, adequate, and reasonable, approve it and all of these other things are just incidental.

MR. ASCHENBRENER: No, Your Honor, that's not what I'm trying to suggest. And I apologize if that is –

THE COURT: No, no, no. I say that and I have said that only because I want you to know that this is very important to me.

MR. ASCHENBRENER: Uh-huh.

THE COURT: And I'm struggling with this because all of the things I mentioned earlier, I think they're a problem.

And I appreciate your helping me out through this problem, I do. I do have some problems with this and all of these little, these little issues to me create a larger issue that cause me some concern, notwithstanding is this settlement fair, adequate, and reasonable? It may be, it may very well be, but the mechanisms, I think, are problematic, and I am having some problem with that.

And, again, it's not because, just because – I appreciate, Mr. Nassiri, you have no further affiliation. I'm sure Harvard is very disappointed they're not receiving alumni [32] checks from you, and that's between you and them.

But these type of cy pres recipients, they shouldn't serve as a substitute, should they, for alumni checks? And they shouldn't serve as a substitute for, oh, this is one of our grads and look what they're doing in their litigation, they're directing cy pres to us. You should be free from that.

MR. NASSIRI: Absolutely, Your Honor.

THE COURT: You should not – I don't want to put either of you in a situation where you're subject to personal criticism for directing funds to your alma maters in some untoward way.

So in one respect I also want to protect you prophylactically in some type of way and measure to

make sure that you are free from that type of criticism. And I don't want to eliminate your philanthropic ideals when you discuss cy pres. That's very important.

Again, getting back to the other question, I'd like to, it just seems to me that a wider, a broader, a larger net can be cast to capture people who are doing additional work.

You know, if you say, well, gee, these people are doing all of the work and we need to have a track record of people, well, you know what the social implications of that are?

MR. NASSIRI: Yes.

THE COURT: That's why we haven't had women be lawyers for the long time because, you know, we just don't [33] allow them to come in because we never looked at them before and so why should we let women practice law now. You understand that. It's not in this case.

But, again, I'm talking about in a social – in a greater measure. There has to be a first.

MR. NASSIRI: I agree, Your Honor. This is a very interesting issue, and there's very little guidance.

THE COURT: Perhaps, we'll create it. Here's a wonderful opportunity for us to give guidance, and I appreciate the invitation.

MR. NASSIRI: It always is, Your Honor, but we did the best we could.

THE COURT: No, no. And I'm not – again, this is not criticism, gentlemen.

MR. NASSIRI: I understand.

THE COURT: It's an effort, it's an effort and an invitation to do better, I suppose.

MR. NASSIRI: Yes, Your Honor. You know, I think at the heart of this in terms of cy pres's proposed recipients, this is a settlement and there had to be some agreement so we had to negotiate this.

And so that does – that's a very real constraint.

THE COURT: Sure.

MR. NASSIRI: And I don't know how we get around that even with direction from the court.

[34] THE COURT: I hope our conversation is going to assist you. You have brilliant lawyers sitting at the table over there, and I know that they're listening to this, and they're not having to stand and listen to it. They have the pleasure of being seated behind your backs and listening to it.

They're not grinning, and they're not smiling. They're taking notes and absorbing this, I think.

Well, let me move to another issue, if I may, and we may come back to the cy pres, but I think it's appropriate to move to the notice issue. And I know you were present in court when I was discussing notice with the other case earlier this morning. And I talked about the imprimatur of a government seal or something like that. I think that appears in this? Does it? Do you have something like that here?

MR. NASSIRI: I believe it's the seal behind you, Your Honor.

THE COURT: Right, right. Not quite as elegant and majestic, though, on your notice. It's one dimensional, of course. And I looked at that and I thought, this is what raised the question, and, perhaps, I'm searching

for nits to pick, but I thought does this appear like something that, you know, like the e-mail from Uncle George in London who lost his wallet that would get ignored?

It just, to me, it looked like one of those, candidly, and then that caused me to think about the, as you point out in [35] your pleadings, the objections were – how many were there? There were four? What were there?

MR. NASSIRI: There were 4 with 13 opt-outs.

THE COURT: Right. And in regards to the class, and you pointed out, judge, this must mean approval because we had so little, little negative response, if you will, adverse response to the settlement, and I appreciate that that's an observation that could be made.

The other side of that coin is that maybe the notice was bad and people didn't get it, and so they didn't know to respond? Maybe it was the uncle in London with the lost wallet and they, you know, clicked the delete button because it was something that was not real to them.

MR. NASSIRI: One of the benefits, Your Honor, of technology and –

THE COURT: Is it brings us these wonderful class action lawsuits?

MR. NASSIRI: Well, no, no, Your Honor. It's that a notice program like the one we implemented is measurable. And this was a very successful notice program. It would – none of this could have been treated as spam, and we can measure the response from the class member.

I believe we had over 200 million impressions and we – Richard Simmons is here, who was leading up

the effort on behalf of the settlement administrator is here, and he is [36] available to answer detailed questions if Your Honor would like. But based on the measurements that he took, we reached over 70 percent of the class with this notice.

Now, I don't think the measurements could tell us exactly what they thought of the notice, but I think we had a highly effective successful notice campaign.

THE COURT: You pointed out the Netflix case as the similar size and similar case, and I note in that case there were, perhaps proportionately more, hundreds of responses. I mean, they got more responses in that case.

And did you look at their notice and copy of their notice? And I'm just curious –

MR. NASSIRI: We looked at that case carefully, Your Honor, especially since it came out of your courtroom, and I believe we did take some lessons from it, but this is a different case with a different class and why we hired Mr. Simmons is because he has expertise and helped us design the best notice practicable here.

THE COURT: I was curious about that and I compared that, and, of course, it was a different case and different facts and different products and things, and maybe the class there is more identifiable. Maybe they're more inclined to receive these types of notices from netflix being a consumer specific.

But there were more responses. And when I look at the – [37] just the parse number of responses, my first reaction was that it must not have been an appropriate notice. Could that many people just completely ignore this? Would they?

What are the conclusions we draw from it?

MR. ASCHENBRENER: Well, we, as Mr. Nassiri pointed out, are somewhat left to speculate as to what consumers thought of the substance.

THE COURT: Sure.

MR. ASCHENBRENER: But what we did in working with analytics, the class administrator, was relied on their expertise primarily but worked with them to devise a notice plan that we really thought would be effective.

And, again, I believe that's the issue of whether the number of opt-outs and objectors is a double edge sword because the Ninth Circuit guidance says if that's a low number, that's good. Of course, I understand the court's concern that a low number may indicate a lack of understanding of the settlement and toward that notice was ineffective.

But what we have here is we used the most measurable means possible for notice currently and tools to effectuate notice to the greatest number of persons and then we were able to measure.

So we used the best tools available to us to effectuate notice, and the notice comports with the guidelines promulgated by the Federal Judicial Center. And so we worked with – there [38] is clear guidance on this issue than, perhaps, in, say, cy pres, and we worked within those guidelines and to meet and exceed that were possible and unlike, say, print campaigns or other forms of notice, we were able to bring to the court for the hearing today, and in our papers leading up to this, the measurements as opposed to having to make even more guesses as would be necessary in other sorts of cases.

THE COURT: Okay. Thank you.

Well, let's turn to attorney's fees. And I have your lodestar amount and I read, as you did, Mr. Frank's objections. And we know, of course, now the Ninth Circuit's opinion of at least one of the causes of action in this particular lawsuit.

What would happen? Let me just ask the hypothetical, what would happen if the case were to go to trial right now?

MR. NASSIRI: Nobody knows better than you, Your Honor. We did go through this in our Facebook class action before the Ninth Circuit.

These are untested claims. The primary claim here is for statutory damages under a statute that is hopefully outdated. We believe there was a violation here, and we're ready and are ready and willing to take the case as far as we can.

But there were – there are tremendous risks involved here at every step of the way going forward from class certification to summary judgment on, you know, whether or not we stated a claim, and then if we did state a claim under the SCA, they're [39] waiting in the wings as a Due Process argument that these penalties are too big.

So I don't know what would happen, Your Honor.

And we believe that the settlement here is a good – it's a good compromise. It provides for certain relief and, you know, we stand behind the settlement.

THE COURT: Well, in regards to risk, a risk analysis in the attorney's fees discussion, what does that mean? What is that? What is the risk?

MR. ASCHENBRENER: The risk is of not getting paid at all and of the case being disposed of in the defendants' favor and that the plaintiffs' lawyers would receive nothing.

THE COURT: That's something that – isn't that in every case there's a risk? That's universal in the practice of law, you might lose.

MR. ASCHENBRENER: Well, it's unique in the sense that in these cases the fees are usually paid on a contingent basis.

THE COURT: Right.

MR. ASCHENBRENER: And so I don't know the fee structure between defendants' counsel and the defendant, but oftentimes it's not contingent in nature. So win, lose or draw, counsel on one side gets paid while counsel on the other side does not.

THE COURT: So the risk analysis for the court to [40] look at is, judge, we've taken on this case and its contingency and if we lose this, we could stand to lose thousands of hours, hundreds of hours of labor.

MR. ASCHENBRENER: That's correct, Your Honor.

THE COURT: And, therefore, that should be a consideration in giving us attorney's fees.

MR. ASCHENBRENER: Well, it's a consideration in this case specifically – yes, Your Honor. And in this case specifically it goes to the lodestar crosscheck.

Our reading of the case law suggested in this case that the primary mechanism for determining attorney's fees is based on the percentage of the fund, but the court is directed, we believe by the Ninth Circuit, to also employ a lodestar crosscheck and within that

lodestar crosscheck the court is allowed to take into account the risk factor.

THE COURT: And I know I've read in your pleadings, you're a respected firm. Your expertise is in these classes. So am I – I just have to assume that you're skilled, as you told me you were, relying on your expertise, Mr. Nassiri, you're skilled at picking winners. You reject a lot of cases, I'm certain, that come in the door because they're either nonmeritorious or they're cases that are not going to be winners, I mean, they're not going to win. You pick winners. That's the nature of the practice, isn't it?

MR. NASSIRI: That is certainly a consideration. We [41] do have to pay the bills and keep the lights on.

THE COURT: Sure.

MR. NASSIRI: But these cases were bigger risks than, say, your standard wage and hour case where it's not a novel legal theory. It's not a class that can fill football stadiums.

Here this was an extra risky case to take on but what we believe a very meritorious case and one that had enough probability of success that it met that calculus.

THE COURT: So the relief here is not a change in the practice; is that right?

MR. NASSIRI: No, Your Honor. Of course, there is prospective relief here that is a change in practice.

We have – Google is now obliged permanently going forward to disclose how it handles search queries and in particular whether it discloses them to third parties in URL's.

THE COURT: That's the change.

MR. NASSIRI: That's the change. And just one thing, Your Honor, is that to the extent that there have been objectors saying that Google could continue to go on doing its legal practice, we haven't stopped them.

Again, particularly under the SCA, if Google has user consent to disclose search queries, then there's nothing in the law preventing Google from doing so. And so the prospective relief here goes directly towards the consent portion of the [42] SCA.

So we have addressed the issue and Google – this is permanent prospective relief, Your Honor.

THE COURT: I asked Mr. Frank the question of the evaluating of the damages. Can you answer that question?

MR. NASSIRI: Best day in court, trillions and trillions of dollars, Your Honor. It's absurd. I believe Judge Seeborg said in cases like this, are they too big to settle or to resolve or to bring? They're monstrous. There are some issues here, and this is one of those mega cases.

THE COURT: Okay. So why should the court grant a multiplier in this case? Why would that be appropriate in this case if it is at all?

MR. NASSIRI: Because of the tremendous risk that we took, because the majority of cases, these privacy cases are disposed of on 12(b) motions, Your Honor. There aren't that many cases that settle, and we believe it was our good work that got us to a settlement that is reasonable compared to a handful of privacy class actions that have settled before us.

And, you know, we also believe that the cy pres component of this we have done better than the cases before us.

So we're providing real relief to the case, the permanent prospective relief requiring disclosures from Google and a sizeable cy pres fund that is going to be used for projects specifically related to the subject matter of the complaint.

[43] THE COURT: Some of the proposals I look at, I think it was maybe our – it might have been Carnegie, the language was very general as to what they were going to do.

It almost looked like they had a standard, and I don't mean to be critical of them, but it looked like the responses were pieces that describe the work that the institutes do in general.

And then there was, you know, insert here and then there was the description of, you know, we're going to do studies, we're going to meet with leaders in the field, we're going to then have an investigation done, we're going to publish records and meet with the leaders to inform the public better, et cetera, et cetera.

And maybe that's – maybe they can't be more specific than that. I think one of the others, and I can't remember which, and I apologize, spoke to going to Washington, D.C. and meeting with leaders and then having subsequent meetings and publicity and that was probably greater specificity as to what at least their goals were as far as the project line but – and maybe it was too much to ask the recipients to give us a timeline of what exactly they're going to do with these particular issues.

Do you want to comment on that?

MR. NASSIRI: Yes, Your Honor. I noticed the same thing. Some proposals are more specific than others.

Carnegie Mellon, Your Honor, was one of the very specific [44] ones and in part because the deliverable that they're able to provide includes technology.

So, of course, when you've got technology and you're trying to develop a specific tool, it's probably easier to bring some specificity to the proposal.

AARP on the other hand is primarily an organization that educates older Americans and they work with law enforcement and other regulatory bodies to try and make sure that people's interests are protected.

So I agree that that proposal was a little more general and it talked about training trainers, developing toolkits and that sort.

But it also does have specific deliverables. It's going to add sections to its call center to address online privacy protection issues.

It did say it was going to offer a consumer tool to help consumers evaluate their current privacy practices and make their current recommendations. They didn't go further than that so I don't know what that means.

But the other thing that we thought was important here was to require each of these entities to publish reports on the results.

So AARP, for example, at the end of this, will let us know whether they reached their standing goal of serving at least 1 million people with – through it's call center or the number [45] of people that it was actually able to train with its toolkit. So each one of these proposals includes kind of a report card phase at the end and so we can see what happens.

THE COURT: Is that something that future courts can look at when they consider whether or not the recipient is appropriate?

MR. NASSIRI: Absolutely. It goes a little bit outside of the scope of this case, but it starts to create much like what is happening in the grant world generally or in the charity world generally I should say.

It starts to build on their reputation so that next time someone proposes AARP to receive money in the context or outside of the context of the lawsuit, this is something that everyone will be able to look at.

So, yes, all of these reports will be published.

THE COURT: Has Berkman done that? We know that they received at least half a million dollars in a previous case. Do we have a report from them?

MR. NASSIRI: Your Honor, I don't know if they have done it previously, but we did require them to include it in their proposal here, that they will do it here.

So everything that they do in terms of the research and the policies that they propose, the conferences will all be available on the website.

And they're also publishing what they're calling one [46] midterm and one final report, because they're a school, where they will report on how the money has been spent and what has happened.

THE COURT: Maybe there should be – maybe we should create – you know, when you said there's not much law in this area, maybe we should create some policy on this so there's a cy pres central so that people can go to that to look at the good works that these organizations do. Just a thought.

One of the other proposals, I can't remember which one though when I went down the list of work that they were going to do, they also talked about smartphone privacy which has little, I think, to do with this case, or does it?

MR. NASSIRI: No, it has a lot to do. I mean, I could talk for days –

THE COURT: Let me ask counsel if they have the time.

MR. NASSIRI: Do you guys have time?

While they're leading the effort, their client is anyway, and everything is moving to the mobile platform and particularly search.

I mean, at the bottom of this case is this notion that when we search for things, Google knows what we're thinking, what we're looking for, what we want, and what our habits are and all of that. And right now it's cumbersome, and I think we'll one day look back and it's a primitive process where we [47] have to type keyword searches into a box on a computer and somewhere down the road they will just be plugged into their brain. And I know I sound crazy to some people, but that's kind of what is happening and mobile is facilitating this kind of more fluid communication where consumers get what they want and get their questions answered by companies like Google.

And I think there is ample evidence. And you asked what has changed in the last year? More and more of the world is moving towards mobile, more developers of applications are focussing on mobile, and all of the major providers like Google, Facebook, Twitter, and the like are focussing on mobile.

So for Stanford to focus on mobile, and I think Stanford is the proposed recipient you're referring to, I think it is great because that is where the world is headed and that's where the research is headed, Your Honor.

THE COURT: And that has a nexus with this lawsuit and the issues attendant to it?

MR. NASSIRI: Absolutely.

THE COURT: So I made my comments about the cy pres. I think, candidly, I am troubled by that. Perhaps I had greater expectations.

I have some problems with that whole selection process. It is, you know, to use that paraphrase, it is the same as it ever was. It was the same we talked about a year ago, those [48] same groups were listed.

Well, let me hear from your colleagues opposites, Mr. Edwards and Mr. Johnson, and any comments they might have. Thank you very much.

MR. NASSIRI: Thank you, Your Honor.

MR. JOHNSON: Thank you, Your Honor.

THE COURT: Good morning. You have had the privilege, I suppose, of sitting and listening to our conversation.

Anything you want to add to the conversation?

MR. JOHNSON: Well, I would yield to my colleague, Mr. Edwards, on the cy pres issue, but I will say that we have listened intently and your comments were very much heard and registered, Your Honor.

One observation, though, I would make right off the bat is that neither Mr. Edwards nor my alma maters

were colead counsel in this case and were represented in any way in the settlement.

THE COURT: Okay. Thank you. Mr. Edwards.

MR. EDWARDS: Just to start with, that was a critical opening fact.

THE COURT: experienced trial lawyers know when to make the appropriate opening, don't they?

MR. EDWARDS: Just a few supplemental points and then, of course, I am happy to answer any questions that you might have of Google on some of the issues that you have [49] raised.

But Google doesn't control and didn't control the process of developing the specific proposals. It doesn't control the expenditure of those funds.

The settlement agreement in paragraphs – in paragraph 3.3 has a sentence that describes that the cy pres funds should be used generally for internet privacy educational purposes.

And the reason for the inclusion of that and the settlement agreement was to ensure that the cy pres was directionally appropriate just from that language alone so that it wasn't a situation where we'll just give money to the American Red Cross. They do good work.

But the design coming out of the preliminary approval process and implementing the settlement was plaintiffs had responsibility and did solicit very detailed proposals from the list of cy pres recipients and ensured and allowed the court and the public and the objectors to all evaluate the very detailed proposals that each of those recipients provided.

One of the potential recipients that was identified in the settlement agreement actually dropped out, Your

Honor may have noticed, because they didn't feel they were going to be able to submit an appropriate proposal with the right criteria and they were not the right recipient in this case.

And I think that helps speak to the appropriateness of this process because ultimately when you're evaluating is a [50] settlement fair, reasonable, and adequate – are these appropriate – is this an appropriate use of cy pres funds? You know, the proof is in the pudding. The proof is in what the proposals will do.

And it may very well be that had a different defendant and a different plaintiff negotiated a privacy settlement on a similar subject matter that they might have chosen – my alma mater is Northwestern, for instance, but that's not what happened here. That doesn't – and it could have been obviously an unaffiliated school or other institution of some kind.

But here each of the institutions that are the proposed recipients have identified very specifically, some a little more detailed than others, but all much more detailed than I have ever seen before the court is evaluating final fairness, are these appropriate uses of the funds consistent with Kellog and the other controlling case law?

And I would submit that they clearly satisfy that. There's a connection between the work that is proposed and there is, you know, detail and accountability with all of that work and the general concerns of the allegations in the case.

And so I think that part of the process – and I understand and I heard Your Honor's comments about the selection and you might have thought that there would be a different or supplemental recipient as well,

but one of the [51] things that this settlement I think is unique in is the level of detail that has been presented to the court but how the money is actually going to be used.

So from that perspective, I think that that really strongly supports the fairness, the reasonableness, and adequacy of the settlement.

THE COURT: Okay.

MR. EDWARDS: In terms of – I think that also addresses the selection in the following sense, that the concern with selection is that settlement funds might be steered into an inappropriate way.

Again, use the Red Cross as an example. And let's pretend that my sister was the president of the American Red Cross and we would like to steer the funds because we would like to make her life better. I mean, here the court can evaluate are these appropriate uses of the funds, and are these institutions credentialed, and do they have a track record and the experience to actually do it? And so that we're not throwing funds that won't be used.

And I believe that the experience of these institutions, which is detailed, and it's also for, I believe all of them or most of them, fairly known, but it's also detailed that they're experienced and they can deliver the kinds of projects that they do and they're different projects ranging from technology development to the AARP proposals.

[52] It was not as detailed technically, but they have experience and they had a multiyear plan and this is what will happen in year one, year two, year three to achieve the goals in their way that they believe are appropriate.

So I think that that touches on the selection process. I'm happy to answer any additional questions there.

THE COURT: Okay.

MR. EDWARDS: You know, I guess may be I should add one additional point, which is Mr. Frank's argument that this is just a change in Google accounting entries.

And, again, I think the level of detail of these programs and the lack of Google's involvement in the development of these programs rebuts that.

These were, these were – it is not just a donation to the American Red Cross. It's not even just a donation to an institution that Google may at some point in the past have provided some money for for some purpose.

These are very specific proposals that are funded out of very specific funds. And so when you compare this to, for instance, the cy pres in the Lane versus Facebook case, this is, I believe, multiple steps away from that in terms of the involvement of the defendant and in terms of the concreteness of what may come out of an approval of the settlement that allows the funds to be implemented in the way that has been described.

[53] And so we fully understand that, perhaps, the preliminary approval process there may have been a little bit of a disconnect in terms of communication with Your Honor about where the unprecedented nature of the cy pres process exists and to the extent that the parties didn't communicate that appropriately, we obviously want to address and remedy that now.

We think that the settlement agreement and certainly the notice identified the recipients and now

we have a much more robust record concretely of what would happen.

And we think that that fully supports the appropriateness of both the selection and the use of those funds.

So I'm happy to address issues there.

THE COURT: Well, thank you. So I think these are appropriate issues to drill down and talk about with greater detail because this is a pure cy pres. And so the recipients, I think, are very important, and that's why I'm asking questions and focussing so much of our morning on that, which does include the transparency of the selection process, the protocol of how these institutions, and I reiterate, I'm not being critical of the work that they do. And I think your point is well taken. They're guided and they have an excellent track record.

It's the kind of work that is appropriate to this class, the lawsuits, the issues that are in this lawsuit. So I [54] understand that and perhaps my greatest focus is on just the selection process.

And as I said earlier, when you put and when I look at it, the usual suspects, I keep using that inelegant phrase, but that and then the percentages to, perhaps, get around, I suppose, or to come within the opinion and in the Easysaver case, all of those things, I look at it and it just causes some question.

And I'm not a naturally suspicious person, I promise you, but it just raises an issue for me of can we do better? And in this case that was – the bar was to be raised, not by you, but in the selection process.

I understand now and I learn today that that's protected because it was part of mediation, and I hope

you appreciate how that doesn't help my thought process. It creates more curiosity, I suppose.

I'm not trying to say that we should not approve this because those organizations aren't deserving, and I'm not trying to say that you should fund startup organizations somewhere else that can do additional work, because as we said, a track record or something I need to be cognizant of.

But at some point shouldn't a wider net be cast or shouldn't there be additional numbers and particularly numbers of applications and particularly here when that isn't, to me, transparent.

[55] MR. EDWARDS: Well, let me try to address as much of that as I can before I get uncomfortable without talking to counsel.

THE COURT: Sure, of course.

MR. EDWARDS: But let me start with the allocations. Just to be clear, Google did not have involvement, and I think Mr. Nassiri explained, you know, plaintiffs received proposals and not everyone chose the exact same numbers.

And then depending on what Your Honor's decisions are on the attorney fee issue, I suppose that will influence the total dollars that are otherwise available.

But Google didn't identify in the proposals and didn't say that we want you to submit for x dollar amount.

And so, you know, there was no involvement from my client and from everything that I understand from plaintiffs either in terms of steering we want 1 percent less of one from one to another.

These are all generally within the ballpark. A comment that Google did share at the outset was that although it was not taking those specific proposals and dictating dollar amounts, it would have been disappointed and would have had significant issues if, one, recipient had received 95 percent of all of the funds and the other recipients received $10 each.

But beyond that extreme situation that was not an area where there was any influence exercised or decision made by [56] Google about how those dollars came in, they come in at slightly different amounts because of the different natures of both I suppose what was being proposed and also what each of these proposed recipients thought they could get and justify.

So I don't know that I can say much more than that because there was no involvement by Google in the selection of that.

I think that they all are – there was involvement by Google as well as plaintiffs, of course, in identifying the recipients.

And the thinking is that you don't want to have 100 recipients necessarily. All kinds of reasons.

THE COURT: Sure.

MR. EDWARDS: And in this case the decision was made on both sides that you also don't want to have one or two. It's a nice cross-section. They're doing different kinds – different recipients are doing different kinds of things and it's a manageable number, and it's a number in which as we can see from looking at the proposals we can get legitimate significant proposals that address the subject matter.

And I, you know, in a counter-factual world we can speculate if we doubled the number of recipients and

cut it in half, each of the proposals, what would those proposals look like? Perhaps it would also be fair, adequate, and reasonable to do something like that. Perhaps. I can't judge.

But what we can judge is I think a half a dozen, I think [57] originally seven, half a dozen, came through the process with proposals for which they're broadly speaking is the appropriate amount of money requested to do things that we believe are appropriate or certainly supportable.

Again, it's not a Google design and chose these specific research projects and development projects, but certainly within the range is this a fair, reasonable, and adequate part of a package in terms of the settlement coupled with the disclosure provision?

You know, I think that – I'll end on this note where I began which is the proof is in the pudding. You can look at it and you can see. There may be other settlements where you can have a different group of recipients but there's nothing wrong with this group in terms of their credentials and what they would do and hearkening back to Lane, well within the bounds of what precedent would say is appropriate.

THE COURT: I guess the distinction here might be the conflict of interest issue which gets to – and I talked about with Mr. Nassiri and whether or not that's a real issue, whether or not it's something that the court should be concerned about.

And to that end, I was curious about, again, the publication of the request for an invitation to apply I suppose. That would have been interesting to know what that process was and what was the target audience for those ROI's, [58] or whatever it was that was sent out. That would have been nice to know.

And the response rate to that would have been instructive also. You know, was Berkeley one of those targeted people? Was USD, Santa Clara? I can name any school. And do they have programs that might, might also fall under the Lane rubric of approval?

And, again, getting back to the history of this case, these recipients were named previously, and so I guess that's the disappointment, if I have any. What is different now than in August of 2013.

MR. EDWARDS: Well, let me try to answer that starting with your last point what is different now than in August of 2013?

In terms of the recipients, you know, it's not as if there were additional recipients added. I think Mr. Nassiri acknowledged that as well.

What is different is the very detailed submission. How are these funds to be used? Are these appropriate uses for the funds? Does it fit within the confines of Kellog and Lane and the other precedential authorities on this point?

And that is really what is new.

In fact, you know, from preliminary approval until now, you know, at the time we had an agreed upon list of what we believed would be appropriate organizations, and as we noted [59] earlier, and the MacArthur Foundation dropped out because they, likely appropriately, decided that they didn't feel that they could submit a proposal that would satisfy the criteria that the settlement contemplated here.

But at the time that they were identified for preliminary approval that, you know, we have this, what we believe was a reasonable number, an appropriate cross-section of recipients, now let's go and make sure

that they can do what the agreement is that they will do and do something that the court will find to be appropriate in terms of a direction for the cy pres funds.

And that's, you know, and that's what was delivered then coming back.

THE COURT: Okay. Well, let me ask you what might be an uncomfortable question, but do you wish to comment on any of the other topics that I raised, the notice topic and the attorney's fees topic?

MR. EDWARDS: So let me turn it over to Mr. Johnson to address notice and the other aspects of the settlement.

On the attorney fee issue, Google is not going to assert – there's no clear sailing provision in the settlement, but we're not asserting a position on that. We believe that's appropriately decided by Your Honor and the agreement defines, you know, whatever Your Honor's award is.

The monies are not reverted back to Google and that's [60] really the only thing we have to say on the attorney fee point.

THE COURT: Okay. Thank you very much.

MR. JOHNSON: Your Honor, on notice, we believe that the plan that the court approved its preliminary approval was a good one and a sound one and Mr. Simmons is here to talk about its implementation which seems to be equally sound.

I would just make the observation, and it was cited in the plaintiffs' brief, the Cohorst case, which is at a final approval, absent newly discovered evidence some kind of a problem, notice that has gone out typically is not reconsidered at final approval.

THE COURT: Thank you. I appreciate that. I raise the topic this morning because of the, candidly, the low response.

MR. JOHNSON: And I think I felt and took the import of Your Honor's comments, and, you know, you read the stats here and you see what was done.

It was reasonable, it was tried and true methods. It's – I understand and sense maybe almost a disappointment in that it is like an election is well turned out.

But sometimes it could depend not on the vehicle or not on how people vote but on how exciting the candidates are and how strongly they feel about the conduct alleged here.

THE COURT: Which gets back to the damage question that I was asking Mr. Nassiri earlier, perhaps.

[61] All right. Anything further you would like me to know?

MR. EDWARDS: No, Your Honor.

MR. JOHNSON: No, Your Honor.

THE COURT: Thank you very much.

MR. EDWARDS: Thank you.

THE COURT: Mr. Nassiri, you are on your feet.

MR. NASSIRI: May I address the court briefly?

THE COURT: Yes.

MR. NASSIRI: Again, at the risk of saying too much but this is interesting because it is new and you focussed some time this morning on the selection process, and I'm trying to imagine what an alternative selection process would look like.

If you open it up to the public, I mean, you can have an American Idol type competition where it's open to votes but people oppose – the public isn't a common wisdom and outsourcing is not always the best way to make a selection like this and it may not stand up to constitutional scrutiny.

THE COURT: I am not advocating for that. I appreciate you are not.

MR. NASSIRI: I am brain storming, Your Honor. And we thought about this going into the settlement, too.

The other thing is that if we had said, okay, let's have an open bid process and then we'll decide. I mean, again, this is a settlement. We have to get signoff from Google. It's unavoidable.

[62] It may have been – we may have been worse off, and I'll tell you why. One thing we had to fight for was control over the process once the recipients, proposed recipients were selected.

THE COURT: So I don't want you to speak to anything in regards to your mediation.

MR. NASSIRI: I won't, Your Honor. I won't cross over any lines. Let me know if I do.

But it was important that these entities were able to decide how to best spend the money in a way where they weren't under the influence from, in my perspective, from defendants.

And you'll see that some of these proposals go directly towards Google and are aimed directly at Google and in making sure that Google is accountable and it adheres to its privacy policies.

I'm thinking specifically about Carnegie Mellon's proposal for creating a tool that would allow third parties, regulators, policy makers, policy advocates to, from outside of the Google ecosphere, to see whether or not Google was actually adhering to its privacy policies. That's not something that Google would necessarily agree to fund.

Stanford, the F.T.C. fine of $22 and a half million dollars because Google circumvented the Apple Safari privacy browser selection, that was a result of Stanford's work.

So by – if we had had an open bid process, I'll circle [63] back now to my point, if we had an open bid process where we took bids and proposals from 100 potential recipients and then made our decision, we may have been worse off because anything that Google found to be threatening that we thought was actually very effective, they might not have ever agreed to.

So we believe this is a good process, and I think Mr. Edwards put it well, we ended up with proposals where if you look at the proposals on the merits, they're very good proposals and very effective, and I think they should be approved, Your Honor.

THE COURT: Okay. Mr. Frank, you're on your feet.

MR. FRANK: Thank you, Your Honor. Two things very quickly, and I'm going to avoid repeating myself, but if you go to the Stanford web page and you look at their doners, number one right there is Google.

And so, yes, this is a separate program, but, you know, I have applied for separate grants for programs, and, again, it's just an accounting entry. You can't tell me that Google is not going to have any influence of

what Stanford does with its money because Stanford depends heavily on that funding.

And you go to the web page and number one was Google and right under it is all of the law firms that have given it cy pres.

THE COURT: And did the founders of Google attend that institution?

[64] MR. FRANK: And founders of Google attended Stanford. That is where they started.

The parties rely a lot on the Easysaver case and the court indicated it was giving it some consideration, and I would caution against that. We have that case on appeal. I have briefed it. We'll argue it at some time in 2015 or 2016, or whenever the Ninth Circuit schedules it, but I invite the court to read those briefs at 13-55373 and I – it's a fool's errand to predict ever what the Ninth Circuit is ever going to do but if you put a gun to my head on any Ninth Circuit case, that's the one I would stake my life on.

If you have any other questions, I'd be happy to answer them.

THE COURT: No. Thank you. I appreciate your participation.

MR. FRANK: Thank you.

THE COURT: Anything further from your table, Mr. Nassiri?

MR. NASSIRI: No, Your Honor.

THE COURT: Mr. Johnson?

MR. JOHNSON: No, Your Honor.

THE COURT: Well, thank you for the conversation this morning. I appreciate you suffering my concerns, and I appreciate the conversation.

I do have real concerns, and I need to give it some [65] additional thought here.

I should tell you in reviewing my notes and reviewing your pleadings, which were helpful, including Mr. Frank's, my initial reaction was in my note to self here and in my paper in front of me says to not approve and get an order out telling you what I think needs fixing.

And that's probably what I'm going to do. I don't want you to be in suspense leaving here waiting for the order, but I'll tell you that's probably what – I do have some concerns.

And they might be, you know, they might be nits that I'm picking here and maybe plaintiffs' table will, you know, strike their foreheads and say, gee, what is this guy thinking? And at least I'll share my thoughts with you in an order.

You've been helpful today describing to me and for me the process but I just, I think I have indicated those indicators that cause me some concern, and I do feel that the transparency about the selection process has not been great, notwithstanding your explanation of it. I appreciate that.

I guess it gets back to this whole net issue and whether or not it should be larger or not, particularly when there's the alleged conflict of interest. I'm not going to call it a real conflict of interest, just this allegation of that, the percentages, you know, why Carnegie Mellon thinks $0.34 is appropriate to ask for in their response is interesting to me.

And, again, I'm not being critical of those organizations [66] and the work they do, it's just that whole process causes me some concern.

The attorney's fees portion is interesting, and maybe, Mr. Nassiri, if you would rise to speak further as to, again, why you think a multiplier is appropriate in this case, I should afford you that opportunity.

MR. NASSIRI: Well, Your Honor, again, this was a very risky case, and these are very difficult cases. And the majority of them are dismissed without any relief whatsoever to the class.

Google obviously had not just one but two nationally prominent recognized law firms and they're fantastic lawyers.

And we don't have a lot of precedent to work with, so we're kind of, you know, working in a little bit – there's not a lot of modeling in here so we had to be innovative and creative, and I believe we were able to get permanent prospective relief and a substantial sum of money that is a testament to the good work that we did over the course of years now.

I believe it's also appropriate for the court to consider the likelihood that should we get approval, that this will go up on appeal and maybe up again and it could be six or eight years from the time that we filed and started putting money into this case that we ever get paid, if at all.

I run a small firm. This is – this was a big risk and a [67] big investment, and so I believe that the results justify this. This is comparable to the mega privacy class action settlements that have come before ours. It's no worse. And in some ways I believe it's better, Your Honor.

THE COURT: Okay. Thank you very much.

MR. NASSIRI: One more thing, Your Honor. I mean, if there's – the selection process and to the extent that it's covered by the mediation process, if that is an impediment here and if it would make any difference to the court's ruling, you know, maybe we could confer with the defense counsel now and there's not a whole lot more to tell you to be honest. It was a negotiation, but, you know, we might be able to offer you more information if we can agree and it would be useful to the court. Maybe it would and maybe it wouldn't.

THE COURT: Well, you have heard my concerns, and I suppose they're based on our conversation a year ago and part and parcel in the transcript that I read to you.

MR. NASSIRI: And I try never to set expectations with my clients that are incorrect, and I am kicking myself now. I thought I was clear, Your Honor, and apparently I wasn't.

But, you know, we had our list of proposed recipients in the settlement agreement. It has been fixed because it was a matter of agreement.

THE COURT: No. I appreciate that. You mention [68] them and then you talked about setting the bar high and the process.

MR. NASSIRI: Yeah.

THE COURT: And it gets back to my rejoinder about, well, what is different? Other than we keep getting younger.

That's the only difference I suppose.

Well, thank you. Thank you very much, and we'll get the order out, and we'll see where it goes.

MR. NASSIRI: Thank you, Your Honor.

MR. JOHNSON: Thank you, Your Honor.

MR. EDWARDS: Thank you, Your Honor.

(COURT CONCLUDED AT 10:55 A.M.)

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