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August 22, 2013

Clerk of the United States District Court for the Northern District of California
San Jose Courthouse, Courtroom 4 - 5th Floor
280 South 1st Street
San Jose, CA 95113

Attention: The Honorable Edward J. Davila

Re: In re Google Referrer Header Privacy Litigation, No. 10-4809

Dear Judge Davila:

The signatories of this letter are privacy and consumer protection organizations who oppose the proposed settlement in *In re Google Referrer Header Privacy Litigation.*[1] Counsel for the parties to the settlement contend that because of the "immediate benefits offered to the Class by injunctive relief and *cy pres* donation, the Settlement is deserving of preliminary approval."[2] That statement is plainly false. The proposed relief provides no benefit to Class members. Furthermore, the proposed *cy pres* allocation is not aligned with the interests of the purported Class members. For these reasons, the preliminary settlement agreement should not be approved.

Preliminary approval is appropriate only if a proposed settlement agreement "appears to be the product of serious, informed, noncollusive negotiations, has no obvious deficiencies, does not improperly grant preferential treatment to class representatives or segments of the class, and falls with the range of possible approval . . . ."[3] Here, the relief proposed by the proposed settlement agreement contains at least three "obvious deficiencies": (1) it fails to require Google to make any substantive changes to its business practices; (2) it provides no monetary relief to the class; and (3) the proposed *cy pres* allocations do not meet the Ninth Circuit's requirements for alignment with the interests of class members.

The Proposed Settlement Fails to Require Google to Change its Business Practices

First, the proposed agreement remarkably states that Google will make no changes to its substantive business practices: "Google will not be required or requested to make any changes to its homepage www.google.com or to the practices or functionality of Google Search, Google Adwords, Google Analytics, or Google Web History."[4] It is absurd to argue that a benefit is

[1] No. 10-4809 (N.D. Cal. filed Oct. 25, 2010).
[2] Mot. Prelim. Approval, Dkt. 52, at 1.
[3] *In re Tableware Antitrust Litig*., 484 F.Supp.2d 1078, 1079 (N.D. Cal. 2007) (citing Manual for Complex Litigation, Second § 30.44 (1985)); *see also Chem. Bank v. City of Seattle*, 955 F.2d 1268, 1291 (9th Cir.1992).
[4] Agreement, Dkt. 52-3, at 7.

provided to the Class where the company makes no material change in its business practices and is allowed to continue the practice that provides the basis for the putative class action. On this basis alone, the proposed settlement should be rejected.

The only change brought about by the proposed settlement is a modification of Google's privacy policy to allow the company to continue the disputed practice.[5] Privacy notices, however, have been widely recognized as ineffective. Simply put, users do not read privacy policies. There are a number of good reasons for this, including the fact that reading and understanding privacy policies requires a significant amount of time,[6] often requires considerable sophistication,[7] and typically produces no practical benefit because the terms are pre-determined by the companies and may be changed at any time.[8] Thus, additional notice will provide no meaningful benefit to the class. To the contrary, the revised notice will essentially ratify the company's continuation of the practice that gave rise to this suit.

Under the logic of this proposed settlement agreement, a company that manufactures a faulty toaster that catches fire because of poor wiring is permitted *post-settlement* to continue to manufacture the toaster as before with no change to the wiring that created the risk to the customers, as long it notifies customers of the risk arising from its ongoing negligence. To make the analogy even more precise, it is also necessary to assume that this particular manufacturer occupies approximately 70 percent of the market for all toasters, which is the market share that Google enjoys for search in the United States.[9]

The absence of meaningful injunctive relief distinguishes this case from others within this Circuit in which approval was granted for a proposed settlement. In *Lane v. Facebook,* the Ninth Circuit upheld a settlement involving Facebook's Beacon program.[10] The Beacon program disclosed the purchasing activity of Facebook users to their friends, often with embarrassing results, and was extraordinarily difficult to opt out of. Crucially, the agreement in *Lane* provided that "Facebook would permanently terminate the Beacon program . . . ."[11] Here, Google is not obliged to change any part of its substantive business practices.

The matter currently before this court is much closer to a case in which Judge Richard G. Seeborg recently denied a preliminary settlement agreement in *Fraley v. Facebook* because the agreement offered insufficient benefit to the class.[12] That agreement, as insufficient as it was,

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[5] Mot. Prelim. Approval, Dkt. 52, at 5.
[6] Alexis Madrigal, *Reading the Privacy Policies You Encounter in a Year Would Take 76 Work Days*, THE ATLANTIC (Mar. 1, 2012), http://www.theatlantic.com/technology/archive/2012/03/reading-the-privacy-policies-you-encounter-in-a-year-would-take-76-work-days/253851/.
[7] Erik Sherman, *Privacy Policies Are Great – For PhDs*, CBS News (Sept. 4, 2008, 5:31 AM), http://industry.bnet.com/technology/1000391/privacypolicies-are-great-for-phds.
[8] For example, Google's terms of use grant the company the right to change the agreement at any time. See Google Terms of Service, Google, https://www.google.com/intl/en/policies/terms/ ("We may modify these terms or any additional terms that apply to a Service to, for example, reflect changes to the law or changes to our Services.").
[9] See comScore Releases January 2013 U.S. Search Engine Rankings, comScore, http://www.comscore.com/Insights/Press_Releases/2013/2/comScore_Releases_January_2013_U.S._Search_Engine_Rankings (showing a 67 percent market share for Google Search). In Europe, the number approaches 90 percent.
[10] *Lane v. Facebook, Inc.*, Nos. 10-16380 & 10-16398 (9th Cir. Sept. 20, 2012).
[11] *Lane v. Facebook, Inc.*, 696 F.3d 811, 817 (9th Cir. 2012).
[12] Order Denying Motion for Preliminary Approval of Settlement, No. 11-01726 (N.D. Cal. filed Apr. 8, 2011).

provided significantly *more* benefit to class members than does the agreement before this Court. Under the *Fraley* agreement, Facebook was required to change its business practices so that consumers could opt out of the "Sponsored Stories" program that was the basis of the class action. This agreement does not even seek to change the underlying practice that provides the putative basis for the class action. It should therefore be rejected.

The Proposed Settlement Provides No Monetary Relief to the Class

Second, the proposed settlement fails to provide *any* monetary relief to the class. In *Fraley*, the absence of monetary relief was sufficient to invalidate the original proposed settlement.[13] The court found the lack of monetary relief particularly problematic in part because the law under which the plaintiffs sued provided statutory damages of $750.[14] Thus, "[m]erely pointing to the infeasibility of dividing up the agreed-to $10 million recovery, or the relatively small per-use revenue Facebook derived, is insufficient, standing alone, to justify resort to purely *cy pres* payments," wrote the Court.[15]

In the instant case, plaintiffs brought suit under several statutes that provide for statutory damages, [16] including the Stored Communications Act (SCA)[17], which provides for a minimum of $1,000 per violation.[18] Given the potential statutory damages at stake, the omission of *any* monetary relief to class members is a glaring deficiency. Accordingly, the proposed preliminary settlement should be rejected.

The Proposed *Cy Pres* Allocation Does Not Meet the Ninth Circuit's Legal Standards

Third, the proposed *cy pres* allocation does not meet clear Ninth Circuit standards for such distributions. This Circuit's doctrine of *cy pres* "allows a court to distribute unclaimed or nondistributable portions of a class action settlement fund to the "next best" class of beneficiaries."[19] As explained in *Nachshin v. AOL, LLC*, the Ninth Circuit considers two guiding factors when approving the award of *cy pres* funds: (1) the objectives of the underlying statute and (2) the interests of the silent class members.[20]

Here, the settlement fails under either factor. First, the complaint alleges violation of privacy statutes such as the Stored Communications Act, which applies criminal penalties to the unauthorized access of electronic communications services.[21] Furthering the objectives of privacy statutes requires, at a minimum, that the proposed *cy pres* recipients be organizations that

[13] *Id.*
[14] *Id.* at 3.
[15] *Id.*
[16] *See* Second Amended Complaint, Dkt. 39.
[17] 18 U.S.C. § 2701 *et seq.*
[18] 18 U.S.C. §2707(c).
[19] *Nachshin v. AOL, LLC*, 663 F.3d 1034, 1036 (9th Cir. 2011).
[20] *See id.* at 1039; *see also Six (6) Mexican Workers v. Ariz. Citrus Growers*, 904 F.2d 1301, 1307 (9th Cir. 1990).
[21] §2701 of the SCA provides criminal penalties for anyone who "intentionally accesses without authorization a facility through which an electronic communication service is provided; or… intentionally exceeds an authorization to access that facility; and thereby obtains, alters, or prevents authorized access to a wire or electronic communication while it is in electronic storage in such system."

seek to protect privacy. But with the exception of the World Privacy Forum, none of the proposed recipients have the protection of privacy as a mission.[22] Just as the objectives of the fair competition law in *Dennis* were not served by *cy pres* distributions to charities that fed the indigent,[23] the objectives of the privacy statutes in this case are not served by *cy pres* distributions to non-privacy organizations.

As to the second standard, the interests of the silent class members demand that *cy pres* funds must be used "for the aggregate, indirect, prospective benefit of the class."[24] Although the overarching standard by which a court should review a settlement is whether the settlement is fair, reasonable, and adequate, "where *cy pres* is considered, it will be rejected when the proposed distribution fails to provide the 'next best' distribution."[25]

The proposed settlement agreement is not nearly "next best." The parties falsely represent to the Court that the list of *cy pres* recipient organizations includes "leading consumer and privacy advocacy groups and academic institutions."[26] In fact, of the seven organizations that would receive the *cy pres* funds under the Parties' preliminary proposal, only one of these organizations – the World Privacy Forum – has the protection of privacy as a mission and is aligned with the interests of class members. Six of the seven designated organizations are simply ineligible for a *cy pres* award under the test set out by this Ninth Circuit in *Nachshin.*

Indeed, the facts of this case closely track those of *Nachshin*,[27] where the Ninth Circuit rejected a proposed settlement arising from AOL's alleged misuse of data from users' outgoing e-mails. That proposed settlement agreement would have given a class of 66 million AOL subscribers zero monetary compensation, would have required minor notice changes and the creation of an opt-out on AOL's part (a requirement that represents a significant improvement over the agreement before this Court), and would have distributed $75,000 in *cy pres* payments. Because class and defense counsel "claimed they could not identify any charitable organization that would benefit the class or be specifically germane to the issues in the case,"[28] the district court selected three organizations as recipients: (1) the Legal Aid Foundation of Los Angeles, (2) the Federal Judicial Center Foundation, and (3) the Boys and Girls Club of America (shared between the chapters in Los Angeles and Santa Monica).

The Ninth Circuit reversed, holding that the groups were "geographically isolated and

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[22] The proposed *cy pres* recipients include: World Privacy Forum; Carnegie Mellon University; Chicago-Kent College of Law Center for Information, Society, and Policy; Berkman Center for Internet and Society at Harvard University; Stanford Center for Internet and Society; MacArthur Foundation; and AARP, Inc. *See* Mot. for Prelim. Approval, Dkt. 52, at 5-6.
[23] Dennis v. Kellogg Co., 697 F.3d 858, 866 (9th Cir. 2012).
[24] *Nashchin*, 663 F.3d at 1038.
[25] *See Molski v. Gleich*, 318 F.3d 937, 953 (9th Cir. 2003) *overruled on other grounds by Dukes v. Wal-Mart Stores, Inc.*, 603 F.3d 571 (9th Cir. 2010); *Six (6) Mexican Workers*, 904 F.2d at 1308; see also Am. Law Inst., Principles of the Law of Aggregate Litigation § 3.07 (2010) ("If, and only if, no recipient whose interests reasonably approximate those being pursued by the class can be identified after thorough investigation and analysis, a court may approve a recipient that does not reasonably approximate the interests being pursued by the class.").
[26] Settlement Agreement and Release, Dkt. 52-3, at 18.
[27] 663 F.3d 1034 (9th Cir. 2011).
[28] *Id.* at 1037.

substantively unrelated charities," and focusing on the latter issue.[29] The Court noted that some courts "appear to have abandoned the 'next best use' principle implicit in the *cy pres* doctrine. These courts have awarded *cy pres* distributions to myriad charities which, though no doubt pursuing virtuous goals, have little or nothing to do with the purposes of the underlying lawsuit or the class of plaintiffs involved."[30] The Court further warned:

> When selection of *cy pres* beneficiaries is not tethered to the nature of the lawsuit and the interests of the silent class members, the selection process may answer to the whims and self interests of the parties, their counsel, or the court. Moreover, the specter of judges and outside entities dealing in the distribution and solicitation of settlement money may create the appearance of impropriety.[31]

The Court held that because the action arose from the alleged online misdeeds of AOL, appropriate *cy pres* relief *must* include organizations that actively work against online misdeeds:

> It is clear that all members of the class share two things in common: (1) they use the internet, and (2) their claims against AOL arise from a purportedly unlawful advertising campaign that exploited users' outgoing e-mail messages. The parties should not have trouble selecting beneficiaries from any number of non-profit organizations that work to protect internet users from fraud, predation, and other forms of online malfeasance. If a suitable *cy pres* beneficiary cannot be located, the district court should consider escheating the funds to the United States Treasury.[32]

More recently, in *Lane v. Facebook*, six judges of the Ninth Circuit dissented from a denial of a petition for a rehearing *en banc*.[33] "Our precedent," they wrote, "holds that it is not enough simply to identify any link between the class claims and a cy pres distribution, such as whether both concern food (*Dennis*) or the Internet (*Lane*). Instead, an appropriate cy pres

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[29] *Id.* at 1034.

[30] *Id.* at 1038, *citing In re Motorsports Merch. Antitrust Litig.,* 160 F.Supp.2d 1392, 1396-99 (N.D. Ga. 2001) (distributing $1.85 million remaining from a price fixing class action settlement relating to merchandise sold at professional stock car races to ten organizations including the Duke Children's Hospital and Health Center, the Make-a-Wish Foundation, the American Red Cross, and the Susan G. Komen Breast Cancer Foundation); *Superior Beverage Co., Inc. v. Owens-Illinois, Inc.,* 827 F.Supp. 477, 480 (N.D. Ill. 1993) (awarding $2 million from an antitrust class action settlement to fifteen applicants, including the San Jose Museum of Art, the American Jewish Congress, a public television station, and the Roger Baldwin Foundation of the American Civil Liberties Union of Illinois).

[31] *Id.* at 1039, *citing Bear Stearns,* 626 F.Supp.2d at 415; George Krueger & Judd Serotta, Op-Ed., *Our Class-Action System is Unconstitutional,* Wall St. J., Aug. 6, 2008 ("Judges, in their unlimited discretion, have occasionally been known to order a distribution to some place like their own *alma mater* or a public interest organization that they happen to favor."); Editorial, *When Judges Get Generous,* Wash. Post, Dec. 17, 2007, at A20 ("Federal judges are permitted to find other uses for excess funds, . . . giving the money away to favorite charities with little or no relation to the underlying litigation is inappropriate and borders on distasteful."); Adam Liptak, *Doling out Other People's Money,* N.Y. Times, Nov. 26, 2007 ("Lawyers and judges have grown used to controlling these pots of money, and they enjoy distributing them to favored charities, alma maters and the like.").

[32] *Id.* at 1041.

[33] Order Denying Rehearing and Rehearing En Banc & Dissent to Order, *Lane v. Facebook, Inc.,* Nos. 10-16380 & 10-16398 (9th Cir. Feb. 26, 2013*)* (Smith, Kozinski, O'Scannlain, Bybee, Bea, and Ikuta, dissenting).

recipient must be dedicated to protecting consumers from the precise wrongful conduct about which plaintiffs complain."[34]

Here, Class counsel allege that Google unlawfully disclosed the contents of search queries to third parties.[35] The interest of the Class, then, is in being protected against future privacy violations committed by Google. As in *Nachshin*, the *cy pres* nominees may all be "pursuing virtuous goals."[36] But only in the case of the World Privacy Forum are these goals related to protecting user privacy from misconduct by companies like Google. It is therefore misleading for the parties to represent to the Court that the "donations to these organizations will benefit the Class by aiding consumers in protecting themselves and their privacy online in the future."[37]

By way of contrast, there are organizations aligned with the interests of Class members – many of whom have previously received *cy pres* awards in similar proceedings – that were excluded by counsel for the parties. Of particular significance for this settlement, these same organizations have advocated for changes in business practices that safeguard Internet privacy rather than ratifying current business practices that place privacy at risk. Because it is specifically the privacy risks arising from Google's referrer heading practices that created the risk to Internet privacy and gave rise to this class action lawsuit, these organizations are far more appropriate recipients of *cy pres* funds as their missions, activities, and advocacy are closely aligned with the interests of Class members. Because only one such organization is identified among the seven *cy pres* recipients, the proposed *cy pres* distribution fails the Ninth Circuit's test articulated in *Nashchin* and should be rejected.

It may be significant that several of the proposed recipients of *cy pres* funds are favored charities of *defendant* Google, which routinely provides funding to these organizations for the benefit of Google. As the Ninth Circuit has stated, "it seems somewhat distasteful to allow a corporation to fulfill its legal and equitable obligations through tax-deductible donations to third parties."[38] Furthermore, in terms of deterrence, the Ninth Circuit considers such schemes a "paper tiger."[39] We also note a disturbing amount of overlap between the proposed *cy pres* recipients and the *alma maters* of the counsel in this matter: proposed class counsel Michael J. Aschenbrener (J.D., Chicago-Kent College of Law)[40] and Kassra P. Nassiri (M.A., Stanford; J.D., Harvard);[41] and defense counsel Eric Butler Evans (A.B., A.M., Harvard University).[42] That such ties exist does not preclude the award of *cy pres* funds to these institutions, but they clearly cannot properly provide the basis.

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[34] *Id.* That decision is now the subject of a petition for certiorari to the U.S. Supreme Court. *See Marek v. Lane*, No. 13-136 (cert. petition filed July 26, 2013).
[35] Settlement Agreement and Release, Dkt. 52-3, at 11.
[36] *Nachshin*, 663 F.3d at 1039.
[37] Settlement Agreement and Release, Dkt. 52-3, at 18.
[38] *Molski v. Gleich*, 318 F.3d 937, 954 (9th Cir. 2003).
[39] *Dennis v. Kellogg Co.*, 697 F.3d 858, 867-68 (9th Cir. 2012).
[40] *Michael Aschenbrener*, http://aschenbrenerlaw.com/michael-aschenbrener/.
[41] *Kassra Powell Nassiri*, http://njfirm.com/kassra-nassiri/.
[42] *Eric B. Evans*, http://www.mayerbrown.com/people/Eric-B-Evans/.

In addition to these objections, we note that the U.S. Federal Trade Commission has expressed increasing concern about class action settlements that are adverse to the interests of class members.[43] The Commission wrote as *amicus* recently in another matter that "[t]he disproportionate breadth of the Class Release and the significant advantages it provides Defendants, as compared to the *de minimis* benefits to the class, cast serious doubts as to the fairness, reasonableness, and adequacy of the proposed settlement. Thus, we respectfully suggest that the Court reject the proposed settlement."[44] That same argument could be made against this proposed settlement as well.

In Similar Cases, Courts Have used Objective *Cy Pres* Application Processes to Safeguard the Interests of the Class

We also note that 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. For example, in *in re Google Buzz Privacy Litigation*, Judge Ware established a formal application process and asked each applicant to provide detailed information that would justify the *cy pres* award.[45]

In *in re Google Buzz Privacy Litigation*, the parties initially proposed that Google would identity recipients of *cy pres* funds and the final recipients would be selected through a determination of counsel.[46] Judge Ware found that this process "lacked specificity and oversight required to provide a reasonable benefit to the Class."[47] Instead, the Court ordered the parties to "nominate the cy pres recipients" based on the following criteria:

(i) The organization's name and address;
(ii) A description of an established program currently undertaking policy or education efforts directed specifically at Internet privacy;
(iii) The number of years that the program has been established and focused on Internet privacy;
(iv) A short statement as to how the particular program will benefit the Class;
(v) The annual operating budget of the organization as a whole and the specific Internet privacy or education program; and
(vi) The amount received, if any, in contributions from Google, Inc. in 2010, independent of the Settlement.[48]

[43] "FTC Files *Amicus* Brief in U.S. District Court Opposing Proposed Class Action Settlement with Debt Buyer Midland Funding LLC," (may 23, 2011), available at http://www.ftc.gov/opa/2011/06/amicus_midland.shtm.
[44] Federal Trade Commission's Brief as Amicus Curiae, *Vassalle v. Midland Funding,*, No. 11-00096 (N.D. Ohio filed June 21, 2011).
[45] Order re. Nomination Process for *Cy Pres* Recipients, *In re Google Buzz Privacy Litigation*, 2011 WL 7460099 (No. 10-00672 JW) (N.D. Cal. entered Feb. 16, 2011) at 2.
[46] Notice of Motion and Memorandum in Support of Motion for Order Granting Final Approval of Class Settlement, Certifying Settlement Class, and Appointing Class Representatives and Class Counsel, *In re Google Buzz Privacy Litigation*, 2011 WL 7460099 (No. 10-00672 JW) (N.D. Cal. entered Feb. 16, 2011) at 6.
[47] Order re. Nomination Process for *Cy Pres* Recipients, *supra* n. 45 at 1.
[48] *Id*. at 2.

The court made explicit its concern that absent such procedures, worthwhile recipients could be improperly excluded.[49] In the May 31, 2011, order granting final approval of the settlement, the Court acknowledged objections to the proposed *cy pres* distribution of counsel and set out a "few necessary modifications" to ensure that "the nominations list adequately represents the interests of the class . . . ."[50]

More recently, in *In re Netflix Privacy Litigation*, the parties have proposed a settlement agreement that includes an objective nomination process. The application process requests certain detailed information from potential recipients, including:

(i) The organization's name and address;
(ii) A description of an established program currently undertaking policy or education efforts directed specifically at issues of technology, law, and privacy;
(iii) A short statement describing how the program benefits the Class;
(iv) The overall annual operating budget of the organization and of the specific program;
(v) The total amount of the cy pres distribution sought;
(vi) Disclosure of any connections, monetary or otherwise, between the organizations and the parties;
(vii) Disclosure of any connections, monetary or otherwise, between the organization and Class Counsel and Supporting Counsel; and
(viii) Disclosure of the amount received, if any, in contributions from the Parties or their counsel in 2011.[51]

This Court should adopt an approach similar to that set out in the two cases above and require the parties to establish an objective application process for organizations to request *cy pres* funding under the Proposed Settlement. This is would help ensure that the settlement is fair, reasonable, and accurate, and that it provides the "'next best' distribution."[52]

Conclusion

The absence of a benefit to the class combined with the proposed allocation of awards to institutions not aligned with the interests of class members is not accidental. Proposed class counsel, seeking to settle the matter and obtain their fees, have prioritized their own personal financial interests above the interests of the Class. It may serve their interests to have the preliminary settlement approved; it serves the putative Class members not all. For these reasons, the preliminary settlement agreement should be rejected.

[49] *See id.*
[50] Order Granting Final Approval of Class Action Settlement; Approval of *Cy Pres* Awards; and Awarding Attorney Fees, *In re Google Buzz Privacy Litigation*, 2011 WL 7460099 (No. 10-00672 JW) (N.D. Cal. entered Mar. 31, 2011) at 2, *available at* http://epic.org/privacy/ftc/googlebuzz/EPIC_Google_Buzz_Settlement.pdf.
[51] Class Action Settlement Agreement, *In re Netflix Privacy Litigation* (No. 11-00379 entered May 25, 2012) at 13-14.
[52] *See Molski*, 318 F.3d at 953; *Six (6) Mexican Workers*, 904 F.2d at 1308; *see also* American Law Institute, Principles of the Law of Aggregate Litigation, § 3.07 (2010) ("The court, when feasible, should require the parties to identify a recipient whose interests reasonably approximate those being pursued by the class.").

Respectfully,

/s/ Marc Rotenberg
Marc Rotenberg, Executive Director
Electronic Privacy Information Center (EPIC)

/s/ Jeff Chester
Jeff Chester, Executive Director
Center for Digital Democracy (CDD)

/s/ John Simpson
John Simpson, Privacy Project Director
Consumer Watchdog

/s/ Deborah Peel
Deborah Peel, Founder and Chair
Patient Privacy Rights

/s/ Beth Givens
Beth Givens, Director
Privacy Rights Clearinghouse

cc: Federal Trade Commission, Class Action Fairness Project