

October 15, 2013

Clerk of the United States District Court for the Northern District of California
San Jose Courthouse, Courtroom 4 - 5th Floor
280 South 1st Street
San Jose, CA 95113

Attention: The Honorable Edward J. Davila

Re: In re Google Referrer Header Privacy Litigation, No. 10-4809

Dear Judge Davila:

We are writing regarding the supplemental declaration received by the Court on September 13, 2013. The supplemental declaration states that the proposed *cy pres* recipients are “organizations best suited to advance the interests of the Class.”¹ In fact, the groups proposed are not at all aligned with the interests of class members. Furthermore, the process used by the parties to select *cy pres* recipients, as set out in the supplemental declaration, is facially invalid. As the Ninth Circuit has stated repeatedly, the requirement for *cy pres* is that the distribution be reasonably certain to benefit the class and advance the objectives of the statutes underlying the litigation.²

On August 22 and 28, 2013, a group of consumer privacy organizations wrote in opposition the proposed settlement in *In re Google Referrer Header Privacy Litigation*.³ The groups explained that the settlement offered no benefit to the class and that the *cy pres* allocation was not aligned with the interests of the purported class. The Court then conducted an extensive hearing to assess the fairness of the settlement, during which the Court requested supplementary materials.⁴ In response to its request for supplementary materials, the Court received a supplemental declaration in support of the proposed settlement.⁵ This declaration makes clear the

¹ Supplemental Declaration of Kassra Nassiri in Support of Motion for Preliminary Approval of Settlement at 3, *In re Google Referrer Header Privacy Litigation*, No. 10-4809 (N.D. Cal. Oct. 25, 2010), ECF No. 61 [Hereinafter “Supplemental Declaration of Kassra Nassiri”].

² See *Lane v. Facebook, Inc.*, 696 F.3d 811, 817 (9th Cir. 2012); *Dennis v. Kellogg Co.*, 697 F.3d 858 (9th Cir. 2012); *Nachshin v. AOL, LLC*, 663 F.3d 1034 (9th Cir. 2011); *Six (6) Mexican Workers v. Arizona Citrus Growers*, 904 F.2d 1301 (9th Cir.1990).

³ See Aug. 22, 2013 Letter from Consumer Privacy Organizations, *In re Google Referrer Header Privacy Litigation*, No. 10-4809 (N.D. Cal. Oct. 25, 2010); see also Aug. 28, 2013 Letter from Consumer Privacy Organizations, *In re Google Referrer Header Privacy Litigation*, No. 10-4809 (N.D. Cal. Oct. 25, 2010), ECF No. 58.

⁴ See Transcript of Oral Argument, *In re Google Referrer Header Privacy Litigation*, No. 10-4809 (N.D. Cal. filed Oct. 25, 2010).

⁵ See Supplemental Declaration of Kassra Nassiri.

misalignment between the interests of the class and the proposed *cy pres* recipients. The declaration also reveals the deep procedural flaws in the selection of recipients in this case.

The Proposed *Cy Pres* Distribution Fails to Satisfy Ninth Circuit Requirements

In evaluating a *cy pres* remedy, the Ninth Circuit considers the objectives of the underlying statute and the interests of the silent class members.⁶ The interests of the silent class members demand that *cy pres* funds must be used “for the aggregate, indirect, prospective benefit of the class.”⁷ The Circuit has warned that “[w]hen selection of *cy pres* beneficiaries is not tethered to the nature of the lawsuit and the interests of the silent class members, the selection process may answer to the whims and self interests of the parties, their counsel, or the court.”⁸ “[I]t is not enough simply to identify any link between the class claims and a *cy pres* distribution Instead, an appropriate *cy pres* recipient must be dedicated to protecting consumers from the precise wrongful conduct about which plaintiffs complain.”⁹

The Ninth Circuit has made clear that the allocation in a *cy pres* distribution should be aligned with the legal claims underlying the settlement and the interests of class members.¹⁰ This entails, at a minimum, that in consumer privacy settlements, *cy pres* funds should be distributed to consumer privacy organizations. The tables below illustrate how class counsel, with one exception, has failed to meet this threshold requirement.

⁶ See *Lane v. Facebook, Inc.*, 696 F.3d 811, 819-20 (9th Cir. 2012); *Nachshin v. AOL, LLC*, 663 F.3d 1034, 1039 (9th Cir. 2011); *Six (6) Mexican Workers v. Ariz. Citrus Growers*, 904 F.2d 1301, 1307 (9th Cir. 1990).

⁷ *Nashchin*, 663 F.3d at 1038.

⁸ *Id.* at 1039 (citing *Bear Stearns*, 626 F.Supp.2d at 415).

⁹ Order Denying Rehearing and Rehearing En Banc & Dissent to Order, *Lane v. Facebook, Inc.*, Nos. 10-16380 & 10-16398 (9th Cir. Feb. 26, 2013), *appeal docketed*, No. 13-136 (Sup. Ct. July 26, 2013) (Smith, Kozinski, O’Scannlain, Bybee, Bea, and Ikuta, dissenting).

¹⁰ See *Dennis v. Kellogg Co.*, 697 F.3d 858 (9th Cir. 2012); *Nachshin v. AOL, LLC*, 663 F.3d 1034 (9th Cir. 2011); *Six (6) Mexican Workers v. Arizona Citrus Growers*, 904 F.2d 1301 (9th Cir.1990).

Table 1: Class Counsel Proposed Organizations as *Cy Pres* Recipients

Organization	Proposed <i>Cy Pres</i> Recipient? ¹¹	Currently Receives Funding from Google? ¹²	Consumer Privacy Organization? ¹³	Alma Mater of Class Counsel?
AARP, Inc	✓	✓		
Harvard University	✓	✓		✓
Carnegie Mellon University	✓	(?)		
Chicago-Kent College of Law	✓			✓
Stanford University	✓	✓		✓
World Privacy Forum	✓		✓	

As the above table demonstrates, however, of the consumer privacy organizations that have defended the interests of the class against prior privacy breaches by Google, only the World Privacy Forum was chosen as a *cy pres* recipient.

Furthermore, the proposed distribution fails to account for the objectives of the underlying statute: the Stored Communications Act (“SCA”).¹⁴ The SCA is not, as the supplemental declaration states, a “notice and choice” statute.¹⁵ Rather, it is a prohibition on a certain form of *misconduct*—specifically, the unauthorized access of stored electronic communications, such as the search queries at issue in this case.¹⁶ The supplemental declaration describes in great detail the benefits of notice, awareness, and education. But a privacy statute focused on prohibiting misconduct requires *cy pres* recipients who are willing to challenge

¹¹ See Mot. for Prelim. Approval at 5-6, *In re Google Referrer Header Privacy Litigation*, No. 10-4809 (N.D. Cal. Oct. 25, 2010), ECF No. 52 [hereinafter “Mot. for Prelim. Approval”].

¹² For information about the organizations funded by Google, see <http://www.google.com/publicpolicy/transparency.html>. Information about the sources of funding for the Berkman Center and the Center for Internet and Society is available at <http://cyber.law.harvard.edu/about/support> and <https://cyberlaw.stanford.edu/about-us>.

¹³ Organizations listed as “Consumer Privacy Organizations” are those that have previously acted on behalf of class members in similar matters concerning Internet privacy and Google. See Letter from Consumer Privacy Groups to Eric Schmidt, CEO, Google, Inc. (June 3, 2008), http://epic.org/privacy/ftc/google/Google_Letter060308.pdf; In re Google, Inc., FTC File No. __, (Complaint, Request for Investigation, Injunction, and Other Relief) https://epic.org/privacy/ftc/googlebuzz/GoogleBuzz_Complaint.pdf; Letter from Consumer Privacy Groups to Eric Schmidt, CEO, Google, Inc., (Oct. 1, 2010), <http://www.privacylives.com/wp-content/uploads/2010/10/Coalition-letter-to-Eric-Schmidt-Oct.-1-2010.pdf>.

¹⁴ 18 U.S.C. § 2701 *et seq.*

¹⁵ Supplemental Declaration of Kassra Nassiri. at 4 (“Plaintiffs have contended that the SCA is, like other privacy protections, based on a “notice and choice” approach.”).

¹⁶ 18 U.S.C. §2707(c).

misconduct. Consumer privacy organizations satisfy this objective; the proposed *cy pres* recipients generally do not.

Table 2: Consumer Privacy Organizations as Cy Pres Recipients

Organization	Proposed <i>Cy Pres</i> Recipient? ¹⁷	Receives Funding from Google? ¹⁸	Consumer Privacy Organization? ¹⁹	Alma Mater of Class Counsel?
American Civil Liberties Union			✓	
American Library Association		✓	✓	
Bill of Rights Defense Committee			✓	
Center for Digital Democracy			✓	
Center for Financial Privacy and Human Rights			✓	
Center for Media and Democracy			✓	
Consumer Action		✓	✓	
Consumer Federation of America		✓	✓	
Consumer Watchdog			✓	
Electronic Frontier Foundation		✓	✓	
Electronic Privacy Information Center			✓	

¹⁷ See Mot. for Prelim. Approval at 5-6.

¹⁸ Courts have previously considered whether proposed *cy pres* recipients are funded by defendant as part of the fairness analysis. See note 20 *infra*. Listing of current funding by Google may be incomplete. For information about the organizations funded by Google, see <http://www.google.com/publicpolicy/transparency.html>. Information about the sources of funding for the Berkman Center and the Center for Internet and Society is available at <http://cyber.law.harvard.edu/about/support> and <https://cyberlaw.stanford.edu/about-us>.

¹⁹ Organizations listed as “Consumer Privacy Organizations” are those that have previously acted on behalf of class members in similar matters concerning Internet privacy and Google. See Letter from Consumer Privacy Groups to Eric Schmidt, CEO, Google, Inc. (June 3, 2008), http://epic.org/privacy/ftc/google/Google_Letter060308.pdf; In re Google, Inc., FTC File No. __, (Complaint, Request for Investigation, Injunction, and Other Relief) https://epic.org/privacy/ftc/googlebuzz/GoogleBuzz_Complaint.pdf; Letter from Consumer Privacy Groups to Eric Schmidt, CEO, Google, Inc., (Oct. 1, 2010), <http://www.privacylives.com/wp-content/uploads/2010/10/Coalition-letter-to-Eric-Schmidt-Oct.-1-2010.pdf>.

Identity Theft Action Council of Nebraska			✓	
Knowledge Ecology International			✓	
Liberty Coalition			✓	
Patient Privacy Rights			✓	
Privacy Journal			✓	
Privacy Lives			✓	
Privacy Rights Clearinghouse			✓	
Privacy Times			✓	
U.S. Bill of Rights Foundation			✓	
World Privacy Forum	✓		✓	

The above list, compiled from an earlier letter to the Court describing specific actions taken by consumer privacy organizations on behalf of class members, provides a pool of possible *cy pres* recipients.

While it is well established that the allocation of a *cy pres* award need not be “ideal,” the two tables above demonstrate the sharp contrast between proposed *cy pres* recipients that are not at all aligned with the interests of the class members and the purpose of the litigation and a group of recipients that clearly is. Moreover, the presence of other factors that may explain class counsel’s proposed *cy pres* recipients – alma mater of class counsel and currently paid by Google as advisors and consultants – suggests selection criterion clearly at odds with the *cy pres* doctrine.

In fact, a comparison of the funding and activities of (1) the seven groups proposed by class and defense counsel and (2) a collection of consumer privacy groups is revealing. The groups proposed by counsel have financial ties to Google and are frequently the almas mater of counsel. The consumer privacy groups are aligned with the interests of the class, and have routinely defended the interests of the class in similar matters.

The Significance of the Withdrawal of the MacArthur Foundation

It is noteworthy also that one of the *cy pres* recipients proposed by class counsel by its own action has withdrawn from the settlement proposal. This is remarkable as the Foundation would have received significant funding from the settlement fund. The Foundation noted that it

was not an appropriate *cy pres* recipient and asked that the funds be “redirected to other non-profit organizations engaged in the underlying issues”²⁰

The withdrawal of one of the organization selected by the *cy pres* process created by class counsel is prima facie evidence that the selection process was flawed. Further inquiry by the Court would reveal that the remaining organizations, with the exception of WPF, do not satisfy the requirements for a *cy pres* award in this matter.

The Parties Failed to Employ an Adequate Cy Pres Selection Process

In contrast to the *cy pres* selection process created by the Parties, courts have employed transparent, objective selection processes to ensure that the interests of the class are served and to protect against conflicts of interest.²¹ *In re Google Buzz Privacy Litigation* provides a particularly instructive example. In that case, Judge Ware established a formal application process and asked each applicant to provide detailed information that would justify the *cy pres* award.²²

In *in re Google Buzz Privacy Litigation*, the parties initially proposed that Google would identify recipients of *cy pres* funds and the final recipients would be selected through a determination of counsel.²³ Judge Ware found that this process “lacked specificity and oversight required to provide a reasonable benefit to the Class.”²⁴ Instead, the court ordered the parties to “nominate the *cy pres* recipients” based on the following criteria:

- (i) The organization’s name and address;
- (ii) A description of an established program currently undertaking policy or education efforts directed specifically at Internet privacy;
- (iii) The number of years that the program has been established and focused on Internet privacy;
- (iv) A short statement as to how the particular program will benefit the Class;
- (v) The annual operating budget of the organization as a whole and the specific Internet privacy or education program; and
- (vi) The amount received, if any, in contributions from Google, Inc. in 2010, independent of the Settlement.²⁵

²⁰ Jeff John Roberts, *Why privacy settlements like Facebook’s “Sponsored Stories” lawsuit aren’t working*, GIGAOM (Sept. 19, 2013), <http://gigaom.com/2013/09/19/why-privacy-settlements-like-facebooks-sponsored-stories-lawsuit-arent-working/>.

²¹ See Order re. Nomination Process for *Cy Pres* Recipients at 2 *In re Google Buzz Privacy Litigation*, 2011 WL 7460099 (No. 10-00672 JW) (N.D. Cal. entered Feb. 16, 2011); Class Action Settlement Agreement at 13-14, *In re Netflix Privacy Litigation* (No. 11-00379 entered May 25, 2012).

²² Order re. Nomination Process for *Cy Pres* Recipients, *In re Google Buzz Privacy Litigation*, 2011 WL 7460099 (No. 10-00672 JW) (N.D. Cal. entered Feb. 16, 2011) at 2.

²³ Notice of Motion and Memorandum in Support of Motion for Order Granting Final Approval of Class Settlement, Certifying Settlement Class, and Appointing Class Representatives and Class Counsel, *In re Google Buzz Privacy Litigation*, 2011 WL 7460099 (No. 10-00672 JW) (N.D. Cal. entered Feb. 16, 2011) at 6.

²⁴ Order re. Nomination Process for *Cy Pres* Recipients, *supra* note 21, at 1.

²⁵ *Id.* at 2.

The court in the *Google Buzz* matter made explicit its concern that absent such procedures, worthwhile recipients could be improperly excluded.²⁶ In the May 31, 2011 order granting final approval of the settlement, the court acknowledged objections to the proposed *cy pres* distribution of counsel and set out a “few necessary modifications” to ensure that “the nominations list adequately represents the interests of the class”²⁷

Here, the lack of adequate procedures has produced a proposed *cy pres* distribution that fails to fund the “next best” class of beneficiaries. The supplemental declaration makes clear that the *cy pres* selection procedure, which required “mutually agreeable candidates,”²⁸ was unduly concerned with selecting organizations favorable to Google. After identifying an initial group of potential recipients, plaintiffs were required to “present to Google for approval.”²⁹ Only with Google’s approval could the final seven *cy pres* recipients be selected. The supplemental declaration claims that the proposed recipients are “independent and free from conflict,”³⁰ but there was no attempt to provide for an objective measure of the recipients’ “independence” by, for example, disclosing the amount of Google’s funding. As a result, many of the organizations selected for *cy pres* funds either have ties to class counsel³¹ or already receive funding from Google. It is entirely inappropriate that Google, the alleged wrongdoer here, be granted explicit veto power over which groups might best provide the protection from Google that Ninth Circuit precedent demands.

Nor were the recipients required to provide “[t]he number of years that the program has been established and focused on Internet privacy,” as required by Judge Ware. And Judge Ware’s concern over the improper exclusion of worthy recipients has been borne out, as those organizations not appearing on class counsel’s initial list were not even considered, let alone given the chance to demonstrate how their ongoing work is aligned with the interests of class members to a neutral arbiter.

Counsel constructed a settlement procedure for the resolution of *cy pres* allocation that explicitly ignored the purpose of the litigation and the interests of the class members. While it is typically appropriate in settlements for parties to find mutually agreeable terms, in class action settlements the court must ensure that *cy pres* allocations satisfy the minimal threshold to protect the interests of the class.

The *cy pres* selection procedure adopted by the parties in this matter does not serve the interests of the class. An open, transparent, and objective process would help ensure that the

²⁶ *See id.*

²⁷ Order Granting Final Approval of Class Action Settlement; Approval of *Cy Pres* Awards; and Awarding Attorney Fees at 2, *In re Google Buzz Privacy Litigation*, 2011 WL 7460099 (No. 10-00672 JW) (N.D. Cal. entered Mar. 31, 2011), available at http://epic.org/privacy/ftc/googlebuzz/EPIC_Google_Buzz_Settlement.pdf.

²⁸ Supplemental Declaration of Kassra Nassiri at 2.

²⁹ *Id.* at 3

³⁰ *Id.* at 5.

³¹ Aug. 23, 2013 Letter from Consumer Privacy Groups at 6 (“We also note a disturbing amount of overlap between the proposed *cy pres* recipients and the *alma maters* of the counsel in this matter: proposed class counsel Michael J. Aschenbrener (J.D., Chicago-Kent College of Law) and Kassra P. Nassiri (M.A., Stanford; J.D., Harvard); and defense counsel Eric Butler Evans (A.B., A.M., Harvard University). That such ties exist does not preclude the award of *cy pres* funds to these institutions, but they clearly cannot properly provide the basis.”).

settlement is fair, reasonable, and accurate and that it provides the ‘next best’ distribution. In the alternative, the Court could modify the proposed settlement, as other courts have done in similar circumstances in the past, to ensure that the *cy pres* funds are allocated to organizations aligned with the interests of class members.³²

Respectfully,

/s/ Marc Rotenberg
Marc Rotenberg, Executive Director
Electronic Privacy Information Center (EPIC)

/s/ Jeff Chester
Jeff Chester, Executive Director
Center for Digital Democracy (CDD)

/s/ John Simpson
John Simpson, Privacy Project Director
Consumer Watchdog

/s/ Deborah Peel
Deborah Peel, Founder and Chair
Patient Privacy Rights

/s/ Beth Givens
Beth Givens, Director
Privacy Rights Clearinghouse

³² Order Granting Final Approval of Class Action Settlement; Approval of *Cy Pres* Awards; and Awarding Attorney Fees at 2, *In re Google Buzz Privacy Litigation*, 2011 WL 7460099 (No. 10-00672 JW) (N.D. Cal. entered Mar. 31, 2011), available at http://epic.org/privacy/ftc/googlebuzz/EPIC_Google_Buzz_Settlement.pdf.