

August 27, 2014

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

RE: Google Referrer Header Litigation Settlement

Dear Judge Davila:

The signatories of this letter are consumer protection organizations who oppose the proposed settlement in *In re Google Referrer Header Privacy Litigation*.¹ We write to you in advance of the upcoming Final Fairness Hearing to urge you not to approve the settlement.² In our letter to you one year ago, we wrote, “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.”³

Our assessment has not changed one year later. The proposed settlement is bad for consumers and does nothing to change Google’s business practices. The company will simply revise its notice so that it may continue to engage in the privacy-invading practice that class counsel claimed at one time provided the basis for class action certification and monetary relief. The settlement confers no monetary relief to class members, compels no substantive change in Google’s business practices, and misallocates the *cy pres* distribution to organizations that, save one, are not aligned with the interests of class members and do not further the purpose of the litigation. With one exception, they are not consumer privacy organizations and they do not seek to limit the privacy impact of advertising practices that adversely impact Internet users.⁴

Chief Justice Roberts expressed substantial concern about class action settlements that provide no actual benefits to class members in his opinion in the denial of certiorari in *Marek v. Lane*.⁵ In that matter, he noted the “fundamental concerns” surrounding *cy pres*, including:

¹ No. 10-4809 (N.D. Cal. filed Oct. 25, 2010).

² Pl. Final Mot. for Final Approval, Dkt. 66, at 1.

³ Letter from EPIC Exec. Dir. Marc Rotenberg *et al.* to the Hon. Edward J. Davila (Aug. 22, 2013), <http://epic.org/privacy/google/EPIC-et-al-Ltr-Google-Referrer-Header.pdf>.

⁴ We have previously noted that World Privacy Forum, unlike the other named *cy pres* recipients, is aligned with the interests of class members and is therefore an appropriate recipient of *cy pres* funding.

⁵ 134 S. Ct. 8, 187 L. Ed. 2d 392 (2013).

when, if ever, such relief should be considered; how to assess its fairness as a general matter; whether new entities may be established as part of such relief; if not, how existing entities should be selected; what the respective roles of the judge and parties are in shaping a *cy pres* remedy; how closely the goals of any enlisted organization must correspond to the interests of the class; and so on.⁶

We have asked the both Federal Trade Commission Class Action Fairness Project and the California Attorney General to object to the settlement.⁷ The Commission recently filed an *amicus* brief in *Fraleley v. Facebook* objecting to that settlement.⁸ Like the proposed Google Referrer Header settlement, the proposed *Fraleley* settlement provided no relief to class members and did nothing to prevent Facebook from engaging in the activity that was the basis of the complaint.⁹ The California Attorney General also filed an *amicus* brief in *Fraleley* in opposition to the proposed settlement.¹⁰

In our letter to the FTC, we highlighted the disturbing trend of class action privacy settlements that do nothing to alleviate the privacy harms to class members. We asked the Commission to address the inadequacy of the Referrer Header settlement, cautioning, “If the proposed settlement survives the final fairness hearing, millions of Google users will suffer an ongoing privacy violation with no means of redress. Your contribution as *amicus* would help bring an end to this trend of settlement agreements that do nothing to advance the purpose of class action privacy litigation.”¹¹

As the date of the final fairness hearing approaches, we respectfully urge you to address the “obvious deficiencies” we identified in our letter to you last year. First, the proposed settlement fails to require Google to make any substantive changes to its business practices; second, it provides no monetary relief to the class; and third, the proposed *cy pres* allocations do not meet the Ninth Circuit’s requirements for alignment with the interests of class members.¹² For these same reasons, the settlement should not be approved at the final fairness hearing scheduled for August 29.

Respectfully,

/s/ Marc Rotenberg

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

⁶ *Id.* at 8-9, 392.

⁷ Letter from EPIC Exec. Dir. Marc Rotenberg *et al.* to James A. Kohm, Federal Trade Comm’n (Jul. 31, 2014), <https://epic.org/privacy/internet/ftc/FTC-Gaos-7-14.pdf>.

⁸ *Amicus Br. of Fed. Trade Comm’n, Fraley v. Facebook*, No. 11-1726, 830 F. Supp. 2d 785 (N.D. Cal. 2011) (No. 13-16918).

⁹ *Fraleley*, 830 F. Supp. 785.

¹⁰ *Amicus Br. of Cal. Att’y General, Fraley*, 830 F. Supp. 785.

¹¹ Letter from Marc Rotenberg *et al.* to James A. Kohm, *supra* note 4, at 2.

¹² Letter from Marc Rotenberg *et al.* to the Hon. Edward J. Davila, *supra* note 3, at 1.

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

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

/s/ Dr. Deborah Peel, MD
Dr. Deborah Peel, MD, Founder and Chair
Patient Privacy Rights

/s/ Beth Givens
Beth Givens, Executive Director
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