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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

IN RE: GOOGLE LOCATION HISTORY
LITIGATION

Case No. 5:18-cv-05062-EJD

**SUPPLEMENTAL OBJECTION OF
JOHN ANDREN, MATTHEW LILLEY,
AND JOSEPH S. ST. JOHN**

JOHN ANDREN, MATTHEW LILLEY, and
JOSEPH S. ST. JOHN,

Time: 9:00 A.M.
Date: April 18, 2024
Judge: Hon. Edward J. Davila
Courtroom: 4, 5th Floor

Objectors.

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INTRODUCTION

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2 On March 4, 2019, class members John Andren, Matthew Lilley, and Joseph St. John (collectively,
3 “Objectors”) filed a timely objection to the proposed settlement and attorneys’ fee request in this action.
4 Objectors reserved the right to supplement their objection after Plaintiffs filed their motion for final approval.
5 *See* Dkt. 354 at 20. This was because Plaintiffs had not proposed specific awards for the proposed *cy pres*
6 recipients by the objection deadline, and it was not clear if the list of proposed recipients was final, as Plaintiffs
7 had already added new recipients after the settlement was finalized. *See, e.g.*, Dkt. 352 at 1 (February 14 filing
8 noting new *cy pres* proposal from UCLA). Objectors now file this supplemental objection to address the
9 proposed *cy pres* distribution and points raised in plaintiffs’ motion.

10 Plaintiffs’ proposed distribution would give tens of millions of dollars that should go to the class to
11 organizations that engage in work that a substantial percentage of the class would not want to support (such
12 as “racial justice”—a codeword for support for racial discrimination and anti-Semitic policies—and promoting
13 abortion); that target for support only narrow subsets of the class (*e.g.*, computer science undergraduates or
14 “historically marginalized communities”) or a population not included in the class at all (*e.g.*, a target population
15 that is “global in scope” or “everyone in the country”); and that have conflicts of interest that made the
16 organizations undeservingly attractive to the parties soliciting and evaluating the proposals. Indeed, Plaintiffs
17 propose directing twice as much as money as to any other organization to three organizations that all engage
18 in extreme left-wing political and ideological work. All three propose using the funds to support a target
19 population that is not aligned with the class, and two of those three have conflicts of interest with the counsel
20 for both parties in the form of co-counsel and *pro bono* relationships. *See* Dkt. 354 at 15; Dkt. 349 at 2; Dkt. 332
21 at 1-2. While *cy pres* itself is problematic in class action settlements, and Objectors preserve their argument that
22 the Ninth Circuit should set new precedent on a number of related legal issues as described in their objection,
23 this Court can apply existing Circuit precedent to reject the proposed settlement because cash distribution is
24 feasible or because class certification is inappropriate, or the Court can reject the settlement or its proposed
25 recipients as improper due to the numerous deficiencies Objectors have identified.

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I. The proposed recipients are so wholly inappropriate that the settlement cannot be approved under Rule 23(e)(2)(c)(ii) or, in the alternative, the proposed recipients cannot be selected.

Plaintiffs attempt to gloss over the impropriety of many of the proposed *cy pres* recipients by claiming that they merely “publicly espouse an interest in promoting racial, social, and environmental justice,” Dkt. 356 at 23, when, in fact, several of the proposals would use the funds to unfairly discriminate against Asian and Caucasian individuals on the basis of their race; would support organizations with deep and well-documented anti-Semitism; or would support increasing the number of abortions. Millions upon millions of class members—including Objectors—would be shocked or at least find it unsettling that funds that rightly belong to them are being used for such controversial purposes.

Plaintiffs’ claim that the proposed *cy pres* will benefit the class overlooks not only the deeply troubling nature of the organizations but also that many of their proposals for using the *cy pres* money are not targeted to benefit the class of Google users. Objectors detail these concerns in the Declaration of Theodore H. Frank, Dkt. 355 ¶¶ 7-35. Those concerns are identified in the chart below for easier reference, with the organizations in the same order as the allocation proposal (Dkt. 356-1):

Organization	%	Amount	Conflict of Interest	Mismatched Target Beneficiary	Documented Anti-Semitism or Racism	Extreme Left-Wing Ideological Work*	Failed to Provide Full Information
Berkman Klein Center for Internet & Society, Harvard	4%	\$1,500,000	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>		<input checked="" type="checkbox"/>
MIT Internet Policy Research Initiative	4%	\$1,500,000	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>		
New York University’s Information Law Institute	1%	\$404,790	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>		
Yale Law School’s Information Society Project	4%	\$1,500,000	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	
Fordham University Center on Law and Information	2%	\$800,000	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>			
Center on Privacy & Tech. at Georgetown Law	4%	\$1,500,000	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>		<input checked="" type="checkbox"/>	

Organization	%	Amount	Conflict of Interest	Mismatched Target Beneficiary	Documented Anti-Semitism or Racism	Extreme Left-Wing Ideological Work*	Failed to Provide Full Information
UCLA Institute for Technology, Law & Policy	4%	\$1,500,000	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>		
The Markup	7%	\$3,000,000		<input checked="" type="checkbox"/>			
Internet Archive	5%	\$2,000,000		<input checked="" type="checkbox"/>			
ACLU Speech, Privacy, and Technology Project	14%	\$6,000,000	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>		<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>
ACLU of N. Cal. Tech. & Civil Liberties Program	4%	\$1,800,000	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>		<input checked="" type="checkbox"/>	
Center for Democracy & Technology	6%	\$2,500,000	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>		<input checked="" type="checkbox"/>	
ConnectSafely	1%	\$350,000		<input checked="" type="checkbox"/>			
Electronic Frontier Foundation	14%	\$6,000,000	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>		<input checked="" type="checkbox"/>	
FPF Education & Innovation Foundation	4%	\$1,500,000	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>			
Free Press	4%	\$1,500,000	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>		<input checked="" type="checkbox"/>	
Privacy Rights Clearinghouse	1%	\$350,000		<input checked="" type="checkbox"/>			<input checked="" type="checkbox"/>
Data & Society Research Initiative	4%	\$1,500,000		<input checked="" type="checkbox"/>		<input checked="" type="checkbox"/>	
National Cybersecurity Alliance	1%	\$350,000		<input checked="" type="checkbox"/>			
Electronic Privacy Information Center (EPIC)	4%	\$1,500,000		<input checked="" type="checkbox"/>			<input checked="" type="checkbox"/>
Rose Foundation	13%	\$5,589,243		<input checked="" type="checkbox"/>		<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>

* E.g., abortion, promotion of racial discrimination, transgenderism.

1 **II. None of Plaintiffs’ excuses for the all-*cy pres* settlement are legally justified.**

2 Plaintiffs are wrong to prioritize their personal view that class members must spend their money “to
3 do something” to minimize future privacy violations with the settlement funds. Dkt. 356 at 7. The settlement
4 funds are compensation for past harm, not a down payment toward future action that class members must
5 fund to protect themselves. Indeed, one of the benefits of a class action is that the legal action is itself intended
6 to deter future wrongdoing by the defendant who had to pay a hefty settlement or judgment. Class members
7 almost certainly would prefer to receive cash—which they can use in any way they like—than to be forced to
8 fund organizations to do work that is not even intended to help them in many cases, or they might disagree
9 with, or that may not be efficiently used, in any event. *See, e.g.*, Dkt. 355 ¶ 16 (objecting to Future Privacy
10 Forum’s proposal to use their distribution toward “fringe benefits” for staff); *id.* ¶ 17 (objecting to Free Press’s
11 proposal to use their distribution toward general expenses, which would mostly be staff payroll).

12 As Objectors demonstrated by discussing and citing countless other settlements with equal or lower
13 ratios of settlement funds to class members, Plaintiffs are demonstrably wrong that class members would not
14 see any compensation unless the funds are “indirectly” used to benefit them by funding *cy pres*. Numerous
15 settlements with similar or lower ratios have paid class members material amounts through a claims-made
16 process, and new electronic payment methods make such distribution relatively easy and inexpensive to
17 administer. Dkt. 355 ¶¶ 35-39; Dkt. 354 at 7-11.

18 The cases that Plaintiffs cite to support their argument that the *pro rata* recovery here is *de minimis* and
19 thus justifies *cy pres* distribution are all inapposite. Plaintiffs failed to inform that Court that after *In re Google*
20 *Referrer Header Privacy Litig.*, 869 F.3d 737 (9th Cir. 2017), was vacated and remanded, the parties reached an
21 amended settlement that distributed about \$7.70 in cash to each claiming class member after the parties had
22 argued for years that it was economically infeasible to distribute a fund to a class of Google users totaling 193
23 million through a claims process. Three of the remaining cases are from over a decade ago, before the advent
24 of inexpensive, electronic financial transfers made distribution of smaller amounts feasible. *See* Dkt. 356 at 16-
25 17 (citing *Six (6) Mexican Workers v. Ariz. Citrus Growers*, 904 F.2d 1301 (9th Cir. 1990); *In re Google Buzz Privacy*
26 *Litig.*, No. 10-00672, 2011 WL 7460099 (N.D. Cal. June 2, 2011); *In re Netflix Privacy Litig.*, No. 11-0379, 2013
27 WL 1120801 (N.D. Cal. Mar. 18, 2013)). And the final case involved only a secondary distribution as *cy pres*
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1 where the class had received a cash distribution. *Id.* (citing *In re Easysaver Rewards Litig.*, 906 F.3d 747 (9th
2 Cir. 2018)).

3 Google’s claim that it is infeasible to identify the individuals who fit the class definition and thus
4 “unusually difficult if not impossible, to verify the validity of theoretical claims based on self-identification” is
5 self-serving and no different than in any class action where, for example, a user purchased a product subject
6 to a class action settlement with cash or without a saved receipt. Google’s concern does not appear to be based
7 on any dispute that Google stored users’ location history even when the location history setting was disabled.
8 *See* Dkt. 329. Its concern instead seems to be that Google might not be able to specifically connect a user’s real
9 personal identifying information with location history data that it has stored without previously deleting. But
10 that standard is not required. Class members either generally are aware of whether their location history is
11 disabled or can review their account information to determine this information and when it was turned off or
12 on. Given the lack of dispute that Google stored users’ location history even when that setting was disabled,
13 all that is needed for class members to self-identify for the purposes of a claims process—as is standard in
14 claims processes—is that the location history setting on their account was disabled. They can do so here,
15 undermining Google’s last-minute infeasibility argument.

16 Plaintiffs devote a short paragraph to identifying only three small ways in which the injunctive relief in
17 the settlement differs from that required by Google’s settlement with the State Attorneys General. Dkt. 356 at
18 9. Their main argument appears to be their unsupported claim that their “negotiations that led to this
19 Settlement’s non-monetary terms” were happening before the State AG settlement. That vague assertion
20 doesn’t change the fact that the injunctive relief offers no incremental value to the class and, indeed, Plaintiffs
21 offer no proposed valuation of the injunction, nor do they suggest any way for the Court to calculate its value
22 for purposes of either settlement approval or attorneys’ fees.

23 Plaintiffs’ argument that class members could opt out if they did not wish to support the *cy pres*
24 recipients is inconsistent with precedent and dishonest with respect to the facts in this case. The deadline for
25 opting out was March 4. Plaintiffs were continuing to modify the proposed *cy pres* list in February and partially
26 disclosing the parties’ conflicts on a seeming ongoing basis in the lead up to the deadline. Class members were
27 not informed of the parties’ proposal for *cy pres* distribution until after the objection deadline when, for the
28 first time, the parties publicly revealed the proposed allocations to a list of recipients. *See Phillips Petroleum Co.*

1 *v. Shutt*s, 472 U.S. 797, 812 (1985) (due process requires that absent class members “must receive notice plus
 2 an opportunity to be heard and participate in the litigation”). Moreover, even if the *cy pres* distribution had been
 3 finalized in the settlement agreement and disclosed to the class before the deadline, opt out is an insufficient
 4 remedy. Outside the Rule 23-context, and as the Supreme Court held in *Janus* and Objectors preserve to raise
 5 in any appeal, forced payments, such as the *cy pres* payment of funds that belong to the class members here,
 6 require the “affirmative[] consent” of the class member. *Janus v. Am. Fed’n of State, Cty. & Mun. Employees*, 138
 7 S. Ct. 2448, 2486 (2018); *see also Oxford Health Plans LLC v. Sutter*, 569 U.S. 564, 574 (2013) (Alito J., concurring)
 8 (failure to respond to “opt-out notices” is not consent). “Ascribing any meaning to silence in response to
 9 publication notice is untenable.” Debra Lyn Bassett, *Class Action Silence*, 94 Boston U. L. Rev. 1781, 1799 (2014);
 10 *accord Redman v. RadioShack Corp.*, 768 F.3d 622, 628 (7th Cir. 2014).

11 **III. Plaintiffs offer no support for their novel argument that a claims process might be invalid**
 12 **under Rule 23(e)(2)(D).**

13 Finally, Plaintiffs’ absurd suggestion that a claims process would violate the Rule 23(e)(2)(D)
 14 requirement that class members be treated equitably relative to each other would up-end the entire class action
 15 system. Unsurprisingly, they cite zero authority for this argument, and it’s obviously wrong. A claims process
 16 treats every class member equitably relative to each other because every class member receives notice through
 17 the same notice plan and has the same opportunity to claim their *pro rata* portion of the settlement through the
 18 same claims process. Rule 23 requires equal treatment, not equal outcome. Thus, in some class actions, the
 19 settlement might provide a certain amount of compensation based on the number of purchases a consumer
 20 made or another calculation to determine the amount of harm each class member incurred based on a measure
 21 that applies equally to every class member. Class members receive equal treatment but not necessarily an equal
 22 recovery. So, too, with a claims process that treats all class members equitably, such as that proposed by
 23 Objectors.

24 **CONCLUSION**

25 The court should deny final approval of the settlement, either because the settlement is unfair because
 26 distribution is feasible, or because class certification is inappropriate. If the settlement is approved, class
 27 counsel is not entitled to fees, and, at a minimum, not entitled to the 30% it has requested.
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1 Dated: April 8, 2024

Respectfully submitted,

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PROOF OF SERVICE

I hereby certify that on this day I electronically filed this Objection using the CM/ECF filing system thus effecting service of such filing on all ECF registered attorneys in this case.

DATED this 8th day of April, 2024.

/s/ Theodore H. Frank
Theodore H. Frank

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