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15 UNITED STATES DISTRICT COURT  
16  
17 NORTHERN DISTRICT OF CALIFORNIA  
18  
19 SAN JOSE DIVISION

20 IN RE: GOOGLE LOCATION HISTORY  
LITIGATION

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

**NOTICE OF MOTION AND MOTION  
FOR FINAL APPROVAL OF CLASS  
ACTION SETTLEMENT;  
MEMORANDUM OF POINTS AND  
AUTHORITIES IN SUPPORT  
THEREOF**

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

26 [Declaration of Cameron R. Azari, Esq. and  
27 Joint Declaration of Tina Wolfson and  
Michael W. Sobol, filed concurrently  
herewith]

1 **NOTICE OF MOTION AND MOTION**

2 TO ALL PARTIES AND THEIR RESPECTIVE ATTORNEYS OF RECORD:

3 **PLEASE TAKE NOTICE** that on April 18, 2024, at 9:00 a.m., in Courtroom 4 of the  
4 United States District Court for the Northern District of California, Robert F. Peckham Federal  
5 Building & United States Courthouse, 280 South First Street, San Jose, California 95113, the  
6 Honorable Edward J. Davila presiding, Plaintiffs<sup>1</sup> will and hereby do move for an order pursuant  
7 to Rule 23 of the Federal Rules of Civil Procedure: (i) granting final approval of the proposed  
8 Class Action Settlement and Release Agreement (Dkt. 328-1) (the “Settlement” or “Settlement  
9 Agreement”); (ii) certifying the Settlement Class; (iii) overruling the objections of objectors John  
10 Andren, Matthew Lilley, and Joseph St. John (Dkt. 354); and (iv) entering final judgment.

11 Plaintiffs’ motion is based upon this Notice of Motion and Motion, the Memorandum of  
12 Points and Authorities set forth below, the Joint Declaration of Tina Wolfson and Michael W.  
13 Sobol in Support of Plaintiffs’ Motion for Final Approval of Proposed Class Action Settlement  
14 (“Joint Declaration”), the Settlement Agreement, the Declaration of Cameron R. Azari, Esq.  
15 (“Azari Declaration”), the pleadings and records on file in this Action, and other such matters and  
16 argument as the Court may consider at the hearing of this Motion.

17 **STATEMENT OF ISSUES TO BE DECIDED**

- 18 1. Whether the Settlement is fair, reasonable, and adequate and should be approved  
19 under Rule 23(e) and controlling Ninth Circuit authority.
- 20 2. Whether the Settlement Class should be certified under Rules 23(a) and 23(b)(3).
- 21 3. Whether the appointment of Ahdoot Wolfson, P.C. and Lief Cabraser Heimann  
22 & Bernstein LLP as Class Counsel should be affirmed.
- 23 4. Whether the appointment of Plaintiffs Napoleon Patacsil, Noe Gamboa, and  
24 Michael Childs as Settlement Class Representatives should be affirmed.

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27 \_\_\_\_\_  
28 <sup>1</sup> All capitalized words and terms are defined in the Settlement Agreement (Section II) unless otherwise defined herein.

1 Dated: March 25, 2024

Respectfully submitted,

2  
3 By: /s/ Tina Wolfson

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**TABLE OF CONTENTS**

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

|  | <b>Page</b> |
|--|-------------|
| NOTICE OF MOTION AND MOTION.....   | ii          |
| STATEMENT OF ISSUES TO BE DECIDED .....  | ii          |
| I. INTRODUCTION .....  | 1           |
| II. BACKGROUND .....   | 1           |
| A. Procedural History .....  | 1           |
| B. Summary of the Settlement .....   | 2           |
| C. Class Notice and CAFA Notice.....   | 5           |
| D. Attorneys’ Fees and Expenses, and Plaintiff Service Awards .....  | 5           |
| E. Class Member Response.....  | 6           |
| III. ARGUMENT .....  | 6           |
| A. The Court Should Certify the Settlement Class .....   | 6           |
| 1. Rule 23(a): Numerosity, Commonality, Typicality, and Adequacy<br>Are Satisfied .....                          | 6           |
| 2. Rule 23(b)(3): Predominance and Superiority Are Satisfied .....   | 10          |
| 3. Rule 23(g): The Court Should Reaffirm the Appointment of Class<br>Counsel and the Class Representatives ..... | 11          |
| B. The Court Should Grant Final Approval to the Settlement.....  | 12          |
| 1. Rule 23(e)(2)(A): The Class Representatives and Class Counsel<br>Have Adequately Represented the Class.....   | 13          |
| 2. Rule 23(e)(2)(B): The Proposed Settlement Was Negotiated At<br>Arm’s Length.....                              | 14          |
| 3. Rule 23(e)(2)(C): The Relief Provided for the Class is Adequate .....   | 14          |
| a. <i>23(e)(2)(C)(i): Costs, Risks, and Delay of Trial and Appeal</i> .....                                      | 14          |
| b. <i>23(e)(2)(C)(ii): Effectiveness of Distribution</i> .....   | 16          |
| i. <i>Cy Pres Awards are Compensation to the Class</i> .....   | 17          |
| ii. <i>Cy Pres Awards Do Not Violate the First<br/>                    Amendment</i> .....                       | 20          |
| iii. <i>The Proposed Cy Pres Recipients Are Appropriate</i> .....  | 21          |
| c. <i>23(e)(2)(C)(iii)Terms of Proposed Attorneys’ Fees</i> .....  | 23          |
| d. <i>23(e)(2)(C)(iv)Agreements Under Rule 23(e)(3)</i> .....  | 24          |
| 4. Rule 23(e)(2)(D): The Proposed Settlement Treats Class Members<br>Equitably Relative to Each Other. ....      | 24          |
| C. The Court Should Grant Class Counsel’s Fee Request .....  | 25          |
| IV. CONCLUSION .....   | 25          |

**TABLE OF AUTHORITIES**

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
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15  
16  
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21  
22  
23  
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25  
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28

| <b>Cases</b>  | <b>Page(s)</b> |
|---|----------------|
| <i>Abante Rooter &amp; Plumbing, Inc. v. Pivotal Payments Inc.</i> ,<br>No. 16-05486, 2018 WL 8949777 (N.D. Cal. Oct. 15, 2018) ..... | 10             |
| <i>Amchem Prods., Inc. v. Windsor</i> ,<br>521 U.S. 591 (1997) .....  | 6              |
| <i>Briseno v. Henderson</i> ,<br>998 F.3d 1014 (9th Cir. 2021) .....  | 13, 14         |
| <i>Brown v. Google, LLC</i> ,<br>No. 20-03664, 2022 WL 17961497 (N.D. Cal. Dec. 12, 2022) .....                                       | 16             |
| <i>Churchill Vill., L.L.C. v. Gen. Elec.</i> ,<br>361 F.3d 566 (9th Cir. 2004) .....  | 5              |
| <i>Dennis v. Kellogg Co.</i> ,<br>697 F.3d 858 (9th Cir. 2012) .....  | 21             |
| <i>Frank v. Gaos</i> ,<br>139 S. Ct. 1041 (2019) .....  | 1, 6, 8        |
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| <i>Harbour v. Cal. Health &amp; Wellness Plan</i> ,<br>No. 21-03322, 2024 WL 171192 (N.D. Cal. Jan. 16, 2024) .....                   | 6              |
| <i>Harris v. Quinn</i> ,<br>573 U.S. 616 (2014) .....   | 20, 21         |
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| <i>Heeger v. Facebook, Inc.</i> ,<br>509 F. Supp. 3d 1182 (N.D. Cal. Dec. 24, 2020) .....   | 15             |
| <i>Hesse v. Sprint Corp.</i> ,<br>598 F.3d 581 (9th Cir. 2010) .....  | 5              |

1 *Hughes v. Kore of Indiana Enter.*,  
731 F.3d 672 (7th Cir. 2013) ..... 8

2

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654 F.3d 935 (9th Cir. 2011) ..... 9, 14, 15

4

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906 F.3d 747 (9th Cir. 2018) ..... 17

6

7 *In re Facebook Biometric Info. Priv. Litig.*,  
522 F. Supp. 3d 617 (N.D. Cal. 2021)..... 19

8

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No. 21-15553, 2022 WL 822923 (9th Cir. Mar. 17, 2022) ..... 10

10 *In re Facebook Consumer Privacy User Profile Litig.*,  
No. 18-md-02843 (N.D. Cal.) ..... 19

11

12 *In re Google Buzz Privacy Litig.*,  
No. 10-00672, 2011 WL 7460099 (N.D. Cal. June 2, 2011) ..... 17, 23

13

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21 F.4th 1102 (9th Cir. 2021) ..... *passim*

15

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611 F. Supp. 3d 872 (N.D. Cal. 2020) ..... 18

17

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869 F.3d 737 (9th Cir. 2017) ..... 16, 22

19

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926 F.3d 539 (9th Cir. 2019) ..... 6

21

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213 F.3d 454 (9th Cir. 2000) ..... 13

23

24 *In re Netflix Privacy Litig.*,  
No. 11-00379, 2013 WL 1120801 (N.D. Cal. Mar. 18, 2013) ..... 8, 17

25

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No. 20-4699, 2022 WL 2982782 (N.D. Ill. Jul. 28, 2022) ..... 15

27

28 *In re Volkswagen “Clean Diesel” Mktg., Sales Pracs., & Prods. Liab. Litig.*,  
No. 2672, 2017 WL 672727 (N.D. Cal. Feb. 16, 2017) ..... 5, 11

1 *In re: Motor Fuel Temperature Sales Pracs. Litig.*,  
 872 F.3d 1094 (10th Cir. 2017) ..... 20

2

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 138 S. Ct. 2448 (2018) ..... 21

4

5 *Jones v. Monsanto Co.*,  
 38 F.4th 693 (8th Cir. 2022) ..... 1

6

7 *Just Film, Inc. v. Buono*,  
 847 F.3d 1108 (9th Cir. 2017) ..... 10

8

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 567 U.S. 298 (2012) ..... 21

10

11 *Lane v. Facebook, Inc.*,  
 696 F.3d 811 (9th Cir. 2012) ..... *passim*

12

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 143 S. Ct. 107 (2022) ..... 1

14

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 No. 18-05761, 2020 WL 13533045 (N.D. Cal. Feb. 12, 2020) ..... 10

16

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 663 F.3d 1034 (9th Cir 2011) ..... 13, 16, 21

18

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 772 F.3d 778 (7th Cir. 2014) ..... 25

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 No. 13-04303, 2016 WL 613255 (N.D. Cal. Feb. 16, 2016) ..... 20

22

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 944 F.3d 1035 (9th Cir. 2019) ..... 19

24

25 *Six (6) Mexican Workers v. Ariz. Citrus Growers*,  
 904 F.2d 1301 (9th Cir. 1990) ..... 17

26

27 *St. John v. Jones*,  
 143 S. Ct. 2458 (2023) ..... 1

28 *Villegas v. J.P. Morgan Chase & Co.*,  
 2012 WL 5878390 (N.D. Cal. Nov. 21, 2012) ..... 14

1 *Vizcaino v. Microsoft Corp.*,  
2 290 F.3d 1043 (9th Cir. 2002) ..... 10

3 *Wolin v. Jaguar Land Rover N. Am., LLC*,  
4 617 F.3d 1168 (9th Cir. 2010) ..... 11

5 **Other Authorities**

6 William B. Rubinstein, *Newberg on Class Actions* (5th ed. 2019 update) ..... 8, 13, 14

7 **Rules**

8 Fed. R. Civ. P. 23 ..... 13

9 Fed. R. Civ. P. 23(a) ..... 6, 7

10 Fed. R. Civ. P. 23(e) ..... 15, 24

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1 **I. INTRODUCTION**

2 Plaintiffs request that the Court grant final approval to a nationwide class action Settlement  
3 which requires Defendant Google LLC (“Defendant” or “Google”) to pay \$62 million into a non-  
4 reversionary cash fund that, if the Settlement is approved, will be used by up to 21 highly qualified,  
5 reputable, 501(c)(3) non-profit organizations for the support and defense of class members’  
6 privacy rights, and which requires meaningful prospective injunctive relief giving class members  
7 greater understanding of, and control over, their Location Information.

8 The Settlement meets all standards for class certification and final approval. At the  
9 conclusion of nationwide notice to a class including hundreds of millions of class members, only  
10 nine class members requested to exclude themselves, indicating that all but a handful of the class  
11 support approval. Only one objection was filed, by activist attorney Ted Frank on behalf of three  
12 objectors. At the core of Mr. Frank’s objection is his belief that courts may *never* approve awards  
13 of class settlement proceeds under the *cy pres* doctrine when some *de minimis* financial distribution  
14 to a fraction of the class theoretically might be possible, because Mr. Frank believes that *cy pres*  
15 awards do not provide value to the Class. Mr. Frank’s opinions are contrary to binding precedent,  
16 a fact acknowledged throughout the objection. Mr. Frank previously has sought, and been denied,  
17 a ruling to his liking by the Supreme Court in several cases in which he similarly objected to class  
18 settlements providing for *cy pres* distributions. *See e.g., In re Google Inc. St. View Elec. Commc’ns*  
19 *Litig.*, 21 F.4th 1102 (9th Cir. 2021), cert. denied *Lowery v. Joffe*, 143 S. Ct. 107 (2022); *Jones v.*  
20 *Monsanto Co.*, 38 F.4th 693 (8th Cir. 2022), cert. denied *St. John v. Jones*, 143 S. Ct. 2458 (2023);  
21 *Frank v. Gaos*, 139 S. Ct. 1041, 1046-48 (2019).

22 This Court should approve the Settlement. The Settlement provides effective, fair,  
23 reasonable, and adequate relief to the Settlement Class, which will benefit significantly from tens  
24 of millions of dollars of expenditures dedicated to serving their interests and the goals of this  
25 lawsuit, as well as from the Settlement’s injunctive relief.

26 **II. BACKGROUND**

27 **A. Procedural History**

28 Plaintiffs previously provided the Court with a detailed procedural history of this action,

1 litigated over nearly six years in the face of an aggressive defense by one of the largest and richest  
2 companies on Earth. *See* Dkt. 327 at 2-6; Dkt. 328; Dkt. 351 at 2-5; Dkt. 351-1. To briefly  
3 summarize, Plaintiffs allege that Google knowingly violated their privacy rights, and those of  
4 millions of U.S. mobile device users to amass and commercially exploit valuable and sensitive  
5 geolocation data, by tracking and storing their location data despite the relevant Google account  
6 setting—“Location History”—being disabled. *See generally* Dkt. 164-1 (First Am. Consol. Class  
7 Action Compl., “FAC”). After two rounds of motions to dismiss, this Court upheld three claims  
8 against Google based on Plaintiffs’ allegation of “continuous and comprehensive” tracking and  
9 storage of location information: (a) intrusion upon seclusion; (b) violation of the California  
10 Constitution’s right to privacy, Art. 1, § 1; and (c) unjust enrichment. Dkt. 162 at 8; *see also* Dkt.  
11 351-1 ¶¶ 7-21 (detailing Plaintiffs’ efforts to diligently investigate and assert their claims,  
12 consolidate six overlapping actions, and overcome Google’s challenges). Over the course of  
13 litigation, the parties engaged in approximately 26 months of discovery, which included serving  
14 and responding to discovery requests, engaging with experts, extensive and often contentious meet  
15 and confers, and participation in regular discovery conferences with Magistrate Judge Nathanael  
16 Cousins. Discovery was very hard-fought. *See* Dkt. 351-1 ¶¶ 22-67 (describing discovery efforts).

17       The parties agreed to the Settlement only after engaging in extensive arm’s-length  
18 negotiations over many months, including three full-day mediation sessions (on March 15, May 2,  
19 and May 24, 2022) and numerous additional discussions facilitated by experienced mediator  
20 Professor Eric D. Green, Esq.; a settlement conference with Magistrate Judge Joseph C. Spero on  
21 January 19, 2023; and strenuous direct negotiations between the parties. Through formal discovery  
22 and information exchanged during settlement negotiations, Plaintiffs and Class Counsel obtained  
23 significant information regarding the Settlement Class’s claims and developed a thorough  
24 understanding of the claims’ strengths and weaknesses at the time the Settlement was reached.

25       On November 7, 2023, the Court preliminarily certified the Settlement Class for settlement  
26 purposes and found that it would likely approve the Settlement Agreement. Dkt. 345.

27       **B. Summary of the Settlement**

28       **The Settlement Class.** The Settlement Class is defined as “all natural persons residing in

1 the United States who used one or more mobile devices and whose Location Information was  
2 stored by Google while ‘Location History’ was disabled at any time during the Class Period  
3 (January 1, 2014 through the Notice Date).” Settlement Agreement (“SA”) ¶ 28.

4 **Monetary Relief.** The Settlement creates a non-reversionary cash Settlement Fund of \$62  
5 million to pay for the costs of Notice and Settlement administration, any Court-awarded attorneys’  
6 fees and expenses, and Class Representative Service Awards, with the balance (the “Net  
7 Settlement Fund”) distributed to Court-approved *cy pres* recipients. SA ¶¶ 32, 39-42. The proposed  
8 *cy pres* recipients must be “independent 501(c)(3) organizations with a track record of addressing  
9 privacy concerns on the Internet (either directly or through grants)” and, as a condition of receiving  
10 any award, were required to provide a proposal “demonstrating and committing that they shall use  
11 the funds to promote the protection of internet privacy.” SA ¶ 41.2.

12 The Parties identified 17 proposed *cy pres* recipients in Exhibit D to the Settlement  
13 Agreement. Dkt. 328-1 at Ex. D. Since then, additional organizations have come forward, bringing  
14 the current number to 21. Each organization’s proposal was posted to the Settlement Website  
15 during the notice period, and the parties filed multiple notices (which also were posted to the  
16 website) disclosing any potentially relevant relationships the parties or their counsel may have  
17 with such recipients. Dkts. 332, 338, 349-50, 352. In accordance with the terms of the Settlement,  
18 the Parties present the Court with their joint proposal for allocation of the Net Settlement Fund in  
19 Exhibit A to this Motion. Under the Settlement, the Court, not the Parties, ultimately designates  
20 the Approved *Cy Pres* Recipients and allocates the Net Settlement Fund between them. SA ¶ 41.1.

21 The Proposed *Cy Pres* Recipients include organizations working on behalf of class  
22 members nationwide, including seven educational institutions with track records of cutting-edge  
23 public interest research and education regarding online privacy issues, influencing privacy policy  
24 and action across the country; a non-profit news organization that employs trained technologists  
25 to conduct independent investigations, and has a reputation for breaking news regarding internet  
26 privacy issues (The Markup); an organization that serves a critical role in enabling access for  
27 researchers, historians, scholars, and the general public to otherwise ephemeral sources on the  
28 web—records critical to protecting consumer choice and privacy (Internet Archive); ten public

1 interest research and consumer advocacy organizations that focus on consumer privacy rights and  
2 issues; and individual researchers whose work will advance the public understanding of privacy  
3 rights and means of securing them (the Data & Society Research Institute). *See* Joint Decl. Exs.  
4 A-U. In addition, the parties propose that the Rose Foundation for Communities and the  
5 Environment receive a proportion of the funds to distribute to additional, smaller, perhaps  
6 otherwise-overlooked organizations through a grantmaking process that will include an open-  
7 application process and targeted outreach to worthy recipients who can use the funds to mitigate,  
8 address, or support matters revolving around online privacy and data security issues. *See* Joint  
9 Decl. Ex. S. The Rose Foundation is well-positioned to ensure that additional organizations  
10 meeting the nexus of this Settlement Class and the claims at issue are able to obtain and dedicate  
11 funding from this Settlement to serve Settlement Class Members.

12 Counsel for the Parties examined each of these organization's past work and populations  
13 served, as well their proposed projects, and evaluated the nexus between (a) the organization and  
14 (b) the claims and the class at issue. In order to make practical proposals regarding specific  
15 allocations to particular entities that satisfied the nexus requirement, counsel also closely examined  
16 each organization's size, existing capacity, budgets, and other indicia of its ability to put Settlement  
17 funds to use so as to advance class members' interests effectively and efficiently. Joint Decl. ¶ 13.

18 As a condition of receiving any portion of the Settlement Fund, each Approved *Cy Pres*  
19 Recipient shall provide a report to the Court and the Parties every six months regarding how any  
20 portion of the Settlement Fund allocated to it has been used and how remaining funds will be used.  
21 SA ¶ 41.4. Class Counsel shall ensure that such reports are posted on the Settlement Website. *Id.*

22 **Injunctive Relief.** As detailed in Exhibit C to the Settlement, the Settlement requires  
23 Google to implement several business practice changes for a period of at least three years,  
24 including, for instance, sending a notification, after the Settlement's Effective Date, to all Google  
25 users with Location History or Web & App Activity settings enabled, explaining how those  
26 features collection Location Information, instructing those users how to disable the settings, and  
27 directing them to new web pages, the content of which was negotiated at length by Class Counsel.  
28 SA Ex. C at ¶¶ 4, 6. Google also is required to maintain a policy under which (a) Location

1 Information stored through Location History and Web & App Activity is automatically deleted by  
2 default after a period no greater than 18 months when users opt into these settings for the first time,  
3 and (b) users can set their own auto-delete periods. And all of the Settlement’s meaningful  
4 injunctive relief extends for at least three years.

5 **Classwide Release.** In exchange for the Settlement’s benefits, class members will release  
6 any claims against the Released Parties that are based on, or arise from, one or more of the same  
7 factual predicates or theories of liability as alleged in the Consolidated Action. *Id.* ¶¶ 50-57. The  
8 scope of the Release is consistent with this Circuit’s governing standards. *See, e.g., Hesse v. Sprint*  
9 *Corp.*, 598 F.3d 581, 590 (9th Cir. 2010) (“A settlement agreement may preclude a party from  
10 bringing a . . . released claim [that] is ‘based on the identical factual predicate as that underlying  
11 the claims in the settled class action’”) (citation omitted).

12 **C. Class Notice and CAFA Notice**

13 Pursuant to the Court’s preliminary approval order, the Administrator implemented a  
14 robust Notice Plan approved by the Court, which “provide[d] a summary of the Settlement and  
15 clearly explain[ed] how Class Members may object to or opt out of the Settlement, as well as how  
16 Class Members may address the Court at the final approval hearing.” *In re Volkswagen “Clean*  
17 *Diesel” Mktg., Sales Pracs., & Prods. Liab. Litig.*, No. 2672, 2017 WL 672727, at \*20 (N.D. Cal.  
18 Feb. 16, 2017); *Churchill Vill., L.L.C. v. Gen. Elec.*, 361 F.3d 566, 575 (9th Cir. 2004) (“Notice is  
19 satisfactory if it generally describes the terms of the settlement in sufficient detail to alert those  
20 with adverse viewpoints to investigate and to come forward and be heard.”).

21 As explained more fully in the concurrently filed declaration of Administrator Cameron  
22 Azari, the Notice Program generated more than 826 million impressions nationwide to an  
23 estimated 80% of the Settlement Class, displayed sponsored “search” listings more than 146  
24 thousand times, and delivered an informational release to approximately 5,000 general media news  
25 outlets. Azari Decl. ¶¶ 23, 39. The appropriate state and federal officials were provided notice of  
26 this Settlement as required under CAFA. Dkt. 335; *Id.* ¶ 9.

27 **D. Attorneys’ Fees and Expenses, and Plaintiff Service Awards**

28 Plaintiffs filed their Motion for Attorneys’ Fees and Expenses (Dkt. 351) in January,

1 seeking an award of attorneys' fees representing 30% of the Settlement Fund, in the amount of  
 2 \$18.6 million; unreimbursed expenses of \$151,756.23; and Service Awards of \$5,000 for each of  
 3 the three Settlement Class Representatives, totaling \$15,000. The Settlement is not conditioned  
 4 upon the Court's approval of any service award, attorneys' fees, or expenses, and Google may  
 5 oppose the request. SA ¶¶ 62-63.

6 **E. Class Member Response**

7 Only nine class members opted out of the Settlement. Azari Decl. ¶ 32. No class member  
 8 objected to the Notice Plan. Mr. Frank submitted the sole objection.

9 **III. ARGUMENT**

10 To determine whether to approve a class action settlement, the Court must first assure itself  
 11 that the proposed settlement class may be certified under Rule 23(a) and (b); next the Court must  
 12 assess whether the proposed settlement is "fair, reasonable, and adequate." *See Hanlon v. Chrysler*  
 13 *Corp.*, 150 F.3d 1011, 1019, 1022, 1025 (9th Cir. 1998); *Harbour v. Cal. Health & Wellness Plan*,  
 14 No. 21-03322, 2024 WL 171192, at \*3 (N.D. Cal. Jan. 16, 2024). The Court must also assure itself  
 15 of Plaintiffs' standing under Article III. *Gaos*, 139 S. Ct. at 1046. Here, the Court can rely on  
 16 Plaintiff's allegations to establish standing. Each Plaintiff alleges a concrete invasion of their  
 17 privacy interests in their own location information. *See supra* § II-A.

18 **A. The Court Should Certify the Settlement Class**

19 At final approval, the Court must conduct a "rigorous" analysis to confirm that the  
 20 requirements of Rule 23(a) and 23(b)(3) are met. *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591,  
 21 619–22 (1997); *In re Hyundai and Kia Fuel Economy Litig.*, 926 F.3d 539, 556 (9th Cir. 2019)  
 22 (citations omitted). The Court thoroughly examined the Rule 23 requirements prior to granting  
 23 preliminary approval. Nothing has occurred that should change the Court's previous determination  
 24 that the requirements of Rule 23 are satisfied.

25 **1. Rule 23(a): Numerosity, Commonality, Typicality, and Adequacy Are**  
 26 **Satisfied**

27 Rule 23(a) requires a showing of: (1) numerosity; (2) commonality; (3) typicality; and (4)  
 28 adequacy. *See Fed. R. Civ. P. 23(a)*. These requirements are satisfied.

**Numerosity.** There can be no doubt that numerosity is satisfied, because it is undisputed

1 that the class consists of hundreds of millions of people. Fed. R. Civ. P. 23(a)(1); Dkt. 328 ¶ 31.  
2 Plaintiffs estimate the Settlement Class includes roughly 247.7 million people. *See* Dkt. 327 at 14.

3 **Commonality.** The same central questions underlie all Plaintiffs’ and Settlement Class  
4 Members’ claims including, *inter alia*, how and why Google stored Location Information, and  
5 what Google did or did not disclose, satisfying commonality. Fed. R. Civ. P. 23(a)(2).

6 **Typicality.** Plaintiffs’ and Settlement Class Members’ claims arise from the same nucleus  
7 of facts, including, *inter alia*, thwarted efforts to prevent the storage of Location Information,  
8 pertain to a common defendant, and are based on the same legal theories, satisfying typicality. Fed.  
9 R. Civ. P. 23(a)(3); Dkt. 131 (CAC) ¶¶ 12, 16, 30.

10 **Adequacy.** As detailed in Plaintiffs’ request for Plaintiffs’ Service Awards and supporting  
11 declarations, and illustrated by the significant recovery on behalf of the Settlement Class, Class  
12 Counsel and the Plaintiffs fairly and adequately prosecuted this Action on behalf of the Settlement  
13 Class. They will continue to do so, and no conflicts of interest exist between Plaintiffs and the  
14 Settlement Class. *See* Fed. R. Civ. P. 23(a)(4); Dkt. 351.

15 Mr. Frank’s sole challenge to class certification under Rule 23(a)—to the adequacy  
16 requirement—rests on the untenable foundation that the Settlement represents “zero-recovery” for  
17 the class because the monetary component of the Settlement would be distributed by *cy pres*. Obj.  
18 at 20-21. The premise of Mr. Frank’s adequacy objection is flawed because the Settlement’s *cy*  
19 *pres* distributions would provide substantial value to the class. The *cy pres* awards are directed at  
20 some of the most effective advocates for internet privacy in the United States. Only “independent  
21 501(c)(3) organizations with a track record of addressing privacy concerns on the Internet (either  
22 directly or through grants)” are eligible for a *cy pres* distribution, and only if they provided a  
23 specific proposal “demonstrating and committing that they shall use the funds to promote the  
24 protection of internet privacy.” SA ¶ 41.2. These groups have demonstrated—through the detailed  
25 descriptions of their past, ongoing, and anticipated work in their respective proposals—that they  
26 will continue to raise awareness of, work to protect, internet privacy. *See* Joint Decl. Exs. A-U.

27 These organizations “can use the money to do something to minimize” future violations of  
28 privacy rights that, “as a practical matter, class members each given \$3.57 cannot.” *Hughes v. Kore*

1 of *Indiana Enter.*, 731 F.3d 672, 676 (7th Cir. 2013). Improvements to privacy in the broad internet  
 2 ecosystem in which a huge proportion of daily life takes place will deliver actual, tangible benefits  
 3 to nearly all class members. Such “indirect” benefits are the hallmark of *cy pres* settlements. *See*  
 4 *Lane v. Facebook, Inc.*, 696 F.3d 811, 819 (9th Cir. 2012). This benefit is *compensation* to class  
 5 members who would otherwise see none. *See id.*; accord William B. Rubinstein, 4 *Newberg on*  
 6 *Class Actions* § 12:32 (5th ed. 2019 update) (“*Newberg*”).<sup>2</sup>

7 Moreover, the proposed class is enormous—estimated at 247.7 million members—and the  
 8 Settlement fund, while significant, could only provide *de minimis* payouts to the class as a whole.  
 9 As this Court recognized at the preliminary approval hearing, “[t]he *cy pres* settlement seems to  
 10 be the appropriate method of settlement in this case, given the size of the class and the funds  
 11 available, cash funds available. Distribution to that size of the class would be impossible and  
 12 meaningless.” Dkt. 343, 10/26/23 Tr. 26:15-19; *see also See Lane*, 696 F.3d at 821 (*cy pres*  
 13 supported where “direct monetary payments . . . would be infeasible given that each class  
 14 member’s direct recovery would be *de minimis*”); *In re Netflix Privacy Litig.*, No. 11-00379, 2013  
 15 WL 1120801, at \*7 (N.D. Cal. Mar. 18, 2013) (approving *cy pres* settlement where, “[g]iven the  
 16 sheer size of the Class . . . each Class member would receive a *de minimis* payment in the event of  
 17 a direct class cash payout”). Under Mr. Frank’s counter-proposal, the Settlement would distribute  
 18 funds to a tiny portion of the class (1-2%) and leave the rest empty-handed, at best. At worst, the  
 19 alternative endorsed by Mr. Frank would expend millions of dollars and generate months to years  
 20 of delay and wasted efforts effectuating a second nationwide class notice program, claims, and  
 21 verification process, only to confirm the obvious: the funds are non-distributable and should be  
 22 distributed via *cy pres* awards.

23 Mr. Frank is wrong to describe the non-monetary relief as “illusory.” Obj. at 23. He  
 24 contends that these provisions are consistent with Google’s obligations under 2022 agreements

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25  
 26 <sup>2</sup> Plaintiffs respectfully submit that Justice Thomas’s *dissenting* opinion in *Frank v. Gaos* that *cy*  
 27 *pres* is “not a form of relief to the absent class members and should not be treated as such” is, on  
 28 these facts, incorrect. *Frank*, 139 S.Ct. at 1047. The leading class action treatise agrees: “If  
 remedies are directed to charities, as they must be, and those charities are truly aligned with the  
 class’s causes of action, *cy pres* awards should produce social benefits consistent with the class’s  
 interest and hence indirectly benefit the class.” *Newberg* § 12:26 n.10.



1 with State Attorneys General. *Id.* It bears noting that negotiations that led to this Settlement’s non-  
2 monetary terms extended for months and predated Google’s settlements with the Attorneys  
3 General. Joint Decl. ¶ 17. In addition, the terms here go well beyond those on which Mr. Frank  
4 relies, including by requiring a default auto-deletion period for Location Information; prohibiting  
5 Google from “mak[ing] any attempts or efforts to re-identify . . . pseudonymous, anonymous, or  
6 de-identified” location information; and requiring an annual email notice. *See* SA Ex. C ¶¶ 1, 2, 8,  
7 and 11. Furthermore, only this Settlement would provide class members the ability to enforce any  
8 injunctive relief provisions here in this Court.

9 Mr. Frank also is incorrect to assert that Class Counsel should have advised class members  
10 to opt out of the Settlement *en masse* because they could still benefit from the work of the *cy pres*  
11 recipients. Obj. 2, 20-21. If a *cy pres* award has a “direct and substantial nexus to the interests of  
12 absent class members,” *Lane*, 696 F.3d at 821, as the awards here do, and must, under Ninth Circuit  
13 precedent, “then it necessarily prioritizes class members’ interests, even if it also provides a diffuse  
14 benefit to society at large.” *Google Stree View*, 21 F.4th at 1116 (quoting *Lane*, 696 F.3d at 821). Mr.  
15 Frank also is wrong as a practical matter. A large number of opt outs would entitle Google to rescind  
16 the Settlement (Dkt. 330; SA ¶ 85), preventing anyone from obtaining its benefits, and denying  
17 class members the fair, reasonable resolution of the risks of continued litigation and appeals that  
18 counsel has achieved. Notably, the many class members do not share Mr. Frank’s opinion about  
19 opting out. After a robust notice program, which fully described the details of the Settlement  
20 agreement and the intended plan of allocation for the monetary component, only nine individuals  
21 excluded themselves.

22 In a final effort to find some other basis for an objection, Mr. Frank falsely asserts that a  
23 “sizable clear-sailing attorneys’ fee, [and] sizable incentive awards” demonstrate inadequate  
24 representation. Obj. at 20. None of that is true. A “clear sailing agreement” is present where  
25 “defendants agree[] *not to object*” to a fee of some specified amount. *In re Bluetooth Headset Prod.*  
26 *Liab. Litig.*, 654 F.3d 935, 947 (9th Cir. 2011) (emphasis added). The Settlement, by contrast,  
27 provides that “Defendant expressly reserves the right to contest the amount of any requests for  
28 attorneys’ fees or service awards.” Dkt. 328-1, SA ¶ 63. And the size of the requested fee and

1 service awards are in line with awards commonly sought and awarded in this Circuit. *See e.g.*,  
2 *Munoz v. Big Bus Tours Ltd.*, No. 18-05761, 2020 WL 13533045, at \*4 (N.D. Cal. Feb. 12, 2020)  
3 (citing *Vizcaino v. Microsoft Corp.*, 290 F.3d 1043, 1047 (9th Cir. 2002)) (“Thirty percent is within  
4 the ‘usual range’”); *In re Facebook Biometric Info. Priv. Litig.*, No. 21-15553, 2022 WL 822923,  
5 at \*2 (9th Cir. Mar. 17, 2022) (“We regularly uphold incentive awards of [\$5,000].”). Moreover,  
6 each award is subject to Court approval and expressly not a condition of the Settlement. *See* SA  
7 ¶ 62.

## 8 **2. Rule 23(b)(3): Predominance and Superiority Are Satisfied**

9 Rule 23(b)(3) requires a showing of (1) predominance and (2) superiority. Fed. R. Civ. P.  
10 23(b)(3). These requirements are satisfied.

11 **Predominance.** Common questions of law and fact predominate over any questions  
12 affecting only individuals because every Settlement Class Member has been subjected to the same  
13 alleged conduct which caused them the same type of harm—invasions of widely held and  
14 reasonable expectations regarding their data, and Google’s wrongful use of it. The overarching  
15 questions at issue in this case can be resolved for all members of the proposed Settlement Class in  
16 a single adjudication. *See, e.g., Abante Rooter & Plumbing, Inc. v. Pivotal Payments Inc.*, No. 16-  
17 05486, 2018 WL 8949777, at \*5 (N.D. Cal. Oct. 15, 2018).

18 **Superiority.** This class action is the only reasonable method for fairly and efficiently  
19 adjudicating Settlement Class Members’ claims against Google. Resolution of the common issues  
20 of fact and law through individual actions is impracticable: the amount in dispute for individual  
21 class members is too small, the technical issues involved are too complex, and the required expert  
22 testimony and document review too costly. *See Just Film, Inc. v. Buono*, 847 F.3d 1108, 1123 (9th  
23 Cir. 2017). Individual litigation is unlikely, as evidenced by the vanishingly small proportion of  
24 Settlement Class Members who opted out of the Settlement (0.000004%), and the fact that no  
25 claims were filed on an individual basis in any forum, at any time, during the pendency of this  
26 litigation (to Class Counsel’s knowledge). If Settlement Class Members’ hundreds of millions of  
27 individual suits were viable, it would be completely impracticable to litigate each claim separately  
28 without exhausting the entire capacity of the federal judiciary. Such individual lawsuits also would

1 present “the possibility of inconsistent rulings and results,” further militating toward class  
 2 treatment. *In re Volkswagen “Clean Diesel” Mktg.*, 2017 WL 672727, at \*14. And because the  
 3 case has settled, no “likely difficulties in managing a class action” exist. *Wolin v. Jaguar Land*  
 4 *Rover N. Am., LLC*, 617 F.3d 1168, 1175 (9th Cir. 2010).

5 Mr. Frank’s sole challenge to class certification under Rule 23(b)(3), based on the  
 6 superiority requirement, rests on his contention that settlement relief is not “compensatory” if it is  
 7 distributed via *cy pres*. Obj. at 21-22. That is not the law in this (or any) Circuit. *In re Google Inc.*  
 8 *St. View Elec. Commc’ns Litig.*, 21 F.4th 1102, 1116 (9th Cir. 2021) (“[T]he infeasibility of  
 9 distributing settlement funds directly to class members does not preclude class certification.”);  
 10 *Google Referrer*, 869 F.3d 742 (“[W]e easily reject Objectors’ argument that if the settlement fund  
 11 was non-distributable, then a class action cannot be the superior means of adjudicating this  
 12 controversy”); *Lane*, 696 F.3d at 826 (affirming certification of class receiving *cy-pres* relief).

13 Mr. Frank overstates the limited out-of-Circuit district court authority on which he relies.  
 14 The order from the Eastern District of North Carolina denying preliminary approval of a settlement  
 15 did not “hold[.],” as he asserts, that all *cy pres* awards are “attenuated” and inconsistent with judicial  
 16 efficiency as a matter of law, or policy. See Obj. at 21; *Supler v. FKAACS, Inc.*, No. 11-00229,  
 17 2012 WL 5430328, at \*4 (E.D.N.C. Nov. 6, 2012). It merely evaluated a proposal to make a limited  
 18 award of \$17,500 to a Legal Aid foundation, where the parties had “not identified any meaningful  
 19 value to the class.” *Id.* Here, the requisite “nexus” requirement is resoundingly met. The Court  
 20 should reject Mr. Frank’s objections to class certification, just as the Ninth Circuit did in *Google*  
 21 *Street View*, and certify the Settlement Class. See *Google Street View*, 21 F.4th at 1122; Obj. at  
 22 21-22 (acknowledging that *Google Street View* rejected identical adequacy and predominance  
 23 arguments).

### 24 **3. Rule 23(g): The Court Should Reaffirm the Appointment of Class** 25 **Counsel and the Class Representatives**

26 “An order certifying a class action . . . must appoint class counsel under Rule 23(g).” Fed.  
 27 R. Civ. P. 23(c)(1)(B). Rule 23(g)(1)(A) requires the Court to consider: “(i) the work counsel has  
 28 done in identifying or investigating potential claims in the action; (ii) counsel’s experience in  
 handling class actions, other complex litigation, and claims of the type asserted in the action; (iii)

1 counsel’s knowledge of the applicable law; and (iv) the resources that counsel will commit to  
2 representing the class.” The Court appointed Tina Wolfson and Michael Sobol as Interim Co-Lead  
3 Class Counsel at the outset of this consolidated litigation (Dkt. 72), and affirmed that appointment  
4 at preliminary approval, designating them Lead Counsel for the Settlement Class, and appointing  
5 Plaintiffs as Settlement Class Representatives. Dkt. 345 at 2-3. Counsel detailed their  
6 qualifications and work performed on behalf of the class in connection with those appointments,  
7 and again in their recent Motion for Attorneys’ Fees. Dkt. 351. They capably managed this  
8 complex litigation and negotiated a settlement that provides meaningful and fair relief to the class.  
9 Plaintiffs diligently fulfilled their roles as class representatives. Class Counsel’s law firms, and the  
10 Settlement Class Representatives should be appointed to represent the Settlement Class, consistent  
11 with the Court’s prior findings and orders. *See Harrington v. City of Albuquerque*, 222 F.R.D. 505,  
12 520 (D.N.M. 2004); *In re Online DVD-Rental Antitrust Litig.*, 779 F.3d at 943. The criteria of  
13 Rule 23(g)(1) are satisfied.

14 **B. The Court Should Grant Final Approval to the Settlement**

15 In deciding whether to approve a proposed settlement, the Ninth Circuit has a “strong  
16 judicial policy that favors settlements, particularly where complex class action litigation is  
17 concerned.” *In re Hyundai and Kia Fuel Economy Litig.*, 926 F.3d 539, 556 (9th Cir. 2019);  
18 *Officers for Justice v. Civil Serv. Comm’n*, 688 F.2d 615, 625 (9th Cir. 1982). “[T]here is an  
19 overriding public interest in settling and quieting litigation,” and this is “particularly true in class  
20 action suits.” *Van Bronkhorst v. Safeco Corp.*, 529 F.2d 943, 950 (9th Cir. 1976).

21 Where a settlement agreement calls for distribution via *cy pres*, the Ninth Circuit instructs  
22 courts to “apply the same standards” as “for any class action settlement, asking whether the total  
23 relief afforded by the settlement—whether in the form of injunctive relief, *cy pres* payments, or  
24 direct monetary payments—adequately compensates class members for relinquishing their  
25 claims.” *Google Street View*, 21 F.4th at 1112 n.3. Thus, “review of a class-action settlement that  
26 calls for a *cy pres* remedy is not substantively different from that of any other class-action  
27 settlement,” except that the court must find that “the *cy pres* remedy ‘account[s] for the nature of  
28 the plaintiffs’ lawsuit, the objectives of the underlying statutes, and the interests of the silent class

1 members.” *Lane*, 696 F.3d at 819-20 (quoting *Naschin v. AOL, LLC*, 663 F.3d 1034, 1036 (9th Cir.  
 2 2011)). Ultimately, the Court's role is not to determine “whether the settlement is perfect,” but to  
 3 determine if it is fair. *Id.* (citing *Hanlon*, 150 F.3d at 1027).

4 In making that determination, Rule 23(e)(2) directs the Court to consider whether:

- 5 (A) the class representatives and class counsel have adequately represented the class;
- 6 (B) the proposal was negotiated at arm’s length;
- 7 (C) the relief provided for the class is adequate, taking into account:
  - 8 (i) the costs, risks, and delay of trial and appeal;
  - 9 (ii) the effectiveness of any proposed method of distributing relief to the class,  
 10 including the method of processing class-member claims;
  - 11 (iii) the terms of any proposed award of attorney’s fees, including timing of  
 12 payment; and
  - 13 (iv) any agreement required to be identified under Rule 23(e)(3); and
- 14 (D) the proposal treats class members equitably relative to each other.

15 *See also Briseno v. Henderson*, 998 F.3d 1014, 1025 (9th Cir. 2021) (describing the Ninth  
 16 Circuit’s eight-factor test as “fall[ing] within the ambit of” the current version of Rule 23).

17 Where, as here, the settlement is reached before litigation class certification, approval requires a  
 18 “higher standard of fairness.” *Lane*, 696 F.3d at 819.

19 **1. Rule 23(e)(2)(A): The Class Representatives and Class Counsel Have**  
**Adequately Represented the Class**

20 Class Counsel and the Settlement Class Representatives “have adequately represented the  
 21 class” under Rule 23(e)(2)(A). The Advisory Committee Notes explain that this subsection, in  
 22 conjunction with subsection (B), “identify matters that might be described as ‘procedural’  
 23 concerns, looking to the conduct of the litigation and of the negotiations leading up to the proposed  
 24 settlement.” *See Fed. R. Civ. P. 23, Notes of Advisory Comm., Subdivision (e)(2), Paragraphs (A)*  
 25 *and (B) (2018)*. Relevant factors may include the nature and amount of discovery conducted, the  
 26 outcome of other cases, and the adequacy of counsel’s information. *Newberg* § 13:49; *In re Mego*  
 27 *Fin. Corp. Secs. Litig.*, 213 F.3d 454, 459 (9th Cir. 2000).

28 As discussed above in connection with Rule 23(a), and as the Court found at preliminary  
 approval, Class Counsel “are competent and capable . . . and will adequately protect the interests  
 of the Settlement Class.” Dkt. 345 ¶ 7. The Settlement is the culmination of six years of hard-

1 fought litigation against a vigorous defense, extensive contentious discovery, and fully-informed  
 2 arms-length negotiations. *See* Dkt. 351. Plaintiffs diligently represented the Class and actively  
 3 participated in this litigation, including broad discovery. *Id.* Rule 23(e)(2)(A) is satisfied.

4           **2. Rule 23(e)(2)(B): The Proposed Settlement Was Negotiated At Arm’s**  
 5           **Length**

6           The Settlement “was negotiated at arm’s length” under Rule 23(e)(2)(B). The Advisory  
 7 Committee notes state that the involvement of a neutral mediator may bear on whether settlement  
 8 negotiations were conducted “in a manner that would protect and further the class interests.” At  
 9 its root, this factor aims to guard against collusive settlements. *See Newberg* § 13:50. The Ninth  
 10 Circuit has similarly directed district courts to pay close attention to signs of collusion, such as the  
 11 presence of a clear sailing arrangement, a disproportionate distribution of the settlement to counsel,  
 12 and/or the presence of a reverter clause. *Briseno*, 998 F.3d at 1023; *Bluetooth*, 654 F.3d at 941.

13           No signs of collusion are present here. Indeed, the Settlement required months of  
 14 contentious, informed negotiations between experienced counsel in a process overseen by a highly  
 15 respected mediator, and, for a time, return to active litigation. *See* Dkt. 343, 10/26/23 Hearing  
 16 Transcript 26:5-8 (“I do see this was a hard fought litigation, I ruled on several motions, Judge  
 17 Cousins ruled on many motions, there were stays in the case, there were motions post-stay, you  
 18 met with mediators.”); *See Villegas v. J.P. Morgan Chase & Co.*, 2012 WL 5878390, at \*6 (N.D.  
 19 Cal. Nov. 21, 2012) (noting that private mediation “tends to support the conclusion that the  
 20 settlement process was not collusive”). There is no clear sailing provision in the Settlement, and  
 21 no portion of the Settlement Fund will revert to Google. *See* SA ¶¶ 32, 40-42, 58-63. Class Counsel  
 22 seek a reasonable and proportionate fee from the common fund created by the Settlement, and had  
 23 every incentive to secure the largest fund possible. Rule 23(e)(2)(B) is satisfied.

24           **3. Rule 23(e)(2)(C): The Relief Provided for the Class is Adequate**

25           The relief provided for the class: a \$62 million common fund and injunctive relief designed  
 26 to address the practices on which Plaintiffs’ claims are based, is “adequate” taking into account  
 27 each of Rule 23(e)(2)(C)’s four enumerated factors.

28           **a. 23(e)(2)(C)(i): Costs, Risks, and Delay of Trial and Appeal**

          The first factor requires the Court to consider “the costs, risks, and delay of trial and

1 appeal.” Fed. R. Civ. P. 23(e)(2)(C)(i); *see also Bluetooth*, 654 F.3d at 946 (listing factors  
2 including “the risk, expense, complexity, and likely duration of further litigation,” in conjunction  
3 with “the strength of the plaintiff’s case”). The \$62 million Settlement Fund and injunctive relief  
4 provides a strong recovery for the class in light of these factors. Although Plaintiffs’ case had many  
5 strengths—among them the large number of potential class members and a body of uncontested  
6 facts concerning Google’s conduct—continuing the case also presented very considerable risks.

7 Even beyond the inherent unpredictability of class action and trial practice, litigation risks  
8 are particularly pronounced in consumer cases against technology companies; privacy-related  
9 claims are often dismissed, just as the court initially dismissed this action, and class certification  
10 can present unique challenges. *See In re TikTok, Inc., Consumer Privacy Litig.*, No. 20-4699, 2022  
11 WL 2982782, at \*28 (N.D. Ill. Jul. 28, 2022) (“Data privacy law is a relatively undeveloped and  
12 technically complex body of law, which creates uncertainty and, therefore, additional risk”);  
13 *Heeger v. Facebook, Inc.*, 509 F. Supp. 3d 1182, 1186 (N.D. Cal. Dec. 24, 2020) (largely  
14 dismissing two related class actions challenging Facebook’s collection of personal location data);  
15 *Yastrab v. Apple Inc.*, 173 F. Supp. 3d 972, 976 (N.D. Cal. Mar. 25, 2016) (dismissing claims  
16 based on software updates that purportedly removed features from iPhones); *In re iPhone*  
17 *Application Litig.*, 6 F. Supp. 3d 1004, 1007 (N.D. Cal. Nov. 25, 2013) (granting summary  
18 judgment and denying class certification as moot in case involving data collection practices).

19 As discussed in Plaintiffs’ Motion for Preliminary Approval (Dkt. 357 at 12, 22), the risks  
20 that the Class faced here are underscored by the Court’s holding that Plaintiffs’ remaining claims  
21 for intrusion upon seclusion and invasion of the California constitutional right to privacy would  
22 depend on proof of “continuous and comprehensive” tracking and storage of Location Information,  
23 which imposed a high evidentiary burden on Plaintiffs in further pretrial and trial proceedings.  
24 Dkt. 162 at 8, 10. That risk is amplified further given Google’s likely arguments in opposition to  
25 class certification. *See, e.g., Hart v. TWC Prod. & Tech. LLC*, No. 20-03842, 2023 WL 3568078,  
26 at \*10-11 (N.D. Cal. Mar. 30, 2023) (denying certification because “[t]he common question of  
27 whether users maintained a reasonable expectation of privacy . . . necessitates an individualized  
28 factual inquiry into whether individual users understood that their affirmative responses to the

1 permission prompts enabled TWC to use the location data it collected”); *Brown v. Google, LLC*,  
2 No. 20-03664, 2022 WL 17961497, at \*19 (N.D. Cal. Dec. 12, 2022) (denying certification of  
3 privacy claims under Rule 23(b)(3)).

4 In short, given the anticipated disputes that inevitably would lie ahead, including at  
5 summary judgment (when Google might prevail by establishing it did not continuously and  
6 comprehensively track class members throughout the Class Period), and at class certification  
7 (when Google might prevail by establishing that individualized issues regarding consent or the  
8 reasonable expectation of privacy would predominate), Plaintiffs faced significant risk of investing  
9 further substantial costs and time in this litigation in order to achieve no recovery whatsoever on  
10 behalf of the class. And, even if Plaintiffs successfully proved their case at trial, the claims in this  
11 litigation provide no guarantee of a substantial damages award. If anything were recovered, it  
12 could take years to secure, as Google would likely appeal any adverse judgment. This factor  
13 warrants Settlement approval.

14 **b. 23(e)(2)(C)(ii): Effectiveness of Distribution**

15 The proposed method of distributing the monetary relief from this Settlement: *cy pres*  
16 awards to 21 non-profit organizations, each of which has a track record of protecting internet  
17 privacy rights, and has submitted a proposal demonstrating and committing to continue that work,  
18 is “effective” under Rule 23(e)(2)(C)(ii).

19 This Circuit, like many others, permits a *cy pres* distribution in circumstances where the  
20 settlement fund is “non-distributable,” meaning “proof of individual claims would be burdensome  
21 or distribution of damages costly.” *Lane*, 696 F.3d at 819; *Nachshin*, 663 F.3d at 1036. An  
22 individual claims process is “burdensome” where “each class member’s recovery under a direct  
23 distribution would be *de minimis*.” *Lane*, 696 F.3d at 825. The relevant “recovery” for this  
24 assessment is determined with respect to the class as a whole, and courts in this Circuit use each  
25 class member’s *pro rata* share of the settlement fund as a key metric in evaluating the fairness of  
26 distributing settlement funds by *cy pres*. See, e.g., *In re Google Referrer Header Priv. Litig.*, 869  
27 F.3d 737, 742 (9th Cir. 2017), *vacated and remanded on other grounds* (affirming finding of non-  
28 distributability where net settlement fund could provide only 4 cents in recovery to each member



1 of settlement class); *In re Easysaver Rewards Litig.*, 906 F.3d 747 (9th Cir. 2018) (finding a second  
 2 distribution to be *de minimis* when there were over one million potential class members, but only  
 3 three million dollars in available funds (*i.e.*, ~\$3 per class member)); *Six (6) Mexican Workers v.*  
 4 *Ariz. Citrus Growers*, 904 F.2d 1301, 1305 (9th Cir. 1990) (“When a class action involves a large  
 5 number of class members but only a small individual recovery, the cost of separately proving and  
 6 distributing each class member’s damages may so outweigh the potential recovery that the class  
 7 action becomes unfeasible. . . . ‘[C]y pres’ distribution avoids these difficulties.”); *In re Netflix*,  
 8 2013 WL 1120801, at \*7 (approving *cy pres* award where, “[g]iven the sheer size of the Class . . .  
 9 each Class member would receive a *de minimis* payment in the event of a direct class cash  
 10 payout”—there, a \$9 million fund and 62 million class members (~15 cents per class member  
 11 before fees and other expenses)); *In re Google Buzz Privacy Litig.*, No. 10-00672, 2011 WL  
 12 7460099, at \*4 (N.D. Cal. June 2, 2011) (approving *cy pres*-only settlement).

13 Here, the total settlement fund before deducting any award of attorneys’ fees, expenses,  
 14 administrative costs, and service awards, is \$62 million. While this amount is substantial, the  
 15 estimated number of Class members is 247.7 million. The resulting *pro rata* recovery per Class  
 16 Member could be no more than 25 cents (assuming no attorneys’ fees, service awards, or  
 17 administration costs), an amount that is “non-distributable” under this Circuit’s above-cited  
 18 precedents. The proposed method of distribution therefore “satisf[ies] the appropriate standards  
 19 for fairness” and should be approved. *See Google Street View*, 21 F.4th at 1114.

20 Mr. Frank challenges the effectiveness of the proposed *cy pres* relief on several grounds, none  
 21 of which withstand scrutiny. He argues that *cy pres* awards deliver no value to class members, that  
 22 they violate the First Amendment’s prohibition on compelled speech, and that the specific potential  
 23 beneficiaries identified for this Settlement, are improper. All of these arguments have been rejected  
 24 previously, and should be rejected again here.

25 **i. Cy Pres Awards Are Compensation to the Class**

26 At the root of all of Mr. Frank’s objections is his opinion that the *cy pres* doctrine represents a  
 27 redirection of settlement benefits away from class members to other entities. *See* Obj. at 4-5. The Ninth  
 28 Circuit, however, has “repeatedly recognized that class members *do* benefit—albeit indirectly—from

1 a defendant's payment of funds to an appropriate third party.” *Google Street View*, 21 F.4th at 1116;  
2 *see also In re Google LLC St. View Elec. Comms. Litig.*, 611 F. Supp. 3d 872, 884 (N.D. Cal. 2020),  
3 *aff’d*, (rejecting identical argument “because it assumes, wrongly, that the *cy pres* settlement is not a  
4 benefit to the class”)

5 Nevertheless, building on the supposition that *cy pres* awards do not qualify as compensatory  
6 relief, Mr. Frank argues that the *cy pres* distributions proposed here are improper if funds could be  
7 distributed to a tiny number of class members through a claims process. In support, Mr. Frank cites a  
8 number of settlements in which, due to low claims rates, otherwise non-distributable settlement funds  
9 were in fact distributed to the fraction of class members who submitted claims. Obj. at 6-7; Frank Decl.  
10 ¶¶ 36-37. Mr. Frank contends that here, too, the parties could rely on nearly all class members choosing  
11 to forego their right to claim their share of monetary relief, speculating that the funds must be  
12 “distributable” because, if only 1.5% of class members filed claims, then that 1.5% could receive about  
13 \$12 each. Obj. at 7-11.

14 In addition to misunderstanding, or ignoring, the value to class members of appropriately-  
15 tailored *cy pres* relief, Mr. Frank applies the wrong test for determining non-distributability of  
16 settlement funds in this Circuit. The Ninth Circuit explained this to Mr. Frank when it rejected the  
17 argument he makes here, which he also raised in *Street View*:

18 Lowery [Mr. Frank’s client] argues that the district court applied the wrong standard for  
19 determining feasibility by asking “whether it is feasible to hand-deliver checks to every  
20 single class member” instead of focusing on “the ability of *some* class members to make  
21 a claim.” We disagree. Lowery cites no authority indicating that a district court must  
22 consider only whether settlement funds are distributable to “some” of a class.

22 *Google Street View*, 21 F.4th at 1114. This confirms that the question for the Court at final approval is  
23 not whether a different settlement with a claims process that would have left 98.5% of the class  
24 members empty-handed was theoretically possible. The question before the Court is whether the relief  
25 provided by *this* Settlement is effective, and “adequately compensates class members for  
26 relinquishing their claims.” *Google Street View*, 21 F.4th at 1112 n.3; *Lane*, 696 F.3d at 819-20; *see*  
27 *also Google Street View*, 611 F. Supp. 3d at 893 (“A settlement that benefits 1% of the class, and that  
28 has no benefit to 99% of the class, is not so obviously superior to a *cy pres*-only settlement that the

1 Court must reject this settlement as unfair.”); *see also Hanlon*, 150 F.3d at 1027 (“[T]he question we  
2 address is not whether the final product could be prettier, smarter or snazzier, but whether it is fair,  
3 adequate and free from collusion.”). Mr. Frank fails to accept that *cy pres* relief is compensation to  
4 the class, and the Court should reject his objections based on that flawed premise.

5 There are numerous other problems with Mr. Frank’s hypothetical proposal for a different  
6 settlement. For one, it depends for its viability on a low response rate, which perversely twists  
7 counsel’s usual obligations to seek and encourage as high of a claims rate as possible. *Cf. Roes, I-*  
8 *2 v. SFBSC Mgmt., LLC*, 944 F.3d 1035, 1058 (9th Cir. 2019) (expressing skepticism of clause in  
9 settlement “creat[ing] an incentive for defendants to ensure as low a claims rate as possible”). That  
10 a high claims rate, ordinarily a measure of success, would *diminish* the success of Mr. Frank’s  
11 proposal suggests its inferiority. Nor would Mr. Frank’s expected results—up to \$12 for 1% of  
12 Class members—be guaranteed. Mr. Frank’s speculation about how a claims process plays out  
13 could be wrong.

14 Plaintiffs suggested in their preliminary approval motion that this settlement, with a claims-  
15 made provision, could have generated a claims rate comparable to the 7% rate reported just this  
16 last year in *In re Facebook Consumer Privacy User Profile Litig.*, No. 18-md-02843, Dkt. 327 at  
17 14 (N.D. Cal.). Mr. Frank contends that 7% is atypically high, but it does happen, and other cases  
18 have exceeded that rate. Indeed, the \$650 million settlement in *In re Facebook Biometric Info.*  
19 *Priv. Litig.*, 522 F. Supp. 3d 617, 622 (N.D. Cal. 2021), generated “a claims rate of approximately  
20 22%.”

21 Further, a claims process involving many millions of claims would entail additional  
22 administrative costs, including anti-fraud measures that would be required to screen out bot-  
23 submitted and otherwise fraudulent claims. According to the Administrator, a 1% claims rate  
24 would consume \$1.9 million of the common fund; a 3% claims rate \$4 million, and a 7% claims  
25 rate \$8.2 million. Azari Decl. ¶ 34. These figures assume that payments will be delivered  
26 electronically where possible. *Id.* ¶ 35. Accounting for such increased administrative costs,  
27 Plaintiffs calculate that, at a 7% claims rate, each claimant in Mr. Frank’s hypothetical different  
28 settlement would be expected to receive approximately \$2; at a 3% claims rate, approximately \$5;

1 and at a 1% claims rate, approximately \$17. Therefore, even applying Mr. Frank’s incorrect test  
2 for “feasibility,” the net result could *still* be a non-distributable settlement fund that is instead  
3 distributed to *cy pres* recipients instead of to claimants, *i.e.*, a massive expenditure of class funds,  
4 time, party and judicial effort, and increased administration costs, for nothing.

5 More practically, Mr. Frank’s hypothetical is not the settlement before the court, or even  
6 the relief he seeks. He asks the Court to deny final approval. If the Court were to affirm Mr. Frank’s  
7 objection here, there is no way to predict what the parties might negotiate, or whether another  
8 settlement is possible.

9 In addition to the non-distributability of *pro rata* payments below 25 cents under clear,  
10 binding precedent, Google has put forward evidence that it contends “make[s] it infeasible to  
11 identify the individuals who fit this class definition,” and thus unusually difficult, if not impossible,  
12 to verify the validity of theoretical claims based on self-identification. Dkt. 329. A lack of a “viable  
13 way for a claims administrator to verify any claimant’s entitlement to settlement funds” also  
14 supports a finding of non-distributability. *See Google Street View*, 21 F.4th at 1114.

15 **ii. Cy Pres Awards Do Not Violate the First Amendment**

16 Mr. Frank also raises a First Amendment challenge to the *cy pres* doctrine, which the Ninth  
17 Circuit already rejected. *See Google Street View*, 21 F.4th at 1118 (“[W]e hold that the settlement  
18 agreement does not compel class members to subsidize third-party speech because any class  
19 member who does not wish to ‘subsidize speech by a third party that he or she does not wish to  
20 support’ . . . can simply opt out of the class.”) (quoting *Harris v. Quinn*, 573 U.S. 616, 656 (2014);  
21 *see also, e.g., In re: Motor Fuel Temperature Sales Pracs. Litig.*, 872 F.3d 1094, 1114 (10th Cir.  
22 2017) (“[T]he district court’s approval of the settlement agreements doesn’t constitute state action.  
23 And absent any state action, [the] First Amendment argument fails.”); *Perkins v. LinkedIn Corp.*,  
24 No. 13-04303, 2016 WL 613255, at \*11 n.9 (N.D. Cal. Feb. 16, 2016) (rejecting argument).  
25 Because class members who do not wish to support the work of the proposed *cy pres* recipients  
26 can opt out of the Settlement, there is no argument that payment of a *cy pres* award compels their  
27 speech through government action.

28 The *Google Street View* court likewise explicitly rejected Mr. Frank’s reliance on Supreme

1 Court cases concerning the extent to which non-union government employees may be compelled  
 2 to pay fees to public unions. Unlike such cases, which concern “paycheck deductions for public  
 3 employees, . . . the settlement here involves funds that, regardless of the *cy pres* provisions, could  
 4 not feasibly be paid to class members.” *Google Street View*, 21 F.4th at 1118-19 (distinguishing  
 5 *Janus v. AFSCME, Council 31*, 138 S. Ct. 2448 (2018); *Harris*, 573 U.S. 616; and *Knox v. SEIU,*  
 6 *Local 1000*, 567 U.S. 298 (2012)).

7 **iii. The Proposed *Cy Pres* Recipients Are Appropriate**

8 Mr. Frank challenges the individual organizations proposed as recipients of *cy pres* awards  
 9 as “improper” due to (1) alleged relationships with counsel for the parties, and (2) Mr. Frank’s  
 10 perception of the organizations’ additional political activity. Obj. at 14-20.

11 The *cy pres* recipients proposed are appropriate. In the Ninth Circuit, “[n]ot just any  
 12 worthy recipient can qualify as an appropriate *cy pres* beneficiary.” *Dennis v. Kellogg Co.*, 697  
 13 F.3d 858, 865 (9th Cir. 2012). To avoid the “many nascent dangers to the fairness of the  
 14 distribution process,” the Court requires that there be “a driving nexus between the plaintiff class  
 15 and the *cy pres* beneficiaries.” *Id.* (quoting *Nachshin*, 663 F.3d at 1038). This nexus is established  
 16 where *cy pres* distributions “account for the nature of the plaintiffs’ lawsuit, the objectives of the  
 17 underlying statutes, and the interests of the silent class members, including their geographic  
 18 diversity.” *Id.* at 1036. Here, the Settlement requires that only “independent 501(c)(3)  
 19 organizations”—*i.e.*, not political entities—“with a track record of addressing privacy concerns  
 20 on the Internet (either directly or through grants)” are eligible for a *cy pres* distribution, and  
 21 further requires that they provide a specific proposal “demonstrating and committing that they  
 22 shall use the funds to promote the protection of internet privacy.” SA ¶ 41.2. The parties  
 23 evaluated each potential *cy pres* recipient closely to ensure that the requisite “nexus” requirements  
 24 were met. Joint Decl. ¶ 13. Each of these organizations has the required track record and can be  
 25 expected to put any award approved by the Court to immediate good use on behalf of the class.

26 The Ninth Circuit has “affirmed *cy pres* provisions involving much closer relationships  
 27 between recipients and parties” than anything Mr. Frank describes in his objection. *Google Street*  
 28 *View*, 21 F.4th at 1119; *Lane*, 696 F.3d at 821 (approving settlement fund awarded to a newly-

1 created foundation, the board of which would include a director appointed by the defendant);  
2 *Google Referrer*, 869 F.3d at 744 (approving *cy pres* award to some recipients to whom defendant  
3 had previously contributed, some that had previously received settlement funds from the  
4 defendant, and some which were housed at class counsel’s *alma maters*). In fact, the Ninth Circuit  
5 guards against the prospect of conflicted *cy pres* recipients primarily through the “nexus”  
6 requirement, which Mr. Frank does not challenge, and which is fully satisfied here. *Id.* at 743.

7 Mr. Frank relies heavily on the American Law Institute’s (ALI) comment that “[a] *cy pres*  
8 remedy should not be ordered if the court or any party has any significant prior affiliation with the  
9 intended recipient that would raise substantial questions about whether the award was made on the  
10 merits.” *Obj.* at 18. The Ninth Circuit did not adopt that standard when Mr. Frank proposed it in  
11 *Google Street View*, 21 F.4th at 1120. Even if the ALI standard applied, there is no such  
12 “affiliation.” Plaintiffs do not believe that Lieff Cabraser’s occasional co-litigation with the ACLU  
13 substantially impairs the perceived fairness of the award to a group that has historically been on  
14 the front lines of defending civil liberties.<sup>3</sup> Nor does Google’s prior funding of some recipient  
15 groups raise such a question. *Id.* at 1119 (“We have never held that merely having previously  
16 received *cy pres* funds from a defendant, let alone *other* defendants in unrelated cases, disqualifies  
17 a proposed recipient for all future cases.”). Moreover, Google explicitly agreed that any *cy pres*  
18 distributions would be in addition to its ordinary charitable giving. SA ¶ 38. And neither Google  
19 nor Plaintiffs’ counsel will exercise control or influence over any recipient’s expenditure of *cy*  
20 *pres* funds other than monitoring the recipients’ reports to ensure compliance with the Settlement.  
21 SA ¶ 41.5.

22 Here, the ultimate selection of *cy pres* recipients is vested in the Court’s discretion. The  
23 parties’ role has consisted of conducting research to identify organizations with the requisite nexus,  
24 soliciting and publicizing proposals, and making a recommendation to the Court. They did so  
25

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26 <sup>3</sup> Mr. Frank’s suggestions of impropriety in Lieff Cabraser’s disclosures are unfounded. Lieff  
27 Cabraser endeavored to identify and disclose co-counsel relationships for the past decade. Dkt.  
28 352 ¶ 3. Mr. Frank’s identification of unrelated co-counsel relationships with the ACLU  
approximately 15 years ago and with the Electronic Frontier Foundation nearly 20 years ago do  
not change the calculus. Dkt. 354 at 15.

1 without favoring their alma maters or organizations with which they are affiliated. If the Court  
 2 believes any relationship raises substantial questions about whether a particular suggested award  
 3 is based on the proposed recipient’s merits, then the Court can and should allocate funds to other  
 4 recipients. It is well within the Court’s power to consider the proposed *cy pres* awards and allocate  
 5 funds differently than the parties propose. *See Google Street View*, 21 F.4th at 1116 (courts should  
 6 consider the nature and objectives of the claims and interests of absent class members with the  
 7 goal of particularly benefiting the class).<sup>4</sup>

8 The Settlement Website provides class members with sufficient information about the  
 9 Settlement, *cy pres* selection process, and including detailed proposals from each of the proposed  
 10 *cy pres* recipients which is, by any measure, far better than the non-disclosure in *In re Google Buzz*  
 11 *User Privacy Litig.*, No. 10-00672, Dkt. 117 (N.D. Cal. Feb. 16, 2011)). *See Lane*, 696 F.3d at 822  
 12 (requiring only that the settlement explain that “the funds will be used . . . to ‘fund and sponsor  
 13 [certain educational, online-privacy-related] programs’”).

14 Finally, that certain organizations publicly espouse an interest in promoting racial, social,  
 15 and environmental justice (Dkt. 354 at 16; 354-1 ¶ 11), in no way makes them inappropriate *cy*  
 16 *pres* recipients and is irrelevant to evaluating the nexus between their privacy-related work and  
 17 this case. Mr. Frank’s unsupported—and frankly offensive—claims that these reputable  
 18 organizations, which are all respected in the privacy (and grant-making) field, is somehow racist  
 19 or anti-Semitic because of their expressed support for diversity simply should not be entertained.  
 20 *See* Dkt. 355 at ¶¶ 7, 9, 10, 12, 17, 21, 23, 26, 27.

21 c. **23(e)(2)(C)(iii) Terms of Proposed Attorneys’ Fees**

22 Rule 23(e)(2)(C)’s third factor for consideration is: “the terms of any proposed award of  
 23 attorney’s fees, including timing of payment.” Here, the Settlement Agreement does not  
 24

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25 <sup>4</sup> Mr. Frank also claims to “reserve the right to supplement” the objection upon review of the  
 26 Parties’ “final list of proposed *cy pres* recipients” and “the percentage of the net settlement funds  
 27 they are requesting” at final approval. Dkt. 354 at 20. As discussed above, ultimately the Court is  
 28 vested with the authority to determine Approved *Cy Pres* Recipients and their allocations.  
 Moreover, the Parties have not suggested any *cy pres* recipients that were not disclosed during the  
 notice period. Mr. Frank cannot reserve a right to supplement the objection indefinitely into the  
 future.

1 contemplate a specific award of attorneys' fees, but provides that any Court-awarded fees will be  
 2 paid from the Settlement Fund, and Google is free to object to Class Counsel's requested award.  
 3 See SA ¶¶ 32, 40-42, 58-63. As detailed in Plaintiffs' Motion for Attorneys' Fees and Expenses  
 4 (Dkt. 351) and as summarized in Section VI, below, Class Counsel's fee request is within the usual  
 5 range of fee awards that are approved in the Ninth Circuit, including in connection with settlements  
 6 offering *cy pres* relief, and the request is merited. Class Counsel will not be paid any fees until  
 7 after the Settlement's Effective Date has passed, and there are no issues with timing that might  
 8 raise concern.

9 **d. 23(e)(2)(C)(iv) Agreements Under Rule 23(e)(3)**

10 Rule 23(e)(2)(C)(iv) requires the Court to consider agreements that must be identified  
 11 under Rule 23(e)(3). This provision is aimed at "related undertakings that, although seemingly  
 12 separate, may have influenced the terms of the settlement by trading away possible advantages for  
 13 the class in return for advantages for others." Fed. R. Civ. P. 23(e), 2003 Advisory Committee  
 14 Notes. Plaintiffs have entered into no such agreements.

15 The Settlement provides effective, fair, reasonable, and adequate relief to the Class,  
 16 satisfying Rule 23(e)(2)(C).

17 **4. Rule 23(e)(2)(D): The Proposed Settlement Treats Class Members**  
 18 **Equitably Relative to Each Other.**

19 The proceeds recovered for each class member are treated the same way, distributed to  
 20 non-profit organizations that meet the standards for approval under Ninth Circuit doctrine, and  
 21 will serve Class members' interests. Mr. Frank's proposals for distribution, by contrast, divide the  
 22 class into winners and losers: a tiny portion of the class who might get some monetary award, and  
 23 the vast majority who get nothing. Mr. Frank proposes a lottery-type system in the event that too  
 24 many claims are submitted (Obj. at 10), which would be entirely arbitrary and would fail to "treat[]  
 25 class members equitably relative to each other," as required by Rule 23(e)(2)(D). The same is true  
 26 with respect to Mr. Frank's proposed claims process that he expects to result in only 1.5% of the  
 27 class receiving any monetary benefit from the Settlement. Mr. Frank fails to explain why the Court  
 28 should prioritize the interests of such a tiny proportion of class members where, as here, *cy pres*  
 awards are expected to result in substantial benefits on a roughly equal basis across a broad cross-



1 section of the class.

2 **C. The Court Should Grant Class Counsel’s Fee Request**

3 Class counsel submitted their application for attorneys’ fees on January 29, 2024. Dkt. 351.  
4 Mr. Frank, acknowledging that his argument conflicts with Ninth Circuit law, invokes out-of-  
5 Circuit authority for the proposition that *cy pres* relief should not be considered for purposes of  
6 attorneys’ fees, and that Class Counsel should not be awarded any fees whatsoever. *See* Obj. at 22  
7 (citing *Pearson v. NBTY, Inc.*, 772 F.3d 778, 784 (7th Cir. 2014), and acknowledging conflict with  
8 *Google Street View*, 21. F.4th at 1121). In this Circuit, “counsel should not be penalized for  
9 fashioning a *cy pres*-only settlement that stands to accomplish some good.” *Google Street View*,  
10 21 F.4th at 1121. Not only does the Seventh Circuit’s *Pearson* case not apply Ninth Circuit law,  
11 but it considered a settlement entirely distinguishable from the one before this Court, which  
12 included a clear-sailing provision and a kicker provision under which any amounts not awarded to  
13 class counsel would revert to defendant. *Pearson*, at 780. As pointed out above, this Settlement  
14 includes no such features, and *Pearson* simply does not speak to the issues before this Court, which  
15 should follow Ninth Circuit law in determining appropriate attorneys’ fees and service awards.

16 Mr. Frank also argues there is no basis to exceed the Ninth Circuit’s 25% benchmark, but  
17 Plaintiffs fully justified their requested award in the Motion for Attorneys’ Fees and Expenses,  
18 based upon (1) the excellent results achieved; (2) the effort, experience, and skill that was required;  
19 (3) the riskiness of the case and the financial burden shouldered by Class Counsel on a contingency  
20 basis; and (4) awards made in similar cases. *See* Dkt. 351 at 9-19. Plaintiffs will not repeat all of  
21 those arguments here and reserve the right to expand on these issues in their forthcoming Reply  
22 brief, but it is clear that, under Ninth Circuit law, the requested award is fully justified.

23 **IV. CONCLUSION**

24 For the foregoing reasons, Plaintiffs respectfully request that the Court enter an order,  
25 substantially similar to the proposed order filed and lodged herewith: (1) certifying the Settlement  
26 Class; (2) granting final approval of the Settlement as fair, reasonable, and adequate; and (3)  
27 entering final judgment as to Google in this Action.

28

1 Dated: March 25, 2024

Respectfully submitted,

2  
3 By: /s/ Tina Wolfson

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12 Dated: March 25, 2024

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**SIGNATURE ATTESTATION**

I am the ECF User whose identification and password are being used to file the foregoing Notice of Motion and Motion for Preliminary Approval of Proposed Class Action Settlement; Memorandum of Points and Authorities in Support Thereof. Pursuant to L.R 5-1(i)(3) regarding signatures, I, Tina Wolfson attest that concurrence in the filing of this document has been obtained.

Dated: March 25, 2024

/s/ Tina Wolfson  
Tina Wolfson