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14
 15 **UNITED STATES DISTRICT COURT**
NORTHERN DISTRICT OF CALIFORNIA
 16 **SAN JOSE DIVISION**

17 IN RE GOOGLE BUZZ USER
 18 PRIVACY LITIGATION

Case No. 5:10-CV-00672-JW

19
 20 This Pleading Relates To:

21
 22 ALL CASES

23 **CLASS COUNSEL’S RESPONSE**
TO (1) *CY PRES* APPLICANTS’
OBJECTION TO CLASS COUNSEL’S
PROPOSED *CY PRES* DISTRIBUTION
AND TO (2) OBJECTIONS TO
PROPOSED ORDER AND FINAL
JUDGMENT GRANTING FINAL
APPROVAL OF CLASS ACTION
SETTLEMENT AND AWARDED
ATTORNEYS’ FEES

1 On February 16, 2011 this Court entered an Order in the above-captioned matter directing
2 the parties to solicit nominations for *cy pres* organizations and ordering Class Counsel to
3 consolidate the list and to submit the organization and distribution amount nominations to this
4 Court, with specific information about each, by March 28, 2011. *See* Order Re Nomination
5 Process for *Cy Pres* Recipients (“Order”), Dkt. 117, February 16, 2011. The parties carried out
6 each of the directives contained in the Order. With the assistance of the Rose Foundation, the
7 parties solicited and collectively received 77 applications for *cy pres* funding seeking a total of
8 more than \$35 million. Pursuant to the Settlement Agreement, counsel for the parties negotiated
9 a list of final nominations and amounts. Class Counsel then consolidated the list and submitted
10 the organization and distribution amount nominations to the Court for approval on March 25,
11 2011, attaching all of the requisite information ordered by the Court. *See* Class Counsel’s
12 Submission of *Cy Pres* Organizations and Distribution Amounts for Court Approval (“Counsel’s
13 Submission”), Dkt. 119, March 25, 2011, and Exhibits A & B.
14

15 The parties received requests for much more funding than there is money available under
16 the settlement. Many deserving organizations applied, and the parties necessarily made some
17 difficult decisions to determine the slate of *cy pres* nominations Class Counsel would submit to
18 the Court. In submitting the proposed nomination list to the Court, the parties complied with (1)
19 all aspects of this Court’s Order of February 16; (2) the terms of the Settlement Agreement, as
20 each nominee is an existing organization focusing on Internet privacy policy or privacy education
21 agreed to by the parties, *see* Settlement Agreement, ¶ 3.4; and (3) the requirements of law, as the
22 nominees are all organizations that conduct Internet privacy research and education, and each
23 therefore pursues goals closely aligned with the interests of the class. *See Six Mexican Workers*
24 *v. Ariz. Citrus Growers*, 904 F.2d 1303, 1308 (9th Cir. 1990). As set forth in Class Counsel’s
25 March 25, 2011 filing, Class Counsel have submitted to this Court a list of nominees that is fair,
26 reasonable, and adequate, and funding Class Counsel’s nominations would promote the interests
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1 of the class.

2 Among the 65 groups that the parties did not recommend for funding, 8 have filed a
3 pleading objecting to Class Counsel’s nominations. *See Cy Pres Applicants’ Objection to Class*
4 *Counsel’s Proposed Cy Pres Distribution (“Applicants’ Objection”)*, Dkt. 121, March 30, 2011.
5 Additionally, three class members who previously objected to the Settlement have filed an
6 additional objection to the *cy pres* nominations. *Objections to Proposed Order and Final*
7 *Judgment Granting Final Approval of Class Action Settlement and Awarding Attorneys’ Fees*
8 *(“Class Member Objection”)*, Dkt. 122, March 30, 2011. Both objections contend that Class
9 Counsel should have nominated a different set of organizations for *cy pres* funding; the 8
10 disappointed applicants propose that 100% of the available funds should be distributed to their 8
11 groups alone and none should go to any of the 12 groups nominated by Class Counsel or to any
12 other group. *See Applicants’ Objection, Appendix 1.* The objectors argue (1) that the nominated
13 groups suffer two harms: that they are too closely aligned with Google because some of them
14 received funding from Google in 2010¹ and that they are ineffectual in addressing internet
15 privacy;² (2) that awards to the nominated groups would violate some legal norm; and (3) that
16 their alternative slate (in the case of the Applicant Objectors) is a better set of nominees. Each of
17 these arguments is meritless and thus objectors do not come close to meeting their burden of
18 proving any assertions they make in arguing against the reasonableness of settlement.³
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22 _____
23 ¹ *See, e.g., Applicants’ Objection*, at 9 (“Six of the twelve groups designated by Class
24 Counsel were funded by Google last year”); *Class Member Objection*, at 3 (“many of these
25 groups, or the institutions with which they are affiliated, receive funding from Defendant or have
26 other entanglements that were not reported to the Court.”).

27 ² *Applicants’ Objection* at 9 (“Virtually none of the organizations receiving funds in the
28 proposed *cy pres* settlement showed any interest in the circumstances of Class members prior to
the announcement of the *cy pres* settlement in this matter,”); *id.* at 9-10 (stating that the
nominated groups “stand by quietly while others do the actual work of safeguarding Internet
privacy”).

³ *See U.S. v. State of Or.*, 913 F.2d 576, 581 (9th Cir. 1990) (“[W]e have usually imposed

1
2 **I.**
3 **THE NOMINATED GROUPS ARE WELL-SITUATED TO PURSUE THE CLASS'S**
4 **INTERESTS**

5 Objectors' contentions that the nominated groups are too close to Google or ineffectual
6 are both unsupported and unsupportable. The *cy pres* organizations nominated by Class Counsel
7 are not unusually connected to Google. Six of the 12 nominated organizations received no
8 funding from Google in 2010; of the other 6 that did receive funding, four received a negligible
9 amount of their annual funding from Google (Berkman Center, 5.6% of its annual budget;
10 Brookings Institution, less than two-tenths of one percent of its annual budget; Center for
11 Democracy & Technology, 9% of its annual budget; Electronic Frontier Foundation ("EFF"), less
12 than one tenth of one percent of its annual budget). Only two recipients (Carnegie Mellon and
13 Stanford) received what appears to be a significant budgetary amount from Google, but of course
14 that is only if the Google contribution for 2010 is judged in terms of the unit receiving the grant
15 and not in terms of the university's budget; obviously, Google funds but a minute fraction of
16 these major universities' expenses and has little, indeed no, ability to control what these
17 universities do or say.

18 Objectors not only incorrectly describe the extent of the nominated groups' Google funds,
19 they also inaccurately report what those funds are used for, stating that the six groups that
20 received 2010 funds from Google "are currently paid by Google to lobby for or to consult for the
21 company." Applicants' Objection at 2; *id.* at 9. Objectors do not offer any support for this
22 statement, and they cannot: there is no basis whatsoever to draw this conclusion. None of these
23 organizations is paid to lobby or consult with Google.
24

25
26
27 the burden on the party objecting to a class action settlement"); *Geier v. Alexander*, 801 F.2d 799,
28 809 (6th Cir. 1986) ("To allow the objectors to disrupt the settlement on the basis of nothing
more than their unsupported suppositions would completely thwart the settlement process.").

1 Indeed, Class Counsel’s nominees have repeatedly demonstrated their independence, not
2 least by publishing materials and taking advocacy positions adverse to Google when they
3 believed doing so would support the privacy interests of Internet users and consumers. Both the
4 ACLU and EFF specifically criticized Google’s launch of Buzz.⁴ And the nominated groups’
5 criticism of Google’s launch of Buzz are not isolated examples. The ACLU, EFF, and
6 Samuelson Law Clinic at Berkeley – which together account for nearly 50% of Class Counsel’s
7 proposed distribution – have done the following:

- 9 • EFF, ACLU, and the Samuelson Law, Technology & Public Policy Clinic jointly filed
10 and argued an objection to a class settlement concerning Google’s book scanning
11 project, arguing in part that the settlement did not do enough to protect user privacy
12 because Google may collect information on users’ reading habits. See Privacy Authors
13 and Publishers’ Objection to Proposed Settlement, Authors Guild, Inc. v. Google Inc.,
14 No. 5-cv-8136-DC (S. D. N.Y. Sep. 8, 2009). The federal district court recently rejected
15 this settlement and cited the privacy concerns raised by EFF, ACLU, and Samuelson in
16 its order denying settlement approval. Opinion, 05-cv-8136 (DC), at 39-40 (S. D. N.Y.
17 Mar. 22, 2011) (Dkt. 971).
- 18 • ACLU urged citizens to send letters to Google asking the company not to enter into a
19 planned information-sharing agreement with the National Security Agency.
20 [http://www.aclu.org/blog/national-security-technology-and-liberty/tell-google-not-enter-
21 agreement-nsa](http://www.aclu.org/blog/national-security-technology-and-liberty/tell-google-not-enter-agreement-nsa)
- 22 • EFF published a warning and how-to guide for Gmail users seeking to disable the link
23 between Google web searches and web advertising in their Gmail accounts. See
24 <https://www.eff.org/deeplinks/2004/04/gmail-rough-guide-protecting-your-privacy>
- 25 • EFF published numerous blog posts critical of Google’s privacy practices. See, e.g.
26 www.eff.org/deeplinks/2010/05/time-google-grow-make-open-wi-fi-privacy-mistake
27 (criticizing Google’s accidental collection of wireless internet data while building street

28 ⁴See Chris Conley, *Google’s CEO Doesn’t Get It* (Feb. 18, 2010) (ACLU post stating that
Google “needs to take [the] lesson [of Buzz’s launch] to heart. Instead of giving in to the
temptation to leverage information that it already has about users of Google products, Google
needs to recognize that it holds that information in trust for its users and respect their right to
control how or whether that information is used for any other purposes” and urging readers to
“keep up the pressure” by contacting Google to complain), available at:
http://www.aclunc.org/issues/technology/blog/google's_ceo_doesn't_get_it.shtml; Kurt Opsahl,
Google Buzz Privacy Update (Feb. 16, 2010) (EFF post stating that “Google leveraged
information gathered in a popular service (Gmail) with a new service (Buzz), and set a default to
sharing your email contacts to maximize uptake of the service. In the process, the privacy of
Google users was overlooked and ultimately compromised.”), available at:
<https://www.eff.org/deeplinks/2010/02/google-buzz-privacy-update>.

1 view); <https://www.eff.org/deeplinks/2008/02/google-gets-healthy> (warning consumers
2 that Google's beta project to collect personal health records might present privacy risks).

3 The Applicant Objectors are inaccurate in characterizing the nominated groups as ones that are
4 inordinately connected to Google.

5 Applicant Objectors' other swipe at the nominated slate is that it consists of groups that
6 "stand by quietly while others do the actual work of safeguarding Internet privacy." *Id.* at 9-10.

7 This characterization is disingenuous in light of the fact that these objectors work cooperatively
8 with many of the nominated groups on a regular basis, conducting activities such as jointly filing
9 amicus briefs, distributing joint press releases, participating in workshops sponsored by the
10 nominated groups, co-authoring research, and co-signing letters to corporations and lawmakers.

11 A partial list of these overlapping activities is attached as Exhibit A and that partial list alone
12 contains more than 150 entries of overlapping activities among the groups. Applicant Objectors
13 are fully aware that the nominated groups are not by-standers.
14

15 Worse than their failure to acknowledge to the Court the work of the nominated groups
16 with which they are very familiar, the Applicant Objectors purposefully conceal this knowledge
17 in their submission. For example, the Applicant Objectors write that:

18 The organizations excluded from the Submission of Class Counsel have frequently
19 cooperated to protect privacy rights of Internet users. For example, in June 2008, EPIC, WPF,
20 PRC, and others sent a letter to Google demanding that the company comply with California
21 law and place a prominent link to its privacy policy on its homepage. EPIC, WPF, and PRC
22 were successful in this effort, and, within weeks, a "privacy" link appeared on Google's
23 homepage.

24 Applicants' Objection at 7-8. What the Applicant Objectors fail to inform the Court is that
25 among the "and others" in this effort were the nominated groups, EFF and the ACLU. *See* Letter
26 to Eric Schmidt, CEO of Google Inc., dated June 3, 2008, available at
http://www.worldprivacyforum.org/pdf/Google_Letter_June032008fs.pdf.

27 The Applicant Objectors' attacks on the work of the nominated groups as being either
28 Google-connected or ineffectual are therefore both misleading and simply wrong.

II.
OBJECTORS PROVIDE NO LEGAL SUPPORT FOR THEIR CONCERNS

Beyond misrepresenting the nominated groups' links to Google, Objectors contend that the nominated groups are legally soiled because Google was involved in their selection⁵ and/or because they previously received funds from Google.⁶ Objectors have articulated no legal principle – and there is none – under which *cy pres* funds from a class settlement may not be distributed with the involvement of the defendant⁷ or to organizations that have previously received charitable contributions from the defendant.⁸ Last year, Google made over \$150 million

⁵ Class Member Objection, at 4-5 (asserting that the defendant should not have been involved in the selection of *cy pres* recipients).

⁶ In fact, neither objection explains *why* prior receipt of funds from Google should make a group ineligible to receive *cy pres* funds. See Class Member Objection, at 3-4 (listing without argument nominated groups that have received charitable funding or support from Google); Applicants' Objection, at 9 (stating without argument that some nominated groups have previously received funding from Google).

⁷ Courts commonly approve settlements that identify *cy pres* recipients in this manner. See, e.g. *In re Pharm. Indus. Average Wholesale Price Litig.*, 588 F.3d 24, 30 (1st Cir. 2009) (affirming approval of settlement in which up to \$10 million went to “mutually acceptable charitable organizations funding cancer research or patient care’ that the court would approve in the future”) (quoting settlement agreement); *Cervantez v. Celestica Corp.*, No. EDCV 07-729-VAP (OPx), 2010 WL 2712267 (C.D. Cal. July 6, 2010) (stating that unclaimed funds would be “donated to a charity mutually agreed-upon by the parties, subject to Court approval”) (final approval granted Nov. 1, 2010, Dkt. No. 202); *Bellows v. NCO Fin. Sys., Inc.*, No. 3:07-cv-01413-W-AJB, 2008 WL 5458986, at *5 (S.D. Cal. Dec. 10, 2008) (granting final approval to settlement providing for a “*cy pres* award totaling \$197,970 to one or more mutually agreed-upon organizations”) and *Bellows v. NCO Fin. Sys., Inc.*, 2009 WL 35466 (S. D. Cal. Jan 5, 2009) (approving and adopting the parties’ recommendations regarding *cy pres* recipients).

⁸Indeed, courts in this circuit routinely approve *cy pres* distribution plans in which some funds go to organizations that have previously received charitable contributions from the defendant. See, e.g., *Nickel v. Bank of Am. Nat. Trust and Savings Ass’n*, No. 94-2716 (SBA), 2009 WL 1270473 (N. D. Cal. May 6, 2009) (approving plan of *cy pres* distribution in which at least two of the designated charities had previously received charitable donations from Bank of America); compare Declaration of Daniel Rosenthal re: Sources and Uses of the Nickel v. Bank of America Settlement Funds, No. 94-2716, Dkt. 972 (N. D. Cal. filed Apr. 30, 2009), Exhibit B (including University of San Diego and Senior Community Centers in list of *cy pres* beneficiaries), with “Bank of America 2003 Grants and Sponsors in San Diego”, available at <http://www.prnewswire.com/news-releases/bank-of-america-2003-grants-and-sponsorships-in-san-diego-total-18-million-company-provides-support-to-more-than-190-local-organizations->

1 in charitable donations, much of it distributed across a broad range of public interest and
2 academic organizations engaged in technology-related research and education.⁹ Hundreds of
3 organizations received Google funding. There is no legal principle that categorically bars every
4 group who received even a dollar of charitable funding from Google from receiving *cy pres* funds
5 in this settlement, without regard to the merit of the group's proposal or whether the proposed
6 program would advance the interests of the class.

7
8 The law requires that the *cy pres* distribution closely approximate the interests of the
9 class, and that the settlement as a whole be fair, reasonable, and adequate. *See Six Mexican*
10 *Workers*, 904 F.2d at1308; Fed. R. Civ. Pr. 23(e). Here, Class Counsel have nominated 12
11 groups, each with an established record of independent service in the public interest. In
12 compliance with this Court's Order and the Settlement Agreement, the nominations are all for
13 established programs focusing on Internet privacy. Class Counsel's nominations are spread
14 throughout the nation and represent a broad cross-section of advocacy, lobbying, education, and
15 research organizations. Class's Counsel nominees approach internet privacy using a wide array
16 of methodologies and they focus their work on disparate populations groups, including the
17 underprivileged and the young. Class Counsel's list of nominations is fair, reasonable, and
18 adequate, and the nominees are closely aligned with the interests of the class.

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20 **III.**
21 **THE OBJECTORS' PROPOSED SLATE PROVIDES NO ADVANTAGES FOR THE**

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23 71748812.html (University of San Diego and Senior Community Centers received charitable
24 donations from Bank of America in 2003). *See also Zaldivar v. T-Mobile USA, Inc.*, No. 07-1695
25 (RAJ), 2010 WL 1611981 (W. D. Wash. Mar. 16, 2010) (granting final approval to settlement
26 where *cy pres* funds would go to the Mobile Giving Foundation). T-Mobile has long supported
27 the Mobile Giving Foundation by waiving texting fees for customers who make charitable
28 donations to the Foundation via text. *See* "Frequently Asked Questions About the Mobile Giving
Foundation", available at http://mobilegiving.org/?page_id=24 (listing T-Mobile USA among
wireless carriers that support the Mobile Giving Foundation).

⁹ *See* <http://www.google.org/googlers.html>

CLASS, ONLY FOR THE OBJECTORS

By contrast to Class Counsel's broad set of nominees, the Applicant Objectors propose a slate of nominees with these characteristics:

- Each of the 8 applicant objectors would receive funds from the settlement but no other group would.
- Each of the 8 applicant objectors would receive 100% of the money that their application sought.
- Each of the 8 applicant objectors' grants from this settlement would constitute a substantial portion of their entire annual funding – indeed four of the groups propose grants for themselves that are more than 150% of their entire 2010 budget, and only one grant would be for less than half (39%) of the group's entire 2011 budget:

GROUP	2011 Budget	Grant Proposed For Self	Grant as % of 2011 Budget
World Privacy Forum	90,000	450,000	500%
EPIC	1,063,688	1,750,000	164%
Patient Privacy Rights	417,000	643,000	154%
Center for Digital Democracy	306,500	450,000	147%
Privacy Rights Clearinghouse	376,387	265,000	70%
Privacy Activism	223,000	153,000	69%
US PIRG	1,900,000	1,000,000	53%
Consumer Action	3,200,000	1,250,000	39%

The Applicant Objectors justify this self-allocation on the basis that, “Virtually none of the organizations receiving funds in the proposed *cy pres* settlement showed any interest in the circumstances of Class members prior to the announcement of the *cy pres* settlement in this matter,” Applicants’ Objection at 9, and that the nominated groups “stand by quietly while others do the actual work of safeguarding Internet privacy.” *Id.* at 9-10. These characterizations by the Applicant Objectors are confusing in that, as noted above, the Applicant Objectors are aware of the significant privacy work done by the nominated groups. Perhaps the Applicant Objectors mean simply to limit their criticism of the nominated groups to the fact that few addressed

1 Google's launch of Buzz specifically. Again, as noted above, however, a number of the
2 nominated groups did strongly criticize Google over the launch of Buzz. Moreover, what is odd
3 about criticizing the nominated groups on the Buzz front is that this criticism applies as well, or
4 perhaps even more, to 7 of the 8 Applicant Objectors, none of whom, as far as Class Counsel is
5 aware, undertook any advocacy or public education work related to Buzz specifically. The
6 lawyers at the eighth group, EPIC, elected to pursue the Buzz matter by filing a complaint with
7 the Federal Trade Commission, a chosen route that appears not to enable the recovery of
8 attorney's fees. Nothing, at the end of the day, distinguishes the 8 Applicant Objectors as a group
9 among the 77 total applicants and 12 nominated groups such that the Court would be required to
10 order their inclusion as *cy pres* recipients.

11 CONCLUSION

12 In sum, the parties have complied with every aspect of this Court's Order, and Class
13 Counsel have propounded a nomination list that meets the requirements of law and promotes the
14 interests of the class. Objectors insist, perhaps inevitably, that a different slate of applicants
15 should have been nominated. Among the 300,000,000,000,000,000,000,000 nomination slates
16 that could be constructed with 77 different applicants and any number of possible combinations,
17 the Applicant Objectors propose the one slate that provides 100% of the available funds to their 8
18 groups. Rather than indulge such attempts to micro-manage the *cy pres* selection process among
19 the 77 applicants and nearly infinite possible slates, more of which may follow on the heels of
20 this one, the Court's role is to ensure that the parties carefully followed the procedures set forth in
21 its Order of February 16, and the terms of the Settlement Agreement, and that Class Counsel
22 nominated a final slate of recipients consistent with the Class's interests. The parties have
23 carefully followed the Court's ordered approach and Class Counsel's nominations are well-
24 known, well-established, well-regarded privacy groups whose work is clearly in the Class's
25 interests. The parties respectfully request that the Court, after reviewing these filings, enter the
26 proposed Final Approval Order.

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Respectfully submitted,

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2 DATED: April 4, 2011

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