No. 17-1480

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

IN RE GOOGLE INC. COOKIE PLACEMENT CONSUMER PRIVACY LITIGATION

On Appeal from the United States District Court
For the District of Delaware
Case No. 12-md-2358
The Hon. Sue L. Robinson

BRIEF OF *AMICUS CURIAE* ELECTRONIC PRIVACY INFORMATION CENTER (EPIC) IN SUPPORT OF APPELLANT

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and 29(c), *amicus curiae* Electronic Privacy Information Center ("EPIC") certifies that it is a District of Columbia corporation with no parent corporation. No publicly held company owns 10% or more of EPIC stock.

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INTEREST OF THE AMICUS

The Electronic Privacy Information Center ("EPIC") is a public interest research center in Washington, D.C., established in 1994 to focus public attention on emerging civil liberties issues and to protect privacy, the First Amendment, and other Constitutional values.[1] EPIC maintains two of the most popular web sites in the world concerning privacy – epic.org and privacy.org – and routinely advocates for consumer privacy in matters before the Federal Trade Commission ("FTC") and the United States Congress.

EPIC is interested in this case for three reasons. First, EPIC's prior work bears a direct nexus to this case. In 2007, EPIC and a coalition of consumer privacy organizations filed a complaint with the FTC raising privacy concerns over the proposed merger of Google and DoubleClick—the very merger that gave rise to the practices at issue in this lawsuit. And EPIC's FTC complaint regarding Google Buzz led to the Commission's 2011 Consent Order which enabled the FTC's subsequent enforcement action against Google regarding the conduct at issue in this case. Second, EPIC has routinely advised courts in consumer privacy class actions to ensure that settlements are aligned with the purpose of the litigation and that the *cy pres* allocations advance the interests of class members. EPIC filed

[1] In accordance with Rule 29, the undersigned states that no monetary contributions were made for the preparation or submission of this brief. This brief was not authored, in whole or in part, by counsel for a party.

as *amicus curiae* before Ninth Circuit in *Fraley v. Facebook*, raising objections to many of the same issues present in this settlement. Third, EPIC's concerns over *cy pres* awards in class action settlements reflect those articulated by Chief Justice Roberts in *Marek v. Lane*. 134 S. Ct. 8 (2013).

ARGUMENT

The *cy pres*-only settlement agreement before the Court is fundamentally flawed. Under the terms, Google is allowed to continue its unlawful conduct and the class members receive no monetary relief. In addition, the parties have chosen *cy pres* recipients that raise significant conflicts of interest concerns. The beneficiaries include charities to which Google has donated and an organization on which Plaintiffs' counsel served as chairman of the board. These concerns merited thoughtful consideration by the District Court. Instead, the District Court glossed over them and rubber-stamped the settlement agreement. EPIC and other consumer privacy organizations have expended significant resources over the years to draw attention to Google's business practices and to ensure that settlements in class actions advance the underlying claims and are aligned with the interests of class members. The Court should reject the settlement agreement because it fails adequately protect the interests of the Class.

I. The parties have not accurately described the scope of consumer privacy work done by the proposed *cy pres* recipients or by other organizations excluded from the settlement.

A *cy pres* award should only be provided to the organizations aligned with the interests of the class members. *See In re Baby Prod. Antitrust Litig.*, 708 F.3d 163, 172 (3d Cir. 2013) (holding that *cy pres* funds must be used "for a purpose related to the class injury"). The lower court should not have approved this settlement without first conducting a rigorous analysis into whether the allocated *cy pres* funds will actually benefit the class. As this Court observed during oral argument, the lower court failed entirely to scrutinize the selection of *cy pres* recipients in this case. In response to detailed questions about the proposed recipients, class counsel made a number of factual assertions about the field of consumer privacy advocacy in general, and the work of these organizations in particular, that is not supported by the record and was not addressed at all by the lower court.

In explaining why these six organizations were chosen, Plaintiffs' counsel falsely claimed to this Court during oral argument that there was a "limited sphere" of organizations representing consumer privacy and data security. The work of EPIC and numerous other consumer privacy organizations on issues directly related to this case demonstrates this claim is plainly false. In fact, EPIC, the Center for Digital Democracy ("CDD") and the U.S. Public Interest Research

Group ("US PIRG") have all done extensive work advocating against the very practices that gave rise to this lawsuit.

In 2007, EPIC, CDD, and US PIRG filed a complaint with the FTC requesting that the Commission open an investigation into the Google's proposed acquisition of DoubleClick. EPIC et al, Complaint and Request for Injunction, Request for Investigation and for Other Relief, *In the Matter of Google, Inc. and DoubleClick, Inc.*, before the Fed. Trade Comm'n (Apr. 20, 2007).[2] EPIC warned that the proposed merger would create "unique risks to privacy and violate previously agreed standards for the conduct of online advertising." *Id*. ¶ 1. EPIC also warned the acquisition would lead to "the increasing collection of personal information of Internet users by Internet advertisers." *Id*. As EPIC had predicted, the acquisition of DoubleClick has now enabled "Google to track both a person's Internet searches and a person's web site visits." *Id*. ¶ 27.

Indeed, Google's widespread tracking of web browsing activity and interception of private communications for advertising purposes is precisely the conduct under review in this case. The plaintiffs alleged that Internet advertising companies owned by Google—including DoubleClick—placed tracking cookies on the plaintiffs' web browsers that circumvented their privacy settings and monitored their Internet activity. *In re Google, Inc. Cookie Placement Consumer*

[2] https://www.epic.org/privacy/ftc/google/epic_complaint.pdf.

Privacy Litigation, 806 F.3d 125, 133 (3d Cir. 2015). The allegations in this case involve the very practices EPIC, CDD, and US PIRG warned of in their FTC complaint.

Moreover, the FTC enforcement action that preceded this lawsuit followed from a prior complaint filed by EPIC. In 2010, EPIC filed a complaint with the FTC regarding Google Buzz, alleging that Google transformed its email service into a social networking service without offering users meaningful control over their information or opt-in consent. EPIC, Complaint, Request for Investigation, Injunction, and Other Relief, *In the Matter of Google, Inc.*, before the Fed. Trade Comm'n (Feb. 16, 2010).[3] In announcing its 2011 Consent Order with Google, the FTC credited EPIC with initiating the action, stating "Google's data practices in connection with its launch of Google Buzz were the subject of a complaint filed with the FTC by the Electronic Privacy Information Center." Press Release, Fed. Trade Comm'n, *FTC Charges Deceptive Privacy Practices in Googles Rollout of Its Buzz Social Network* (Mar. 30, 2011).[4] In 2012, the FTC fined Google $22.5 million to settle charges that it violated the 2011 Google Buzz Consent Order by misrepresenting privacy assurances to users of Apple's Safari Internet Browser. *Id*.

[3] https://epic.org/privacy/ftc/googlebuzz/GoogleBuzz_Complaint.pdf.
[4] https://www.ftc.gov/news-events/press-releases/2011/03/ftc-charges-deceptive-privacy-practices-googles-rollout-its-buzz.

The factual allegations in that enforcement action became the basis for the instant lawsuit.

The significant work of EPIC, CDD, and US PIRG—among other consumer privacy organizations—to protect internet users from the very practices at issue in this lawsuit demonstrate that class counsel's references to a "limited sphere" of consumer privacy groups is both unsupported by the record and contrary to the history of this case. This Court should remand to correct the record and have the District Court conduct an inquiry into why these six organizations were chosen over other organizations that are aligned with the interests of the Class. In other similar matters, courts have asked parties to set up an objective application process that provides a basis to select *cy pres* recipients to ensure that the interests of the class are served and to protect against conflicts of interest. *See*, *e.g.* Order re. Nomination Process for *Cy Pres* Recipients, *In re Google Buzz Privacy Litigation*, 2011 WL 7460099, at 2 (N.D. Cal. entered Feb. 16, 2011) (No. 10-00672 JW); Class Action Settlement Agreement, *In re Netflix Privacy Litigation*, No. 11-00379, at 13–14 (N.D. Cal. entered May 25, 2012).

While the lower court acknowledged that *cy pres* distributions must "bear a direct *and* substantial nexus to the interests of absent class members" (Mem. Op. 2) the court did not actually conduct that inquiry in this case. Courts must not act as a rubber stamp for *cy pres* settlements, particularly where there are both actual and

apparent conflicts of interest. That conduct is especially concerning here where, as this Court noted during oral argument, there is a significant risk of both actual conflicts of interest and the appearance of conflicts of interest.

In the recent settlement in *In re Google Referrer Header Privacy Litigation*, the lower court raised concerns that "[s]ome of the proposed *cy pres* recipients are 'usual suspects.'" The court stated that, "using the same list of *cy pres* recipients in every internet privacy class action … discourages the development of other worthy organizations," and "raises questions about the effectiveness of those organizations that have received prior distributions. *In re Google Referrer Header Privacy Litig.*, 87 F. Supp. 3d 1122, 1133 n.1 (N.D. Cal. 2015), *aff'd*, 869 F.3d 737 (9th Cir. 2017). The court also concluded that "if class action counsel truly seeks to raise the bar for *cy pres* settlements, they should consider contributing to organizations other than the same typical few." *Id*.

In *Lane v. Facebook*, six judges of the Ninth Circuit dissented from a denial of a petition for rehearing *en banc*, writing "it is not enough simply to identify any link between the class claims and a *cy pres* distribution . . . [i]nstead, an appropriate *cy pres* recipient must be dedicated to protecting consumers from the precise wrongful conduct about which plaintiffs complain." *Lane v. Facebook, Inc*., 709 F.3d 791, 794 (9th Cir. 2013) (Smith, Kozinski, O'Scannlain, Bybee, Bea, and Ikuta, dissenting from denial of rehearing en banc).

In connection with the Supreme Court's denial of rehearing en banc in *Lane*, Chief Justice John Roberts wrote separately to express skepticism of the settlement where "Facebook thus insulated itself from all class claims arising from the Beacon episode by paying plaintiffs' counsel and the named plaintiffs some $3 million and spending $6.5 million to set up a foundation in which it would play a major role." *Marek v. Lane*, 134 S. Ct. 8 (2013) (Statement of Chief Justice Roberts respecting the denial of certiorari). The Chief Justice concluded that "in a suitable case, this Court may need to clarify the limits on the use of such remedies." *Id*.

Google has in the past used *cy pres* awards to advance its own interests. For example, in the *Google Referrer Header* settlement some of the *cy pres* recipients were favored charities of the defendant Google. In fact, two of the *cy pres* beneficiaries were the same organizations as the proposed beneficiaries here: the Stanford Center for Internet and Technology and the Berkman Center for Internet and Society at Harvard University. *In re Google Referrer Header*, 87 F. Supp. 3d at 1130. The American Law Institute has stated that "a *cy pres* remedy should not be ordered if the court or any party has any significant prior affiliation with the intended recipient that would raise substantial questions about whether the award was made on the merits." The American Law Institute, *Principles of the Law of Aggregate Litigation* § 3.07 cmt b (2010). And the Ninth Circuit has admonished

that "it seems somewhat distasteful to allow a corporation to fulfill its legal and equitable obligations through tax-deductible donations to third parties." *Molski v. Gleich,* 318 F.3d 937, 954 (9th Cir. 2003); *see also Dennis v. Kellogg Co.*, 697 F.3d 858, 864 (9th Cir. 2012) (holding that *cy pres* should not be approved where the defendant might be using "previously budgeted funds" to make the same contribution it would have made anyway).

The lower court also failed to address why Public Counsel, an organization on which Plaintiffs' counsel served as chairman of the board, would best represent the interests of the class. As class counsel conceded during oral argument, Public Counsel is not primarily a privacy organization. In fact, it does not list "privacy" or "consumer privacy" as any of its ten practice areas on its website.[5] It fails to mention "privacy" as one of the aims of its "Consumer Law Project," stating "The Consumer Law Project (CLP) assists with a wide variety of consumer matters, including consumer fraud, unfair business practices, foreclosure and real estate fraud." This Court rightly noted during oral argument that to the extent that Public Counsel deals with electronic privacy, its program was established shortly before this lawsuit. Given the potential conflicts of interest in this case, it is clear that the lower court should have engaged in a searching inquiry into whether these

[5] http://www.publiccounsel.org/practice_areas/consumer_law.

organizations would best protect the interests of the class. This Court should vacate and remand to the lower court to conduct the appropriate analysis.

II. The lower court should have conducted a thorough review of the fairness of this settlement, and its failure to do so warrants remand.

A. This settlement fails to prohibit the underlying unlawful conduct that gave rise to the suit.

The alleged conduct that triggered this lawsuit involved Google permitting Internet advertisers to "place[] tracking cookies on the plaintiffs' web browsers in contravention of their browsers' cookie blockers and defendant Google's own public statements." *In re Google Inc. Cookie Placement Consumer Privacy Litig.*, 806 F.3d 125, 130 (3d Cir. 2015). This Court concluded that a reasonable jury could find that these practices violated California law. *Id*. at 151. Google's conduct was also the subject of an FTC enforcement action that forced Google to pay a record $22.5 million civil penalty to settle charges that it "misrepresented to users of Apple Inc.'s Safari Internet browser that it would not place tracking 'cookies' or serve targeted ads to those users." Press Release, Fed. Trade Comm'n. *Google Will Pay $22.5 Million to Settle FTC Charges It Misrepresented Privacy Assurances to Users of Apple's Safari Internet Browser: Privacy Settlement is the Largest FTC Penalty Ever for Violation of a Commission Order* (Aug. 9, 2012).[6] The FTC's

[6] https://www.ftc.gov/news-events/press-releases/2012/08/google-will-pay-225-million-settle-ftc-charges-it-misrepresented ("FTC Press Release").

Consent Order prohibits Google from "misrepresenting the extent to which consumers can exercise control over the collection of their information." *Id*.

Despite the substantial evidence of Google's wrongdoing, the proposed settlement contains no provision enjoining Google from such conduct in the future. Other than the proposed *cy pres* award, the only other relief to the class members is "Google's assurances that it took actions to expire or delete, by modifying the cookie deletion date contained in each cookie, all third-party Google cookies that exist in the browser filed for Safari browsers." (Mem. Op. 1)

Despite the fact that the Consent Order bars the practice at issue in this case, Google makes no promises to the Class that it will not engage in such conduct in the future. It is hard to imagine how a settlement provides a benefit to the Class if the company is allowed to continue the practice that gave rise to the putative class action. On this basis alone, the proposed settlement should be rejected.

B. This settlement does not provide direct relief to class members.

EPIC has studied extensively the challenge of *cy pres* awards in the consumer privacy field and we have concluded that settlement funds should be provided directly to class members for two reasons: (1) that is the preferred outcome in law, and (2) the risk of collusion among repeat players is too great. Marc Rotenberg & David Jacobs, *Enforcing Privacy Rights: Class Action*

Litigation and the Challenge of Cy Pres, in *Enforcing Privacy Law, Governance and Technology Series* 307 (David Wright & Paul De Hert eds., 2016).

Neither the size of the class nor the substantive claims should preclude establishing a claims process for class members. In this case, the district court determined that a *cy pres*-only settlement was appropriate given "the substantial problems of identifying the millions of potential class members and then of translating their alleged loss of privacy into individual cash amounts" (Mem. Op. 4). But in *Fraley*, the court confronted a similar class settlement that did provide monetary relief to individual class members. *Fraley v. Facebook*, 966 F. Supp. 2d 939 (N.D. Cal. 2013) (concerning Facebook's "Sponsored Stories" that allegedly misappropriated plaintiffs' names and likenesses). That class consisted of roughly 150 million members and the parties reached a settlement that would award "small cash payments to the relatively low percentage of class members who filed claims." *Id*. at 941.

In *Fraley* not only was the class comparably large, but the underlying substantive claims similarly lacked concrete monetary damages. The court awarded monetary relief to the class despite observing that "[s]ubstantial barriers to recovery remained, not the least of which would be the requirement to demonstrate that the complained-of conduct caused cognizable harm." *Id*. In fact, the court in *Fraley* initially denied a proposed settlement because it lacked any

monetary relief to the class.[7] In the instant case, the District Court found a *cy pres*-only settlement acceptable because, "[t]he nature of the claims—invasion of privacy—pose difficulties in terms of establishing liability (as demonstrated by Google's successful motion to dismiss) and damages." (Mem. Op. 3). But the same difficulties were present in *Fraley* and did not prevent the court from approving a settlement fund that directly benefited class members.

CONCLUSION

Amicus respectfully request this Court reverse the lower court's order approving the settlement agreement.

Respectfully submitted,

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[7] Order Denying Motion for Preliminary Approval of Settlement, No. 11-01726 (N.D. Cal. filed Apr. 8, 2011).

CERTIFICATE OF COMPLIANCE WITH FEDERAL RULES

This brief complies with the type-volume limitation of Fed. R. App. P. 29(d) and Fed. R. App. P. 32(a)(7)(B) because it contains 2,895 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii). This brief also complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Office Word for Mac 2011 in 14 point Times New Roman.

Dated: November 22, 2017

/s/ Marc Rotenberg
Marc Rotenberg

CERTIFICATE OF COMPLIANCE WITH LOCAL RULES

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Dated: November 22, 2017

/s/ Marc Rotenberg
Marc Rotenberg

CERTIFICATE OF SERVICE

I hereby certify that on November 22, 2017, I electronically filed the foregoing Brief of *Amici Curiae* Electronic Privacy Information Center Support of Appellant with the Clerk of the United States Court of Appeals for the Third Circuit using the CM/ECF system. All parties are to this case will be served via the CM/ECF system.

Dated: November 22, 2017

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