Gary E. Mason (*pro hac vice*)
gmason@masonlawdc.com
Donna F. Solen (*pro hac vice*)
dscolen@masonlawdc.com
MASON LLP
1625 Massachusetts Ave., NW
Washington, DC 20036
Telephone: (202) 429-2290
Facsimile: (202) 429-2294

Michael F. Ram (SBN 104805)
mram@ramoson.com
RAM & OLSON LLP
555 Montgomery Street, Suite 820
San Francisco, California 94111
Telephone: (415) 433-4949
Facsimile: (415) 433-7311

William B. Rubenstein (SBN 235312)
rubenstein@law.harvard.edu
1545 Massachusetts Avenue
Cambridge, Massachusetts 02138
Telephone: (617) 496-7320
Facsimile: (617) 496-4865

Attorneys for Plaintiffs and the Proposed Class

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

IN RE GOOGLE BUZZ USER PRIVACY LITIGATION

This Pleading Relates To:

ALL CASES

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

NOTICE OF MOTION; CLASS COUNSEL'S APPLICATION FOR ATTORNEYS' FEES AND REIMBURSEMENT OF EXPENSES

Date: January 31, 2011
Time: 9:00 a.m.
Place: Courtroom 8, 4th Floor
[Hon. James Ware]

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Treatises

TO ALL PARTIES AND THEIR COUNSEL OF RECORD:

Please take notice that on January 31, 2011 at 9:00 a.m., or on such other date as the Court directs, in Courtroom 8, 4th Floor of the United States District Court, Northern District of California, San Jose Division, before the Honorable James Ware, Plaintiffs Andrew Souvalian ("Souvalian"), Katherine C. Wagner ("Wagner"), Mark Neyer ("Neyer"), Barry Feldman ("Feldman"), John H. Case ("Case"), Lauren Maytin ("Maytin"), and Rochelle Williams ("Williams") (collectively "Plaintiffs" or "Class Representatives") on behalf of themselves and all those similarly situated and Google Inc. ("Google") will respectfully move this Court for an order granting class counsel's application for award of attorneys' fees.

This application will be based on this Notice; the accompanying Application for Attorneys' Fees and Reimbursement of Expenses; the Declaration of Gary E. Mason and exhibits thereto, and [Proposed] Order Granting Class Counsel's Application for Attorneys' Fees and Reimbursement of Expenses.

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Class Counsel seek an award of attorney's fees and expenses. The factual issues in this case involved a brand new Internet program with innovative features completely unique to this action, and the legal claims rested on novel, untested, and highly uncertain legal theories – this was not a cookie-cutter case. Both the factual and legal issues were strongly contested by a well-funded adversary. Class Counsel undertook significant risk in bringing the case and invested substantial time developing plaintiffs' legal claims and investigating the complex facts surrounding Buzz. Yet within a year, Class Counsel were able to achieve a settlement enhancing the privacy features of the novel program and creating what is to Counsel's knowledge the largest fund for privacy work in history. For this impressive result, Class Counsel seek 25% of the common fund, the benchmark for attorneys' fees in the Ninth Circuit. Such a fee amounts to a multiple of about 1.67 times Class Counsel's current lodestar. This modest multiplier is appropriate in light of the risk Class Counsel undertook in bringing this case and the results achieved. In short, Class Counsel achieved an excellent result in this risky case against strong

opposition and with no assurance that they would be compensated or even recover the time and expenses they advanced in pursuing this litigation. The benchmark fee they seek should be granted.

II. FACTS, PROCEDURAL HISTORY AND SETTLEMENT

A. Google's Launch of Buzz

On February 9, 2010, Google launched a social networking program, "Google Buzz" (or "Buzz"). Google Buzz was built into Gmail, Google's email program. In the terms used in Google Buzz, Buzz users are networked with some individuals whom they are "following" and others who are their "followers." Buzz suggests follower/following lists to prospective Buzz users based in part upon who they email and chat with most in Gmail. Buzz users' follower/following list may be publicly viewable through their Google profile. Plaintiffs alleged that this approach to a social networking program raised privacy concerns (1) because email users did not necessarily want to be in social networks with their email contacts; and (2) because public knowledge of how the "follower/following" lists were populated, coupled with the potential public availability of these lists, appeared to divulge a Gmail user's most frequent email contacts without sufficient consent.

B. Plaintiffs' Legal Claims and Google's Defenses

Eva Hibnick filed the initial class action complaint in this action on February 17, 2010, on behalf of all Gmail users in the United States to whose accounts Google introduced the Buzz program. Additional complaints were filed against Google on March 3, April 5, May 7, and June 7, 2010. The plaintiffs in these actions alleged that aspects of the operation of Google Buzz violated: (i) the Electronic Communications Privacy Act ("ECPA"), 18 U.S.C. §2510 *et seq.*; (ii) the Stored Communications Act ("SCA"), 18 U.S.C. §2701 *et seq.*; (iii) the Computer Fraud and Abuse Act, 18 U.S.C. §1030 *et seq.*; (iv) the California common law tort of public disclosure of private facts; and (v) the California Unfair Competition Law, Cal. Bus. & Prof. Code §17200 *et seq.*

Google contends that the plaintiffs have mischaracterized and misunderstood how Google Buzz operates, has denied and continues to deny Plaintiffs' allegations, and denies that it has

engaged in any wrongdoing whatsoever relating to Google Buzz. Google denies that the plaintiffs and putative class are entitled to any form of damages or other relief, and has maintained throughout this litigation that it has meritorious defenses to all alleged claims and that it was and is prepared to vigorously defend against those claims.

On June 30, 2010, this Court granted Plaintiff Hibnick's motion to consolidate the cases and to appoint interim lead class counsel and liaison counsel.

C. Negotiations, Mediation, and Settlement

Google proposed to Class Counsel an in-person meeting to discuss the way the Buzz program functioned and the possible resolution of the litigation. The first meeting between the parties took place on April 23, 2010 at the office of Google's counsel in San Francisco. *See* Declaration of Gary E. Mason in Support of Preliminary Approval of Class Action Settlement, Docket No. 42 ("Mason Prelim. Decl.") (filed September 3), at ¶ 5. Google's Vice President for Product Management, whose responsibilities included the launch of Buzz, spent several hours discussing the program with Class Counsel. *Id.* He provided an explanation of how Buzz functioned and responded to Class Counsel's questions. *Id.* Google's counsel also made an extended presentation of the company's defenses to the allegations in the complaints, characterizing the presentation as essentially representing the substantive contentions that Google would pursue were it to file a motion to dismiss. *Id.* Class Counsel debated these legal issues with Google Counsel. *Id.* These discussions culminated with an agreement to exchange information and to then engage in a formal mediation session. *Id.*

Prior to the mediation, Google provided further material to Class Counsel, including numerous screenshots showing the functioning of the Buzz program at various times since its launch. Mason Prelim. Decl., at ¶ 6. Using this information and through an independent investigation of the facts and law, Class Counsel produced for Google and the Mediator a 73-page Mediation Statement that included a 31-page legal brief in support of plaintiffs' case. *Id.* This brief outlined the plaintiffs' affirmative legal argument and responded to the de facto motion to dismiss Google's Counsel had presented at the April meeting. *Id.* Similarly, Google produced a Mediation Statement for the Mediator, some of which was shared with Class Counsel.

Id.

On June 2, 2010, the parties met for the formal mediation at the JAMS office in San Francisco. Mason Prelim. Decl., at ¶ 7. Hon. Fern Smith, a retired judge of the United States District Court for the Northern District of California with extensive experience in class actions, presided. *Id.* At the outset, Class Counsel made a formal presentation of plaintiffs' factual and legal case to the mediator and Google's Counsel. *Id.* The parties spent the remainder of the day discussing the factual and legal issues and the possibilities for settlement. *Id.* After approximately 14 hours, the mediation proved successful, resulting in a Term Sheet and ultimately in the formal Settlement Agreement. *Id.* The Settlement Agreement was previously filed with this court as Exhibit 1 to Plaintiffs Motion for Order Preliminarily Approving Class Action Settlement, Docket No. 41 (filed Sept. 3, 2010).

D. Confirmatory Discovery

As part of the Settlement, the parties agreed that Google would provide materials to Class Counsel for the purpose of confirmatory discovery. Mason Prelim. Decl., at ¶ 8. Shortly after the Mediation, Google made available to Class Counsel all consumer feedback that it had received about the Buzz program from users throughout the world. *Id*. Google also produced a series of sworn statements in which Google employees described relevant aspects of Buzz's launch and subsequent operations. *Id.* Class Counsel reviewed these documents, which amounted to thousands of pages. *Id.* Class Counsel developed a coding system to analyze the user feedback. Class Counsel identified no instances in which a class member alleged they had suffered out-of-pocket damages due to Buzz's release.

E. Relief to the Class

The Settlement recognizes and secures three significant benefits for the class. *First*, the Settlement recognizes that, since the inception of these lawsuits, Google has made changes to the Buzz program to address privacy and other concerns raised by users. Settlement, at ¶ 3.2. *Second*, the Settlement requires that Google undertake wider public education about the privacy aspects of Buzz. Google will report back to Class Counsel identifying the content of the educational efforts it undertakes within 90 days of the entry of final judgment. *Id.* at ¶ 3.3.

Third, the Settlement provides for the creation of an $8.5 million Settlement Fund. *Id.* at ¶ 3.4. After deduction of attorneys' fees and expenses, incentive awards and administrative costs, the balance of the Settlement Fund will be paid to *cy pres* beneficiaries, which shall be existing organizations focused on Internet privacy policy or privacy education. *Id*. The parties shall mutually agree on the *cy pres* recipients and the amounts for each.

F. Settlement Acknowledges Plaintiffs' Request for Fees and Expenses

The Settlement Agreement acknowledges Class Counsel's intention to apply for fees and reimbursement of expenses and provides that Google will not object to a fee request of up to 30% of the Settlement Fund. Settlement, at ¶ 10.1. This provision was negotiated only after all of the other settlement terms had been finalized. *See* Declaration of Gary E. Mason Esq. In Support of Application for Attorneys' Fees and Reimbursement of Expenses ("Mason Final Decl.") (filed concurrently with this brief), at ¶ 11. In addition, the Settlement acknowledges that Class Counsel will request incentive awards in the amount of $2,500 for the Class Representatives. Settlement, at ¶ 10.1.

III. THE FEE AWARD SOUGHT HERE IS REASONABLE ON EITHER A PERCENTAGE OR LODESTAR/MULTIPLIER BASIS IN LIGHT OF THE RISK COUNSEL TOOK AND THE BENEFIT THEY CONFERRED ON THE CLASS

Lawyers responsible for creating a common fund are entitled to a fee from that fund. *Fischel v. Equitable Life Assur. Society of U.S.*, 307 F.3d 997, 1006 (9th Cir. 2002). The fee is premised on the notion of unjust enrichment: if a group garners a benefit without paying those who produced it for them, they will be unjustly enriched at their lawyers' expense. Under Ninth Circuit law, the District Court has discretion to apply either the percentage-of-the-fund method or the lodestar/multiplier method to determine a reasonable attorneys' fee. *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1029 (9th Cir. 1998). Whichever method is used, the fee award should take into account the particular factors in the case and must be "reasonable under the circumstances." *State of Fla. v. Dunne*, 915 2.d 542, 545 (9th Cir. 1990).

The percentage of the fund method for calculating a fee is the preferred method in

common fund cases.[1] Class Counsel therefore seek a fee award as a percentage of the common fund, but demonstrate, as well, that the requested fee is also fully justified under a lodestar/multiplier approach. The requested 25% fee, which comprises a reasonable number of hours at reasonable rates and embodies a modest multiplier of about 1.67 (a figure that will decline as the litigation advances), comports with both the Ninth Circuit percentage factors (Part A, *infra*) and the Circuit's *Kerr* factors for lodestar awards (Part B, *infra)*.

That the direct beneficiaries of the fund in this case are *cy pres* recipients, rather than class members, does not alter the conclusion that Counsel is entitled to recover a percentage of the fund for their efforts – courts routinely apply the percentage method in *cy pres* cases. *See, e.g. In re Toys "R" Us Antitrust Litig.*, 191 F.R.D. 347 (E. D. N.Y. 2000) (awarding 26.7% of common fund where the only cash benefit of the settlement was a *cy pres* distribution to State governments as *parens patriae* on behalf of resident consumers); *In re Metlife Demutualization Litig.*, 689 F.Supp.2d 297 (E. D. N.Y. 2010) (awarding fees of 21% of a common fund, $2.5 million of which would be distributed via *cy pres*); *In re Consumer Privacy Cases*, 96 Cal.Rprt.3d 127 (Cal. App. 1 Dist. 2009) (affirming fee award based on common fund theory where relief secured by settlement included a $3.25 million *cy pres* distribution to privacy-related organizations); *cf. In re Vitamin Cases*, 2004 WL 5137597, at *17-18 (Cal. Sup. Apr. 12, 2004) (awarding attorneys' fees of $7.6 million, representing a multiplier of 1.99 on counsels' lodestar, to compensate counsel for the creation of a common fund that was distributed entirely via *cy pres*). As the Supreme Court has explained:

> Since [the late nineteenth century], this Court has recognized consistently that a litigant or a lawyer who recovers a common fund for the benefit of persons other than himself or his client is entitled to a reasonable attorney's fee from the fund as a whole. The common-fund doctrine reflects the traditional practice in courts of equity, and it stands as a well-recognized exception to the general principle that

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[1] *See* FEDERAL JUDICIAL CENTER, MANUAL FOR COMPLEX LITIGATION (FOURTH) §14.121 (2004) (hereafter "*Manual for Complex Litigation"*) ("After a period of experimentation with the lodestar method . . . the vast majority of courts of appeals now permit or direct district courts to use the percentage-fee method in common fund cases.") (citations omitted); *id*. the lodestar method is difficult to apply, time-consuming to administer, inconsistent in result, and capable of manipulation"); Third Circuit Task Force, *Court Awarded Attorney Fees*, 108 F.R.D. 237, 258 (1985) (characterizing the lodestar formula as a "cumbersome, enervating, and often surrealistic process of preparing and evaluating fee petitions"). *See generally In re Copley Pharmaceutical, Inc.*, 1 F.Supp.2d 1407 (D. Wy. 1998) (enumerating advantages of percentage method).

> requires every litigant to bear his own attorney's fees. The doctrine rests on the perception that persons who obtain the benefit of a lawsuit without contributing to its cost are unjustly enriched at the successful litigant's expense. Jurisdiction over the fund involved in the litigation allows a court to prevent this inequity by assessing attorney's fees against the entire fund, thus spreading fees proportionately among those benefited by the suit.

Boeing Co. v. Van Gemert, 444 U.S. 472, 478 (1980) (citations omitted). *See also Manual for Complex Litigation* at §14.121 ("The common-fund exception to the American Rule is grounded in the equitable powers of the courts under the doctrines of *quantum meruit* and unjust enrichment.") (citation omitted).

A. Class Counsel's Benchmark Fee Request is Appropriate Under the Percentage Method

The Ninth Circuit has held that the benchmark percentage-of-the-fund fee award is 25%. *Vizcaino v. Microsoft Corp.*, 290 F.3d 1043, 1047-48 (9th Cir. 2002). The 25% benchmark is a "starting point." Higher or lower percentages may be appropriate based on all the circumstances in a given case. *See Vizcaino*, 290 F.3d at 1048; *Six (6) Mexican Workers v. Arizona Citrus Growers*, 904 F.2d 1301, 1311 (9th Cir. 1990). Regardless of whether the percentage or lodestar method is used, "the critical inquiry is whether the fees and expenses ultimately awarded [are] reasonable in relation to what the plaintiffs recovered." *Koumoulis v. LPL Financial Corp.*, 2010 WL 4868044 at *5 (S. D. Cal. Nov. 19, 2010) (quoting *Powers v. Eichen*, 229 F.3d 1249, 1258 (9th Cir. 2000)). Courts in the Ninth Circuit have established a non-exhaustive list of factors to determine the reasonability of a fee request, including: "(1) the results achieved; (2) the risk of litigation; (3) the skill required and quality of work; (4) the contingent nature of the fee and the financial burden carried by the plaintiffs; and (5) awards made in similar cases." *Tarlecki v. bebe Stores, Inc.*, 2009 WL 3720872, at *4 (N. D. Cal. Nov. 3, 2009) (citing *Vizcaino*, 290 F.3d at 1048-50).

Here, Class Counsel seek no more than the benchmark: 25% of $8.5 million, or $2.125 million.[2] This amount is substantially less than the 30% maximum fee request to which the

[2] Because the settlement secures valuable relief in addition to the $8.5 million fund, the percentage award Counsel seek here is effectively less than 25% of the total value of the settlement. The settlement recognizes changes Google has made to the privacy-related features of Buzz since the inception of this litigation, and provides that Google will undertake a public

Defendant agreed in the Settlement Agreement. It is also significantly less than the norm for settlements of this size. *See* Stuart Logan et al., *Attorney Fee Awards in Common Fund Class Actions*, 24 CLASS ACTION REP. 167 (2003) (concluding in empirical study of 1,120 common fund cases that in $5-10 million fund settlements, the average percentage award is 30%). Each of the relevant factors recognized by the Ninth Circuit supports the reasonableness of Class Counsel's fee request.

1. Counsel Advanced Significant Time and Expense on a Contingency Basis

To date, counsel have reasonably spent over 2,500 hours and advanced nearly $30,000 in expenses with no assurance of repayment. Mason Final Decl., ¶¶ 16 & 18. In the course of this matter, Class Counsel have: (1) investigated the release of a brand new, heretofore unknown product, Google Buzz, researched the potential legal claims, and filed this action; (2) interviewed numerous class members and the Class Representatives regarding their experience with Buzz; (3) reviewed a variety of concerns about Buzz raised by both public officials and non-governmental organizations in the US and throughout the world; (4) extensively researched how Buzz worked and followed the numerous modifications Google made to the program; (5) prepared for and attended a meeting with Google to discuss Buzz's functioning, Google's legal defenses, and the possibility of settlement; (6) researched and prepared a 73-page mediation brief presenting plaintiffs' case and responding to Google's defenses; (7) reviewed affidavits by Google employees and thousands of user comments; (8) engaged in a mediation before Hon. Fern Smith, which produced a term sheet; (9) negotiated and drafted the final language in the Settlement Agreement; (10) successfully moved for preliminary approval of the Settlement; (11) devised the notice program and drafted its various components; (12) argued and resolved a dispute with

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education program to inform users about the privacy aspects of Buzz. These provisions enhance the value of the settlement to the class and provide further support for the reasonableness of Counsel's percentage fee request. *See Castaneda v. Burger King Corp.*, 2010 WL 2735091 (N.D. Cal. Jul. 12, 2010) (awarding 33% of common fund and stating that presence of injunctive relief weighed in favor of award because: "the monetary damages in this settlement. . . are only part of the relief obtained for the class. . . [T]he settlement also provides for injunctive relief at the ten restaurants in question to eliminate accessibility barriers.").

Google over the content of the email notice; (13) begun reviewing applications from potential *cy pres* recipients and establishing a process by which the plaintiffs will propose a list of recipients; and (14) begun research and drafting to respond to objections that have already been raised or Counsel anticipate will be raised. *See* Mason Final Decl. ¶ 2; Declaration of William B. Rubenstein in Support of Application for Attorney's Fees and Reimbursement of Expenses (filed concurrently), at ¶¶ 4-5.

2. Counsel Achieved Superior Results

As discussed in Plaintiffs' Motion for Preliminary Approval, the Settlement provides substantial relief for the class. Counsel who obtain "substantial relief" are entitled to full compensation for their efforts, even if some contentions were rejected or some sought-after relief was denied. *See Schwarz v. Sec. of Health & Human Servs.*, 73 F.3d 895, 901-901 (9th Cir. 1995).

The Settlement recognizes changes that Google has made to the Buzz program during the course of this litigation. These changes have made Buzz more privacy-sensitive, the central goal of the litigation. In addition, under the terms of the Settlement, Google will undertake a public education program to teach users about the privacy aspects of Buzz. This represents substantial relief because many of Buzz's privacy problems resulted from users' difficulties understanding the program and controlling the privacy settings on their accounts.

Perhaps most centrally, the Settlement creates an $8.5 million common fund that will be distributed to organizations focused on Internet privacy policy or privacy education, thus ensuring that the money will be used in a manner that furthers the interests of the class. If the Settlement is approved and Class Counsel's fee request is granted, the Settlement will distribute over $6 million to Internet privacy organizations. This amount would represent, to Counsel's knowledge, the largest single *cy pres* distribution to privacy-related organizations ever achieved.[3]

[3] The Settlement Agreement in *Lane v. FaceBook*, No. 08-3845 (N. D. Cal., filed Aug. 12, 2008) would create a $9.5 million fund, of which between $6 and $7 million would be distributed via *cy pres*. However, the case is currently on appeal to the Ninth Circuit and no money has been distributed to date. Furthermore, the FaceBook Settlement would not fund existing privacy organizations, but would instead create a new foundation.

This unprecedented distribution will yield a significant benefit for all class members in the enhanced awareness and sensitivity to Internet privacy that the funded organizations will produce through their efforts.

Given the changes to Buzz, the public education campaign, and the historic level of funding made available here, there can be little question that the Settlement confers substantial relief on the class.

3. Counsel Assumed Substantial Risk in Pursuing this Case

Class Counsel undertook this litigation on a purely contingent basis, with no assurance of recovery expenses or attorneys' fees. *See* Mason Final Decl., ¶ 10. Class Counsel expended considerable time and resources to prosecute the case successfully on behalf of the Class. Counsel undertook substantial risk of non-payment, and the percentage fee request here will fairly compensate Counsel for this risk. "In common fund cases, attorneys whose compensation depends on their winning the case must make up in compensation in the cases they win for the lack of compensation in the cases they lose." *Vizcaino*, 290 F.3d at 1051 (quoting *In re Wash. Pub. Power Supply Sys. Sec. Litig. (WPPSS)*, 19 F.3d 1291, 1300-01 (9th Cir. 1994)).

The risk Class Counsel took in litigating this case was substantial as plaintiffs' claims concerned an unknown product, relied principally on a novel and untested theory of liability, and were brought against a giant adversary with massive financial resources and excellent legal representation. If settlement had not been achieved, Class Counsel would have faced numerous hurdles, any one of which might have resulted in no recovery for the class and nonpayment of fees, including: (1) surviving a motion to dismiss, most crucially against the argument that the SCA does not protect the type of information divulged by Buzz; (2) winning a class certification motion despite Google's likely contentions that variations in the experience of individual users and the manageability problem of multiplied statutory damages would preclude certification; (3) litigating the case to trial and winning a judgment; and (4) litigating any appeals.

In short, Counsel invested substantial time and resources in a challenging case with a high risk of non-payment. The benchmark fee requested here will compensate for this risk.

4. The Case Required Substantial Skill and Counsel Produced Quality Work

This case is novel and complex, due both to the complicated facts surrounding the release and functioning of Buzz and the novelty of plaintiffs' legal claims. The defendant is a corporation with massive resources and a highly skilled legal team. Counsel obtained a very favorable result in a complicated case against a formidable adversary, an achievement that required considerable legal skill and quality work by Class Counsel.

This action arose from user experiences with Google Buzz, an innovative Internet program. Buzz's unique functioning and method of introduction to users are unlike anything that came before it: the program combines features of Facebook, Twitter, and other social networking programs, as well as some features unique to Buzz. Indeed, the aspect of Buzz that was most novel – the use of email contact lists to seed a user's social network – formed the factual basis for plaintiffs' claims. Class Counsel invested substantial time and effort in understanding how Buzz was introduced to user accounts, how it functioned once activated, and how modifications made by Google affected Buzz.

Plaintiffs' legal claims rested on a novel and untested interpretation of the Stored Communications Act. There is no reported case applying the Stored Communications Act, or any of the other federal statutes plaintiffs cited in their complaints, to a social networking program like Buzz. Crucially, plaintiffs' claims depended on a theory under which the identities of users' most frequent email contacts were "contents of a communication" within the meaning of the SCA rather than "record" information which Google may legally divulge. *See* 18 U.S.C. § 2702.

Counsel spent significant effort and exhibited considerable skill in developing the factual and legal claims in the case, and in arguing these claims to opposing counsel and before the Mediator. Through these efforts and in the face of difficult issues of fact and law, Class Counsel negotiated a favorable settlement against a well-funded and highly skilled adversary.

5. Counsel Fee Request is Consistent with Awards in Similar Cases

Class Counsel's request for 25% of the common fund is directly in line with the

benchmark in the Ninth Circuit. *See Vizcaino*, 290 F.3d at 1047. It is also fully consistent with the percentages courts routinely award in consumer and other class actions. *See, e.g. Suzuki v. Hitachi Global Storage Technologies, Inc.*, 2010 WL 956896 at *5 (N. D. Cal. Mar. 12, 2010) (awarding fees of 25% in common fund arising from fair debt collection claim); *Nobles v. MBNA Corp.*, 2009 WL 1854965 (N. D. Cal. Jun. 29, 2009) (awarding 25% of $9.3 million fund arising from consumer fraudulent solicitation claim); *Mark v. Valley Ins. Co*, 2005 WL 1334373 (D. Or. May 31, 2005) (awarding fees of 30% in Fair Credit Reporting Act case); *Fernandez v. Victoria Secret Stores, LLC*, 2008 WL 8150856 (C. D. Cal. Jul. 21, 2008) (awarding 34% of settlement fund valued by the court at $8.5 million in action by job applicants who worked without pay); *Razilov v. Nationwide Mut. Ins. Co.*, 2006 WL 3312024 (D. Or. Nov. 13, 2006) (awarding 30% of $19 million fund in Fair Credit Reporting Act case); *Young v. Polo Retail, LLC*, 2007 WL 951821 (N. D. Cal. Mar. 28, 2007) (awarding 31% of $1.4 million in case alleging store forced employees to purchase and wear store merchandise). *See also* Logan, 24 CLASS ACTION REP. at 167 (concluding in empirical study of 1,120 common fund cases that in $5-10 million fund settlements, the average percentage award is 30%).

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In short, Class Counsel invested their own time and money at significant risk of non-payment in a complicated case against an enormous company. Counsel spent a reasonable number of hours to achieve a superior result: probably the largest *cy pres* distribution to privacy organizations in history. A benchmark fee award of 25% is eminently fair compensation, fully in accord with percentage awards granted in similar actions. A lodestar cross-check also confirms the reasonableness of the requested percentage fee, as demonstrated in the lodestar discussion that follows.

B. Class Counsel's Lodestar Confirms the Reasonableness of a 25% Fee Award as a Cross Check and Provides an Independent Basis for the Requested Fee

When the lodestar approach is used, multiplying the number of hours counsel worked by a reasonable hourly rate establishes the lodestar. *In re Wash. Pub. Power Supply Sys. Sec. Litig.*, 19 F.3d 1291, 1295 (9th Cir. 1994). There is a "strong presumption" that the lodestar figure

submitted by counsel represents a reasonable fee. *Fischel v. Equitable Life Assur. Society of U.S.*, 307 F.3d 997, 1007 (9th Cir. 2002) (internal quotations omitted). After the lodestar has been determined, the Court may apply a multiplier to the lodestar when "(1) attorneys take a case with the expectation that they will receive a risk enhancement if they prevail, (2) their hourly rate does not reflect that risk, and (3) there is evidence that the case was risky." *Fischel*, 307 F.3d at 1008 (internal citation omitted). Ninth Circuit law identifies a series of factors relevant to the multiplier, including:

> (1) the time and labor required, (2) the novelty and difficulty of the questions involved, (3) the skill requisite to perform the legal service properly, (4) the preclusion of other employment by the attorney due to acceptance of the case, (5) the customary fee, (6) whether the fee is fixed or contingent, (7) time limitations imposed by the client or the circumstances, (8) the amount involved and the results obtained, (9) the experience, reputation, and ability of the attorneys, (10) the "undesirability" of the case, (11) the nature and length of the professional relationship with the client, and (12) awards in similar cases.

Kerr v. Screen Extras Guild, Inc., 526 F.2d 67, 70 (9th Cir. 1975); *see also Hanlon*, 150 F.3d at 1029 (the court may apply a multiplier "to account for several factors including the quality of the representation, the benefit obtained for the class, the complexity and novelty of the issue presented, and the risk of nonpayment") (citing *Kerr*). Many of these factors overlap with the five factors from *Tarlecki* cited above for the reasonableness of the percentage fee request. *See* Part III(A)(1)-(5), *supra*. Those factors also support the reasonableness of the requested fee under the lodestar method.

Application of the lodestar method to the facts of this case confirms the reasonableness of Class Counsel's fee request. Counsel expended a total of 2,548.68 hours since the case began. *See* Mason Final Decl., ¶ 16. Multiplied by Class Counsel's hourly rates, which are comparable to those of other class action attorneys and reasonable in light of the skill and experience of Class Counsel, this amounts to a total lodestar of $1,275,888.90. *Id.* Given Class Counsel's current lodestar, a fee award of 25% embodies a multiplier of 1.67; what's more, this small multiplier will be even lower at the conclusion of this matter given the significant amount of work that remains.

1. Reasonable Hours

This is a reasonable number of hours for an action of this type. Class Counsel litigated this action over almost exactly one year. During this time, Counsel communicated with clients, investigated the facts, researched claims, filed complaints, met with opposing counsel to discuss the case, prepared for and engaged in a formal mediation, negotiated and drafted the final language of the Settlement Agreement, reviewed and catalogued thousands of documents produced by the defendant, filed and argued the motion for preliminary approval, and performed various other tasks necessary to produce the benefit this Settlement brings to the class. *See* Part II(A)-(E), *supra.*

The number of hours expended also reflects that fact that this action is the consolidation of several class action cases filed throughout the United States. In each of these actions, initiating counsel undertook factual and legal research pertaining to their individual clients and ultimately coordinated their efforts with Lead Counsel in this matter. Upon consolidation, Lead Counsel imposed a leadership structure to promote efficiency and reduce duplication and unnecessary billing. The multiplicity of cases was an important factor in the settlement of this matter as it increased the leverage upon Google to settle the case.

The total number of hours – about 2,500 – generated by all the lawyers in the multiple actions consolidated here is roughly equal to the time one very busy lawyer might herself bill in one year. That nearly a dozen lawyers in the several cases that have been pending for just under one year billed no more than this amount reflects the reasonableness of the overall quantity of hours.

2. Reasonable Rates.

The hourly rates counsel use in their lodestar submission are all justified as the prevailing hourly rates relevant to those counsel. See Mason Final Decl., ¶ 13. See Declaration of William Rubenstein, ¶ 7 (Exh. E to Mason Final Decl.); Declaration of Michael Ram, ¶ 6 (Exh. F to Mason Final Decl.); Declaration of Peter N. Wasylyk, ¶ 5 (Exh. G to Mason Final Decl.); Declaration of Andrew J. Kierstead, ¶ 6 (Exh. H to Mason Final Decl.); Declaration of Reginald Terrell, ¶ 6 (Exh. I to Mason Final Decl.); Declaration of Michael D. Braun, ¶ 4 (Exh. J to Mason

Final Decl.); Declaration of Jonathon Shub, ¶ 6 (Exh. K to Mason Final Decl.); Declaration of Lawrence E. Feldman, ¶ 7 (Exh. L to Mason Final Decl.); Declaration of Eric D. Freed, ¶ 6 (Exh. M to Mason Final Decl.); and Declaration of Peter Thomas, ¶ 6 (Exh. N to Mason Final Decl.).

3. Reasonable Multiplier.

A comparison with multipliers awarded in similar cases also supports the reasonableness of Counsel's fee request. A multiplier of 1.67 is on the low end of the range of multipliers approved by courts in the Ninth Circuit. *See Vizcaino*, 290 F.3d at 1052-54 (approving cross-check multiplier of 3.65 and citing a survey of class settlements from 1996-2001 indicating that most multipliers range from 1.0 to 4.0); *In re Prudential Ins. Co.*, 148 F.3d 283, 341 (3rd Cir. 1998) ("[m]ultiples ranging from one to four are frequently awarded in common fund cases when the lodestar method is applied.").[4] Multipliers at or above 2.0 are frequently awarded to compensate attorneys who bring contingency fee suits in high-risk areas of law such as consumer class actions. *See e.g. Castaneda v. Burger King Corp.*, 2010 WL 2735091 (N. D. Cal. Jul. 10, 2010) (awarding a multiplier of 1.9 in action by disabled consumers alleging ADA violations); *Ozga v. U.S. Remodelers, Inc.*, 2010 WL 3186971 (N. D. Cal. Aug. 9, 2010) (awarding a multiplier of 2.3 in a wage-and-hour action); *In re HPL Technologies, Inc. Securities Litigation*, 366 F.Supp.2d 912, 922-925 (N. D. Cal. 2005) (awarding multiplier of 2.87 in a securities action); *Wing v. Asarco Inc.*, 114 F.3d 986 (9th Cir. 1997) (affirming multiplier of 2.0 in environmental contamination suit brought on behalf of residential property owners); *see also* Logan, 24 CLASS ACTION REP. at 167 (concluding in empirical study of 1,120 common fund cases that in $5-10 million fund settlements, average percentage award is 30%, average multiplier is 1.89).

While Counsel's multiplier is modest at present, it will be even more so – perhaps close to 1 – by the conclusion of this action. A significant amount of legal work remains here, meaning

[4] The fact that the recovery here is *cy pres* does not affect Counsel's entitlement to a multiplier under the lodestar method. In the leading California state case, the court awarded attorneys' fees of $7.6 million, which represented a multiplier of 1.99 on counsels' lodestar, to compensate counsel for the creation of a common fund that was distributed entirely via *cy pres*. *See In re Vitamin Cases*, 2004 WL 5137597, at *17-18 (Cal. Sup. Apr. 12, 2004).

that Counsel's lodestar will increase and its multiplier accordingly decrease. At the time of filing of this fee petition under the new Ninth Circuit procedure, which advances the timeline for fee briefing, Class Counsel have yet to:

- Receive and review all objections to the Settlement (the objection deadline is still weeks away);
- Draft and file a reply brief responding to the objections in this matter;
- Prepare, appear, and argue in support of final approval of the Settlement at the fairness hearing;
- Respond to any concerns raised by the Court at the fairness hearing;
- Assuming final approval of the Settlement, effectuate the *cy pres* distribution program envisioned by the Settlement, including reviewing applications for awards, negotiating with Google over a final slate of grants, and ensuring distribution of the monies and successful completion of funded projects;
- Receive from Google its report of the public education envisioned by the Settlement and review the report;
- Defend the Settlement against any appeals that are filed, briefing and arguing as necessary in the Ninth Circuit.

The multiplier Counsel now seek is currently on the low end of the range in the Ninth Circuit and compares favorably to multipliers awarded in similar cases – and it will be even lower by the conclusion of this matter. It is therefore a reasonable multiplier in this case.

* * *

In light of the substantial risk Counsel undertook by bringing this action on a contingency basis, the factual and legal complexity of the case, the excellent result obtained, and comparison with lodestars and multipliers awarded in similar actions, the requested lodestar fee, embodying a modest multiplier, is reasonable.

C. Class Counsel's Request for Reimbursement of Expenses is Also Reasonable

Since this litigation began in February 2010, Class Counsel have incurred out-of-pocket expenses of $29,286.85. Mason Final Decl., at ¶ 18. "Reasonable costs and expenses incurred by an attorney who creates or preserves a common fund are reimbursed proportionately by those

class members who benefit from the settlement." *In re Media Vision Tech. Sec. Litig*., 913 F. Supp. 1362, 1366 (N. D. Cal. 1996) (*citing Mills v. Elec. Auto-Lite Co.*, 396 U.S. 375, 391-92 (1970)). The expenses must be relevant to the litigation and reasonable in amount. *Id.* at 1266.

Class Counsel's expenses to date include the following: (1) filing fees; (2) copying, mailing, and serving documents; (3) conducting research; (4) travel to meetings, mediations, and hearings; and (5) mediation expenses. *See* Mason Final Decl., at ¶ 18. Class Counsel put forward these out-of-pocket expenses without assurance they would be repaid. These expenses were necessary to secure the resolution of this litigation. *See In re Immune Response Sec. Litig*., 497 F. Supp. 2d 1166, 1177-78 (S. D. Cal. 2007) (finding that costs such as filing fees, photocopy costs, travel expenses, postage, telephone and fax costs, computerized legal research fees, and mediation expenses are relevant and necessary expenses in a class action litigation). The Settlement Agreement provides that "costs as awarded by the Court shall be paid out of the Common Fund." Settlement Agreement, at ¶ 10.1.

For these reasons, Class Counsel's request for expenses of $29,286.85 is reasonable.

D. The Requested Incentive Award to the Class Representative is Appropriate

Class Counsel request an incentive payment of $2,500 for each Class Representative, to be paid from the Common Fund. The Settlement Agreement provides that Class Counsel will apply for up to that amount. Settlement, at ¶ 10.2. Incentive awards recognize the efforts made by the Class Representatives on behalf of the class.

Throughout this litigation, the Class Representatives accepted burdens that were not imposed on the rest of the class. The named Class Representatives exposed themselves to Google's investigation, made themselves available as potential witnesses at deposition and trial, and subjected themselves to all the obligations of named parties. They also faced a risk of scrutiny through possible private investigation and public media coverage that ordinary class members did not suffer. An award of $2,500 fairly compensates the Class Representatives for these obligations.

At no point did Class Counsel enter into any agreements with the Class Representatives regarding the incentive reward that Counsel would request, nor is the amount Class Counsel are

now requesting tied in any way to the results obtained in this Settlement. *Cf. Rodriguez v. West Publishing Corp.*, 563 F.3d 948, 958-60 (9th Cir. 2009) (criticizing *ex ante* incentive award agreements between counsel and class representatives because such agreements put counsel and the class representatives in conflict with the interests of the class). Rather, Class Counsel request a $2,500 incentive award on the basis that this amount will fairly compensate the Class Representatives for the time, effort, and reputational risk that they contributed to this litigation.

Incentive awards promote the public policy of encouraging individuals to undertake the responsibility of representative lawsuits. *See Rodriguez v. West Publishing Corp.*, 563 F.3d 948, 959-59 (9th Cir. 2009) ("[incentive awards] are intended to compensate class representatives for work done on behalf of the class, to make up for financial or reputational risk undertaken in bringing the action, and, sometimes, to recognize their willingness to act as private attorney general"); *see also* 4 William B. Rubenstein et al., NEWBERG ON CLASS ACTIONS, § 11:38 (4th ed. 2008 and 2010 supp.) ("class representatives frequently receive substantial incentive payments to compensate them for their participation in a class action lawsuit"). Such awards are common and range from several hundred dollars to many thousands of dollars, although most often they fall within the $1,000 to $3,000 range, as requested here. *See, e.g., Staton v. Boeing*, 327 F.3d 938, 976 (9th Cir. 2003) (noting approval of incentive award of $5,000 for each class representative); *Coca-Cola*, 200 F.R.D. at 694 (approving payments of $3,000 for each person who executed an affidavit, in recognition of contribution to litigation that entailed risk and effort); *see also* Theodore Eisenberg & Geoffrey P. Miller, *Incentive Awards to Class Action Plaintiffs: an Empirical Study*, 53 U.C.L.A. L. Rev. 1303, 1308 (2006) (presenting data on incentive awards across a sample of 374 class action cases representing a broad range of case types and jurisdictions, and noting that the median incentive award for class representatives was $4,357).

IV. CONCLUSION

This case presented a high risk because it involved a new, unheard of product, the legal claims rested on novel and untested legal theories, and the defendant was a massive corporation with formidable financial and legal resources. In spite of this risk, Class Counsel undertook this

case on a contingency basis and invested substantial time developing plaintiffs' legal claims and investigating the complex facts surrounding Buzz, with no assurance that they would be paid. Class Counsel achieved an excellent result in this case against strong opposition. The requested fee of 25% of the common fund is the benchmark for attorneys' fees in the Ninth Circuit and will fairly compensate Counsel for the risk they assumed in litigating this case. Counsel's fee request embodies a multiplier of, at most, 1.67, which is modest and appropriate. For these reasons, the requested fee is justified under either the percentage or lodestar/multiplier method and hence this motion should be granted.

Respectfully submitted,

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/s/ Gary E. Mason

Gary E. Mason, Esq. (admitted *pro hac vice*)
MASON LLP
1625 Massachusetts Ave., N.W., Suite 605
Washington, D.C. 20036
Tel. (202) 429-2290
Fax. (202) 429-2294

Michael F. Ram (SBN 104805)
RAM & OLSON LLP
555 Montgomery Street, Suite 820
San Francisco, California 94111
Phone: (415) 433-4949
Fax: (415) 433-7311

William B. Rubenstein (SBN 235312)
1545 Massachusetts Avenue
Cambridge, Massachusetts 02138
Phone: (617) 496-7320
Fax: (617) 496-4865

Peter N. Wasylyk (pro hac vice)
LAW OFFICES OF PETER N. WASYLK
1307 Chalkstone Avenue
Providence, Rhode Island 02908
Phone: (401) 831-7730

Andrew S. Kierstead (SBN 132105)
LAW OFFICE OF ANDREW KIERSTEAD
1001 SW 5th Avenue, Suite 1100
Portland, Oregon 97204
Phone: (508) 224-6246

/ / /

Peter W. Thomas
THOMAS GENSHAFT, P.C.
0039 Boomerand Rd, Ste 8130
Aspen, Colorado 81611
Phone: (970) 544-5900

Michael D. Braun (SBN 167416)
BRAUN LAW GROUP, P.C.
12304 Santa Monica Blvd., Suite 109
Los Angeles, CA 90025
Phone: (310) 836-6000

Donald Amamgbo
AAMAMGBO & ASSOCIATES
7901 Oakport St., Ste 4900
Oakland, California 94261

Reginald Terrell, Esq.
THE TERRELL LAW GROUP
P.O. Box 13315, PMB # 149
Oakland, California 94661

Jonathan Shub (SBN 237708)
SEEGER WEISS LLP
1818 Market Street, 13th Floor
Philadelphia, Pennsylvania 19102
Phone: (610) 453-6551

Christopher A. Seeger
SEEGER WEISS LLP
One William Street
New York, New York
Phone: (212) 584-0700

Lawrence Feldman
LAWRENCE E. FELDMAN & ASSOC.
423 Tulpehocken Avenue
Elkins Park, Pennsylvania 19027
Phone: (215) 885-3302

Eric Freed (SBN 162546)
FREED & WEISS LLC
111 West Washington Street, Ste 1311
Chicago, IL 60602
Phone: (312) 220-0000

/ / /

Howard G. Silverman
KANE & SILVERMAN, P.C.
2401 Pennsylvania Ave, Ste 1C-44
Philadelphia, PA 19130
Phone: (215) 232-1000

Attorneys for Plaintiffs and the Proposed Class

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