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

|                           |   |                                     |
|---------------------------|---|-------------------------------------|
| IN RE GOOGLE BUZZ USER    | ) | Case No. 5:10-CV-00672-JW           |
| PRIVACY LITIGATION        | ) |                                     |
|                           | ) | <b>CY PRES APPLICANTS’ REPLY IN</b> |
| This Pleading Relates To: | ) | <b>SUPPORT OF OBJECTION</b>         |
|                           | ) | <b>TO CLASS COUNSEL’S PROPOSED</b>  |
| ALL CASES                 | ) | <b>CY PRES DISTRIBUTION</b>         |
| _____                     | ) |                                     |

22 The Electronic Privacy Information Center (“EPIC”) respectfully files this reply  
 23 in support of its objection (Dkt. No. 121) to Class Counsel’s March 25, 2011 submission  
 24 (Dkt. No. 119) on behalf of itself, the Center for Digital Democracy, Consumer Action,  
 25

27 <sup>1</sup> Mr. Rotenberg is barred in the District of Columbia, the Commonwealth of  
 28 Massachusetts, the U.S. Supreme Court, and several federal Circuits Courts.  
<sup>2</sup> Mr. Verdi is barred in the District of Columbia and the State of New Jersey.  
<sup>3</sup> Ms. McCall is barred in the State of Pennsylvania.

1 Patient Privacy Rights, Privacy Activism, the Privacy Rights Clearinghouse, U.S. PIRG,  
2 and the World Privacy Forum.

3           Regarding the allocation of settlement funds in this matter, EPIC presented to the  
4 Court a list of eight organizations dedicated to protecting the interests of Class Members,  
5 with a proven track record in the Internet privacy field, and with no significant financial  
6 ties to Google. All of these organizations submitted timely proposals to the Rose  
7 Foundation in accordance with the stated guidelines. EPIC further noted its specific role  
8 in the Federal Trade Commission (“FTC”) investigation of the Google Buzz matter that  
9 led to the recent Consent Order. That FTC Order provides far-reaching benefits to Class  
10 Members and others who are similarly situated.  
11

12           The Court Order of February 16, 2011, Dkt. No. 117 (the “Court Order”), set out  
13 criterion to evaluate the organizations that would apply for settlement funds. The Court  
14 also stated that "the final approval list of *cy pres* organizations may draw, but need not be  
15 drawn, entirely from the submission of nominations by Class Counsel." *Id.* The Court  
16 further said that it "reserves the right to designate *cy pres* recipients who would  
17 reasonably benefit the Class through established Internet privacy education and policy  
18 programs on its own motion." *Id.*  
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22           For reasons set forth below, and in accordance with the Court Order and the  
23 doctrine of *cy pres*, the Court should reject the proposed *cy pres* allocation of Class  
24 Counsel and adopt instead the proposed *cy pres* allocation of Objectors, or consolidate  
25 the two proposals, or make other modifications as it chooses. Of these various  
26 alternatives, the least desirable outcome for the Class Members is to accept Class  
27 Counsel's proposal exactly as submitted.  
28

1 **The Cy Pres Doctrine Requires that the Distribution Represent the “Next Best” Use**  
2 **of Settlement Funds**

3 “[T]he term ‘cy pres’ derives from the Norman French expression *cy pres comme*  
4 *possible*, which means ‘as near as possible.’” *Democratic Cent. Comm. v. Washington*  
5 *Metro. Area Transit Comm’n*, 84 F.3d 451, 455 n.1 (D.C. Cir. 1996). The *cy pres*  
6 doctrine arose in the law of equity and originated as a rule of construction to save a  
7 testamentary charitable gift that would otherwise fail, allowing “the ‘next best’ use of the  
8 funds to satisfy the testator’s intent ‘as near as possible.’” *Id.*

10 A *cy pres* distribution is not proper simply because it is “fair, reasonable, and  
11 adequate.” Class Counsel’s Response at 8, Dkt. No. 124. Rather, “[T]he [*cy pres*]  
12 distribution should be made in the ‘next best’ fashion in order as closely as possible to  
13 approximate the intended disposition.” *Wilson v. Sw. Airlines, Inc.*, 880 F.2d 807, 811  
14 (5th Cir. 1989) (citing *In Re Folding Cart Anti-Trust Litigation*, 557 F. Supp. 1091, 1108  
15 (N.D. Ill. 1993), *rev’d on other grounds*, 744 F.2d 1252, 1254 (7th Cir. 1984)). The  
16 allocation of settlement funds should be aligned with the interests of the underlying class  
17 and the objectives of the litigation. Consideration should also be given to those who are  
18 similarly situated. Funds “should be distributed for a purpose as near as possible to the  
19 legitimate objectives underlying the lawsuit, the interests of class members, and the  
20 interests of those similarly situated.” *In re Airline Ticket Comm’n Antitrust Litigation*,  
21 307 F.3d 679, 682 (8th Cir. 2002). Courts “emphasize the importance of tailoring a *cy*  
22 *pres* distribution to the nature of the underlying lawsuit.” *In re Airline Ticket Comm’n*  
23 *Antitrust Litig.*, 307 F.3d 679, 683 (8th Cir. 2002).

27 Moreover, there is “scholarly support for the notion that the unclaimed portion of  
28 a class action recovery may be applied *cy-pres* – ‘as nearly as possible’ – to the failed or

1 unachievable purpose for which the recovery is collected. *Wilson v. Sw. Airlines, Inc.*,  
2 880 F.2d 807, 811 (5th Cir. 1989). Ultimately, "The district court's choice among  
3 distribution options should be guided by the objectives of the underlying statute and the  
4 interests of the silent class members." *Six Mexican Workers*, 904 F.2d 1301, 1307 (9<sup>th</sup>  
5 Cir. 1990). The distribution cannot simply be reasonable. The funds must be put to the  
6 "next best" use, the use that matches the class's interests "as nearly as possible." *In Re*  
7 *Folding Cart Anti-Trust Litigation*, 557 F. Supp. at 1108; *Wilson*, 880 F.2d at 811.  
8

9  
10 **The Court's February 16, 2011 Order Seeks to Identify the Next Best Use of**  
11 **Settlement Funds**

12 On February 16, 2011, the Court found "that the [parties'] proposed nomination  
13 process to determine *cy pres* recipients and the amounts granted to each recipient lacks  
14 the requisite specificity and oversight required to provide a reasonable benefit to the  
15 Class." Dkt. No. 117 at 1.

16 Therefore, the Court ordered the parties to "nominate the *cy pres* recipients"  
17 based on the following criteria:

- 18
- 19 (i) Name
  - 20 (ii) Address
  - 21 (iii) Description of an established program currently undertaking policy or  
22 education efforts directed specifically at Internet privacy.
  - 23 (iv) Years that the program has been established and focused on Internet  
24 privacy.
  - 25 (v) A short statement as to how the particular program will benefit the Class.
  - 26 (vi) Overall annual operating budget of the organization as a whole and the  
27 specific Internet privacy or education program.
  - 28 (vii) Amount received, if any, in contributions from Google, Inc. in 2010  
independent of this Settlement.

*Id.* at 2.

The Order identifies seven criteria for determining organizations' ability to ensure  
the "next best" use of *cy pres* distributions in this case: the organization's name and

1 address (factors (i) and (ii)); the existence of an “established program ... directed  
 2 specifically at Internet privacy” that “will benefit the class”(factors (iii) and (v)); the  
 3 duration of the program (factor iv); the program and organizational budgets (factor vi);  
 4 and the “Amount received, if any, in contributions from Google, Inc. in 2010 independent  
 5 of this Settlement” (factor vii). *Id.*

7 The chart below compares the Objecting Organizations’ proposed distribution to  
 8 Class Counsel’s proposed distribution, based on a key descriptive factor (the actual  
 9 names of the organizations) and four numeric factors set forth in the Court Order.  
 10

11 **Comparison of Proposed *Cy Pres* Allocations**  
 12 (As per the Court Order In re Google Buzz User Privacy Litigation<sup>4</sup>)

|   | <b><i>Cy Pres</i> Allocation<br/>Class Counsel<br/>Proposal<sup>5</sup></b> | <b><i>Cy Pres</i> Allocation<br/>Objector Proposal<sup>6</sup></b> |
|---|---|--|
| Name (Organizations with<br>“Privacy” in title) <sup>7</sup>  | 1   | 5  |
| Years that the program<br>has been established <sup>8</sup>   | 9   | 11   |
| Total Contributions From<br>Google, Inc. in 2010 <sup>9</sup> | \$5,570,359   | \$120,000<br>(including in-kind)                                   |
| Overall annual operating<br>budget <sup>10</sup>              | \$234,209,502   | \$7,576,495  |
| Total annual Internet<br>programs budget <sup>11</sup>        | \$6,034,104   | \$1,960,628  |
| Total Amount<br>Requested <sup>12</sup>                       | \$6,065,000   | \$6,114,000  |

23  
 24 <sup>4</sup> Order Re Nomination Process for *Cy Pres* Recipients (“Order”), Dkt. 117, February 16, 2011, (hereinafter  
 “Court Order”) at Section (d)(iv).

25 <sup>5</sup> Class Counsel’s Submission of *Cy Pres* Organizations and Distribution Amounts for Court Approval,  
 Dkt. 119, March 25, 2011, and Exhibits A & B.

26 <sup>6</sup> *Cy Pres* Applicants’ Objection to Class Counsel’s Proposed *Cy Pres*, Dkt. 121, March 30, 2011.

27 <sup>7</sup> Order at (d)(i).

<sup>8</sup> Order at (d)(iv).

<sup>9</sup> Order at (d)(v)

28 <sup>10</sup> Order at (d)(vi).

<sup>11</sup> Order at (d)(vi).

<sup>12</sup> Order at (a). (Several of the proposals accumulated in this category are for multiple years.)

1           The chart demonstrates that the Objecting Organizations’ proposed distribution is  
2 far preferable to the proposal set forth by Class Counsel. First, Objector organizations are  
3 in fact “privacy” organizations. Second, Objector organizations have, on average, a  
4 longer period of time working on Internet privacy. Third, the Objector organizations do  
5 not receive any significant funding from Google. (The \$120,000 is the assigned value of  
6 advertising provided by Google to one of the organizations.) Fourth, Objector  
7 organizations are clearly devoted to the work of consumer privacy as a much higher  
8 percentage of their annual budgets are directed to this work. It is also notable that under  
9 the allocation proposed by Class Council, defendant Google would disburse to recipient  
10 organizations in 2011 slightly more than it gave to these same organizations in 2010. A  
11 *cy pres* settlement fund should not be used to offset ongoing obligations.

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14           **The Objecting Organizations’ Proposed Distribution is the Next Best Use of**  
15           **Settlement Funds**

16           Class Counsel’s Response alleges that its nominated groups are “well-situated to  
17 pursue the class’s interests.” Dkt. No. 124 at 4. Though many of the groups included in  
18 Class Counsel’s proposal perform meritorious work, it is clear that Class Counsel  
19 purposefully excluded the one group – EPIC – whose work matches the class’s interests  
20 “as nearly as possible” and represents the “next best” use of settlement funds. *Wilson*,  
21 880 F.2d at 811; *In Re Folding Cart Anti-Trust Litigation*, 557 F. Supp. at 1108. Nor can  
22 Google’s self-interest in the selection of recipient organizations set out by Class Counsel  
23 be ignored. Class Counsel’s proposed distribution is therefore deeply flawed.

24  
25  
26           The Court should favor Objectors’ proposed distribution, which includes a  
27 substantial award to EPIC, as well as awards to other groups who routinely represent the  
28 interests of the class.

1 EPIC's unique role in this matter is plainly apparent by the FTC's investigation  
2 and subsequent Order in the Google Buzz matter. On February 16, 2010, EPIC filed a  
3 complaint with the FTC highlighting several aspects of the Google Buzz service that  
4 threatened Gmail users' privacy. Dkt. No. 121 at Appendices 11-12. The EPIC complaint  
5 reflected substantial work by EPIC, on behalf of Gmail users who objected to Google's  
6 change in business practice, exactly the same issue underlying this litigation. EPIC  
7 worked full-time to develop a substantial complaint for the Federal Trade Commission so  
8 that the FTC could act on behalf of Gmail users. EPIC canvassed blog posts and user  
9 comments. EPIC tested the service, took screen shots, and carefully reviewed what  
10 Google had told users about the service.  
11

12  
13 EPIC's complaint argued that Google's change in business practices and service  
14 terms violated user privacy expectations, diminished user privacy, contradicted Google's  
15 own privacy policy, and may have also violated federal wiretap laws. EPIC's complaint  
16 asked for the following relief:  
17

18 54. EPIC requests that the Commission investigate Google, enjoin its  
19 unfair and deceptive business practices, and require Google to protect the  
20 privacy of Gmail users. Specifically, EPIC requests the Commission to:

- 21 • Compel Google to make Google Buzz a fully opt-in service for  
22 Gmail users;
- 23 • Compel Google to cease using Gmail users' private address book  
24 contacts to compile social networking lists;
- 25 • Compel Google to give Google Buzz users more control over their  
26 information, by allowing users to accept or reject followers from  
27 the outset; and
- 28 • Provide such other relief as the Commission finds necessary and  
appropriate.

Dkt. No. 121, Appendix 11 at 15.

1           On March 30, 2011, the FTC announced settlement of its charges concerning  
2 Google Buzz. Federal Trade Commission, *FTC Charges Deceptive Privacy Practices in*  
3 *Google's Rollout of Its Buzz Social Network*, <http://ftc.gov/opa/2011/03/google.shtm>. The  
4 Commission determined that “personal information of Gmail users was shared without  
5 consumers’ permission through the Google Buzz social network” and that Google made  
6 statements that were “false or misleading and constitute a deceptive act or practice.”  
7 Exhibit 1 at 4-5. These findings mirror the analysis contained in EPIC’s FTC Complaint.  
8 Dkt. No. 121 at Appendices 11-12.  
9  
10

11           The Commission entered an Order and set out a draft Agreement that provided  
12 comprehensive privacy safeguards not only for users of Google Buzz but of all Google  
13 products and services. Exhibits 1 and 2. Under the Agreement, Google must establish a  
14 “Comprehensive Privacy Program” and it will be subject to biennial independent privacy  
15 audits for a twenty-year period. Exhibit 2 at 4-5. The Agreement requires Google to  
16 accurately inform users of “the extent to which [Google] maintains and protects the  
17 privacy and confidentiality” of user data and bars Google from transmitting users’  
18 information to third parties without “obtain[ing] express affirmative consent.” Exhibit 2  
19 at 4.  
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22           The Agreement states that Google shall implement “a comprehensive privacy  
23 program that is reasonably designed to: (1) address privacy risks related to the  
24 development and management of new and existing products and services for consumers,  
25 and (2) protect the privacy and confidentiality of covered information.” Exhibit 2 at 4. In  
26 addition, Google shall maintain records and make available to the FTC upon request  
27 information concerning:  
28



- 1 - "the extent to which [Google] maintains and protects the privacy and  
2 confidentiality of any covered information, with all materials relied upon in  
3 making or disseminating such statements;
- 4 - "consumer complaints directed at [Google], or forwarded to respondent by a  
5 third party, that allege unauthorized collection, use, or disclosure of covered  
6 information and any responses to such complaints;
- 7 - "documents, whether prepared by or on behalf of [Google], that contradict,  
8 qualify, or call into question respondent's compliance with this order; and
- 9 - "materials relied upon to prepare the Assessment, whether prepared by or on  
10 behalf of respondent, including but not limited to all plans, reports, studies,  
11 reviews, audits, audit trails, policies, training materials, and assessments. *Id.* At 6.

12 Further, Google shall provide the FTC Order to "all current and future principals,  
13 officers, directors, and managers, and to all current and future employees, agents, and  
14 representatives having supervisory responsibilities relating to the subject matter of this  
15 order." *Id.* at 6-7.

16 The Commission found that Google "used deceptive tactics and violated its own  
17 privacy promises to consumers when it launched [Buzz]" and stated that EPIC's  
18 Complaint provided the basis for the Commission's investigation. *Id.* ("Google's data  
19 practices in connection with its launch of Google Buzz were the subject of a complaint  
20 filed with the FTC by the Electronic Privacy Information Center shortly after the service  
21 was launched."). The FTC did not cite the work of any other organization concerning the  
22 Commission's settlement regarding Google Buzz.

23 The FTC's investigation and subsequent Order followed directly from the careful  
24 research, study, and articulation of legal theories set out in the initial EPIC complaint  
25 regarding Google Buzz. It was EPIC that reviewed and compiled the concerns of Class  
26 Members who expressed concerns about the introduction of Buzz and presented them to  
27 the FTC so that the privacy of Internet users would privacy.  
28

1           Subsequent to the filing of the EPIC complaint with the Federal Trade  
2 Commission, Class Counsel initiated its own lawsuit, raising many of the same claims set  
3 out originally in the EPIC materials. It is almost absurd at this point that Class Counsel  
4 would propose a *cy pres* allocation in the Google Buzz litigation that would exclude  
5 EPIC, the organization that actually and successfully pursued the interests of Class  
6 Members concerning Google Buzz.  
7

8           **Class Counsel’s Submission Improperly Supports Organizations That Routinely**  
9           **Receive Funding from Google**

10           The majority of funds in the *cy pres* allocation set forth in the submission of Class  
11 Counsel would be allocated to organizations that currently receive support from Google  
12 for lobbying, consulting, or similar services. Six of the 12 groups designated by Class  
13 Counsel were funded by Google last year. Dkt. No. 119, Ex. B at 4-6, 10. Class Counsel  
14 proposes that these Google-funded groups receive \$3,315,000 of the *cy pres* funds in this  
15 matter, accounting for 54% of the total distribution. *Id.*; Dkt. No. 119 at 1.  
16

17           The Court Order does not preclude *cy pres* awards to groups who otherwise  
18 receive funding from Google. But the Order acknowledges that the “amount received, if  
19 any, in contributions from Google, Inc. in 2010 independent of this Settlement” is a  
20 relevant factor in analyzing the propriety of a proposed *cy pres* distribution. Dkt. No. 117  
21 at 2. Receipt of such funding by a group weighs against a *cy pres* distribution to that  
22 organization. Google should not be permitted to use settlement funds to advance  
23 Google’s own business purposes or to meet its ongoing obligations. And Class Counsel’s  
24 proposed *cy pres* awards to Google-supported organizations are substantial.  
25

26           Class Counsel asserts that its proposed organizations receive, at most, a  
27 “negligible amount” of funding from Google. However, this assertion is misleading. The  
28

1 correct measure of influence is the comparison Google’s funding proportional to each  
2 organization’s Internet program budget, which as Class Counsel’s own filing reveals, is  
3 substantial.  
4

5       Regarding the involvement of the Rose Foundation in the determination of  
6 proposed *cy pres* recipients presented to the Court by Class Counsel, it is Objectors'  
7 understanding that the Foundation does not approve of Class Counsel's proposal but is  
8 prohibited from communicating its views on the matter to the Court because of a non-  
9 disclosure agreement. The Court may wish to contact the Foundation directly regarding  
10 this. It is noteworthy, for example, that the Foundation's involvement in the matter has  
11 been so thoroughly "scrubbed" that all of the materials regarding the widely publicized  
12 request for proposals for the settlement funds -- Class Counsel noted that more than 75  
13 detailed applications were submitted -- have been removed from the Foundation's web  
14 site. The link to the webpage “Rose Foundation: Google Buzz Privacy Settlement” no  
15 longer works and a search on the site for “Buzz” produces 0 results.<sup>13</sup>  
16  
17

18 **Conclusion**

19       This litigation arises from a claim that Google acted improperly with the  
20 introduction of Buzz and that, in lieu of an actual award to Class Members, the Court  
21 should approve a *cy pres* settlement that would promote Internet privacy. EPIC is the  
22 organization that successfully pursued the underlying claim on behalf of Class Members  
23 at the Federal Trade Commission. Under the *cy pres* doctrine, the proposed allocation of  
24 settlement funds put forward by Objectors is clearly preferable to the one put forward by  
25 Class Counsel.  
26  
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28 <sup>13</sup> “Rose Foundation: Google Buzz Privacy Settlement,” (“We are soliciting applications from organizations who want to apply for monies from the Google Buzz Settlement. Deadline is March 14, 2011.”) [www.rosefdn.org/article.php?list=type&type=140](http://www.rosefdn.org/article.php?list=type&type=140) (last visited Apr. 8, 2011).  
Case No. 10-00672-JW – *CY PRES* APPLICANTS’ REPLY IN SUPPORT OF OBJECTION TO CLASS COUNSEL’S PROPOSED *CY PRES* DISTRIBUTION

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