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

74

IN RE GOOGLE BUZZ USER PRIVACY LITIGATION

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

OBJECTION OF CLASS MEMBER ALISON JACKSON TO CLASS ACTION SETTLEMENT

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

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TO ALL PARTIES AND TO THEIR COUNSEL OF RECORD:

Please take notice that class member Alison Jackson ("Jackson") intends to appear through counsel at the fairness hearing scheduled for January 31, 2011 at 9 a.m. (PST).

MEMORANDUM OF POINTS AND AUTHORITIES

Jackson hereby objects to the proposed class action settlement[1] (the "Settlement") in the above-captioned matter between the plaintiffs (the "Plaintiffs") and Google, Inc. ("Google") (the "Settlement Agreement") on behalf of a class (the "Class") that includes "all Gmail users in the United States presented with the opportunity to use Google Buzz through the Notice Date" (the "Class Members").

I. STATEMENT OF ISSUES TO BE DECIDED

Jackson identifies the following issues to be decided:

- Whether the Court should review the Settlement Agreement with heightened scrutiny?
- Whether the Settlement Agreement's failure to name the recipients of the *cy pres* fund renders it unfair, inadequate, and unreasonable?
- Whether the Settlement Agreement's failure to obligate Google to any specific improvements or public education as to privacy issues related to Buzz and failure to afford Class Members the right for Plaintiffs to approve any such improvements or public education, results in no benefit to the Class Members and renders the Settlement Agreement unfair, inadequate, and unreasonable?
- Whether the Settlement Agreement's requirement that Class Members release and dismiss their claims upon entry of the Settlement Agreement's Approval Order, prior to Google being obligated to perform any remedy (which occurs only after the Approval Order becomes final and non-appealable), renders the Settlement Agreement unfair, inadequate, and unreasonable?
- Whether the Class definition, which includes a Class period from February 9, 2010 through November 2, 2010, renders the Settlement Agreement unfair, inadequate and unreasonable because the definition is overly broad and includes periods after February 11, 2010 when the alleged security problem had already been cured?

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[1] Doc. 41-1.

- Whether the Settlement is fair, adequate, and reasonable where the Class Members release their claims in exchange for no benefit to the Class?

II. FACTUAL AND PROCEDURAL BACKGROUND

On February 9, 2010, Google launched "Buzz," its social networking program. Google automatically enrolled users of Google's web-based mail system, Gmail, in Buzz. When it launched Buzz, Google stated: "Buzz is built right into Gmail, so there's nothing to set up—you're automatically following the people you email and chat with the most."[2] Gmail users who were automatically enrolled in Buzz were stunned to learn that Buzz publicly exposed sensitive, personal data, including users' most frequent Gmail contacts, all without their consent. On February 11, 2010, following a flood of complaints from users regarding the Buzz privacy breach, Google admitted some of Buzz's defects and announced and implemented several improvements: "More visible option to not show followers/people you follow on your public profile"; "Ability to block anyone who starts following you"; and "More clarity on which of your followers/people you follow can appear on your public profile."[3]

Eva Hibnick filed the first complaint in this action (the "Original Complaint") on February 17, 2010.[4] On June 30, 2010, the Court consolidated several related cases into this action and ordered the interim lead counsel ("Class Counsel") to file an amended class action complaint.[5] The Consolidated and Amended Class Action Complaint[6] (the "Complaint") seeks damages resulting from Google's unlawful conduct under: (i) the Electronic Communications

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[2] Edward Ho, "Google Buzz in Gmail" (Feb. 9, 2010) available at http://gmailblog.blogspot.com/2010/02/google-buzz-in-gmail.html.

[3] Todd Jackson, "Millions of Buzz users, and improvements based on your feedback" (Feb. 11, 2010) available at http://gmailblog.blogspot.com/2010/02/millions-of-buzz-users-and-improvements.html.

[4] Class Action Complaint, Doc. 1 (Feb. 17, 2010).

[5] Order Granting Motion to Consolidate Cases; Appointing Interim Lead Class Counsel and Liaison Counsel, Doc. 30 (June 30, 2010).

[6] Doc. 31.

Privacy Act (the "ECPA"),[7] (ii) the Stored Communications Act (the "SCA"),[8] (iii) the Computer Fraud and Abuse Act (the "CFAA"),[9] (iv) the common law tort of public disclosure of private facts, as recognized by California common law, and (v) the California Unfair Competition Law.[10]

On June 2, 2010—less than four months after the Buzz launch and little over three months after the initial complaint was filed in this action—Google and Class Counsel (the "Negotiating Parties") reached the proposed settlement. The Settlement Agreement defines the Class as "all Gmail users in the United States presented with the opportunity to use Google Buzz through the Notice Date."[11] The Notice Date occurred on November 2, 2010, when Google emailed Class Members to notify them of the Settlement Agreement.

The *cy pres* settlement affords class members no compensation. Rather, under the terms of the Settlement Agreement, Google will establish an $8.5 million common fund (the "Fund") which, after deducting attorneys' fees and class representative fees, is to be used to fund as-yet-unnamed "organizations focused on Internet privacy policy of privacy action" (the "Fund Recipients").[12] Furthermore, while Google also agreed to educate its users about the privacy aspects of Buzz ("Buzz Education"), it has negotiated the Settlement Agreement so as to have no specific obligation to provide any such Buzz Education and Google has retained complete

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[7] 18 U.S.C. § 2510, *et seq.*

[8] 18 U.S.C. § 2701, *et seq.*

[9] 18 U.S.C. § 1030, *et seq.*

[10] California Business & Professions Code § 17200.

[11] Settlement Agreement (hereinafter "SA"), Doc. 41-1 § 1.3. *See also* Notice and Motion for Order (1) Preliminarily Approving Class Action Settlement; (2) Provisionally Certifying Settlement Class and Appointing Class Counsel; (3) Authorizing Distribution of Notice of Settlement; and (4) Setting a Schedule for the Final Approval Process; Memorandum of Points and Authorities (hereinafter the "Preliminary Approval Motion"), Doc. 41 (Sep. 3, 2010).

[12] SA, § 3.4(a).

control over the content and extent of the Buzz Education.[13] In exchange for nothing, the Settlement Agreement requires Class Members to release,[14] and Class Counsel to dismiss,[15] any and all claims arising out of the privacy breach Google committed via Buzz.

The Negotiating Parties executed the Settlement Agreement on September 2, 2010. Class Counsel filed the Preliminary Approval Motion together with the executed Settlement Agreement on September 3, 2010.[16] At the time the Settlement Agreement was filed, no dispositive motions had been filed, nor had Class Counsel moved for class certification. The Negotiating Parties had not engaged in any formal discovery, although some undisclosed "confirmatory discovery" is alleged to have been taken after the settlement terms had already been reached. At no time before the settlement was reached, less than four months after the Complaint was filed, did the Negotiating Parties exchange written discovery, conduct depositions, or brief the legal issues that are central to the claims in this case.

Jackson, who resides at 3629 Woodbridge Place, Cincinnati, Ohio 45226, submits this Objection for the Court's consideration by and through counsel. Proof of Jackson's class membership is attached hereto as Exhibit A.

Jackson objects to several aspects of the settlement in this case: (i) the failure of the Settlement Agreement to name the Fund Recipients, (ii) the failure to require specific Buzz Education privacy improvements from Google which are overseen by an independent third party and approved by Plaintiffs in exchange for the Class Members' releases, (iii) the requirement that Class Members release their claims upon entry of the Settlement Agreement Approval Order before Google is required to provide any benefit (which only occurs upon such Approval Order

[13] SA, § 3.3.
[14] SA, § 9.1.
[15] SA, § 8.2.

becoming final and non-appealable), (iv) the over-inclusive Class definition which includes an inappropriate Class period, and (v) a Settlement Agreement that provides no benefit to the Class in exchange for the release of their claims. For the reasons described herein, Jackson urges the Court to withhold final approval of the Settlement Agreement and to direct the Negotiating Parties to modify the Settlement Agreement as proposed below.

III. STANDARD OF REVIEW FOR CLASS ACTION SETTLEMENTS

In deciding whether to approve a class action settlement, a court must determine whether the settlement is "fundamentally fair, adequate, and reasonable."[17] A district court must make this determination to ensure proffered settlements are "not the product of fraud or overreaching by, or collusion between, the negotiating parties."[18]

District courts consider the following factors, among others, when presented with a class action settlement:

> the strength of plaintiffs' case; the risk, expense, complexity, and likely duration of further litigation; the risk of maintaining class action status throughout the trial; the amount offered in settlement; the extent of discovery completed, and the stage of the proceedings; the experience and views of counsel; the presence of a governmental participant; and the reaction of the class members to the Settlement Agreement.[19]

"The relative degree of importance to be attached to any particular factor will depend upon and be dictated by the nature of the claim(s) advanced, the type(s) of relief sought, and the unique facts and circumstances presented by each individual case."[20] Applying the factors outlined above, it is clear that the settlement in this case is neither "fundamentally fair," "adequate," nor "reasonable."

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[16] Doc. 41.

[17] *Officers for Justice v. Civil Service Com'n of City and County of San Francisco*, 688 F.2d 615, 628 (9th Cir. 1982). *See also* Fed. R. Civ. P. 23(e)(2).

[18] *Id.* at 625.

[19] *Id.* at 628.

IV. THE COURT SHOULD REVIEW THE SETTLEMENT AGREEMENT WITH HEIGHTENED SCRUTINY

While district court review of class action settlements is normally deferential, certain circumstances demand heightened scrutiny.[21] Because each circumstance presents itself in this case, the Court should review the Settlement Agreement with heightened scrutiny.

A. Heightened Scrutiny Applies to this Pre-Certification Settlement

In this Circuit, "[s]ettlements that take place prior to formal class certification require a higher standard of fairness."[22] Heightened review of such settlements is necessary because "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."[23] Further, the risk of "collusion, individual settlements, buy-offs . . . , and other abuses" is greater in the context of pre-certification settlements because a court has "less information about the class" than it would if the parties engaged in discovery relating to certification issues and the merits of the case.[24] "The incentives for the negotiators to pursue their own self-interest and that of certain class members are implicit in the circumstances and can influence the result of the negotiations without any explicit expression or secret cabals."[25]

Here, the Negotiating Parties reached the Settlement Agreement less than four months after the alleged unlawful conduct occurred and the Original Complaint was filed. The Settlement was agreed to before the Class Counsel was appointed and the Complaint was filed. The parties engaged in no discovery before reaching the Settlement Agreement, depriving the

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[20] *Id.*

[21] *See, e.g. id.* at 625.

[22] *Molski v. Gleich*, 318 F.3d 937, 953 (9th Cir. 2003).

[23] *Amchem Prod. v. Windsor*, 521 U.S. 591, 620, 117 S.Ct. 2231, 138 L.Ed.2d 689 (1997). *See also Narouz v. Charter Comms.*, LLC, 591 F.3d 1261, 1266 (9th Cir. 2010).

[24] *In re Gen. Motors Corp. Pick-Up Truck Fuel Tank Prod. Liab. Litig.*, 55 F.3d 768, 787 (3d Cir. 1995).

[25] *Staton v. Boeing Co.*, 327 F.3d 938, 960 (9th Cir. 2003).

Court and the Plaintiffs to determine the full extent of Defendants' alleged misconduct and an opportunity to adjust the class as the litigation unfolds. This is particularly problematic in this case, as the Complaint alleges such wide-ranging and legally-distinct violations of the ECPA, the SCA, the CFAA, and California state law claims that discovery is necessary to fully understand the nature of the unlawful conduct and the potential remedies available to the Class. Because they reached the Settlement Agreement so early in this case, the Negotiating Parties have abdicated their responsibility to develop any of the factual or legal issues relevant to these claims. And the risks of collusion, individual settlement, buy-offs, and other abuses are inherent in this pre-certification Settlement Agreement. Accordingly, the Court should review the Settlement Agreement with heightened scrutiny.

B. Heightened Scrutiny Applies to this Non-Monetary Settlement Agreement

District courts should apply heightened scrutiny in deciding whether to approve settlements where class members receive either no benefit or only non-monetary relief, in order to ensure class members receive an actual benefit and not an illusory one. It is because of the danger that class members will release valuable claims in exchange for virtually valueless non-monetary relief that cy *pres* settlements are disfavored. While *cy pres* settlements are permitted in some limited circumstances, the Ninth Circuit has remarked that "it seems somewhat distasteful to allow a corporation to fulfill its legal and equitable obligations through tax-deductible donations to third parties."[26]

Cy pres settlements present special problems because they not only alter the class members' substantive rights, they do so while circumventing individualized proof

[26] *Molski*, 318 F.3d at 954.

requirements.[27] Specifically, *cy pres* settlements may "stray far from the next best use for undistributed funds and turn courts into a grant-giving institution." As a result, such settlements often benefit the defendant or class counsel more than the class members, creating the appearance of impropriety.[28]

The Settlement Agreement at issue in this case poses the risk of turning this Court into a "grant-giving institution." The Class Administrator can only disburse the Fund by the mutual agreement of the Negotiating Parties. In the event of any disagreement, the parties must seek the Court's intervention to resolve the dispute, forcing this Court into the role of non-profit internet privacy advocate. Because the Settlement Agreement does not provide any benefit to Class Members, including monetary benefit, there is also a substantial likelihood that the Settlement Agreement benefits Google more than the Class Members. In exchange for the Class Members releasing their valuable legal claims, Google receives the tax benefits of a charitable donation and the public relations benefit of appearing responsive to its users' complaints. Class Members receive nothing.

The "clear sailing" feature of the Settlement Agreement allows Class Counsel to collect a fee equal to 30% of the Fund without objection from Google.[29] Again, Class Members receive nothing while Class Counsel takes $2,550,000.00 for their 113 calendar days of work between the Buzz launch and the settlement of the Class claims. This equates to just over $22,556.37 per day. These figures illustrate Class Counsel's windfall as compared to Class Members' non-recovery.

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[27] *Id.*
[28] *S.E.C. v. Bear, Stearns & Co. Inc.*, 626 F.Supp.2d 402 (S.D.N.Y. 2009).
[29] SA § 10.1.

Finally, the Settlement Agreement creates the appearance of impropriety: Google donates a tax-deductible pittance to as-yet-unnamed organizations to discharge the claims of ***substantially all their users*** while Class Counsel takes 30% of the Fund for facilitating the release of all claims. The incongruity is stark. Because the Negotiating Parties reached the Settlement Agreement before certification, and because it provides no benefit to the Class Members, including monetary relief, the Court should review the Settlement Agreement with heightened scrutiny.

V. ARGUMENTS IN OPPOSITION TO THE SETTLEMENT AGREEMENT AND SUGGESTED IMPROVEMENTS

When the Court looks beyond the Negotiating Parties' characterizations of the Settlement Agreement to review its actual terms, the Court will find the Settlement Agreement's deficiencies render it unfair, inadequate, and unreasonable. Specifically, the Settlement Agreement fails to designate the Fund Recipients who will receive the bulk of the $8.5 million Fund, affords Google unfettered discretion in establishing measures to correct its own improper conduct and curtail further privacy breaches, requires Class Members to release their claims before Google is obligated to perform any benefits or remedial action, has an overbroad Class definition, and, finally, provides no direct benefits for the Class Members. For the reasons detailed below, the Court should withhold approval of the Settlement Agreement and require the Negotiating Parties to modify the Settlement Agreement to rectify its deficiencies.

A. The Settlement Agreement is Unfair, Inadequate, and Unreasonable Because It Failed to Designate the Fund Recipients.

The failure of the Settlement Agreement to identify the Fund Recipients is a fatal defect as it renders the Settlement Agreement fundamentally unfair, inadequate, and unreasonable. Jackson therefore respectfully requests that the Court deny final approval of the Settlement

Agreement and require the parties to modify the Settlement Agreement to cure its inadequacies and allow the Class and the Court review of and approval of the *cy pres* recipient.

1. The Negotiating Parties have Not Carried their Burden to Prove the Fairness of the Cy Pres *Remedy*

The burden of proving that a *cy pres* recipient is acceptable rests on the settling parties.[30] The settling parties must prove, *inter alia*, that *cy pres* recipients have a substantial record of service, that the funds "adequately target the plaintiff class," and that there is "adequate supervision over distribution."[31]

Here, the Negotiating Parties have failed to meet this standard because the Settlement Agreement does not identify the Fund Recipients. The Settlement Agreement instead purports to disburse the Fund to unnamed "existing organizations focused on Internet privacy policy or privacy education."[32] But there is no guarantee that the Negotiating Parties will actually designate Fund Recipients that meet the service requirement. Neither does the Settlement Agreement adequately target the Class. On the contrary, it bestows unfettered discretion on the Negotiating Parties to designate recipients who may or may not in fact have the necessary focus. There is simply no guarantee that the Fund Recipients—whoever they ultimately may be—will target the Class. Furthermore, an adequate oversight procedure is conspicuously absent from the Settlement Agreement. Upon approval, Google can walk away from the courthouse confident that it can ignore the legitimate claims of the Class Members with impunity.

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[30] *Six Mexican Workers v. Arizona Citrus Growers*, 904 F.2d 1301, 1307 (9th Cir. 1990).
[31] *Id.* at 1308-9.
[32] SA, § 3.4(b).

2. *The Settlement Agreement is Unfair, Inadequate, and Unreasonable because it Prevents the Court from Discharging its Fiduciary Duty to Class Members*

District courts owe a fiduciary duty to class members when class counsel derive their fee from a common settlement fund.[33] The Court stands as a fiduciary in this case because the Settlement Agreement provides that Class Counsel may take up to 30% of the Fund as their fee. Yet the Court cannot discharge its fiduciary duty because the Settlement Agreement leaves the future determination of the Fund Recipients solely to the discretion of the Negotiating Parties. The failure to designate the Fund Recipients renders the Court unable to exercise its fiduciary duty to ensure that the settlement, and the Fund created thereunder, will in fact benefit all Class Members. Furthermore, there is no guarantee that the Negotiating Parties will select recipients that meet the "substantial record of service" or other requirements, as the Court has no mechanism for reviewing the Negotiating Parties' designation.

The Negotiating Parties must identify the Fund Recipients ***before*** the Court enters the Final Order and Judgment. This is the only way that the Court will be able to discharge its duty to review the Fund Recipients and properly determine that the Fund will or will not benefit the Class Members.

3. *The Settlement Agreement is Unfair, Inadequate, and Unreasonable Because it Invites Additional Future Litigation*

Allowing the parties to decide the Fund Recipients after the entry of the Final Order and Judgment also invites needless litigation. The Settlement Agreement provides that the "Parties" shall determine the Fund Recipients.[34] The "Parties" to this action include Google, the Class Representatives, and the Class Members—not Class Counsel.[35] The Settlement Agreement also

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[33] *In re Washington Public Power Supply System Securities Litigation*, 19 F.3d 1291, 1302 (9th Cir. 1994).
[34] SA, § 3.4(b).
[35] SA, § 1.19.

does not set forth how the Parties will "mutually agree" on the Fund Recipients. Such vague and ambiguous language is almost certain to spark further litigation. The Court can avoid future discord and strain on judicial resources by requiring the Negotiating Parties to identify the Fund Recipients and the amounts each is to receive in advance of the Court's final approval of the Settlement Agreement.

4. The Settlement Agreement is Unfair, Inadequate, and Unreasonable Because it Gives Google Control Over Naming the Fund Recipients

Cy pres funds are the class members' property; once disbursed, class action defendants retain ***no ownership interest*** in such funds.[36] This principle is consistent with the trust theory underlying the *cy pres* doctrine: class members are the beneficiaries with full equitable title to the fund; the class administrator is the trustee with full legal title to the fund; and the class action defendant is the settlor who donates the corpus and is left with no property interest in or right to control the corpus.

The Settlement Agreement improperly allows Google to determine the Fund Recipients. This provision directly contravenes the *cy pres* doctrine and the trust theory on which *cy pres* doctrine is based. The Court should withhold final approval of the Settlement Agreement and require the Negotiating Parties to modify the Settlement Agreement to eliminate Google's improper influence and control over the Fund.

5. The Settlement Agreement is Unfair, Inadequate, and Unreasonable Because it Disincentivizes Class Counsel from Objecting

Another troubling fact is that the Class Counsel's interests are now more closely aligned with Google's than with those of the Class Members. District court review of class action settlements exists precisely to police this misalignment, which is ripe for abuse. "The primary

[36] *Six Mexican Workers*, 904 F.2d at 1307.

concern of [district court review] is the protection of those class members, including the named plaintiffs, whose rights may not have been given due regard by the negotiating parties."[37]

In this case, while the Class Members receive no direct benefit, Class Counsel only receives its 30% cut of the Fund if the Court approves the Settlement Agreement without amendment.[38] The Settlement Agreement terminates if the Court vacates, modifies, or reverses it, which would send the Negotiating Parties back to the settlement drawing board.[39] The Settlement Agreement therefore incentivizes Class Counsel to quash legitimate objections both now and after the Final Order and Judgment.

Accordingly, the Court should require the Negotiating Parties to name the Fund Recipients and the amounts to be disbursed to each before the Court grants final approval to the Settlement Agreement. This would allow the Court to discharge its fiduciary duty to the Class Members by guaranteeing that the Fund will actually benefit Class Members.

B. The Court Should Require the Negotiating Parties to Amend the Settlement Agreement to Actually Benefit the Class Members Through Substantive and Specific Improvements in Buzz's Privacy Controls and Specific Designation of Buzz Privacy Education

Although Google promises to improve Buzz and to provide Buzz Education, the Settlement Agreement provides no obligation for Google to provide any specific improvements or privacy education related to Buzz, no standards for such improvements or Buzz Education, and no oversight or consequences relating to such improvements and Buzz Education. These failures render the Settlement Agreement unfair, inadequate, and unreasonable. The Settlement Agreement simply does not benefit the Class Members. Jackson therefore respectfully requests that the Court withhold final approval of the Settlement Agreement and require the Negotiating

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[37] *Officers for Justice*, 688 F.2d at 624.
[38] SA, § 10.1.

Parties to modify the Settlement Agreement to specify substantive improvements to Buzz and Buzz Education.

1. The Settlement Agreement is Unfair, Inadequate, and Unreasonable Because Google's Past Consideration Does Not Benefit the Class

It is axiomatic that past consideration cannot support a contract.[40] This is because a party has already received the benefit of a counterparty's completed performance, thus there can be no change in position adequate to support consideration.

In contravention of this well-established rule of contract law, the Settlement Agreement identifies Google's changes to the Buzz interface and privacy controls shortly after its launch but prior to even the first lawsuit being filed as "relief" for the Class.[41] These past actions cannot constitute "relief" under the Settlement Agreement. First, Google made improvements to Buzz's privacy features in order to improve its reputation and internet profile, which had come under attack following the disastrous Buzz launch. Therefore, these improvements were made prior to settlement negotiations and cannot be consideration for the Class in terms of the Settlement Agreement. Second, the purported "duties" undertaken by Google through the Settlement Agreement were already discharged prior to the Settlement Agreement. Such past consideration cannot support the Settlement Agreement, or any other contract. As such, the Settlement Agreement fails for lack of consideration. Furthermore, the Court should not consider the confirmatory discovery or Google's pre-Final Order and Judgment improvements to Buzz in its fairness analysis.

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[39] SA, § 11.2.
[40] *See, e.g. Passante v. McWilliam,* 62 Cal.Rptr.2d 298, 53 Cal.App.4th 1240, 1247 (Cal. App. 1997).
[41] SA, §§ 3.1 & 3.2.

2. *The Settlement Agreement is Unfair, Inadequate, and Unreasonable Because it Lacks Any Substantive Guidelines for Google's Required Educational Efforts*

In addition to the creating the Fund and blessing Google's past actions, the Settlement Agreement requires Google to:

- "[D]isseminate wider public education about the privacy aspects of Google Buzz." (the "Public Education Relief");[42]
- "[C]onsider the suggestions that it has received from Class Counsel and any other suggestions it may receive from Class Counsel on this issue within thirty (30) days after this Settlement Agreement is executed by all Parties." (the "Suggestion Relief");[43] and
- "[P]rovide a report to Lead Class Counsel within three months after the Final Order and Judgment describing the public education efforts concerning privacy aspects that it undertook pursuant to this Settlement Agreement." (the "Report Relief").[44]

Such vague promises lack any specific obligation of Google and therefore lack any substantive force and do not discharge the Negotiating Parties' burden to prove that the Settlement Agreement benefits Class Members. The Settlement Agreement neither defines nor provides details regarding the "public education" Google will be compelled to provide. This leaves Google absolute discretion. Google, the wrongdoer here and a competitor in the cutthroat arena of social networking, has no incentive to highlight its shortcomings. Google is much more likely to use the Public Education Relief as a marketing tool rather than make it an honest remedy for Class Members.

The Suggestion Relief similarly provides no Class relief. It only requires Google to "consider" any suggestions it received from Class Counsel within 30 days after the Negotiating Parties executed the Settlement Agreement. The Negotiating Parties executed the Settlement Agreement on September 2, 2010. The suggestion period therefore closed on October 1, 2010,

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[42] SA, § 3.3.
[43] *Id.*

over a month before the Class Notice announcing the Settlement Agreement was disseminated. It is unclear what—if any—suggestions Google received during this period or whether any changes resulted. Furthermore, Class Members who were not notified until the Class Notice was sent via email on November 2, 2010 were given no opportunity to review, approve, or provide suggestions regarding the Public Education Relief. The Suggestion Relief provides only illusory relief for Class Members.

Finally, the Report Relief fails to benefit the Class Members. The Report Relief gives Class Counsel no recourse if the Public Education Relief or Suggestion Relief described in the Report is unsatisfactory. Furthermore, as described below in more detail, by the time Class Counsel receives Google's report, Class Members will have long since released their claims and any right to seek a legal remedy.

Accordingly, the Court should reject the Settlement Agreement as unfair. In the alternative, the Court should require the Negotiating Parties to modify the Settlement Agreement to require specific improvements to Buzz and the Buzz Education on specific timelines, and to provide Class Members with recourse if Google fails to adequately address Buzz's defects.

C. The Court Should Modify the Settlement Agreement to Require Google to be Obligated to Perform the Benefit or Remedy Simultaneously with Class Members Releasing Their Claims

The Settlement Agreement requires Class Members to release all their claims arising out of Google's misconduct[45] and requires Class Counsel to dismiss this action with prejudice[46] (the "Release and Dismissal") upon entry of the Final Order and Judgment. Google, however, is not obligated to provide any Class benefits or relief, including paying the *cy pres* relief, until the

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[44] *Id.*
[45] SA § 9.1.
[46] SA § 8.2.

Final Order and Judgment becomes final and non-appealable.[47] Specifically, the Settlement Agreement provides that the Claims Administrator need not disburse the Fund until the later of "Settlement Date" or the mutual agreement of the Negotiating Parties as to the Fund Recipients and the amounts to be disbursed to each.[48] The Settlement Date is defined as the date when the Final Order and Judgment becomes final and non-appealable. This might never happen because the Final Order and Judgment may be overturned on appeal. Class Members will have relinquished all rights to relief while Google will not be obligated to provide any relief, including any *cy pres* payment, under a Settlement Agreement that has been invalidated on appeal. This is particularly insulting since $8 million is a nuisance value settlement for a corporation of Google's size.

Under the Settlement Agreement, the Class Members will forfeit their right to recovery for a *cy pres* remedy and other relief that may never materialize upon entry of the Final Order and Judgment which will extinguish the Class Members' claims. Instead, Jackson respectfully requests that the Court withhold final approval of the Settlement Agreement and require the Negotiating Parties to modify the Settlement Agreement to require Google to be obligated to perform its remedy—including paying the *cy pres* relief—simultaneously with the Class Members releasing their remedial rights through the Release and Dismissal.

D. The Settlement Agreement is Unfair, Inadequate, and Unreasonable Because the Class Definition is Overbroad and Includes Class Members That Have Not Been Harmed

Google launched Buzz on February 9, 2010. Two days later, on February 11, 2010, Google announced that it would be making substantive privacy improvements to Buzz. Those improvements on February 11, 2010 are the only specific improvements referenced in the

[47] SA § 3.4.

Settlement Agreement. Yet the Settlement Agreement defines the Class as "all Gmail users in the United States presented with the opportunity to use Google Buzz through the Notice Date."[49] The Notice Date occurred on November 2, 2010, when Google emailed the Class Notice to Class Members to inform them of the Settlement Agreement.

There is no reason why the Class should include those who used Buzz between Google's February 11 improvements and the artificial November 2, 2010 Notice Date. At this early stage of the litigation there is simply no evidence to suggest that Google continued its harmful conduct after February 11, 2010. The Notice Date is an arbitrary cutoff point and it includes many Buzz users that, if Google at some point presumably halted its offending conduct prior to the Notice Date, Google never harmed.

Assuming, *arguendo*, the February 11th improvements actually ended the violations alleged in the Complaint, then the Class must exclude those who became Gmail users and who accessed Buzz after the improvements were made. Including post-improvement users in the Class makes the class overly broad.

The Settlement Agreement indicates that the corrective actions to the Google interface occurred on February 11, 2010. If in fact the February 11, 2010 corrections cured the alleged breaches, then Gmail users after that date should not be required to release their claims.

Jackson therefore respectfully requests that the Court withhold final approval of the Settlement Agreement and order the Negotiating Parties to adjust the Settlement Agreement's definition of "Class" to include only a Class period from February 9, 2010 to February 11, 2010 to reflect that claims after that date would not be released.

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[48] SA, § 3.4(c).

[49] SA § 1.3. *See also* SA § 1.16 (defining "Notice Date"); § 5.1(requiring Google to email Class Members regarding the Settlement Agreement).

E. The Settlement Agreement Provides No Benefit to Members of the Class.

Paragraph three of the Settlement Agreement, "Relief," provides the following purported relief to settle the Class claims: (i) the production of documents and information by Google to Lead Class Counsel; (ii) changes by Google to the Buzz user interface; (iii) Google's agreement—in its sole discretion—to disseminate public education about the privacy aspect of Buzz; and (iv) a *cy pres* award to as-yet-unnamed *cy pres* recipients.

The only user interface changes referenced in the Settlement Agreement were made by Google to Buzz on February 11, 2010, before the filing of the Original Complaint in this matter. Such relief prior to entering into the Settlement Agreement cannot be consideration or benefit procured by the parties' subsequent entering into the Settlement Agreement.

In addition, the Settlement Agreement fails to obligate Google to implement any specific substantive improvements to Buzz or to provide to the Class any specific public education relating to Buzz privacy issues in exchange for the Release and Dismissal. The Negotiating Parties have agreed that "Google will select and design the final content of the public education efforts in its discretion."[50] Allowing Google unfettered discretion to decide its own obligations under the Settlement Agreement does not provide Class Members with any relief in exchange for forever releasing their rights to recover.

In addition, promising to disburse the Fund to an unnamed *cy pres* recipient does not obligate Google to provide any benefit to the Class, as there is no assurance the Fund Recipient eventually named will provide any services that benefit the Class.

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[50] SA § 3.3.

Finally, providing to Class Counsel documents and information relevant to Google's alleged misconduct is not relief for the Class Members. Google, under basic discovery rules and judicial rules of fairness, would have been required to provide such discovery in any event.

For the foregoing reasons, none of the purported "relief" obligates Google to provide any real relief or benefits to the Class Members in exchange for the Class Members extinguishing claims against Google for its egregious breach. Therefore, the Court should withhold final approval of the Settlement Agreement and require the Negotiating Parties to modify the Settlement Agreement to rectify this deficiency.

VI. CONCLUSION

The Settlement Agreement is substantively deficient and is inherently unfair, inadequate, and unreasonable. Therefore, the Court should withhold final approval of the Settlement Agreement until the Negotiating Parties modify the Settlement Agreement to address the deficiencies described above.

Dated: January 5, 2011

Respectfully submitted,

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CERTIFICATE OF SERVICE

Pursuant to the *Order Granting Preliminary Approval of Class Action Settlement* (Oct. 7, 2010) Doc. 50, ¶9, and the *Settlement Agreement* (Sep. 3, 2010) Doc. 41-1, ¶13.11, the undersigned hereby certifies that copes of the foregoing were served via Federal Express Priority Overnight, to the following on this 5TH day of January, 2011:

Clerk of the United States District Court
for the Northern District of California
San Jose Division
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San Jose, CA 95113

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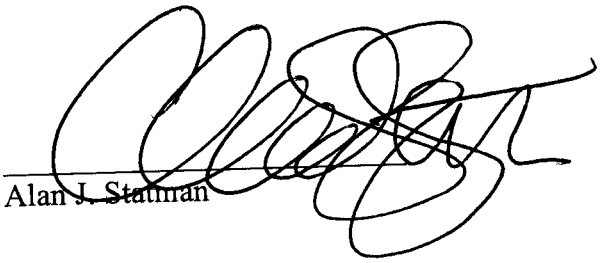

Alan J. Statman

EXHIBIT

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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	Case No. 5:10-CV-00672-JW **AFFIDAVIT OF CLASS MEMBER ALISON JACKSON** Date: January 31, 2011 Time: 9:00 a.m. Place: Courtroom 8, 4th Floor [Hon. James Ware]

AFFIDAVIT OF ALISON JACKSON

STATE OF OHIO)
) **SS:** 460 85 0953
COUNTY OF HAMILTON)

Now comes affiant Alison Jackson, being first duly cautioned and sworn, and deposes and states as follows:

1. I am over eighteen years of age and am competent to testify upon my personal knowledge of the events of this case.
2. I reside at 3629 Woodbridge Place, Cincinnati, Ohio 45226.
3. I have used Google's GMail service since January, 2010, including throughout the Class Period in this case.
4. I received the Class Notice issued in this case.

AFFIANT FURTHER SAYETH NAUGHT.

Alison Jackson

Sworn to before me and subscribed in my presence this 4th day of January 2011, came Alison Jackson and acknowledged the foregoing.

Notary Public

NOTARIAL SEAL
STATE OF OHIO

Nancy Neiheisel
Notary Public, State of Ohio
My Commission Expires 10-20-2015