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14 **UNITED STATES DISTRICT COURT**  
15 **NORTHERN DISTRICT OF CALIFORNIA**  
16 **SAN JOSE DIVISION**

18 PALOMA GAOS, ANTHONY ITALIANO, and  
19 GABRIEL PRIYEV individually and on behalf of  
all others similarly situated,

20 Plaintiffs,

21 v.

22 GOOGLE INC., a Delaware corporation,

23 Defendant.

Case No. 5:10-CV-4809-EJD

CLASS ACTION

**PLAINTIFFS' NOTICE OF  
MOTION AND MOTION FOR  
FINAL APPROVAL OF CLASS  
ACTION SETTLEMENT**

Date: August 29, 2014

Time: 9:00 a.m.

Place: Courtroom 4, 5th Floor

Judge: Hon. Edward J. Davila

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**NOTICE OF MOTION**

NOTICE IS HEREBY GIVEN that the Plaintiffs will move the Court, pursuant to Federal Rule of Civil Procedure 23(e), to grant final approval of the proposed class action settlement entered into by the Parties on August 29, 2014 at 9:00 a.m., or at such other time as set by the Court, at 280 South 1st Street, Courtroom 4, 5th Floor in San Jose, California, before the Honorable Judge Davila.

Plaintiffs seek an order granting final approval of the proposed class action Settlement. The Motion is based on this Notice of Motion, the Brief in Support of the Motion attached hereto and the authorities cited therein, oral argument of counsel, and any other matter raised or submitted at the hearing, and all of the documents in the record.

Dated: July 25, 2014

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1 **I. INTRODUCTION**

2 The proposed Settlement is a successful outcome for the Class and for advocates of  
3 Internet user privacy. In exchange for dismissal of the Class's claims, the Settlement requires  
4 Defendant Google, Inc. ("Google"), the Internet's most visited website, to make permanent  
5 changes to the way it discloses its practices, as well as a non-reversionary payment of \$8.5  
6 million.

7 Under the terms of the Settlement, Google will be obligated to inform users as to when and  
8 under what circumstances the content of users' search queries and web histories are disclosed to  
9 third parties. These disclosures represent a critical and long overdue transition to informed consent  
10 between Google and its users. Notably, Google has never agreed to make these crucial disclosures  
11 in the absence of litigation.

12 The Settlement also contains a monetary component in the form of an \$8.5 million  
13 Common Fund, out of which money will be distributed to six proposed *Cy Pres* Recipients. The  
14 Recipients have crafted concrete proposals, with diverse reach, dedicated to privacy-focused  
15 education, advocacy, and technology aimed at preventing the use of private information without  
16 appropriate disclosure. (Settlement Agreement, Dkt. 52-3, ¶ 3.2.)

17 Plaintiffs now bring this Settlement Agreement before the Court in an effort to fully and  
18 finally resolve this matter. In response to the instant consolidated class action, after numerous  
19 motions to dismiss (Dkts. 19, 29, and 44), discovery, and negotiations before a neutral mediator,  
20 the Parties have arrived at a Settlement Agreement that is fair, adequate, and reasonable. Notably,  
21 to date there has not been a single objection to the Settlement, and only twelve Class Members  
22 (out of more than a class that likely exceeds 100 million) have chosen to opt out of the Settlement.  
23 Because Class Counsel have, through the Class Administrator, dutifully implemented the Court-  
24 approved Notice Plan and because the terms of the Settlement are favorable to the Class under  
25 each of the *Churchill* factors (*infra*), Plaintiffs respectfully request that this Court enter final  
26 approval on this Settlement.

1 **II. FACTUAL BACKGROUND**

2 **A. Litigation History**

3 Plaintiffs assert in their complaint the following causes of action: (1) violations of the  
4 Stored Communications Act (“SCA”), 18 U.S.C. § 2701; (2) breach of contract; (3) breach of the  
5 covenant of good faith and fair dealing; (4) breach of implied contract; (5) unjust enrichment; and  
6 (6) declaratory and injunction relief.

7 Google moved to dismiss all claims under Rule 12(b)(1). (Dkt. 19.) The Honorable James  
8 Ware dismissed Plaintiff Gaos’s Complaint with leave to amend. (Dkt. 24.) The case was then  
9 reassigned and Defendant’s second motion to dismiss was granted with leave to amend. (Dkts. 25,  
10 38.) Plaintiff Gaos then filed a Second Amended Complaint, adding Plaintiff Italiano as an  
11 additional class representative, and which Defendant again moved to dismiss. (Dkts. 39, 44.)  
12 Meanwhile, Plaintiff Priyev filed an action on February 29, 2012 in the Northern District of  
13 Illinois. That case was transferred to this district and ultimately consolidated with Plaintiff Gaos  
14 and Plaintiff Italiano’s complaint for the purpose of settlement proceedings. (Dkt. 51.)

15 From the beginning and while actively litigating, the Parties attempted to resolve the  
16 matter without further litigation, but did not find success until mediation with Randall Wulff. (Dkt.  
17 52 at 2.) Also, throughout the litigation, Plaintiffs propounded written discovery upon Google,  
18 including requests for admission and deposition notices. (Declaration of Michael Aschenbrener  
19 (“Asch. Decl.”), attached hereto as Exhibit 1, ¶ 5.)

20 During this time, Plaintiff Priyev filed a case, alleging claims inclusive of the conduct at  
21 issue in *Gaos*, in the Northern District of Illinois in February 2012. *Priyev v. Google, Inc.*, No. 12-  
22 cv-1467 (N.D. Ill.). Priyev’s allegations and causes of action related to Google’s sharing of search  
23 queries via referrer headers and, among other things, Google’s resulting breach of its own express  
24 contract terms related to Google’s Web History service. (Dkt. 53 at 3.) On August 28, 2012, the  
25 Court in the Northern District of Illinois transferred the *Priyev* matter to the Northern District of  
26 California. (*Id.*) On December 8, 2013 Priyev’s case file was electronically transferred to the  
27 Northern District of California. (*Id.*) On January 8, 2013, the *Priyev* action was officially  
28 transferred to the Northern District of California’s docket. (*Id.*)

1 In an effort to advance the putative class’s interest most efficiently and effectively, counsel  
2 for Plaintiffs Gaos and Italiano and for Plaintiff Priyev decided to work cooperatively to again  
3 attempt to resolve the matter. (Dkt. 53 at 3.) On January 28, 2013, in Oakland, California, the  
4 Parties mediated the case before Randall Wulff, an experienced and well-respected mediator of  
5 class action disputes. (Asch. Decl., ¶ 11); (Declaration of Kassra Nassiri (“Nassiri Decl.”),  
6 attached hereto as Exhibit 2, ¶ 8); (Declaration of Ilan Chorowsky (“Chor. Decl.”) attached hereto  
7 as Exhibit 3, ¶ 15). Based upon his review of the facts and applicable law, Mr. Wulff proposed a  
8 settlement amount in the form of a “mediator’s proposal,” which the Parties accepted and used to  
9 form the material terms of the Settlement. (Asch Decl., ¶ 12); (Nassiri Decl., ¶ 8). On March 16,  
10 2013, the Parties executed the Settlement Agreement. (*See generally*, “Settlement Agreement,”  
11 Dkt. 52-3.)

## 12 **B. Key Settlement Terms**

13 After an arms-length negotiation before a mediator, the Parties have come to terms, as  
14 memorialized in the Settlement Agreement currently before this Court for final approval. The key  
15 terms of the Settlement are briefly summarized here as follows:

### 16 ***1. Class Definition***

17 The Settlement Agreement provides for a single Settlement Class, which this Court  
18 certified in its Preliminary Approval Order (Dkt. 63) for purposes of Settlement, and defined as  
19 follows:

20 All persons in the United States who submitted a search query to Google at any  
21 time between October 25, 2006 and the date of notice to the class of certification.  
22 Excluded from the Class are Google, its officers and directors, legal  
23 representatives, successors or assigns, any entity in which Google has or had a  
24 controlling interest, any judge before whom this case is assigned and the judge’s  
25 immediate family.

26 Dkt. 63 at 2.

### 27 ***2. Settlement Fund Payments***

28 Google has agreed to pay a total amount of eight million five hundred thousand dollars  
(\$8.5 million USD) in cash into a Settlement Fund—none of which will revert to Google under  
any circumstances—to be used for the payment of Settlement Administration Expenses, *cy pres*



1 distributions to the proposed *Cy Pres* Recipients, any Fee Award or costs awarded to Class  
2 Counsel, and any incentive awards awarded to the Class Representatives and named Plaintiffs in  
3 the Related Actions. (Dkt. 52-3, ¶ 3.2.)

### 4 **3. Prospective Relief**

5 A major component of the Settlement is Google's agreement, for the first time, to disclose  
6 to users the ways in which Google actually treats queries entered into Google.com, so that users  
7 can make informed choices about whether and how to use Google search. (Asch. Decl., ¶ 18);  
8 (Nassiri Decl., ¶ 11). Pursuant to the Settlement, Google has implemented significant changes to  
9 the disclosures on its website, to alert users that they can prevent transmission or sale of their  
10 search queries by using Google's encrypted search option ("SSL Search") or by choosing another  
11 search engine. Moreover, Google's obligation to disclose its treatment of search queries is  
12 permanent under the Settlement Agreement.

### 13 **4. Cy Pres**

14 After payment of Settlement Administration Expenses, the Fee Award and the collective  
15 Incentive Award, the balance of the Settlement Fund shall be distributed to the *Cy Pres* Recipients  
16 selected by the parties and approved by the Court. Class Counsel have proposed the following  
17 entities as *Cy Pres* Recipients:

- 18 • **Carnegie Mellon University (21%):** Carnegie Mellon's CyLab is one of the  
19 largest academic security and privacy research centers in the world, with over 50  
20 faculty and 100 graduate students working on all facets of computer and  
21 information security and privacy issues. Carnegie Mellon intends to use its  
22 distribution to fund a comprehensive effort to improve user privacy online, by: (1)  
23 furthering researchers' understanding of user privacy behaviors and online threats  
24 to users' privacy; (2) improving user-facing interfaces and technologies to increase  
25 users' understanding and control of their privacy; and (3) developing computational  
26 mechanisms to help ensure that systems and organizations adhere to privacy  
27 regulations or policies.
- 28 • **World Privacy Forum (17%):** World Privacy Forum (WPF) is the only privacy-

1 focused public interest research group in the United States. As a public interest  
2 research and consumer education group, WPF focuses exclusively on consumer  
3 privacy in general, and digital privacy in particular. WPF intends to use its  
4 distribution to fund two interrelated projects: (1) a research project into third-party  
5 data flows to uncover consumer harms stemming from search queries typed into  
6 online search boxes; and (2) a national consumer education project focused on  
7 bringing online privacy education to all consumers, with a particular focus on  
8 vulnerable consumers who often miss online privacy educational campaigns due to  
9 financial, linguistic, educational, medical, or other barriers.

- 10 • **Chicago-Kent College of Law Center for Information, Society, and Policy**  
11 **(16%):** The Center for Information, Society and Policy at IIT Chicago-Kent  
12 College of Law (“CISP”) is an academic research project dedicated to analyzing the  
13 role that privacy plays in the law and in society, to helping people assess their  
14 online privacy risks, and to helping policymakers develop policies to respond to  
15 those risks. CISP intends to use its distribution to fund PRIVACY  
16 PREPAREDNESS, which will combine academic research, public education, and  
17 outreach to safeguard individuals’ online privacy and to help users implement  
18 privacy protections when they interact with the Internet.
- 19 • **Stanford Law School Center for Internet and Society (16%):** Stanford Law  
20 School’s Center for Internet and Society (“CIS”) is a non-profit organization that  
21 works to improve technology law and policy through ongoing interdisciplinary  
22 study, analysis, research and discussion. CIS intends to use its distribution to fund  
23 four projects designed to improve users’ ability to make informed online privacy  
24 decisions: (1) original research to advance best practices for mobile phone privacy;  
25 (2) controlled trials to improve existing Privacy Enhancing Technologies (“PETs”)  
26 and develop new ones; (3) analysis of proposed privacy legislation; and (4) an  
27 educational speaker and public outreach series to educate, inform, and train users  
28 about online privacy risks and available tools to mitigate those risks.

- 1           • **Berkman Center for Internet & Society at Harvard University (15%):** The  
2 Berkman Center is a university-wide, interdisciplinary program founded to explore  
3 cyberspace, share in its study, and help pioneer its development. The Berkman  
4 Center intends to use its distribution to develop concrete proposals for safeguarding  
5 Internet privacy more effectively via legal and policy reform, company action,  
6 technological innovation, targeted education and user outreach. This initiative will  
7 generate specific recommendations targeted at lawmakers and relevant companies,  
8 as well as materials, resources, and tools that enable users to make informed  
9 choices about their data—and better control it—when searching the Internet.
- 10          • **AARP Foundation (15%):** The AARP Foundation is the charitable arm of AARP,  
11 the leading national expert on people aged 50 and over, with access to data and  
12 research regarding each socioeconomic segment of the population. The AARP  
13 Foundation intends to use its distribution to develop a national initiative to educate  
14 and inform 1,000,000 individuals over a three-year period on how to protect their  
15 online privacy and proactively avoid the harmful impact of Internet fraud and  
16 identity theft.

17           Class Counsel have made public, via the Settlement Website, the proposals and suggested  
18 allocation of funds to each proposed *Cy Pres* Recipient. If this Court approves the Settlement, the  
19 notice on the Settlement Website indicates the percentage of the \$8.5 million dollars (minus  
20 attorneys' fees and costs, any potential incentive awards, and administration costs) that each *Cy*  
21 *Pres* Recipient will receive.<sup>1</sup>

## 22                           5.       *Other Relief*

23           The Settlement Fund is also designed to cover: (1) all notice and administration costs (Dkt.  
24 52-3, ¶ 5.3.); (2) incentive awards for each Class Representative, up to \$5,000 each, subject to  
25 Court approval (*Id.* at ¶¶ 10.1-10.2.); and (3) attorneys' fees and costs. Class Counsel, as detailed  
26

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27 <sup>1</sup> Notification listed at: <http://www.googlesearchsettlement.com/hc/en-us/articles/202372170-Proposed-Cy-Pres-Recipients-and-Allocations>.  
28

1 in their Motion for Approval of Fees, Costs, and Incentive Awards filed herewith, seek \$2,125,000  
2 in fees, \$21,643.16 in costs, and \$15,000 in incentive awards (\$5,000 for each of the Class  
3 Representatives).

4 The Fee Award will be paid from the Settlement Fund, and it is not a condition of this  
5 Settlement that any particular amount of attorneys' fees, costs, or expenses be approved by the  
6 Court, or that such fees, costs, or expenses be approved at all. *Id.* Plaintiffs have not negotiated  
7 and do not intend to negotiate a "clear sailing" provision for Plaintiffs' attorneys' fees and costs  
8 request.

### 9 **III. ARGUMENT**

10 The Settlement Agreement, reached by the Parties after arms'-length negotiations, provides  
11 immediate relief to the Class in the form of permanent, prospective relief designed to inform  
12 Google search users about their rights to privacy and Google's use of search query information.  
13 The *cy pres* distributions the Parties propose go even further, funding a variety of initiatives to  
14 educate users and advance the state of technology, law, and policy in the direction of protecting  
15 online privacy rights. Because the methods of notice to all Class Members and the content of the  
16 Agreement itself are appropriate, Plaintiffs request that this Court enter final approval of the  
17 Settlement.

#### 18 **A. The Settlement Between the Parties Should Be Approved.**

19 The Settlement Agreement, mutually agreed upon by the Parties, is ripe for final approval.  
20 Plaintiffs request that this Court grant final approval to the Settlement because the law favors the  
21 voluntary settlement of disputes. Moreover, the Settlement is a fair and reasonable outcome based  
22 upon the *Churchill* factors, outlined below. *Churchill Village, LLC v. Gen. Elec.*, 361 F.3d 566,  
23 575 (9th Cir. 2004).

##### 24 ***1. The standard for judicial approval favors class action settlements.***

25 The law strongly favors parties voluntarily resolving their disputes. "Unless the settlement  
26 is clearly inadequate, its acceptance and approval are preferable to lengthy and expensive litigation  
27 with uncertain results." *Nat'l Rural Telecomms. Coop. v. DirecTV, Inc.*, 221 F.R.D. 523, 526  
28 (C.D. Cal. 2004). Settlements avoid the time, cost, and inconvenience of complex litigation. *See*

1 *Class Plaintiffs v. City of Seattle*, 955 F.2d 1268, 1276 (9th Cir. 1992); *Officers for Justice v. Civil*  
2 *Srv. Comm’n*, 688 F.2d 615, 625 (9th Cir. 1982); *Van Bronkhorst v. Safeco Corp.*, 529 F.2d 943,  
3 950 (9th Cir. 1976).

4 This is “particularly true in class action suits which are now an ever increasing burden to  
5 so many federal courts.” *Van Bronkhorst*, 529 F.2d at 950. Settling such complex cases relieves a  
6 heavy burden on otherwise strained judicial resources and serves the interests of justice more  
7 efficiently. *See e.g. Byrd v. Civil Serv. Comm’n.*, 459 U.S. 1217 (1983); *Churchill Village*, 361  
8 F.3d at 576. Moreover, there is a presumption that a class settlement produced from adversarial  
9 negotiation by capable counsel is fair. *See e.g. Wal-Mart Stores, Inc. v. Visa USA, Inc.*, 396 F.3d  
10 96, 116 (2d Cir. 2005) (a “presumption of fairness, adequacy, and reasonableness may attach to a  
11 class settlement reached in arm’s-length negotiations between experienced, capable counsel after  
12 meaningful discovery”) (quoting *Manual for Complex Litigation (Third)* § 30.42).

13 Under Federal Rule of Civil Procedure 23(e), the court must approve any settlement,  
14 voluntary dismissal, or compromise of the claims, issues, or defenses of a certified class. The court  
15 may only approve a settlement “after a hearing and on finding that [the settlement] is fair,  
16 reasonable, and adequate.” *Id.*; *see In re OmniVision Tech, Inc.*, 559 F. Supp. 2d 1036, 1040 (N.D.  
17 Cal. 2008). A settlement is fair, reasonable, and adequate where, as here, “the interests of the class  
18 are better served by the settlement than by further litigation.” *v. State Farm Mut. Auto Ins. Co.*,  
19 2010 WL 1687832 at \*8 (N.D. Cal. Apr. 22, 2010) (quoting *Manual for Complex Litig. (4th)* §  
20 21.61 (2004)).

21 While “the decision to approve or reject a settlement [under Rule 23(e)] is committed to  
22 the sound discretion of the trial [j]udge[.]” *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1026 (9th  
23 Cir. 1988), the Court should nonetheless limit its inquiry to a determination “that the agreement is  
24 not the product of fraud or overreaching by, or collusion between, the negotiating parties, and that  
25 the settlement taken as a whole, is fair, reasonable, and adequate to all concerned.” *Officers for*  
26 *Justice*, 688 F.2d at 625. *See also Pierce v. Rosetta Stone, Ltd.*, 2013 WL 5402120 at \*5 (N.D.  
27 Cal. Sept. 26, 2013). In exercising such discretion, courts give “proper deference to the private  
28 consensual decision of the parties[.]” and avoid substituting their own judgment of what is fair for

1 what the parties have deemed fair during arms-length negotiations. *Garner*, 2010 WL 1687832, at  
2 \*8 (citing *Rodriguez v. West Publg. Corp.*, 563 F.3d 948, 965 (9th Cir. 2009)).

3 Here, the Settlement Agreement is fair, adequate, and reasonable. Not only was the  
4 Settlement Agreement the product of adversarial negotiation (as detailed in the litigation history  
5 above), it was achieved through arms-length negotiation with an experienced mediator and the  
6 terms were largely adapted from the mediator's proposal by capable Class Counsel with extensive  
7 experience in consumer class action cases. (Asch. Decl., ¶ 41); (Nassiri Decl., ¶¶ 4, 7-9). Upon  
8 agreeing to the terms of this Settlement Agreement, Plaintiffs filed an unopposed motion for  
9 preliminary approval on July 19, 2013. (Dkt. 52 at 24.) This Court granted preliminary approval  
10 on March 26, 2014. (Dkt. 63 at 14.) Plaintiffs' unopposed motion for final approval further  
11 evidences that the Parties have mutually agreed that settlement, rather than continued litigation, is  
12 in their best interests. Because courts within this Circuit favor class action settlements (*see e.g.*  
13 *Van Bronkhorst*, 529 F.2d at 950), and because there was extensive, arms-length negotiations  
14 between the Parties and vigorous litigation prior to settlement discussions, this Court need not  
15 harbor any concerns about collusion. As such, Plaintiffs request that this Court grant final  
16 approval to the Settlement Agreement.

17 **2. The Ninth Circuit factors to assess whether a settlement is fundamentally**  
18 **fair, adequate, and reasonable favor settlement for the Parties.**

19 To assess whether a class action settlement is fair, adequate, and reasonable, courts in the  
20 Ninth Circuit generally consider the following non-exhaustive list of factors:

21 “(1) the strength of the plaintiff's case; (2) the risk, expense, complexity, and likely  
22 duration of further litigation; (3) the risk of maintaining class action status  
23 throughout the trial; (4) the amount offered in the settlement; (5) the extent of  
24 discovery completed and the stage of the proceedings; (6) the experience and view  
25 of counsel; (7) the presence of a governmental participant; and (8) the reaction of  
26 the class members to the proposed settlement.”

27 *Churchill Village* 361 F.3d at 575 (9th Cir. 2004); *see also Rodriguez*, 563 F.3d at 963 (quoting  
28 *Molski v. Gleichi*, 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)); *In re Mego Fin. Corp. Sec. Litig.*, 213 F.3d 454,  
458 (9th Cir. 2000).

1 Applying these factors to the proposed Settlement Agreement, each factor favors final  
2 approval.

3 *a. The strength of Plaintiffs' case favors settlement.*

4 The first step in assessing the fairness of a class action settlement is to examine the  
5 strength of the plaintiff's case. The Court's analysis of this first factor is not rigid or beholden to  
6 any "particular formula by which the outcome must be tested," nor is the Court meant to "reach  
7 any ultimate conclusions of the contested issues of fact and law which underlie the merits of the  
8 dispute, for it is the very uncertainty of outcome in litigation and avoidance of wasteful and  
9 expensive litigation that induce consensual settlements." *Garner*, 2010 WL 1687832 at \*9  
10 (quoting *Rodriguez*, 563 F.3d at 965). "Rather, the Court's assessment of the likelihood of success  
11 is 'nothing more than an 'amalgam of delicate balancing, gross approximations and rough  
12 justice.'" *Garner*, 2010 WL 1687832 at \*9 (citing *Officers for Justice*, 688 F.2d at 625). Given the  
13 subjective components inherent in handicapping any potential range of recovery, "the Court may  
14 presume that through negotiation, the Parties, counsel, and mediator arrived at a reasonable range  
15 of settlement by considering Plaintiff[s'] likelihood of recovery." *Id.* (citing *Rodriguez*, 563 F.3d  
16 at 965).

17 While Plaintiffs are confident in the strength of their claims and their ability to ultimately  
18 prevail at trial, Plaintiffs are also cognizant that litigation is inherently risky. (Asch. Decl., ¶ 23);  
19 (Nassiri Decl., ¶ 13-14); (Chor. Decl., ¶ 13). That is even more so where Defendant may raise  
20 credible substantive and/or procedural defenses to the Class's claims, including express defenses  
21 under the SCA. These potential defenses make this Settlement all the more reasonable. (Asch.  
22 Decl., ¶ 24) (Nassiri Decl., ¶ 15); (Chor. Decl., ¶ 14). *Cf. Rodriguez* 563 F.3d at 964 (9th Cir.  
23 2009) (defendants' substantive and procedural defense to the class's claims favored final approval  
24 of class settlement agreement).

25 Proceeding to trial would carry significant risks, including the danger that a jury might not  
26 properly grasp the technical concepts implicated by Plaintiffs' claims, or that key expert testimony  
27 might be excluded. (*See* Asch. Decl., ¶ 23); (Nassiri Decl., ¶ 14). Moreover, at the time Plaintiffs  
28 filed this action, some of Plaintiffs' allegations and legal theories were matters of first impression

1 within the Ninth Circuit. Since then, the Ninth Circuit held in *In re Zynga Privacy Litig.*, 750 F.3d  
2 1098 (9th Cir. 2014), that the plaintiffs' claims under the SCA against defendants for using  
3 plaintiffs' personal information were not actionable. The *In re Zynga* SCA allegations are  
4 substantially similar to the SCA allegations proffered by Plaintiffs here, and thus put the viability  
5 of some of Plaintiffs' claims at risk.

6 Even a verdict in Plaintiffs' favor would bring additional challenges. Calculation of actual  
7 damages suffered by Class Members would be inordinately difficult, while a full award of  
8 statutory damages might reach into the trillions of dollars, a sum that would far exceed the value  
9 of Google. Google would then be inclined to seek *remitter*, on constitutional due process  
10 grounds, again multiplying the risk to the Class.

11 Viewed against this backdrop, Plaintiffs' counsel justifiably accepted the Settlement,  
12 which offers an immediate and certain award for the Class.

13 *b. The risk, expense, complexity, and likely duration of further*  
14 *litigation favors settlement.*

15 When a party continues to deny liability, there is an inherent risk in continuing litigation.  
16 In *Thieriot v. Celtic Ins. Co.*, 2011 WL 1522385 at \*5 (N.D. Cal. April 21, 2011), the district court  
17 approved a settlement agreement in which the defendant specifically denied liability, noting that  
18 such denial of liability posed a risk to continued litigation. *See also Mora v. Harley-Davidson*  
19 *Credit Corp.*, 2014 WL 29743 at \*4 (E.D. Cal. Jan. 3, 2014) (granting final approval to settlement  
20 agreement where defendant denied any liability). Further, the court acknowledged that "even with  
21 a strong case, litigation entails expense." *See Greko v. Diesel U.S.A., Inc.*, 2013 WL 1789602 at \*4  
22 (N.D. Cal. Apr. 26, 2013).

23 Similarly here, the terms of the Proposed Settlement include Defendant's absolute denial  
24 of any liability. (Dkt. 52-3 at 2.) Defendant has also vigorously litigated this case, filing three,  
25 separate Motions to Dismiss in response to Plaintiffs' original complaints and subsequent  
26 amended complaints. (Dkts. 19, 29, and 44.) Defendant's absolute denial of liability, paired with  
27 its concerted efforts to dismiss this case, favor granting final approval to the proposed Settlement  
28 Agreement. Otherwise, the Class is certain to face significant procedural hurdles, including



1 anticipated motions for summary judgment, class certification, and possible appeals. *Rodriguez*,  
2 563 F.3d at 966.

3         The degree of complex issues or facts facing the parties also favors settlement. *See e.g.*  
4 *Lane v. Facebook, Inc.*, 696 F.3d 811, 820 (9th Cir. 2012). Here, Plaintiffs allege Google violated  
5 both the SCA, as well as state law claims. (Dkt. 50.) At the time Plaintiffs filed this action, the  
6 allegations were matters of first impression within the Ninth Circuit. Since then, the Ninth Circuit  
7 held in *In re Zynga Privacy Litig.*, 750 F.3d at 1098, that the plaintiffs' claims under the SCA  
8 against Facebook for using plaintiffs' personal information were not actionable. The *In re Zynga*  
9 SCA allegations are substantially similar to the allegations proffered by Plaintiffs here, adding to  
10 the risk of continued litigation. Moreover, the use of referrer headers is a highly technical,  
11 complex area of the law. This complexity, in conjunction with the now challenged viability of  
12 some of Plaintiffs' claims, counsels in favor of a certain and immediate settlement.

13                     *c.         The risk of maintaining class action status throughout the trial*  
14                                     *favors final approval of the Settlement.*

15         This factor favors final approval where a Court grants preliminary approval to a class  
16 certification for settlement purposes, and no developments occur between preliminary approval  
17 and final approval that warrant reexamining the certification. *See In re HP Laser Printer Litig.*,  
18 2011 WL 3861703, at \*2 (C.D. Cal. Aug. 31, 2011) (finding that where the court previously  
19 granted plaintiffs' request to certify class for purposes of settlement, and where nothing changed  
20 since granting preliminary approval, final approval was appropriate.) Moreover, a district court  
21 has the ability to decertify a class at any time. *Gen. Tel. Co. of Sw. v. Falcon*, 457 U.S. 147, 160  
22 (1982) ("Even after a certification order is entered, the judge remains free to modify it in light of  
23 subsequent developments in the litigation.").

24         Here, the Court approved class certification for purposes of settlement only. (Dkt. 63 at 7.)  
25 As in *In re HP Laser Printer Litig.*, there have not been any substantive changes to this Class's  
26 satisfaction of the numerosity, commonality, typicality, or adequacy of representation elements  
27 pursuant to Fed. R. Civ. P. 23. As such, the Court need not reexamine its certification of this Class  
28 for settlement purposes.

1 Although Plaintiffs and Class Counsel believe they would be successful in obtaining  
2 certification of an adversarial class absent the Settlement, Google has made it clear that it would  
3 vigorously oppose class certification. (Asch. Decl., ¶ 23); (Nassiri Decl. ¶ 16). As discussed in  
4 Section I-B-2, *supra*, Defendant has forcefully litigated this matter, filing three separate Motions  
5 to Dismiss in an effort to terminate Plaintiffs' case. (*See generally*, Dkts., 19, 29, and 44.)  
6 Plaintiffs have no doubt that Defendant will continue to litigate this case vigorously, should this  
7 Court decline to grant final approval to the Settlement Agreement. The amount offered in the  
8 Settlement is the best means of providing a benefit to the Class.

9 *d. The amount offered in the Settlement is the best means of providing*  
10 *a benefit to the Class.*

11 This Settlement contemplates both monetary relief (\$8.5 million distributed via a Common  
12 Fund as *cy pres* awards) and prospective relief (via Google's Agreed-Upon Disclosures). (Dkt. 52-  
13 3, ¶¶ 3.1-3.2.) In combination, the terms of this Settlement provide the best means of conveying a  
14 benefit to the Class that directly addresses the substance of Plaintiffs' complaint: protecting  
15 consumers' privacy online and informing consumers of their rights.

16 *i. The Settlement's \$8.5 million cy pres distribution is an*  
17 *appropriate use of the Settlement Fund due to the sheer size*  
18 *and negligible individual payout to the Class.*

19 A *cy pres* class action settlement is appropriate where "the proof of individual claims  
20 would be burdensome or distribution of damages costly." *Nachshin v. AOL, LLC*, 663 F.3d 1034,  
21 1036 (9th Cir. 2011); *In re Netflix Privacy Litig.*, 2013 WL 1120801 at \*7 (Mar. 18, 2013); *Lane*,  
22 696 F.3d at 825. Here, because the amount of potential Class Members likely exceeds one hundred  
23 million individuals, requiring proofs of claim from this many people would impose a significant  
24 burden to distribute, review, and then verify. (Dkt. 63 at 10–11.) As this Court noted in its  
25 preliminary approval order, "the cost of sending out what would likely be a very small payment to  
26 millions of class members would exceed the total monetary benefit obtained by the class." (*Id.* at  
27 11.) Just as in *Netflix*, 2013 WL 1120801 at \*7 (with a class of over 62 million members), the  
28 sheer class size makes individual distributions impracticable. This use of the Settlement funds for

1 *cy pres* awards is appropriate and favors final approval.

2       The size of the *cy pres* recovery obtained by Class Counsel (\$8.5 million) also strongly  
3 supports final approval. (Dkt. 52-3, ¶ 3.2.) The substantial monetary value of the *cy pres* donations  
4 compare favorably to settlement in other Internet consumer privacy class action settlements. *See,*  
5 *e.g. In re Google Buzz Privacy Litig.*, 2011 WL 7460099, at \*3-4 (N.D. Cal. June 2, 2011)  
6 (unauthorized disclosure of email contact lists; \$8.5 million settlement fund with *cy pres*  
7 payments); *Lane*, 696 F.3d at 818 (unauthorized disclosure of personal information; *cy pres*  
8 distribution of \$9.5 million); and in *In re Netflix Privacy Litig.*, 2013 WL 1120801 at \*6 (March  
9 18, 2013) (unauthorized storage of personal information; *cy pres* distribution of \$9 million).

10       Finally, there is an appropriate nexus between the interests of the class and the *cy pres*  
11 recipients. A district court’s review of class-action settlement damages in the form of *cy pres*  
12 awards is not substantively different from that of any other class-action settlement; however, the  
13 court should not find the settlement fair, adequate, and reasonable unless the *cy pres* remedy  
14 “account[s] for the nature of the plaintiffs’ lawsuit, the objectives of the underlying statutes, and  
15 the interests of the silent class members.” *Lane*, 696 F.3d at 819 (quoting *Nachshin*, 663 F.3d at  
16 1036). In *Lane*, the Ninth Circuit approved a *cy pres* donation to a newly created entity with a  
17 mission to “fund and sponsor programs designed to educate users . . . regarding critical issues  
18 relating to the protection of identity and personal information.” 696 F.3d at 822.

19       Here, the recipients of the *cy pres* donations are organizations with track records that have  
20 identified specific uses for the distributed funds, ensuring that each *cy pres* distribution accounts  
21 for the natures of Plaintiffs’ lawsuit (protecting consumer privacy), the objectives of the  
22 underlying statutes (protecting consumer privacy), and the interest of the Class (having their  
23 privacy protected). As this Court noted in its Preliminary Approval Order, the proposed *Cy Pres*  
24 Recipients meet certain qualifying criteria<sup>2</sup> tailored to the claims in this case and the proposed

25 \_\_\_\_\_  
26 <sup>2</sup> Plaintiffs’ Counsel used the following criteria to select appropriate *cy pres* recipients: (1)  
27 organizations that were independent and free from conflict; (2) organizations with exemplary  
28 service records that would promote public awareness and education, and/or support research,  
development, and initiatives related to protecting privacy on the Internet, with an emphasis on  
consumer-facing efforts; (3) organizations reaching and targeting internet users of all

1 recipients have submitted detailed proposals aimed at resolving issues tailored to the subject of  
2 Plaintiffs' claims and the goals of the litigation – protecting Internet privacy. (Dkt. 63 at 11.)  
3 Given this careful selection of *Cy Pres* Recipients, the sheer size of the class, and the amount  
4 proposed in the Settlement, this factor favors final approval.

5 *ii. Google's disclosures are appropriate prospective relief for*  
6 *the Class.*

7 Noneconomic, prospective relief is appropriate where it provides a remedy to the  
8 violations alleged in a class action. *See Dennings v. Clearwire Corp.*, 2013 WL 185797 (W.D.  
9 Wash. May 3, 2013), *aff'd* (Sept. 9, 2013) (granting final approval where settlement provided non-  
10 monetary, programmatic relief to class members regarding defendant's deceptive advertising);  
11 *Bellows v. NCO Fin. Sys., Inc.*, 2008 WL 4155361, at \*9 (S.D. Cal. Sept. 5, 2008) (holding that  
12 injunction requiring defendant to implement company-wide training program to prevent collectors  
13 from making unwanted calls was appropriate settlement relief); *LaGarde v. Support.com, Inc.*,  
14 2013 WL 1994703 (N.D. Cal. May 13, 2013) (granting final approval to settlement with terms  
15 proscribing noneconomic relief directing the defendant to create documentation for its product that  
16 more clearly and concisely described terms) .

17 In addition to the *cy pres* award, this Settlement also contemplates non-monetary,  
18 permanent prospective relief. Specifically, Defendant agrees to make certain "Agreed-Upon  
19 Disclosures" concerning search queries. Defendant will post these disclosures on Google's  
20 "FAQs" webpage, "Key Terms" webpage, and "Privacy FAQ for Google Web History" webpage.  
21 (Dkt. 52-3, ¶ 3.1.) These disclosures alert Google users to the ways in which their personal  
22 information or Google search web history could be used or compromised via referrer headers.<sup>3</sup>

23  
24 demographics across the country; (4) organizations willing to provide detailed proposals to the  
25 court and the class; and (5) organizations capable of using the funds to educate the class about  
26 risks attendant with disclosing personal information to internet service providers; or to inform  
27 policy makers about the challenges associates with internet privacy and possible solutions; or to  
28 develop tools allowing consumers to understand and control the flow of their personal information  
to third parties; or to develop tools to prevent third parties from exploiting consumer data. (Asch.  
Decl., ¶ 21).

<sup>3</sup> For example, on Google's Privacy FAQ webpage, [www.google.com/policies/privacy/faq](http://www.google.com/policies/privacy/faq),  
Defendant discloses that "[w]hen you click on a search result in Google Search, your web browser

1 This permanent prospective relief, paired with the *cy pres* distributions, weighs favorably as a  
2 factor toward granting final approval of this Settlement.

3 *e. Class Counsel have engaged in extensive motion practice and*  
4 *extensively negotiated the terms of the Settlement.*

5 The fifth *Churchill* factor requires the Court to consider both the extent of the discovery  
6 conducted to date and the stage of the litigation as indicators of class counsel's familiarity with the  
7 case and ability to make informed decisions. *OmniVision*, 559 F. Supp. 2d at 1042 (citing *In re*  
8 *Mego Fin. Corp.*, 213 F.3d at 459). A compromise based on an understanding of the legal and  
9 factual issues with a genuine arm's-length negotiation is "presumed fair." *Nat'l Rural Telecomms.*  
10 *Corp*, 221 F.R.D. at 528.

11 Final approval is appropriate here because Class Counsel have engaged in extensive  
12 motion practice and document exchange. Plaintiffs have fully briefed, argued, and opposed three  
13 motions to dismiss. (Dkts. 19, 29, and 44.) Furthermore, this Settlement is the of product arms-  
14 length, serious, and extensive discussion amongst the Parties. *Cf. In re Mego Fin. Corp. Sec.*  
15 *Litig.*, 213 F.3d at 459; *Rodriguez*, 563 F.3d at 963; *Girsh v. Jepson*, 521 F.2d 153, 157 (3d Cir.  
16 1975); *Barbosa v. Cargill Meat Solutions Corp.*, 297 F.R.D. 431, 445 (E.D. Cal. 2013). *See also*  
17 *Tijero v. Aaron Bros., Inc.*, 2013 WL 6700102, at \*7 (N.D. Cal. Dec. 19, 2013) (where settlement  
18 reached after parties participated in private mediation, settlement was appropriate for final  
19 approval).

20 The Parties met on multiple occasions, face-to-face, to discuss and negotiate the terms of  
21 this Settlement. (Asch. Decl., ¶ 14); (Nassiri Decl., ¶ 9). Counsel for the Parties first met in person  
22

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23 also may send the Internet address, or URL, of the search results page to the destination webpage  
24 as the HTTP Referrer. The URL of the each results page may sometimes contain the search query  
25 you entered. If you are using SSL Search (Google's encrypted search functionality), under most  
26 circumstances, your search terms will not be sent as part of the URL in the HTTP Referrer. There  
27 are some exceptions to this behavior, such as if you are using some less popular browsers. More  
28 information can be found here [hyperlinking to  
<https://support.google.com/websearch/answer/173733?hl=en>]. Search queries or information  
contained in the HTTP Referrer may be available via Google Analytics or an application  
programming interface (API). In addition, advertisers may receive information relating to the  
exact keywords that triggered an ad click."

1 in January 2011 in San Francisco to discuss possible resolution. (Asch. Decl., ¶ 7); (Nassiri Decl.,  
2 ¶ 6). Although the initial meeting was unsuccessful, Counsel for the parties met again in San  
3 Francisco in February 2011 but were unable to come to an agreement. (Asch. Decl., ¶ 8); (Nassiri  
4 Decl., ¶ 6). Counsel for the Parties met a third time in June 2012, this time for an all-day  
5 negotiating session, but once again were unsuccessful in coming to terms despite extensive post-  
6 meeting discussions throughout the summer of 2012. (Asch. Decl., ¶ 9); (Nassiri Decl., ¶ 6).  
7 Finally, on January 28, 2013, in Oakland, California, the Parties mediated before Randall Wulff,  
8 an experienced and well-respected mediator of class action disputes. (Asch. Decl., ¶ 11); (Nassiri  
9 Decl., ¶ 8); (Chor. Decl., ¶ 15). The arms-length negotiation went all day and long into the night.  
10 The Parties accepted Mr. Wulff’s proposed settlement amount in the form of a “mediator’s  
11 proposal” and used the proposal for creating the framework of a settlement in principle. (Asch  
12 Decl., ¶ 12); (Nassiri Decl., ¶ 8). Later that week, the parties began negotiating a settlement  
13 agreement over the span of two months. (Asch. Decl., ¶¶ 15-16); (Nassiri Decl., ¶ 9). The  
14 negotiation involved exchanging numerous drafts between the parties and related documents.  
15 Finally, on March 16, 2013 the Parties executed the Settlement Agreement that is now before this  
16 Court for final approval. (Asch. Decl., ¶ 17); (Nassiri Decl., ¶ 10).

17 Settlement discussions were taken seriously by all Parties, and this Agreement is the result  
18 of months of arms-length negotiation. Therefore, this factor favors final approval.

19 *f. Class Counsel have abundant experience and their opinion favoring*  
20 *settlement should be affirmed by this Court.*

21 Where the attorneys have such experience, “[t]he recommendations of plaintiff’s counsel  
22 should be given a presumption of reasonableness.” *OmniVision*, 559 F. Supp. 2d at 1043 (quoting  
23 *Boyd v. Bechtel Corp.*, 485 F. Supp. 610, 622 (N.D. Cal. 1979)). Reliance on such  
24 recommendations is premised on the fact that “parties represented by competent counsel are better  
25 positioned than courts to produce a settlement that fairly reflects each party’s expected outcome in  
26 litigation.” *Rodriguez*, 563 F.3d at 967 (quoting *In re Pacific Enters. Sec. Litig.*, 47 F.3d 373, 378  
27 (9th Cir. 1995)). *See also Garner*, 2010 WL 1687832 at \*14 (considering views of plaintiff’s and  
28 defendant’s counsel that the settlement was fair); *OmniVision*, 559 F. Supp. 2d at 1043.

1 Class Counsel have regularly engaged in major complex litigation and have extensive  
2 experience in consumer class action lawsuits that are similar in size, scope, and complexity to the  
3 present case. (*See* Firm Resume of Aschenbrener Law, P.C. (attached to Asch. Decl. as Exhibit 1-  
4 1)); Nassiri & Jung LLP (attached Nassiri Decl. as Exhibit 2-1); and Progressive Law Group LLC  
5 (attached as Exhibit 3-1). In light of these credentials and the experience of Class Counsel, this  
6 Court should award final approval to the settlement.

7 *g. No government official has objected to the Settlement after receiving*  
8 *notice.*

9 “Although CAFA does not create an affirmative duty for either the state or federal officials  
10 to take any action in response to a class action settlement, CAFA presumes that, once put on  
11 notice, state or federal officials will raise any concerns that they may have during the normal  
12 course of the class action settlement procedures.” *LaGarde*, 2013 WL 1283325 at \*7 (N.D. Cal.  
13 March 26, 2013).

14 Here, the Parties directed the Class Administrator to comply with CAFA’s notice  
15 requirement and the Class Administrator provided the appropriate notice on August 8, 2013.  
16 (Class Administrator Declaration (“Class Admin. Decl.”), attached hereto as Exhibit 4, ¶ 48.) A  
17 copy of the CAFA notice substantially similar to the notice sent is attached to the Declaration of  
18 the Class Administrator as Exhibit 4-6. To date, no state or federal officials have raised any  
19 objection to the Settlement. (Class Admin. Decl., ¶ 63.) Therefore, this factor favors final approval  
20 of the Settlement.

21 *h. The reaction of the Class members to the Settlement favors final*  
22 *approval.*

23 Courts in the Ninth Circuit consider the number of class members who object to a  
24 proposed settlement when determining whether to grant final approval to a settlement agreement.  
25 *Mandujano v. Basic Vegetable Prods. Inc.*, 541 F.2d 832, 837 (9th Cir. 1976). Where the vast  
26 majority of class members have not objected to the terms of a proposed settlement, this factor  
27 weighs in favor of the court granting final approval. *Nat’l Rural Telecomms. Coop.*, 221 F.R.D. at  
28 526 (holding that “in the absence of a large number of objections to a proposed class action

1 settlement, settlement actions are favorable to the class members.”).

2 To date, although the period for filing objections has not yet passed, the Class  
3 Administrator has not received any objections to the Settlement. (Class Admin. Decl., ¶ 60.) This  
4 strongly indicates a favorable class reaction, especially in a class of more than 100,000,000  
5 individuals. (Dkt. 63 at 12.) *See Chun-Hoon v. McKee Foods Corp.*, 716 F. Supp. 2d 848, 852  
6 (N.D. Cal. 2010) (approving settlement where no objections raised to settlement).

7 Where exclusions and opt-outs are low, there is also a presumption of a favorable class  
8 reaction. *Id.* at 850 (granting final approval where sixteen out of 329 class members excluded  
9 themselves from the settlement).

10 Here, the exclusion period has passed, and the total number of exclusions pales in  
11 comparison to the number of Class Members who have opted to remain within the class. The Class  
12 Administrator received only twelve exclusion forms by the opt-out deadline of June 24, 2014.  
13 (Class Admin. Decl., ¶ 64.) This minimal number of exclusions—representing approximately  
14 0.000012% of the Class—paired with absolutely no objections, demonstrates a favorable class  
15 reaction.

16 *i. Given the absence of any signs of collusion, the Settlement is*  
17 *appropriate for final approval.*

18 Because collusion is not always evident on the face of a settlement, the Court may be  
19 required to look to these signs for evidence that counsel have pursued their own interests at the  
20 cost of the interests of the class. *Officers for Justice*, 688 F.2d at 625. The Ninth Circuit has  
21 instructed courts to carefully scrutinize cases that are settled without adversarial certification for  
22 possible collusion. *Hanlon*, 150 F.3d at 1026. In particular, courts are to be aware of certain signs  
23 that warrant heightened scrutiny of the negotiation process, including: (1) where class counsel  
24 receives a disproportionate distribution of the settlement or when the class receives no monetary  
25 distribution; (2) where unawarded attorneys’ fees revert to defendants rather than the settlement  
26 fund for the class; and (3) where there is a “clear sailing” fee arrangement. *Laguna v. Coverall N.*  
27 *Am., Inc.*, 2014 WL 2465049 at \*5 (9th Cir. June 3, 2014).

28 Here, the Class was certified for purposes of settlement only, and therefore was not the



1 product of adversarial certification. (Dkt. 63 at 7.) Nonetheless, even when examined under  
2 heightened scrutiny, this Settlement is wholly free of collusion. First, the terms of the Settlement  
3 do not raise the concern that counsel is receiving a disproportionate distribution of the settlement.  
4 Here, Class Counsel seek the Ninth Circuit’s “benchmark” twenty-five percent (25%) fee award of  
5 the \$8.5 million common fund earmarked for *cy pres* distributions. *See Powers v. Eichen*, 229  
6 F.3d 1249, 1256 (9th Cir. 2000) (“We have . . . established twenty-five percent of the recovery as  
7 a ‘benchmark’ for attorneys’ fees calculations under the percentage-of-recovery approach”).  
8 Further, although it is true that the Settlement does not involve a direct cash distribution to Class  
9 members, such a distribution would produce only *de minimis* cash payments, which would be  
10 reduced even further after applying administrative and distribution costs. (Dkt. 63 at 11.) Instead,  
11 the terms of the Settlement ensure that each Class member enjoys an actual indirect benefit  
12 through the sizeable *cy pres* distributions. (Dkt. 52-3, ¶ 3.2.)

13         Second, this Settlement does not provide for payment of attorneys’ fees separate and apart  
14 from funds paid to the Class. (Dkt. 52-3, ¶ 10.1). Rather, Class Counsel seek a percentage of the  
15 common fund from which *cy pres* distributions will be made – and any funds not awarded in fees  
16 will simply be distributed to the approved *cy pres* recipients rather than reverting to Google. (Dkt.  
17 52-3, ¶ 10.1); *compare In re HP Laser Printer Litigation*, 2011 WL 3861703 at \*4 (It is a sign of  
18 collusion “when the parties arrange for fees to revert to the defendant instead of to the class fund  
19 or a *cy pres* fund.”).

20         Third, this Settlement does not contain a “clear sailing” provision.<sup>4</sup> (*See generally*, Dkt.  
21 52-3.) The absence of a “clear sailing” provision supports a finding of non-collusion. In fact, the  
22 Settlement is not contingent on the Court awarding a specific fee to Class Counsel. Rather, the  
23 Parties have agreed to an overall Settlement Fund and have left the division of that fund as  
24 between the Class and Counsel to the district court, as is usual in common fund cases. (Dkt. 52-3,  
25 ¶ 10.1); *see Vizcaino v. Microsoft Corp.*, 290 F.3d 1043, 1047 (9th Cir. 2002); *In re Coordinated*

26  
27 <sup>4</sup> A “clear sailing” provision refers to a settlement term in which a defendant agrees not to  
28 challenge class counsels’ fee request up to an agreed amount.

1 *Pretrial Proceedings in Petroleum Products Antitrust Litig.*, 109 F.3d 602, 607 (9th Cir. 1997).

2 Finally, although not dispositive, the presence of a mediator supports a finding of non-  
3 collusion. *Vincent v. Reser*, 2013 WL 621865 at \*4 (N.D. Cal. Feb. 19, 2013). As described *supra*,  
4 the complete process resulting in the Settlement was done at arms-length, by well-represented  
5 parties, and under the supervision of a neutral mediator. (Asch. Decl., ¶ 11); (Nassiri Decl., ¶¶ 7-  
6 8); (Chor. Decl., ¶ 15). In fact, the terms of the Settlement were based upon the mediator's  
7 proposal that mediator Randall Wulff suggested to the parties. (Asch Decl., ¶ 12); (Nassiri Decl.,  
8 ¶ 8).

9 Accordingly, the non-collusive nature of this Settlement, reached after a series of arms-  
10 length negotiations and a contested mediation, should dispel any concern of the signs of collusion  
11 that appear in some class actions but are completely absent here.

12 **B. The Class Notice Comports with Due Process and Rule 23.**

13 In order for a court to grant final approval of a class action settlement, the class must be  
14 provided with notice of the settlement that complies both with the requirements of due process and  
15 Federal Rule of Civil Procedure ("Rule") 23(e)(1). Class notice satisfies these requirements where  
16 the notice states in plain, easily understood language "the nature of the action; the definition of the  
17 class certified; the claims, issues or defense; that a class member may enter an appearance through  
18 an attorney if the member so desires; that the court will exclude from the class any member who  
19 requests exclusion; the time and manner for requesting exclusion; and the binding effect of a class  
20 judgment on members under Rule 23(c)(3)." Fed. R. Civ. P. 23(c)(2)(B). *See also Four in One*  
21 *Co., Inc. v. S.K. Foods, L.P.*, 2014 WL 28808 at \*12-13 (E.D. Cal. Jan. 2, 2014); *Hanlon*, 150  
22 F.3d at 1024.

23 Here, notice requirements have been appropriately satisfied. The Class Administrator was  
24 allocated \$1.0 million to implement the Notice Plan (Dkt. 63 at 8), and this Court approved the  
25 Plan. (*Id.*) Moreover, given that the size and nature of the Class (which likely exceeds one hundred  
26 million (100,000,000) (Dkt. 63 at 12)) makes it nearly impossible to determine exactly who may  
27  
28

1 qualify as a Class Member, the Notice Plan that was proposed, approved, and implemented, was  
2 appropriate.<sup>5</sup> (Class Admin. Decl., ¶ 24.) The Class Administrator used four media channels: (1)  
3 Internet-based notice using paid banner ads targeted at potential class members (in English and in  
4 Spanish on Spanish-language websites); (2) notice via “earned media” or, in other words, through  
5 articles in the press; (3) a website dedicated solely to the settlement (in English and Spanish  
6 versions); and (4) a toll-free telephone number through which Class Members can obtain  
7 additional information and request a class notice. (Class Admin. Decl., ¶ 29.) This plan was based  
8 upon substantial research to determine how to best target potential Class Members. (Class Admin.  
9 Decl., ¶¶ 20-28.)

10 As a result of the Notice Plan, 90,238 unique visitors visited the Settlement Website from  
11 April 25, 2013 to July 24, 2014. (Class Admin. Decl., ¶ 59.) Class Counsel and the Class  
12 Administrator responded to 179 inquiries posted on the Settlement Website or sent via email.  
13 (Class Admin. Decl., ¶ 67.) Furthermore, per Rule 23, the notice language used simple, plain  
14 language regarding the nature of the lawsuit and the operative complaint, the terms of the  
15 Settlement, and how a Class Member could participate in, object to, or be excluded from the  
16 Settlement. (Class Admin. Decl., ¶ 62.) Notice also provided the dates and deadlines for  
17 responding to the Notice and informed Class Members that the Settlement would be binding.  
18 (Class Admin. Decl., ¶ 43.) A copy of the notice posted on the Settlement Website is attached to  
19 the Declaration of the Class Administrator as Exhibit 4-4.

20 Notice on the Settlement Website was also supplemented with paid banner advertising and  
21 earned media. There were 221,668,171 views of these ads by an estimated 95,014,649 individuals.  
22 (Class Admin. Decl., ¶ 65.) Copies of these banner ads are attached to the Declaration of the Class  
23 Administrator as Exhibit 4-5.

24 Lastly, sixty-three individuals used the toll-free number to contact the Class Administrator  
25 regarding the Settlement and its terms. (Class Admin. Decl., ¶ 68.)

26 \_\_\_\_\_  
27 <sup>5</sup> Indeed, based open a comprehensive study of Internet users and their preferred search engines,  
28 the Class Administrator determined that approximately 72.6% of the U.S. Internet population had  
visited Google.com within a six-month period. (Class Admin. Decl., ¶ 25.)

1 The notice terms fall in line with other, similar, class action notice plans. *See e.g. Vasquez*  
2 *v. Coast Valley Roofing, Inc.*, 670 F. Supp. 2d 1114 (E.D. Cal. 2009) (finding proposed settlement  
3 notice appropriate where it generally described the nature of the litigation, the essential terms of  
4 the Settlement, how to make a claim, object to or comment on or elect not to participate in the  
5 settlement, and where notice was additionally provided via newspaper publication). Because  
6 notice to the Class complied with the Preliminary Approval Order (Dkt. 63), Rule 23, and Due  
7 Process, it comprised the best practicable notice under the circumstances.

8 **IV. CONCLUSION**

9 For the foregoing reasons, Plaintiffs, on behalf of the Class, respectfully request that this  
10 Court grant Plaintiffs' Motion for Final Approval of the Class Action Settlement Agreement, and  
11 award such and further relief as the Court deems equitable and just.

12 Dated: July 25, 2014

ASCHENBRENER LAW, P.C.

14 /s/ Michael J. Aschenbrener  
15 Michael J. Aschenbrener

16 ATTORNEYS FOR PLAINTIFFS  
17 AND THE CLASS

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**CERTIFICATE OF SERVICE**

The undersigned certifies that, on July 25, 2014, he caused this document to be electronically filed with the Clerk of Court using the CM/ECF system, which will send notification of filing to counsel of record for each party.

Dated: July 25, 2014

ASCHENBRENER LAW, P.C.

By: /s/ Michael J. Aschenbrener  
Michael J. Aschenbrener