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**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION**

In re GOOGLE REFERRER HEADER PRIVACY LITIGATION

This Document Relates To: All Actions

Case No. 5:10-cv-04809-EJD

[Hon. Edward J. Davila]

[PROPOSED] PRELIMINARY APPROVAL ORDER

Plaintiffs move for preliminary approval of settlement, provisional class certification and designation of Plaintiffs as class representatives, appointment of counsel as class counsel. The motion is unopposed and will be GRANTED as set forth below.

I. BACKGROUND

The instant case is a putative class action brought by Google Search users, Paloma Gaos, Anthony Italiano, and Gabriel Priyev (collectively “Plaintiffs”), challenging the way Defendant Google Inc. (“Google”) allegedly divulged its users’ search queries.

Plaintiff Paloma Gaos initiated this action on October 25, 2010, alleging that Google unlawfully divulged her search queries and the search queries of millions of other Google Search users to third parties. On February 29, 2012, Gabriel Priyev filed an action in the Northern District of Illinois (Priyev v. Google Inc., Case No. 12-cv-1467 (N.D. Ill.)), which was subsequently transferred to this district (re-captioned as Priyev v. Google Inc., Case No. 13-cv-0093-LHK (N.D. Cal.)) and consolidated with the Gaos action. See Dkt. No. 51.

1 Plaintiffs reached a settlement with Defendant after a mediation overseen by Randall W.
2 Wulff of Wulff Quinby Sochinsky. The Settlement Agreement provides for a single Settlement
3 Class, defined as follows:

4 [A]ll Persons in the United States who submitted a search query to Google
5 at any time during the period commencing on October 25, 2006, up to and
6 including the date of the Notice of Proposed Class Action Settlement
pursuant to the Notice Plan.

7 Pls. Mot. Prelim. Approval of Class Action Settlement Ex. 3 § 1.4, Dkt. No. 52-3.

8 Excluded from the Settlement Class are] (i) Google, its subsidiaries and
9 affiliates, officers, and directors; (ii) the judge(s) to whom these cases are
10 assigned and any member of the judge's or judges' immediate family; (iii)
11 Persons who have settled with and released Google from individual claims
substantially similar to those alleged in the Gaos Complaint and the Priyev
12 Complaint; and (iv) Persons who submit a valid and timely Request for
Exclusion pursuant to Paragraph 6.1 [of the Settlement Agreement].

13 Id. at 1.7, Dkt. No. 52-3.

14 The Settlement Agreement creates a common fund totaling \$8,500,000.00 ("Settlement
15 Fund"). After payment of the expenses of administering the settlement ("Settlement
16 Administration Expenses"), any fee award or costs awarded to Class Counsel ("Fee Award"),
17 and any incentive awarded to the Class Representatives in the related actions ("Incentive
18 Award"), the balance of the Settlement Fund shall be distributed to *cy pres* recipients selected by
19 the Parties and approved by the court. The *cy pres* distribution shall be made to recipients that
20 will promote public awareness and education, and/or to support research, development, and
21 initiatives, related to protecting privacy on the Internet. The Settlement Agreement also requires
22 Google to make certain disclosures concerning search queries on its "FAQ" page, "Key Terms"
23 page, and "Privacy FAQ for Google Web History." In exchange for the relief above, and upon
24 entry of a final order approving this Settlement, Google and each of its related affiliates and
25 entities will be released from any and all claims that any Class Member may now or at any time
26 have up to the date of preliminary approval of this Agreement, whether or not known or existing
27 at the time of this Agreement, arising out of the subject matter giving rise to the claims in the

1 Actions. See Pls. Mot. Prelim. Approval of Class Action Settlement Ex. 3 §§ 1.34, 9.1-9.3, Dkt.
2 No. 52-3.

3 **II. LEGAL STANDARD**

4 **A. Preliminary Approval**

5 “In evaluating a class action settlement under Rule 23(e), the district court determines
6 whether the settlement is fundamentally fair, reasonable, and adequate.” In re Syncor ERISA
7 Litig., 516 F. 3d 1095, 1100 (9th Cir. 2008). Preliminary approval of a class action settlement
8 requires the Court to consider whether “(1) the negotiations occurred at arm's length; (2) there
9 was sufficient discovery; (3) the proponents of the settlement are experienced in similar
10 litigation; and (4) only a small fraction of the class objected.” In re Netflix Privacy Litigation,
11 2012 WL 2598819, *2 (N.D. Cal. July 5, 2012).

12 **B. Class Certification**

13 Federal Rule of Civil Procedure 23(a) permits a class action where: “(1) the class is so
14 numerous that joinder of all members is impracticable, (2) there are questions of law or fact
15 common to the class, (3) the claims or defenses of the representative parties are typical of the
16 claims or defenses of the class; and (4) the representative parties will fairly and adequately
17 protect the interests of the class.” In addition, the class action must satisfy one of the provisions
18 of Rule 23(b). Satisfying 23(b)(3) requires that “the questions of law or fact common to class
19 members predominate over any questions affecting only individual members, and that a class
20 action is superior to other available methods for fairly and efficiently adjudicating the
21 controversy.” Fed. R. Civ. P. 23(b)(3).

22 **C. Class Counsel**

23 In appointing class counsel, the court must consider “(i) the work counsel has done in
24 identifying or investigating potential claims in the action; (ii) counsel's experience in handling
25 class actions, other complex litigation, and the types of claims asserted in the action; (iii)
26 counsel's knowledge of the applicable law; and (iv) the resources that counsel will commit to
27 representing the class.” Fed. R. Civ. P. 23(g).

1 **III. DISCUSSION**

2 **A. Preliminary Approval**

3 The instant settlement appears fair, non-collusive and within the range of possible final
4 approval. The settlement was a product of arm’s length negotiation before a mediator and does
5 not appear to benefit those who participated in the mediation at the expense of any other parties.

6 For purposes of the *cy pres* doctrine, a class-action settlement fund is “non-distributable”
7 when “the proof of individual claims would be burdensome or distribution of damages costly.”
8 Nachshin v. AOL, LLC, 663 F.3d 1034, 1038 (9th Cir. 2011) (quoting Six Mexican Workers v.
9 Ariz. Citrus Growers, 904 F.2d 1301, 1305 (9th Cir. 1990)). “The district court’s review of a
10 class-action settlement that calls for a *cy pres* remedy is not substantively different from that of
11 any other class-action settlement except that the court should not find the settlement fair,
12 adequate, and reasonable unless the *cy pres* remedy ‘account[s] for the nature of the plaintiffs’
13 lawsuit, the objectives of the underlying statutes, and the interests of the silent class
14 members....” Lane v. Facebook, Inc., 696 F.3d 811, 819-20 (9th Cir. 2012) (quoting Nachshin,
15 663 F.3d at 1036). The “*cy pres* remedy must account for the nature of the plaintiffs’ lawsuit,
16 the objectives of the underlying statutes, and the interests of the silent class members.” Id. at 821
17 (internal quotations and citations omitted). Although a *cy pres* remedy must provide the “next
18 best distribution” absent a direct monetary payment to absent class members, the Ninth Circuit
19 does not require “that settling parties select a *cy pres* recipient that the court or class members
20 would find ideal. On the contrary, such an intrusion into the private parties’ negotiations would
21 be improper and disruptive to the settlement process.” Id.

22 In light of the minimal monetary recovery that would be realistically recoverable by
23 individual Settlement Class members and the immediate benefits offered to the Class by the
24 injunctive relief and *cy pres* donations, the Settlement Agreement is deserving of preliminary
25 approval. In this case, distribution of damages would be costly and burdensome, effectively
26 rendering this settlement fund non-distributable and appropriate for *cy pres* distribution.

1 Additionally, the combination of injunctive or prospective relief and substantial *cy pres*
2 donations compares favorably to settlements in other online consumer privacy cases. See, e.g., In
3 re Netflix Privacy Litig., No. 5:11-cv-00672-EJD (Dkt. No. 80, 256) (unauthorized storage of
4 personal information; \$9.0 million settlement fund with *cy pres* payments); In re Google Buzz
5 Privacy Litig., No. 5:10-cv-00672-JW (Docket Nos. 41, 128) (N.D. Cal. 2010) (disclosure of
6 email contact lists without consent; \$8.5 million settlement fund with *cy pres* payments); Lane v.
7 Facebook, Inc., No. 5:08-cv-03845 RS, 2009 WL 3359020 (N.D. Cal. Sept. 18, 2009)
8 (unconsented disclosure of personally identifiable information based on Facebook Beacon
9 program; settlement created privacy foundation with funding of \$9.5 million).

10 Plaintiffs employed a process to determine that each recipient is independent, is a well-
11 qualified organization with an exemplary service record, and will use the funds to advance Class
12 interests. Plaintiffs have required that the recipients disclose to the Court and the Class in great
13 detail exactly how the funds will be used. As a result, the fund will be distributed in a transparent
14 fashion that will significantly enhance due process for the Class. Accordingly, the proposed *cy*
15 *pres* distribution satisfies Ninth Circuit precedent. Whether other organizations may also be
16 satisfactory or even preferred recipients is irrelevant. The recipients proposed by Plaintiffs are
17 appropriate and adequate, and it would be improper and disruptive to the settlement process for
18 the Court to suggest or require different or additional recipients.

19 Furthermore, the method employed to select *cy pres* recipients is satisfactory. Plaintiffs
20 considered at least twenty-two (22) potential recipients large, small, established, new to the field,
21 well-known, and not well-known. Neither Plaintiffs, Defendant, nor their respective counsel will
22 have any role in how the funds are used once the distribution is made.

23 Also, any class member can opt out of the settlement, and the proponents of the
24 settlement are experienced in this type of litigation.

1 **B. Class Certification**

2 Class certification is appropriate here because all four requirements of Rule 23(a) are met
3 and the action also satisfies the requirements of Rule 23(b) (other than as to manageability
4 issues, which the Court need not and does not consider for purposes of a settlement class).

5 The proposed class is of persons in the United States who submitted a search query to
6 Google during a multi-year time period. Thus, “[t]he class is so numerous that joinder of all
7 members is impractical.” See Fed. R. Civ. P. 23(a)(1).

8 There are questions of law or fact common to class members, see Fed. R. Civ. P.
9 23(a)(2), because the settled claims for relief arise from Google’s stated policies and a uniform
10 practice of disclosing its users’ search queries to third parties via referrer headers—affecting all
11 those individuals in the same way. Such allegations show that Plaintiffs and the proposed
12 Settlement Class share common statutory claims under the Stored Communications Act
13 (“SCA”), 18 U.S.C. § 2702, as well as various state law claims, that likewise result in common
14 and shared factual and legal questions. Furthermore, although the Court need not and does not
15 consider manageability issues when evaluating certification of a settlement class, it otherwise
16 finds the requirements of Fed. R. Civ. P. 23(b)(3) to be satisfied..

17 Plaintiffs’ claims are typical of those of the putative class they seek to represent. See Fed.
18 R. Civ. P. 23(a)(3). Google allegedly divulged Plaintiffs’ and the Class’s search queries to third
19 parties via referrer headers without consent. Plaintiffs argue this practice violates the SCA,
20 which would provide identical statutory damages to all members of the proposed Class, as well
21 as Google’s terms and express and implied contracts. Plaintiffs’ representation of the Settlement
22 Class is appropriate because they were subjected to the same alleged unlawful conduct.

23 Plaintiffs and their counsel will fairly and adequately protect the interests of the class.
24 See Fed. R. Civ. P. 23(a)(4). To determine if representation is adequate, the Court must ask “(1)
25 do the named plaintiffs and their counsel have any conflicts of interest with other class members
26 and (2) will the named plaintiffs and their counsel prosecute the action vigorously on behalf of
27 the class?” Hanlon v. Chrysler Corp., 150 F.3d 1011, 1020 (9th Cir. 1998). Plaintiffs’ interests

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1 are representative of and consistent with the interests of the proposed Settlement Class—all stand
2 to recover statutory damages under the SCA for Google’s alleged unlawful disclosure of their
3 search queries to third parties via referrer headers. Also, Plaintiffs’ active participation in this
4 litigation demonstrates that they have and will continue to protect the interests of the proposed
5 Settlement Class. Further, proposed Class Counsel have regularly engaged in major complex
6 litigation and have extensive experience in consumer class action lawsuits that are similar in size,
7 scope, and complexity to the present case. See Decl. of Michael Aschenbrener, Ex. 1-A, Dkt. No.
8 52-1; Decl. of Ilan Chorowsky, Ex. 2-A, Dkt. No. 52-2; and Decl. of Kassra Nassiri, Ex. 5-A,
9 Dkt. No. 52-5.

10 Accordingly, the proposed class will be provisionally certified for settlement purposes,
11 and the Court will designate Paloma Gaos, Anthony Italiano, and Gabriel Priyev as class
12 representatives.

13 **C. Class Counsel**

14 Proposed Class Counsel have conducted extensive pre-litigation investigation of the class
15 claims and are experienced and knowledgeable, as discussed above. Accordingly, Kassra Nassiri
16 of Nassiri & Jung LLP, Michael Aschenbrener of Aschenbrener Law, P.C., and Ilan Chorowsky
17 of Progressive Law Group LLC are preliminarily appointed as Class Counsel for the Settlement
18 Class.

19 **D. Notice of Class Certification and Settlement Administration**

20 Rule 23(c)(2)(B) requires “the best notice that is practicable under the circumstances,
21 including individual notice to all members who can be identified through reasonable effort.”
22 Rule 23(e)(1) requires reasonable notice to all class members who would be bound by the
23 proposed settlement. The notice must explain in easily understood language the nature of the
24 action, definition of the class, class claims, issues and defenses, ability to appear through
25 individual counsel, procedure to request exclusion, and the binding nature of a class judgment.
26 Fed. R. Civ. P. 23(c)(2)(B). Here, the parties in this case have created and agreed to perform the
27 following Notice Plan:

1 **Settlement Website.** The Class Administrator shall create and maintain a Settlement
2 Website until at least thirty days after Effective Date of the Settlement, which is roughly sixty
3 days after the Court enters an order granting final approval of the Settlement. The Settlement
4 Website shall (i) post, without limitation, the operative complaint(s), this Settlement Agreement,
5 and Long Form Notice and Opt-Out Form; (ii) notify Class Members of their rights to object or
6 opt out; (iii) inform Class Members that they should monitor the Settlement Website for
7 developments, including the final proposed *cy pres* distribution; and (iv) notify Class Members
8 that no further notice will be provided to them once the Court enters the Final Order and
9 Judgment, other than through updates on the Settlement Website. See Pls.’ Mot. Prelim.
10 Approval of Class Action Settlement Ex. 3 § 5.5, Dkt. 52.

11 **Publication Notice.** The Parties shall also implement a notice and publication plan. See
12 Pls.’ Mot. Prelim. Approval of Class Action Settlement Ex. 3 §§ 5.1-5.4.

13 The Notice Plan will be established and publication will begin within thirty days of the
14 entry of an order by the Court granting preliminary approval of the proposed Settlement. All
15 costs associated with implementing the Notice Plan, including the fees and costs of the Class
16 Administrator, will be paid out of the Settlement Fund. Google will have the Class
17 Administrator notify the appropriate state and federal officials of this Agreement pursuant to the
18 Class Action Fairness Act of 2005, 28 U.S.C. § 1715. See Pls.’ Mot. Prelim. Approval of Class
19 Action Settlement Ex. 3 § 5.6. Dkt. 52.

20 The Court finds the procedure described above, including the timeline established for
21 notice, opt-outs and objections, meets the standards of Rule 23 and due process.

22 **IV. ORDER**

23 In light of the preceding discussion, the motion for approval of the motion for conditional
24 certification of a settlement class and preliminary approval of class action settlement is
25 GRANTED as follows:

26 1. This action is certified as a class action only for settlement purposes pursuant to
27 subsections (a) and (b)(3) of Federal Rule of Civil Procedure 23.

1 2. The Settlement Agreement is preliminarily approved as fair, reasonable, and
2 adequate pursuant to Federal Rule of Civil Procedure 23(e).

3 3. Plaintiffs Paloma Gaos, Anthony Italiano, and Gabriel Priyev are approved to act
4 as Class Representatives for settlement purposes only.

5 4. Kassra Nassiri of Nassiri & Jung LLP, Michael Aschenbrener of Aschenbrener
6 Law, P.C., and Ilan Chorowsky of Progressive Law Group LLC are appointed Class Counsel
7 pursuant to Federal Rule of Civil Procedure 23(g) for settlement purposes only.

8 5. The Notice Plan as set forth in Plaintiffs' Motion for Preliminary Approval of
9 Class Action Settlement and the content and form of Notice to the Settlement Class as set forth
10 in the Supplemental Declaration of Kassra Nassiri in Support of Motion for Preliminary
11 Approval of Settlement are approved pursuant to subsection (c)(2)(B) and (e) of Federal Rule of
12 Civil Procedure 23.

13 6. A hearing on the final approval of class action settlement shall be held before this
14 court on February 14, 2014 at 9:00 a.m., United States District Court, Northern District of
15 California, San Jose Division, 280 South 1st Street, Courtroom 4, 5th Floor, San Jose, California
16 95113. Class Counsel may file brief(s) requesting final approval of the Settlement Agreement,
17 Fee Award, and Incentive Award, no later than 35 calendar days before the final approval
18 hearing. Objections must be filed no later than January 24, 2014. All other applicable dates shall
19 be established by the Settlement Agreement and Plaintiffs' Motion for Preliminary Approval of
20 Class Action Settlement.

21
22 IT IS SO ORDERED.

23 Dated: _____, 2013

24
25 _____
26 EDWARD J. DAVILA
27 United States District Judge