MARK BRNOVICH
ATTORNEY GENERAL
(Firm State Bar No. 14000)

Drew C. Ensign (CA Bar No. 243956)
Deputy Solicitor General
Office of the Arizona Attorney General
2005 N. Central Ave.
Phoenix, Arizona 85004
Telephone: (602) 542-5025
Facsimile: (602) 542-8083
Drew.Ensign@azag.gov

Attorney for Amicus Arizona Attorney General's Office

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

IN RE GOOGLE LLC STREET VIEW ELECTRONIC COMMUNICATIONS LITIGATION

Case No.: 3:10-md-02184-CRB

STATE ATTORNEYS GENERAL *AMICUS CURIAE* BRIEF URGING REJECTION OF PROPOSED *CY PRES*-ONLY CLASS ACTION SETTLEMENT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

TABLE OF AUTHORITIES–Continued

STATUTES

TABLE OF AUTHORITIES–Continued

OTHER AUTHORITIES

INTEREST OF AMICI CURIAE

The undersigned Attorneys General are their respective States' chief law enforcement or legal officers. Their interest here arises from two responsibilities. *First*, the Attorneys General have an overarching responsibility to protect their States' consumers. *Second*, the undersigned have a responsibility to protect class members under the Class Action Fairness Act, which prescribes a role for state Attorneys General in the class action settlement approval process. *See* 28 U.S.C. § 1715; *see also* S. REP. 109-14, 2005 U.S.C.C.A.N. 3, 6 (requirement "that notice of class action settlements be sent to appropriate state and federal officials," exists "so that they may voice concerns if they believe that the class action settlement is not in the best interest of their citizens."); *id.* at 34 ("notifying appropriate state and federal officials ... will provide a check against inequitable settlements"; "Notice will also deter collusion between class counsel and defendants to craft settlements that do not benefit the injured parties.").

This brief is a continuation of the ongoing effort of state Attorneys General to protect consumers from class action settlement abuse, an effort that has produced meaningful settlement improvements. *See, e.g.*, *Allen v. Similasan Corp.*, No. 12-cv-376, Dkts. 219, 223, 257, 261 (S.D. Cal.) (after state Attorneys General *amicus*, court rejected initial settlement and revised deal was reached, increasing class' cash recovery from $0 to ~$700,000); *Cowen v. Lenny & Larry's, Inc.*, No. 17-cv-01530, Dkts. 94, 110, 117 (N.D. Ill.) (involvement of government officials, including state Attorneys General, produced revised settlement that increased class's cash recovery from $350,000 to ~$900,000).

The Attorneys General submit this brief to further these interests, speaking for consumers who will be harmed by the proposed settlement that has obtained a $13 million cash fund yet sends no cash or other direct compensation to class members.[1]

[1] The parties do not oppose this filing.

SUMMARY OF ARGUMENT

The Court should reject the settlement because it proposes to bargain away class claims on behalf of millions of consumers nationwide in exchange for no direct benefit to the class, which cannot satisfy Rule 23 or the obligations the Court owes to the unnamed class members. This case illustrates in stark terms the erroneous nature of *cy pres*-only class action settlements; almost a decade of litigation has resulted in a deal that offers nothing to the class even as Defendant Google, named plaintiffs, and class counsel walk away with substantial value. The proposed settlement generates a $13 million cash fund from the release of unnamed class members' claims, but instead of sending that money to class members, the parties have instead divided it between select *cy pres* recipients, class counsel, and class representatives. And the purported injunctive relief mirrors relief already promised by Google through a 2013 agreement with 39 state Attorneys General.

Put simply, in this settlement, class members, who are already at a disadvantage in the class action settlement process, release their claims in exchange for nothing. Such a settlement cannot be fair, reasonable, and adequate under Rule 23. Courts at all levels have debated the appropriateness of *cy pres* within class action settlements. And the issue has drawn recent interest from the Supreme Court. *See Frank v. Gaos*, 138 S. Ct. 1697 (2018) (granting certiorari in a *cy pres*-only class action settlement case); *Marek v. Lane*, 571 U.S. 1003 (2013) (Roberts, C.J., statement respecting denial of certiorari) (recognizing need to address "fundamental concerns" surrounding use of *cy pres*).

Whatever the contours of appropriate *cy pres* relief in a class action settlement might be (if any), it cannot be that a *cy pres*-only deal like this one passes muster under Rule 23. The Court has a duty to the absent class members in the present posture of this case that necessitates rejecting this settlement, sending the parties back to divide the settlement proceeds such that unnamed class members get a direct benefit from the millions of dollars that Defendant Google has put on the table to resolve the class claims in this case.

ARGUMENT

I. THE COURT SHOULD REJECT THE SETTLEMENT, WHICH PROVIDES NO DIRECT BENEFIT TO CLASS MEMBERS

A. THE PROPOSED SETTLEMENT DIVERTS ALL CASH COMPENSATION TO *CY PRES* RECIPIENTS, NAMED PLAINTIFFS, AND CLASS COUNSEL

The proposed settlement generates a $13 million cash fund, but instead of sending cash compensation to the class members whose claims are being released, the settlement is structured to only pay third-party *cy pres* recipients, class counsel, and class representatives. The settlement sends ~$8.75 million to selected *cy pres* recipients, ~$4 million to class counsel, and ~$91 thousand to class representatives. Absent class members receive nothing from the $13 million cash fund. Yet it is the absent class members who are being certified together into a class solely so their claims, both injunctive *and* monetary, can be bargained away in order to warrant a $13 million pay out by Defendant Google. Those "'settlement funds are the property of the class[.]'" *In re BankAmerica Corp. Sec. Litig.,* 775 F.3d 1060, 1064 (8th Cir. 2015); *see also Klier v. Elf Atochem N. Am., Inc.*, 658 F.3d 468, 474 (5th Cir. 2011) ("[S]ettlement-fund proceeds, having been generated by the value of the class members' claims, belong solely to the class members."). Unlike settlements that use *cy pres* solely to distribute leftover funds or uncashed checks after class members have received their share of the funds, this *cy pres*-only settlement makes no attempt to send *any* portion of the significant cash fund to the class members to whom the money properly belongs. *Cf. In re Easysaver Rewards Litig.*, 906 F.3d 747, 761 (9th Cir. 2018) (recognizing use of *cy pres* for distributing leftover or "unclaimed" funds).

B. ANY PURPORTED INJUNCTIVE RELIEF IS ILLUSORY

Settlement proponents cannot rely on purported injunctive relief to explain away the failure to provide direct monetary compensation to unnamed class members here because the purported injunctive relief plainly reiterates terms that Google already agreed

to when it entered an "Assurance of Voluntary Compliance" in 2013 with 39 state attorneys general (the "AG Assurance"). *See* Dkt. 186 at 78–90. The settlement proposes that Google will (1) destroy all "Acquired Payload Data"; (2) not collect and store "Payload Data" without consent; (3) comply with the privacy program described in the AG Assurance; and (4) maintain educational resources instructing users on encrypting wireless networks and removing networks from Google's location services. Dkt. 166-1 at 19–20. But these are the terms to which Google already committed itself in settling with state Attorneys General. In the AG Assurance, using almost identical terms, Google committed to: (1) delete or destroy all "Payload Data"; (2) not collect and store "Payload Data" for use in any product or service without notice and consent; (3) maintain a privacy program as set forth in the AG Assurance; and (4) implement a public service and educational campaign. Dkt. 186 at 78–83.

There can be no question that at the time of the settlement, Google had already agreed (through the AG Assurance) to the same injunctive provisions that are now presented to the Court as offering independent settlement value. There is no basis for treating these reiterated promises as having independent value here, especially given that the promises were previously made to government enforcement entities. *See, e.g.*, *In re Prudential Ins. Co. Am. Sales Practice Litig. Agent Actions*, 148 F.3d 283, 338 (3d Cir. 1998) (error for district court to fail "to distinguish between those benefits created by the [governmental agencies] and those created by class counsel" (cited favorably by *In re Bluetooth Headset Prods. Liab. Litig.*, 654 F.3d 935, 943 (9th Cir. 2011)).

Proponents cannot evade the reality of the injunctive relief's overlap here by pointing to the extension of certain existing promises into future years. As an initial matter, the promises in the AG Assurance to delete or destroy the "Payload Data" and refrain from collecting such data in the future came without an expiration date. As for the privacy program and educational commitments, Google had already agreed in the AG Assurance to maintain a privacy program until 2023 and create educational resources.

Proponents face a stiff burden in trying to demonstrate that class members materially benefit from the settlement's promise to extend the duration of the existing privacy program and educational resources for two years. First, multiple provisions of the AG Assurance Privacy Program require mere delivery of the AG Assurance to management and supervisors within 30 days of its effective date. Dkt. 186 at 80. There can be no material value from reiteration of these historic promises requiring delivery of a document almost a decade ago. Second, multiple provisions of the AG Assurance Privacy Program relate to Google's internal practices of staying informed about privacy concerns. These promises include providing regular employee training about user privacy, establishing a "Privacy Week" providing programs internally on privacy, taking steps to hire third-parties with capability of maintaining user privacy, creating a program for responding to events of unauthorized collection or disclosure, and designating an employee to conduct periodic reviews. These provisions may have been novel, material, and valuable when originally entered into in 2013. But intervening years have changed the privacy landscape and fundamentally altered how large technology companies, and in particular Google, must approach user-privacy questions. The drumbeat of high-profile, critical articles about Google's handling of privacy and user information alone have placed privacy in the technology sector at the forefront of the public discussion.[2] There can be little doubt that now, with privacy concerns sitting front and center for consumers and for Silicon Valley as a whole, Google will maintain privacy training, privacy advertising, and management-level attention to questions of user privacy and identified

[2] *See, e.g.*, Geoffrey A. Fowler, *Goodbye, Chrome: Google's Web Browser Has Become Spy Software*, Wash. Post (June 21, 2019, 5:00 AM), https://www.washingtonpost.com/technology/2019/06/21/google-chrome-has-become-surveillance-software-its-time-switch/; Ryan Nakashima, *AP Exclusive: Google Tracks Your Movements, Like It or Not*, AP News (Aug. 13, 2018), https://apnews.com/828aefab64d4411bac257a07c1af0ecb/AP-Exclusive:-Google-tracks-your-movements,-like-it-or-not.

instances of unauthorized collection or disclosure; proponents have certainly failed to carry their burden of explaining how extension of general privacy promises made almost a decade ago provide material value in the current environment.

Not only is the relief already in place, and likely to stay in place as a matter of necessity in light of the current privacy environment, but it is also forward looking and not designed to benefit class members any more than the public at large. Courts have repeatedly recognized the "obvious mismatch" between injunctive relief consisting of only future disclosures and a class comprised of those alleging *past* harm. *See Koby v. ARS Nat'l Servs., Inc.*, 846 F.3d 1071, 1079 (9th Cir. 2017); *see also Pearson v. NBTY, Inc.*, 772 F.3d 778, 786 (7th Cir. 2014) ("future purchasers are not members of the class, defined as it is as consumers who have purchased [defendant's product]."); *In re Dry Max Pampers Litig.*, 724 F.3d 713, 720 (6th Cir. 2013) ("'The fairness of the settlement must be evaluated primarily based on how it *compensates class members*'—not on whether it provides relief to other people[.]"). The Ninth Circuit noted in *Koby* that the defendant's promise to make certain disclosures in the future was "worthless to most members of the class" because the relief was not designed to specifically benefit "those who had suffered a past wrong." 846 F.3d at 1079. The court also noted that "[b]ecause the settlement gave the absent class members nothing of value, they could not fairly or reasonably be required to give up anything in return." *Id*. at 1080. Class members who were harmed by the alleged wrongful conduct here receive no material value from the nominal extension of resources fashioned to benefit the general public.

Without receiving any of the $13 million cash fund or any meaningful injunctive relief, class members receive no direct benefit from the settlement. The settlement's broad release therefore extinguishes class members' claims in exchange for nothing.

C. THIS *CY PRES*-ONLY SETTLEMENT FAILS TO COMPORT WITH THE MANDATES OF RULE 23(e)

District courts have "a fiduciary duty to look after the interests of … absent class

members." *Allen v. Bedolla*, 787 F.3d 1218, 1223 (9th Cir. 2015). The district court's "inquiry is not a casual one; the uncommon risks posed by class action settlements demand serious review by the district court." *In re Volkswagen "Clean Diesel" Mktg., Sales Practices, & Prods. Liab. Litig.*, 895 F.3d 597, 610 (9th Cir. 2018). This is particularly true "[w]hen, as here, the settlement was negotiated before the district court certified the class." *Id.* at 610–11; *see also In re Bluetooth,* 654 F.3d at 946 ("Prior to formal class certification, there is an even greater potential for a breach of fiduciary duty owed the class during settlement."). A settlement proposed before class certification "must withstand an even higher level of scrutiny for evidence of collusion or other conflicts of interest than is ordinarily required under Rule 23(e) before securing the court's approval as fair." *In re Bluetooth*, 654 F.3d at 946.

Given the court's fiduciary duty to protect absent class members, as well as the extensive interest that the use of *cy pres* has generated in courts across the country, including from the Supreme Court, this Court should look critically at the settlement here, recognize that it offers no direct compensation to unnamed class members in exchange for the release of their claims, and on that basis reject the settlement as insufficient under Rule 23(e), sending the parties back to craft a way to put the millions of dollars here into the hands of consumers.

1. Courts Have Continued To Criticize The Use Of *Cy Pres* In Class Action Settlements, And In Particular, *Cy Pres*-Only Settlements

Cy pres settlements "'have been controversial in the courts of appeals.'" *In re BankAmerica*, 775 F.3d at 1063. "The opportunities for abuse have been repeatedly noted." *Klier*, 658 F.3d at 480 (Jones, J., concurring). And circuit judges have explained that, "[w]hatever the superficial appeal of *cy pres* in the class action context may have been, the reality of the practice has undermined it." *Id*. at 481.

But it is not only the courts of appeals that have recognized the concerns surrounding the use of *cy pres* in this context. Supreme Court Justices have weighed in

on the issue, recognizing the controversy and questions created by the importation of the *cy pres* doctrine into the class action settlement context. In 2013, the Court denied certiorari in *Marek v. Lane*, a *cy pres*-only settlement case arising out of the Ninth Circuit. 571 U.S. 1003 (2013). But Chief Justice Roberts issued a statement along with the Court's denial noting the existence of "fundamental concerns surrounding the use of [*cy pres*] remedies in class action litigation, including when, *if ever*, such relief should be considered; how to assess its fairness as a general matter; … what the respective roles of the judge and parties are in shaping a *cy pres* remedy; … and so on." *Id.* (Roberts, C.J., statement respecting denial of certiorari) (emphasis added).

And in its last term, the Court granted certiorari in *Frank v. Gaos*, a Ninth Circuit case with factually similar issues, challenging whether a *cy pres*-only settlement could be "fair, reasonable, and adequate" under Rule 23(e). 138 S. Ct. 1697 (2018). The Court did not reach the merits of the *cy pres* question, ultimately vacating the Ninth Circuit's opinion and remanding to the lower courts to address a question of standing.[3] But Justice Thomas dissented, stating that he would have reached the merits and reversed. *Frank v. Gaos*, 139 S. Ct. 1041, 1046 (2019) (Thomas, J., dissenting). Justice Thomas stated that he would have held "that the class action should not have been certified, and the settlement should not have been approved" because class members "received no settlement fund, no meaningful injunctive relief, and no other benefit whatsoever in exchange for the settlement of their claims[.]" *Id.* at 1048. He further stated that "*cy pres* payments are not a form of relief to the absent class members and should not be treated as such (including when calculating attorney's fees)." *Id.* at 1047.

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[3] The case is currently pending at the U.S. District Court, Northern District of California. *See* No. 5:10-CV-04809.

2. *Cy Pres*-Only Settlements Cannot Be Approved As Fair, Reasonable, And Adequate Under Rule 23(e) Because The Class Receives No Direct Benefit

In its Rule 23(e) fairness determination, this Court must consider that a *cy pres*-only settlement, such as the settlement at hand, provides no direct benefit to class members. "Rule 23 of the Federal Rules of Civil Procedure is meant to provide a vehicle to compensate class members and to resolve disputes." *In re Thornburg Mortg., Inc. Sec. Litig.*, 885 F. Supp. 2d 1097, 1105 (D.N.M. 2012). And Rule 23 is to be "applied with the interests of absent class members in close view." *Amchem Prod., Inc. v. Windsor*, 521 U.S. 591, 629 (1997). It is therefore critical that any class action settlement under Rule 23(b)(3) include a direct benefit to the class—otherwise, the class action being certified and judicially approved serves only to allow defendants to aggregate claims solely for purposes of extinguishing them.[4]

Yet *cy pres* distributions themselves do not directly benefit the class; in the place of the traditional direct benefit to the class in exchange for the extinguishment of their claims, *cy pres* deals substitute an indirect benefit. *See, e.g., Lane v. Facebook, Inc.*, 696 F.3d 811, 819 (9th Cir. 2012) ("A cy pres remedy … is a settlement structure wherein class members receive an indirect benefit … rather than a direct monetary payment."). And courts have readily noted that the "indirect benefit" received by the class from *cy pres* in place of direct compensation "is at best attenuated and at worse illusory." *In re Baby Prods. Antitrust Litig.*, 708 F.3d 163, 173 (3d Cir. 2013).

Cy pres's diversion of settlement funds away from consumers is particularly concerning because consumers already face disadvantages in the class action settlement

[4] Rule 23(b)(3) class actions present different considerations than those under (b)(1) and (b)(2). Rule 23(b)(3) actions are focused specifically on "individualized monetary claims," whereas under (b)(1) or (b)(2), "individual adjudications [are] impossible or unworkable" or "the relief sought must perforce affect the entire class at once." *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 361–62 (2011).

process. Most notably, in dividing settlement funds that are obtained via the release of class members' claims, the interests of class members and others often diverge. Class counsel has an incentive to obtain a large fee, causing potential conflicts with the class. *See In re HP Inkjet Printer Litig.*, 716 F.3d 1173, 1178 (9th Cir. 2013). And *cy pres* settlement arrangements further the existing "conflict of interest between class counsel and their clients because the inclusion of a *cy pres* distribution may increase a settlement fund, and with it attorneys' fees, without increasing the direct benefit to the class." *In re Baby Prods.*, 708 F.3d at 173; *see also Lane*, 696 F.3d at 834 (Kleinfeld, J. dissenting) (noting the "incentive for collusion" in *cy pres* class settlements; "the larger the *cy pres* award, the easier it is to justify a larger attorneys' fees award.").

And defendants are not incentivized to correct this conflict. "[A] defendant who has settled a class action lawsuit is ultimately indifferent to how a single lump-sum payment is apportioned between the plaintiff's attorney and the class." William D. Henderson, *Clear Sailing Agreements: A Special Form of Collusion in Class Action Settlements*, 77 TUL. L. REV. 813, 820 (2003). The fee and class award "represent a package deal," *Johnston v. Comerica Mortg. Corp.*, 83 F.3d 241, 246 (8th Cir. 1996), with a defendant "'interested only in the bottom line: how much the settlement will cost him.'" *In re Sw. Airlines Voucher Litig.*, 799 F.3d 701, 712 (7th Cir. 2015). Defendants may actually prefer *cy pres* as opposed to direct relief to the class. *See, e.g., Lane*, 696 F.3d at 834 (Kleinfeld, J. dissenting) ("A defendant may prefer a *cy pres* award ... for the public relations benefit"); *S.E.C. v. Bear, Stearns & Co., Inc.*, 626 F. Supp. 2d 402, 415 (S.D.N.Y. 2009) (*cy pres* may "actually benefit[] the defendant rather than the plaintiffs," as "defendants reap goodwill from the donation of monies to a good cause"); *see also Google and Facebook's New Tactic in the Tech Wars*, Fortune (July 30, 2012) (noting existing corporate donations to many proposed *cy pres* recipients and support on cases and issues those recipients often give to donating corporations).

* * *

Where a settlement generates a $13 million cash fund and releases millions of class members claims, but benefits only third-party organizations, class counsel, and a select few members of the class, the Court should find that such a settlement is not fair, reasonable, and adequate under Rule 23(e). In the absence of a direct benefit to the class, a proposed *cy pres*-only settlement like this one cannot pass muster under basic conceptions of fairness, much less Rule 23's specific requirements. A tenuous, illusory benefit from a third-party distribution does not match the purposes of Rule 23, and should not be blessed as serving the interests of the class or being fair, reasonable, and adequate.

CONCLUSION

The Court should deny final approval to the proposed settlement.

RESPECTFULLY SUBMITTED this 20th day of January, 2020.

MARK BRNOVICH
ATTORNEY GENERAL

/s/ Drew C. Ensign
Drew C. Ensign
Deputy Solicitor General
Office of the Arizona Attorney General
2005 N. Central Ave.
Phoenix, Arizona 85004
602-542-5025
Drew.Ensign@azag.gov

ALSO SUPPORTED BY:

STEVE MARSHALL
Attorney General of Alabama

KEVIN G. CLARKSON
Attorney General of Alaska

LESLIE RUTLEDGE
Attorney General of Arkansas

LAWRENCE G. WASDEN
Attorney General of Idaho

CURTIS T. HILL, JR.
Attorney General of Indiana

JEFF LANDRY
Attorney General of Louisiana

ERIC SCHMITT
Attorney General of Missouri

DAVE YOST
Attorney General of Ohio

CERTIFICATE OF SERVICE

I hereby certify that on this 20th day of January, 2020, I electronically filed the foregoing with the Clerk of the Court for the United States District Court for the Northern District of California using the CM/ECF filing system. Counsel for all parties are registered CM/ECF users and will be served by the CM/ECF system pursuant to the notice of electronic filing.

/s/ Drew C. Ensign
Drew C. Ensign