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Objector in Pro Per

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THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

IN RE GOOGLE BUZZ USER PRIVACY LITIGATION This Pleading Relates to: ALL CASES	Case No. 10-CV-00672-JW **OBJECTION TO PRELIMINARILY APPROVED CLASS ACTION SETTLEMENT** Hearing Date: January 31, 2010 Hearing Time: 9:00am Location: Courtroom 8, 4th floor Honorable James Ware

OBJECTION TO PRELIMINARILY APPROVED CLASS ACTION SETTLEMENT

I. ARGUMENT

A. The Proposed Settlement Should Not Be Approved

The proposed settlement agreement in this case is neither fair nor reasonable and should not be approved.

1. The Terms Are Neither Fair Nor Reasonable

"With less information about the class, the judge cannot as effectively monitor for collusion, individual settlements, buy-offs (where some individuals use the class action device to benefit themselves at the expense of absentees), and other abuses." *In re Gen. Motors Corp. Pick-Up Truck Fuel Tank Prods. Liability Litig.*, 55 F.3d 768 (3d Cir. 1995); accord *Acosta v. Trans Union, LLC*, 243 F.R.D. 377, 397 (C.D. Cal. 2007). Extra scrutiny is also required because the parties are no longer in an adversarial posture, and in light of the inherent tension attributable to class counsel's self-interest in achieving a settlement that, like this one, involves a substantial proposed attorneys'

fee award in an unlitigated case. *See Staton v.Boeing Co.*, 327 F.3d 938,959- 60 (9th Cir. 2003); *see also Powers v. Eichen,* 229 F.3d 1249, 1256 (9th Cir. 2000). This concern is especially relevant where, as here, the settlement offers no direct compensation to the class. *See Mars Steel Corp. v. Cont'l Ill. Nat'l Trust Co.,* 834 F.2d 677, 681 (7th Cir. 1984).

"We hold the 'fluid recovery' concept and practice to be illegal, inadmissible as a solution of the manageability problems of class actions and wholly improper." *Eisen v. Carlisle & Jacquelin,* 479 F.2d 1005, 1018 (2d Cir. N.Y. 1973); *See also Windham v. American Brands, Inc.,* 565 F.2d 59, 72 (4th Cir. S.C. 1977)

A cy pres distribution must adequately target the plaintiff class. *Six Mexican Workers v. Arizona Citrus Growers,* 904 F.2d 1301 (9th Cir. Ariz. 1990) *See also, City of Philadelphia v. American Oil Co.,* 53 F.R.D. 45 (D.N.J. 1971)

The proposed settlement imposes a total fluid recovery to charities "focused on enhancing internet privacy and/or furthering public education about internet privacy." Memorandum of Points and Authorities in Support of Motion for Preliminary Approval of Settlement 12:8-11 ("MPA Preliminary Approval"). This fluid recovery only approach is generally disfavored by the courts especially when used to circumvent class certification standards such as class manageability. Approval of this settlement is improper for four reasons as follows:

First, the settlement proposes a total fluid recovery. As discussed further below, *Amchem Prods., Inc. v. Windsor,* 521 U.S. 591 (1997) ("Amchem") does not apply to this action as plaintiffs' attorneys Gary E. Mason, Esq., et al. ("Class Counsel") contends. Manageability is a necessary part of the approval of this settlement agreement and the class, as defined, is unmanageable and the settlement circumvents class certification standards by the use of the total fluid recovery approach and is illegal, inadmissible and should not be approved. *See,* Section B(2)(a) of this objection.

Second, the settlement proposes a total cy pres distribution to charities which provide services to and educate the general public. The settlement should benefit only a few million gmail users—or the smaller injured class of only a few gmail users—but is instead designed to benefit over 300 million citizens of the United States (US Census Bureau (July 2009). *See,* http://www.census.gov/popest/states/tables/NST-EST2009-01.xls) which is over one hundred times

larger than the putative class. As such, the settlement is unfair, unreasonable and should be revised to more adequately target the putative class.

Third, the settlement admittedly seeks to benefit an overbroad, nationwide putative class of non-injured plaintiffs. The settlement proposes a total fluid recovery which would rob injured plaintiffs eligible for compensatory and other damages of their relief. Furthermore, Class Counsel negotiated total fluid recovery based on 2000 complaints, by people without damages, out of the millions of gmail users which is under 0.002% of the putative class. The settlement is unfair and unreasonable as to the injured plaintiffs[1].

Fourth, requiring the litigation of class certification through standard law and motion procedures will help narrow the current overbroad, nationwide putative class of primarily non-injured persons to a better defined class of injured persons. The narrowed class would be sufficiently smaller to both be manageable and warrant a direct, non-fluid, fair and reasonable recovery. If the class does not become sufficiently smaller, a settlement similar to this may still be negotiated and brought before this Court for approval.

Class Counsel defends their position that the total fluid recovery is appropriate for the situation citing three non-binding, trial court level cases. *Lane v. Facebook, Inc.*, No. 08-cv-3845 RS (N.D. Cal. 2009), *In re DoubleClick, Inc. Privacy Litig.*, No. 00 Civ 0641 (NRB) (S.D.N.Y. 2001) and *DeLise v Farenheit Entertainment,* Civ. Act. No. CV-014297 (Cal. Sup. Ct., Marin Cty. Sept. 2001). However, these cases do not apply to the instant case.

In *Lane*, litigation extended *over a year and a half* before a settlement was reached. Plaintiffs endured a motion to dismiss, which was ultimately dropped by defendants, as well as over *seven months of settlement negotiations. Facebook fought the action and resisted settlement.* This privacy action involved the transmission of unrelated activities on third party websites, *such as a movie the user recently rented from Blockbuster's website,* to Facebook for publication on the users'

[1] Though benefitting a class of non-injured persons in sound, it's only the named plaintiffs and Class Counsel who benefit from the settlement. A similar request that the settlement benefit the named plaintiffs only was previously made in the Court of Appeals but not discussed because interests of the named plaintiffs must not diverge from the interests of the class. See, *Kincade v. General Tire & Rubber Co.,* 635 F.2d 501 (5th Cir. Tex. 1981). In this action, the Court should give less weight to the requests of the named plaintiffs and Class Counsel as the settlement here also creates a conflict of interest between them and the putative class.

home and profile pages where minimal damages exist.

In *DoubleClick*, limited information is available. However, this privacy action involved the collection of contact information, browser history and online purchase behavior, *which is not disseminated to third parties, for the purpose of targeted advertising* where minimal damages exist.

In *DeLise*, limited information is available. However, this privacy action involved the collection of music preferences, listening habits and preventing the use of music on portable MP3 players *to prevent online music theft* where minimal damaged exist.

In the instant action, Google sought to correct its privacy mishap prior to the filing of any litigation, contacted Class Counsel after a complaint was filed to have an informal meeting and made offers to Class Counsel prior to and during mediation. Class Counsel made little to no effort in seeking settlement. Settlement was reached within a few months of initiation of this action. *This action was barely litigated by any party.* In essence, Google is buying off Class Counsel and the named plaintiffs to the detriment of the putative class. This privacy action involves Google's *invasion into private communications* and third party social networking accounts for *transmission to the entire world* via the internet where significant damages potentially exist especially with professionals who have confidential and privileged communications and relationships which must not be disclosed.

As such, the instant action is distinguished from other cases which total fluid recovery is decidedly acceptable. The use of total fluid recovery in this case is illegal and inadmissible and should not be approved. The terms of settlement are neither fair nor reasonable and should not be approved.

B. The Court Should Not Certify a Settlement Class

The proposed settlement class does not meet the predominance and superiority Requirements of Rule 23(B)(3).

1. Individual Questions Predominate and Settlement is Improper

Predominance is determined not by counting the number of common issues but by weighing their significance. *Mullen v. Treasure Chest Casino, L.L.C.,* 186 F.3d 620, 627 (5th Cir. La. 1999)

Predominance is a far more demanding test than commonality alone. *Amchem Prods., Inc. v. Windsor,* 521 U.S. at 623-624.

Novel and immature torts are improper for class treatment. *Castano v. American Tobacco Co.*, 84 F.3d 734, 749 (5th Cir. La. 1996).

Indeed, there are questions which are common to the entire class such as, their identical operative facts and legal theories. MPA Preliminary Approval 17:20-22. These, however, are dwarfed by the significance of the question of damages. As Class Counsel admits, there are different classes of injured persons; the vast majority of uninjured plaintiffs and the few injured plaintiffs. MPA Preliminary Approval 17:22-23. The settlement forecloses any possible recovery of compensatory damages as to the injured putative class members.

The overbroad, nationwide class definition not only includes conflicting classes of persons such as injured and non-injured persons but also businesses and consumers. Occasionally a professional or small business owner will open a personal email account, such as gmail, for professional and business activities. Google's alleged privacy violations would have affected businesses and consumers differently but the settlement includes both and provides a total fluid recovery regardless of their incorporation status[2].

The question of damages is also significant in another way. Class Counsel indicates that federal privacy statutes have yet to be applied to internet based social networks. MPA Preliminary Approval 13:2-3. How the novel application of privacy statutes to internet based social media is not the only question but also how it is applied to the different types of putative class members; these additional questions are individual in nature[3]. Regardless of how privacy laws fit with internet based social media, the settlement assumes all putative class members will be entitled to injunctive relief and not entitled to compensatory damages. Furthermore, Class Counsel negotiated total fluid recovery based on 2000 complaints, by people without damages, out of the millions of gmail users which is under 0.002% of the putative class.

Instead of addressing these issues, the parties attempt to circumvent the predominance of individual questions of the putative class by use of total fluid recovery and justify it by saying that

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[2] Though not applicable to Objector's argument, *Amchem* also notes that the existence of narrower possible classes within a larger overbroad class creates questions as to class typicality and adequacy of representation. *Amchem* at 626.

[3] Though not applicable to the Objector's argument, *Castano* notes that class actions based on novel and immature torts often result in many mini-trials rendering it unmanageable and inferior to individual litigation. *Castano* at 749.

"each class member would seek to remedy the same grievance" (MPA Preliminary Approval 17:24) to the detriment of the putative class members who were injured in fact and would lose compensatory damages because of this settlement.

Individual questions predominate because the class definition is overbroad. Resolution of the predominance of individual issues could result in a better, legal and admissible settlement for the class.

2. Manageability Must Be Considered, the Putative Class is Unmanageable and Settlement, in this Context, is Illegal

Class Counsel proposes that manageability is not necessarily a determining factor in provisional certification for settlement approval procedures and cites *Amchem Prods., Inc. v. Windsor,* 521 U.S. 591 (1997) in support of this claim. However, the instant case is distinguished from *Amchem* and it does not apply.

In *Amchem*, the Supreme Court indeed concluded that class manageability need not be considered as part of approval of a class settlement. However, the *Amchem* settlement was founded upon a stipulation of over 100 pages providing a detailed administrative mechanism *which provided direct cash settlement* to several well defined classes of injured people *and excluded non-injured class members* from recovery. Furthermore, the administration of claims in *Amchem* was structured to include a Plaintiff Steering Committee. *Amchem* was also founded upon products liability torts which normally result in many expensive mini-trials focused on individualized causation and damage issues which typically render them improper for class treatment[4]. A class likely would not have been certified by the trial court if not for the settlement. *Amchem id* at 599-605.

Here, the settlement barely exceeds ten pages *for an overbroad nationwide class of admittedly non-injured class members with a total fluid recovery* by cy pres distribution to charities which do not adequately target the class in that the charities provide services to and educate the general public. This action is founded in privacy rights with a single event leading to the damage (or lack thereof) of the entire putative class which could easily be certified and resolved through

[4] *See, In re Northern Dist. of California, Dalkon Shield IUD Products Liability Litigation,* 693 F.2d 847, 853 (9th Cir. Cal. 1982), class certification reversed because product liability actions are not suitable for class treatment.

traditional class action procedures and yield better compensation for the class if the putative class were more manageable in size[5].

Clearly, the intent behind *Amchem* was not to circumvent traditional class certification procedure in all cases if a settlement was reached but, instead, to assist an otherwise uncertifiable class in obtaining a reasonable settlement without the personal and judicial expense of individual litigation. Also, *Amchem* was not intended to allow an illegal and inadmissible practice such as total fluid recovery. Therefore, the instant action is distinguished, *Amchem* does not apply and the Court must consider class manageability as part of the approval of this settlement.

Notwithstanding this analysis of *Amchem*, Objector contends the *Amchem* is not mandatory upon the court and manageability may, and should, still be considered. *Amchem id* at 620. Further, *Amchem* conditionally indicates that only manageability of *trial* need not be considered as part of a provisional certification of a class in settlement not manageability in general. There are factors to manageability other than trial considerations such as size of class (*Castano v. American Tobacco Co.*, 84 F.3d 734 (5th Cir. La. 1996)) which should still be considered.

After the holding that manageability is conditionally irrelevant, *Amchem* goes on to say that, during the settlement process, the rules were "designed to protect absentees by blocking unwarranted or overbroad class definitions--demand undiluted, even heightened, attention in the settlement context. Such attention is of vital importance, for a court asked to certify a settlement class will lack the opportunity, present when a case is litigated, to adjust the class, informed by the proceedings as they unfold." *Amchem id* at 620. Class Counsel accepted a total fluid recovery in lieu of a direct cash settlement due, in part, to the unmanageability of the significant size of the overbroad, nationwide class which, therefore, calls for heightened attention upon the manageability aspect of the class definition.

a. The Class As Defined is Unmanageable in Size

The size of a class may render a class action unmanageable and uncertifiable. *Castano v.*

[5] *See, Grainger v. State Sec. Life Ins. Co.*, 547 F.2d 303, 307 (5th Cir. Ala. 1977). Class cert denied as individual issues predominate in fraud actions. Appellate Court reversed holding discovery of alleged uniform misrepresentations could resolve deficiencies. *See also, Crasto v. Estate of Kaskel,* 63 F.R.D. 18, 23 (S.D.N.Y. 1974) where subclasses are used to resolve deficiencies in class definition. The settlement and class definition could be similarly improved through discovery and subclasses to narrow issues and class size.

American Tobacco Co., 84 F.3d 734 (5th Cir. La. 1996)

"We hold the 'fluid recovery' concept and practice to be illegal, inadmissible as a solution of the manageability problems of class actions and wholly improper." *Eisen v. Carlisle & Jacquelin*, 479 F.2d 1005, 1018 (2d Cir. N.Y. 1973); *See also Windham v. American Brands, Inc.*, 565 F.2d 59, 72 (4th Cir. S.C. 1977)

The class, as defined, sets forth a manageability problem in the size of the resulting class. Even in the most favorable class action scenarios where a class member need only submit a claim form for a standardized settlement amount, the sheer volume of claims would render the administration of settlement or trials so costly and time consuming that individual litigation would be superior.

The instant action is not the most favorable scenario and presents problems with individual questions of damages. For example, the Wiretap act offers statutory damages in the amount of $100 per day of violation per class member. 18 U.S.C. § 2520(c)(2). How many days were each of the millions of gmail users violated by Google's conduct? The answer is impossible without an individual showing of damages which would require an extensive, costly and time-consuming claims program in a settlement/judgment or mini-trials.

Instead of addressing these issues, the parties attempt to circumvent the unmanageable size of the class by use of total fluid recovery and justify it by saying that "few, if any, Gmail users suffered out-of-pocket damages as a result of the launch of Buzz" (MPA Preliminary Approval 13:18-19) to the detriment of the putative class members who were injured and are robbed of compensatory damages because of this settlement.

The use of total fluid recovery in this case is illegal and inadmissible and should not be approved. The class is unmanageable in size because the class definition is overbroad. Resolution of the unmanageability of the class size could result in a better, legal and admissible settlement for the class.

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II. CONCLUSION

The terms of settlement are neither fair nor reasonable and should not be approved.

Dated: December 28, 2010

By: _____
ABRAHAM A. FLORES III
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