No. 10-16380

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SEAN LANE, et al.,

Plaintiffs-Appellees,

GINGER MCCALL, Class Member,

Objector-Appellant,

v.

FACEBOOK, INC., et al.,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

BRIEF FOR APPELLANT GINGER MCCALL

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JURISDICTION

The district court had jurisdiction over this class action under 28 U.S.C. §§ 1332(d), 1331, and 1367. The district court's final order and judgment approving the settlement of the class action, which resolved all claims of all parties, were entered on May 27, 2010. Appellant and objecting class member Ginger McCall filed her notice of appeal on June 22, 2010. ER 1-2.[1] This Court has jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF ISSUES

1. Whether the district court's approval of this settlement was an abuse of discretion because it did not evaluate the plaintiffs' claims or compare the value of those claims to the proposed settlement award, and because it did not require the settling parties to show that direct distribution of a fair settlement award would be infeasible, either because class members cannot be reasonably identified or because distribution would involve such small amounts that, because of the administrative costs involved, such distribution would not be economically viable.

2. Whether the settlement is, as a matter of law, unfair, unreasonable, and inadequate because it involves a cy pres recipient founded by defendant Facebook, controlled in part by Facebook's chief lobbyist, and that does not have a

[1] The abbreviation "DE" refers to the docket entries in the district court record; the abbreviation "ER" refers to the Excerpts of Record filed by Objector-Appellant McCall.

record of service or clear mission, and because the only other alleged benefit to class members is the promise to terminate a program that has long ceased to exist in the form that gave rise to plaintiffs' complaint.

3. Whether notice was inadequate because it failed to inform class members of the value of their claims, and because it failed to disclose to class members that the cy pres recipient would be in part controlled by defendant Facebook's chief lobbyist and that the Beacon Program, which Facebook promised to terminate, had already been effectively terminated.

INTRODUCTION

Facebook's Beacon Program shared 3.6 million people's online activities with those people's friends, relatives, coworkers, and acquaintances. And it did so without permission. The shared online activities ranged from mundane to highly personal; they included Christmas gifts, video rentals, flight purchases, and hotel reservations. As a result, an unknown number of these 3.6 million individuals have claims for actual or statutory damages under any number of federal and state privacy laws. The proposed settlement in this case would release those claims in return for nothing.

Facebook has agreed to pay the plaintiffs' attorneys $2.85 million, to give the class representatives $41,500, and to found an online privacy organization to be controlled in part by Facebook's chief lobbyist. This settlement should be viewed

with skepticism. Most fundamentally, it is unprecedented for a settlement to give a class award to an organization created and controlled in part by a defendant to the action.

Moreover, the district court here made no effort to evaluate the plaintiffs' claims and determine whether a cy pres award is appropriate. Where the cost of individual distribution is great in comparison to the amount distributed, the distribution of settlement funds to a charity might constitute the next best use of a settlement award. Charitable donations are not a legitimate substitute for compensating class members, however, where individual compensation is economically viable and would provide meaningful relief.

Instead of carefully reviewing this settlement, the district court noted only that Facebook's monetary contribution to its own online-privacy organization is "substantial." Although Facebook might perform a social service by promoting online privacy, it cannot pay for this service with other people's money.

STATEMENT OF CASE AND FACTS

This class action suit involves claims by Facebook users that Facebook, through its Beacon Program, unlawfully shared users' online activities with third parties without the users' permission.

I. Facebook's Beacon Program

Facebook is an online social networking site on which users develop a network of "friends" to whom they can broadcast messages. ER 129-30. Around November 6, 2007, Facebook launched its Beacon Program. ER 133. As Facebook described in a letter to its advertisers and affiliates, the Beacon Program was designed to "[a]llow your customers to share with their friends the actions they take on your website. For user actions you define, Facebook Beacon will publish a story in the users' profile and to friends' News Feeds with a link back to your site." *Id.* The letter further stated that to protect user privacy, "[t]he user must proactively consent to have a story from your website published." *Id.* Many online companies participated in the Beacon Program, including Blockbuster, Fandango, Hotwire, STA Travel, Overstock, GameFly, and Zappos, all of which are defendants in this class action. ER 124-26.

The Beacon Program was keyed to certain online consumer activities known as "triggering events." When one engaged in a triggering event on the website of one of the participating companies, that company's website would communicate the activity to Facebook. ER 136. For example, when a customer rented a movie from Blockbuster's website, Facebook was notified, regardless of whether the Blockbuster customer was a Facebook user. ER 137-38. If the customer was a

Facebook user, Facebook would then "publish a story" about the rental available to the user's online network. ER 133-34.

Contrary to Facebook's letter to its advertisers and affiliates, the Beacon Program was initially designed to be an opt-out program, meaning that a user's online activities (such as renting a movie from Blockbuster) were broadcast *unless* the user took the affirmative step of opting out. ER 139. The opt-out mechanism, as described in the plaintiffs' complaint, was a pop-up window that appeared for ten seconds on a user's computer screen after the user triggered the Beacon Program; if the user did not see the pop-up window, the user's online activities were broadcast on Facebook. ER 138-39.

The experiences of plaintiff Sean Lane and objector Ginger McCall illustrate how the Beacon Program worked in practice. Lane was a 28-year-old technical project manager at an online printing company. On November 21, 2007, Lane purchased a diamond ring for his wife as a Christmas present from Overstock, a Beacon affiliate. Unbeknownst to Lane, his purchase—"Sean Lane bought 14k White Gold 1.5 ct Diamond Eternity Flower Ring from overstock.com"—was broadcast to everyone in Lane's Facebook network, which included 500 Columbia University classmates and 220 other friends, coworkers, and acquaintances. The message further noted that the ring was purchased at a 51 percent discount. Two

hours after the purchase, Lane was contacted by his wife: "Who is this ring for?" ER 139-40.

McCall was a Facebook user from November 2007 to January 2010. In November 2007, McCall triggered the Beacon Program when she rented a video from Blockbuster.com. McCall had never opted in to the Beacon Program or authorized Facebook or Blockbuster to share her video rental information. In December 2007, after learning that her video rentals were being broadcast on Facebook, McCall attempted to affirmatively disable the Beacon Program. But on January 3, 2008, McCall was notified by a friend that her rental of the film *The Untraceable* on Blockbuster.com was broadcast on Facebook. Again, on February 5, 2008, several friends of McCall notified her that Facebook continued to broadcast her Blockbuster.com rentals. ER 44-45.

Many Facebook users were outraged to learn of the Beacon Program and stories like those of Sean Lane and Ginger McCall. ER 140-42. In response to the public "brouhaha," *id.*, on December 5, 2007, Facebook founder Mark Zuckerberg posted a statement on Facebook's website promising to modify Beacon to appease users' privacy concerns:

> About a month ago, we released a new feature called Beacon to try to help people share information with their friends about things they do on the web. We've made a lot of mistakes building this feature, but we've made even more with how we've handled them. We simply did a bad job with this release, and I apologize for it. While I am disappointed with our mistakes, we appreciate all the feedback we

> have received from our users. I'd like to discuss what we have learned and how we have improved Beacon.
>
> . . .
>
> Last week we changed Beacon to be an opt-in system, and today we're releasing a privacy control to turn off Beacon completely. You can find it here. If you select that you don't want to share some Beacon actions or if you turn off Beacon, then Facebook won't store those actions even when partners send them to Facebook.

ER 142-44. In September 2008, before this action was filed, Facebook removed Beacon from its "Business Solutions" website, and the Beacon home page ceased to exist. *See* Justin Smith, *Is Facebook Shutting Down Beacon?*.[2] By January 2009, a Facebook administrator stated that "the Beacon program is permanently closed." Facebook Platform Developer Forum, post of Ishepard_fb, Jan. 15, 2009.[3]

Facebook remains at the center of a heated public debate on online privacy. *See, e.g.*, Benny Evangelista, *Facebook's Places Raises More Privacy Debate*, S.F. Chronicle, August 20, 2010[4]; Daniel Lyons, *Who Needs Friends Like Facebook: Not me. Why Mark Zuckerberg and His Social Network Should Stop Invading Our Privacy*, Newsweek, May 24, 2010[5]; Dan Fletcher, *How Facebook Is Redefining*

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[2] http://www.insidefacebook.com/2008/09/20/is-facebook-shutting-down-beacon.
[3] http://forum.developers.facebook.net/viewtopic.php?pid=101496.
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[5] *Available at* http://www.newsweek.com/2010/05/24/who-needs-friends-like-facebook.html.

Privacy, Time, May 20, 2010[6]; Jenna Wortham, *Facebook and Privacy Clash Again*, N.Y. Times, May 6, 2010.[7]

II. The Lawsuit and Settlement

A. *Harris v. Blockbuster*

On June 3, 2008, just over two months before commencement of this case, Cathryn Elaine Harris filed a putative class action against Blockbuster in the District Court for the Eastern District of Texas based on Blockbuster's involvement in the Beacon Program. *See* Complaint, *Harris v. Blockbuster Inc.*, 622 F. Supp. 2d 396 (N.D. Tex. 2009). The complaint accused Blockbuster of violating the Video Privacy Protection Act, 18 U.S.C. § 2710, which provides that "[a] video tape service provider who knowingly discloses, to any person, personally identifiable information concerning any consumer of such provider shall be liable to the aggrieved person . . . not less than liquidated damages in an amount of $2,500." *Id.* § 2710(b), (c)(2)(A). The district court rejected Blockbuster's argument that its Terms and Conditions barred the litigation. *See Harris*, 622 F. Supp. 2d 396. Blockbuster filed an interlocutory appeal to the United States Court of Appeals for the Fifth Circuit. That appeal was later dismissed by agreement of the parties.

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[6] *Available at* http://www.time.com/time/business/article/0,8599,1990582,00.html.
[7] *Available at* http://query.nytimes.com/gst/fullpage.html?res=9D02E3D61431F935A35756C0A9669D8B63.

B. *Lane v. Facebook*

On August 12, 2008, Sean Lane and eighteen others filed a putative class action against Facebook, Blockbuster, and 46 other defendants in the United States District Court for the Northern District of California, alleging violations of (1) the Electronic Communications Privacy Act, 18 U.S.C. § 2510 (1986), (2) the Computer Fraud and Abuse Act, 18 U.S.C. § 1030 (1986), (3) the Video Privacy Protection Act, 18 U.S.C. § 2710 (1988), (4) California's Consumers Legal Remedies Act, California Civil Code § 1750, and (5) California's Computer Crime Law, Penal Code § 502. ER 150-67.

On February 11, 2010, after negotiations and two mediation sessions, but before any formal discovery and before the district court had considered either a motion for class certification or any dispositive motion, the parties reached a proposed settlement. The proposed settlement provides for a $9.5 million fund that would be used to pay for the settlement's administrative costs, attorneys' fees, "incentive awards" for the named plaintiffs, and the establishment of an online-privacy organization. ER 83-90. Pursuant to the settlement agreement, the plaintiffs' attorneys will not request more than one-third of the $9.5 million fund and, in what is known as a "clear sailing arrangement," *see BTZ, Inc. v. Great Northern Nekoosa*, 47 F.3d 463, 467 (1st Cir. 1995), Facebook will not challenge

the fee request. ER 85. The 21 class representatives would receive a total of $41,500, ER 117, $15,000 of which would go to plaintiff Sean Lane. ER 86.

After administrative costs, incentive awards, and attorneys' fees, the remainder of the fund would go to a Facebook-founded organization. As the agreement states, "Facebook shall form and establish the a [sic] non-profit foundation . . . , the purpose of which shall be to fund projects and initiatives that promote the cause of online privacy, safety, and security." ER 86. The organization would have three directors, to be selected by the parties to the settlement. If the parties were unable to agree on the directors, each party would select one director and nominate a second, with the settlement mediator ultimately choosing the third director. ER 87. During the organization's first year, the directors would make all major decisions, including director and officer succession, by unanimous vote, and they would make decisions relating to governance and operation by majority vote. *Id.*

Article IV of the organization's Articles of Incorporation identifies the organization's directors. *See* Articles of Incorporation of Digital Trust Foundation, http://www.beaconclasssettlement.com/Files/ByLawAndFormation.pdf; *see also* DE 108 at 17 (plaintiffs' brief discussing selected directors); DE 141 at 26 (final approval hearing discussing selected directors). One director is Tim Sparapani, who is currently Facebook's chief lobbyist. Another director is Larry Magid, co-

director of Connectsafely.org, an organization that receives funding from Facebook. *See* Connect Safely, Supporters Logos, http://www.connectsafely.org/our_supporters.[8] The third director is Chris Jay Hoofnagle, the director of the Berkeley Center for Law & Technology's information privacy programs. A document appended to the Articles of Incorporation provides that Tim Sparapani and Chris Hoofnagle would be the foundation's co-presidents, and Larry Magid would be its chief financial officer and secretary. The Articles of Incorporation and related documents were first made publicly available on January 25, 2010, one week prior to the February 1 opt-out deadline. ER 38. It is unclear when these documents were drafted.

The settlement agreement also provides that "within sixty (60) days of the Preliminary Approval Date, Facebook shall terminate the Beacon program in its entirety." ER 87.

Finally, the settlement agreement states that "[u]pon the Effective Date, each of the Representative Plaintiffs and each of the Class Members will be deemed to have, and by operation of the Judgment will have, fully, finally, and forever

[8] Larry Magid has also consistently defended Facebook on privacy matters. *See, e.g.*, Larry Magid, *Magid: The Other Side of the Facebook Privacy Issue*, MercuryNews.com, July 25, 2010, http://www.mercurynews.com/larry-magid/ci_15578818; Larry Magid, *Magid: Online Privacy Concerns Often Misplaced*, MercuryNews.com, August 15, 2010, http://www.mercurynews.com/larry-magid/ci_15748748?nclick_check=1; Larry Magid, *Facebook Privacy Lawsuit a "Jumbled Mess,"* CNet News, August 18, 2009, http://news.cnet.com/8301-19518_3-10312609-238.html.

released, relinquished, and discharged the Protected Persons from all Released Claims." ER 87-88. The "Certain Definitions" section defines "Protected Persons" as "Facebook and the Beacon Merchants, collectively, and each of their respective past and present officers, directors, employees, insurers, agents, representatives, partners, joint-venturers, subsidiaries, affiliates, attorneys, successors and assigns." ER 79.

C. *Harris v. Blockbuster* Motion to Intervene

On October 2, 2009, the *Harris v. Blockbuster* plaintiffs moved to intervene in this case to prevent the release of their claims against Blockbuster. Counsel for the *Harris* plaintiffs claimed to have learned of this suit only two weeks before the motion to intervene. ER 57. The *Harris* plaintiffs alleged in their motion that "the terms of the proposed settlement are contrary to public policy and are unfair, inadequate, and unreasonable." ER 65. Moreover, they sought permission "to review the discovery taken in this case and to conduct their own discovery, so that they can determine the extent to which Blockbuster's potential liability has been explored in this action and to permit them to make fully-informed objections to the settlement." ER 65-66.

On October 23, 2009, the district court denied the motion to intervene on the ground that it was untimely. ER 61-63. The court found that *Harris* counsel had known about the *Lane* suit since September 2008 and about the pending settlement

since May 2009. ER 61. In addition, the court concluded that the *Harris* plaintiffs' rights were "adequately protected through the process for submitting objections that will follow upon preliminary approval of the settlement agreement." ER 65. The *Harris* plaintiffs did not, however, object to the settlement. Instead, *Harris* plaintiffs' counsel "ultimately supported the settlement, with no material changes in its terms" and applied for attorneys' fees out of the *Lane* settlement. ER 8.

D. Preliminary Approval

On October 23, 2009, the district court certified the class for settlement purposes only and preliminarily approved the settlement. ER 51. The certified class includes:

> All Facebook members who, during the period of November 6, 2007 to the date this Order is entered, engaged in one or more activities on a website of any company, corporation, business enterprise, or other person that entered into an agreement with Facebook with respect to the Beacon functionality, which triggered Beacon, the program launched by Facebook on November 6, 2007 and all iterations thereof bearing the "Beacon" name.

Id.

The identities of class members are unknown to all except Facebook. The class consists of Facebook users who during the class period visited a Beacon Merchant—Blockbuster, Fandango, Hotwire, STA Travel, Overstock, GameFly, and Zappos, among others—and triggered the Beacon Program. Facebook claims

to have identified everyone in this class by "querying their databases to identify members whose Facebook actions included beacon execution during the class period." ER 36. It concluded that the class consists of 3,663,651 individuals. *Id.*

Facebook notified these individuals of the proposed settlement in several ways: It posted an electronic notice on the "Updates" section of users' Facebook accounts. It sent a notice by email to all users whose email addresses it had on file. And it published a notice in the national edition of USA today. These notices provided a link to a settlement website, located at www.beaconclasssettlement.com.[9] The notice triggered almost no response. Of the 3.6 million class members, 108 opted out and four filed objections. ER 36-38.

On March 17, 2010, the district court approved the settlement. The court's Findings of Fact, Conclusions of Law, and Order Approving Settlement is in nearly all respects a verbatim copy of the parties' [Proposed] Findings of Fact, Conclusions of Law, and Order Thereon. The findings conclude that the settlement is "fair, reasonable, adequate and proper and in the best interests of the Settlement Class." ER 14.

[9] The parties claimed in their brief to the district court that "10% of the class members who received notice visited the settlement website," DE 110 at 16, relying on a declaration that states only that "the website had been accessed 328,538 times." ER 37. Although 328,538 (number of times website accessed) is slightly under 9 percent of 3,663,651 (size of the class), it is unrealistic to assume that no one accessed the site more than once and that no non-class member accessed the website.

With regard to the proposed Facebook-founded organization, the district court noted the "theoretical inefficiencies" of creating a new organization, as opposed to giving the funds to an existing online privacy organization, but concluded that the "possibility does [not] undermine the conclusion that the Settlement is fair and adequate." ER 18.[10] As to the criticism that one of the three directors, and the foundation's co-president, would be a Facebook employee, the court observed that "there is no requirement that the funds be used in a manner wholly antagonistic to the defendant's interests." *Id.* Moreover, the court stated that "[o]bjectors have not shown there is any substantial reason to doubt the independence of two of the three directors," and "[w]hile the director associated with Facebook may reasonably be expected to exercise his influence against the Foundation taking any actions that would clearly and directly harm Facebook, there has been no persuasive showing that the Foundation will be a mere publicity tool for Facebook." *Id.*

On May 24, 2010, the district court approved the plaintiffs' counsel's unchallenged request for $2,828,000 in fees and $42,210.58 in costs. ER 6. The court accepted the lodestar amount of $1,161,381.50, which represented 2500 hours of work, distributed among three law firms. ER 7. It then rejected the "novel suggestion" of the *Harris* plaintiffs' counsel that they too should be

[10] This section of the district court's findings is the only section that is not a near-verbatim adoption of the parties' proposed findings.

compensated from the *Lane* settlement fund, noting that "the only efforts *Harris* counsel undertook in *this* case were directed at *preventing* preliminary approval of the settlement." ER 8.

In addition, the district court decided that a multiplier of two "is warranted under the circumstances here." *Id.* Plaintiffs' counsel had requested a multiplier of two "[w]ith the inclusion of the *Harris* counsel's hours in the lodestar," but "that if the Court is not inclined to include the *Harris* hours in the lodestar, then it should apply a multiplier of 2.4, to reach the same total fee award." *Id.* The district court rejected this "disturbingly cynical" suggestion. *Id.*

III. Cy Pres Awards that Substitute for Compensation of Class Members

"Cy pres" is short for the Norman French expression "cy pres comme possible," which means "as near as possible." *In re Holocaust Victim Assets Litig.*, 424 F.3d 132, 141 n.10 (2d Cir. 2005). Courts have traditionally used cy pres awards to save testamentary charitable gifts where the intended recipient of the charitable gift no longer exists. Under these circumstances, courts assign the gift to the next best charitable recipient. *Id.*

Although the cy pres doctrine has long been a part of trust law, the idea of extending it to the class action context originated with a 1972 student note. *See* Stewart R. Shepherd, *Damage Distribution in Class Actions: The Cy Pres Remedy*, 39 U. Chi. L. Rev. 448 (1972). The problem this note sought to address is what a

court should do with unclaimed funds after all known class members have been fully compensated. Courts and commentators have identified several possible ways of disposing of unclaimed funds: (1) reversion to the defendant; (2) reversion to the state or federal government; (3) further distribution to the already-compensated known class members, and (4) a cy pres distribution that will indirectly benefit class members. *See, e.g.*, *Powell v. Georgia-Pac. Corp.*, 119 F.3d 703, 705 (8th Cir. 1997); *see also Six Mexican Workers v. Arizona Citrus Growers*, 904 F.2d 1301, 1307-09 (9th Cir. 1990); Shepherd, 39 U. Chi. L. Rev. at 453.

The use of a cy pres award to dispose of unclaimed funds after all known class members have been fully compensated must be sharply distinguished from the use of a cy pres award to avoid the burdens of determining actual damages or distributing funds to known class members. *See In re Pharm. Indus. Average Wholesale Price Litig.*, 588 F.3d 24, 34 (1st Cir. 2009) (noting these two distinct applications of the cy pres doctrine). In the former context, individual substantive rights are not implicated. *Cf. Six Mexican Workers*, 904 F.2d at 1307. By contrast, in the latter context, the cy pres award substitutes entirely for direct compensation of class members. Accordingly, if the cy pres award does not even indirectly benefit class members, they have released their rights in return for nothing.

SUMMARY OF ARGUMENT

The district court's approval of the settlement should be vacated on three independent grounds:

1. Inadequate Scrutiny of Settlement. Under this Court's decision in *Molski v. Gleich*, 318 F.3d 937 (9th Cir. 2003), *overruled on other grounds*, *Duke v. Wal-Mart Stores, Inc.*, 603 F.3d 571 (9th Cir. 2010), settlements involving cy pres awards that substitute for direct compensation of a settlement-only class require heightened scrutiny. When presented with such a settlement, a district court must carefully evaluate the plaintiffs' claims and compare the value of those claims to the proposed settlement award. It must also ensure that the settling parties have carried their burden of showing that individual distribution of the settlement award would be infeasible, either because class members cannot be reasonably identified or because distribution would involve such small amounts that, because of the administrative costs involved, such distribution would not be economically viable.

The district court here did not sufficiently scrutinize the proposed settlement. Its findings, adopted nearly verbatim from the settling parties' proposed findings, do not involve any meaningful evaluation of the plaintiffs' claims. Specifically, the district court gave short shrift to the objection that a subclass with more valuable claims under the Video Protection Privacy Act might exist. Moreover, because neither the settling parties nor the district court attempted to estimate the

value of the class's claims, the record contains no evidence that direct distribution of a fair settlement award to the class or a subclass would be infeasible.

2. Unfair, Unreasonable, and Inadequate. The settlement is substantively unfair, unreasonable, and inadequate because the alleged benefits for which class members would release potentially meritorious claims are deficient and illusory. The cy pres award is deficient for several reasons. First, the proposed recipient is a Facebook-founded organization controlled in part by Facebook's chief lobbyist. In addition, because the proposed organization is untested, it is an unacceptable cy pres recipient under this Court's decision in *Six Mexican Workers*, which prohibits cy pres awards to organizations without a "substantial record of service." 904 F.2d at 1308. More generally, the proposed organization's structural conflict of interest and inefficiencies render it far from the "next best" use of the settlement funds. *Id.* at 1308.

Facebook's promise to terminate the Beacon Program is illusory because the Beacon Program was effectively terminated long ago.

3. Insufficient Notice. Notice to the class was insufficient because it failed to apprise class members of the value of their claims, did not inform class members that Facebook's chief lobbyist would be a director and co-president of the cy pres recipient, and misled class members by promising to terminate the Beacon Program without disclosing that the program had already ceased to exist.

STANDARD OF REVIEW

This Court reviews for abuse of discretion a district court's approval of a class action settlement. *See Molski*, 318 F.3d at 953. A district court abuses its discretion if it applies the wrong legal standard or its findings of fact are clearly erroneous. *In re Mego Fin. Corp. Sec. Litig.*, 213 F.3d 454, 458 (9th Cir. 2000). "A district court's failure to exercise discretion constitutes an abuse of discretion." *Caudle v. Bristow Optical Co., Inc.*, 224 F.3d 1014, 1027 (9th Cir. 2000).

ARGUMENT

I. The District Court Did Not Sufficiently Scrutinize the Proposed Settlement.

A district court must take special care to ensure the fairness of a settlement award in which a settlement-only class receives no direct compensation. The district court exercised no such care in this case. It adopted nearly verbatim the proposed findings submitted by the settling parties, and even those findings do not include any meaningful evaluation of the plaintiffs' claims or the possible range of litigation outcomes. Because the district court did not adequately determine what a fair settlement amount would be, it could not have assured itself that distribution of a fair settlement amount to individual class members would be infeasible. Accordingly, the district court failed to exercise its discretion and the judgment should be vacated and remanded.

A. The Proposed Settlement Requires Heightened Judicial Scrutiny.

"One risk of class action settlements is that class counsel may collude with the defendants, tacitly reducing the overall settlement in return for a higher attorneys' fee. The Federal Rules respond by requiring judicial oversight of class action settlements." *Knisley v. Network Assoc., Inc.*, 312 F.3d 1123, 1125 (9th Cir. 2002). Under the Federal Rules, a district court may approve a class action settlement "only after a hearing and on finding that it is fair, reasonable, and adequate." Fed. R. Civ. P. 23(e)(2); *see Staton v. Boeing Co.*, 327 F.3d 938, 952 (9th Cir. 2003). "The absence of direct proof of collusion does not reduce the need for careful review of the fairness of the settlement, particularly those aspects of the settlement that could constitute inducements to the participants in the negotiation to forego pursuit of class interests." *Staton*, 327 F.3d. at 958 n.12; *see also Reynolds v. Beneficial Nat'l Bank*, 288 F.3d 277, 283 (7th Cir. 2009) (stating that "[a]lthough there is no proof that the settlement was actually collusive in the reverse-auction sense, the circumstances demanded closer scrutiny than the district judge gave it" and requiring the "highest degree of vigilance in scrutinizing" class action settlements).

Although courts have a duty to evaluate all proposed class settlements for fairness, adequacy, and reasonableness, class settlements involving certain characteristics warrant closer scrutiny. Three such characteristics are relevant here.

First, heightened scrutiny is warranted in cases in which class representatives receive significantly more than absent class members. *See Cohen v. Resolution Trust Corp.*, 61 F.3d 725, 728 (9th Cir. 1995), *opinion vacated by agreement of parties*, 72 F.3d 686 (1996) ("[H]eightened judicial review of the fairness of [settlements that treat class members differently] is necessary."); *Molski*, 318 F.3d at 955-56; *Crawford v. Equifax Payment Servs., Inc.*, 201 F.3d 877, 881 (7th Cir. 2000) (rejecting a settlement as unfair because the class representative "and his attorney were paid handsomely to go away [and] the other class members received nothing") (quoted with approval in *Molski*, 318 F.3d at 953-54)).

Second, where settlements provide class members only nonmonetary relief, heightened scrutiny is needed to ensure that the class members are receiving an actual benefit. *See Six Mexican Workers*, 904 F.2d at 1308 (rejecting a cy pres settlement on the ground that the charitable donation "benefits a group far too remote from the plaintiffs' class"); *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."); *cf.* 2003 Advisory Committee Notes, Fed. R. Civ. P. 23(h) (noting in the context of reviewing attorneys' fee awards that "[s]ettlements involving nonmonetary provisions for class members . . . deserve

careful scrutiny to ensure that these provisions have actual value to the class"); *Bell Atlantic Corp. v. Bolger*, 2 F.3d 1304, 1311 (3d Cir. 1993) (observing the risk that parties might use "nonpecuniary" awards to "conceal[] a collusive settlement").

Third, "'[s]ettlements that take place prior to formal class certification require a higher standard of fairness.'"[11] *Molski*, 318 F.3d at 953 (quoting *In re Mego Fin. Corp. Sec. Litig.*, 213 F.3d 454). Heightened review of such settlements is necessary because "a court asked to certify a settlement class will lack the opportunity, present when a case is litigated, to adjust the class, informed by the proceedings as they unfold." *Amchem Prod. v. Windsor*, 521 U.S. 591, 620 (1997); *see Narouz v. Charter Comms., LLC*, 591 F.3d 1261, 1266 (9th Cir. 2010). Moreover, the risk of "collusion, individual settlements, buy-offs . . . , and other abuses" is greater in the context of settlement-only classes because a court has "less information about the class." *In re Gen. Motors Corp. Pick-Up Truck Fuel Tank Prod. Liab. Litig.*, 55 F.3d 768, 787 (3d Cir. 1995).

All three of the above characteristics are present where a cy pres award substitutes entirely for direct compensation of a settlement-only class. It is thus unsurprising that this Court in *Molski* viewed such a settlement with skepticism. *Molski* involved claims by a class of mobility-impaired individuals that the

[11] A settlement-only class is one instituted in a non-adversarial process exclusively for the purpose of achieving a "global settlement." *See Amchem Prod. v. Windsor*, 521 U.S. 591, 597 (1997).

Atlantic Richfield Company had violated the Americans with Disabilities Act and California disability laws by failing to make its facilities more accessible. The parties entered into an agreement in which (1) the defendant would complete certain accessibility enhancements to its facilities, (2) the named plaintiff would receive $5,000, (3) class counsel would receive $50,000, and (4) eight well-established charities would receive $195,000. *Id.* at 943-44. In return, class members would release their claims against the defendant. *Id.*

After carefully reviewing the terms of the settlement, the Court rejected it on the ground that it did not adequately protect the interests of the class. The Court reasoned that "the class members lost their rights to pursue any claims . . . . ; the class representative received monetary relief of $5,000; and the class counsel was paid $50,000. The corporation was required to make tax-deductible donations to third parties and simply meet its legal obligations[.]" *Id.* at 953. The Court found this outcome "particularly problematic" because "only a minimal amount of discovery occurred in this case." *Id.* at 954. Finally, it concluded that in any event, cy pres can only substitute for direct payment to class members when there is proof that "individual claims would be burdensome or that distribution of damages would be costly." *Id.* at 954-55.

B. The District Court's Review Was Inadequate

In light of the concerns discussed above, to adequately safeguard the rights and interests of absent class members, a district court must evaluate a class's claims and compare the value of those claims to the proffered settlement award. When a proposed settlement involves a cy pres award that would substitute for direct compensation of class members, a district court must ensure that the settling parties have satisfied their burden of showing that distribution to class members is not feasible, either because class members cannot be reasonably identified or because distribution would involve such small amounts that, because of the administrative costs involved, such distribution would not be economically viable.

The district court here abdicated its responsibility to the absent class members at every step. Rather than evaluate the plaintiffs' claims, the court simply adopted the settling parties' proposed findings. Accordingly, those "findings" do not deserve this Court's deference. *See Molski*, 318 F.3d at 946 ("The district court's decision must be supported by sufficient findings to be afforded the traditional deference given to such a determination." (internal quotation marks omitted)); *see also In re Cmty. Bank of N. Virginia*, 418 F.3d 277, 301, 302 (3d Cir. 2005) ("Because we are not convinced that the District Court exercised 'independent judgment' in adopting the proposed findings of the settling parties, we conclude that the settlement-only class was never properly

certified[.]"). Because the district court failed to exercise its discretion, the judgment must be vacated.

1. The district court did not evaluate the plaintiffs' claims or compare the value of those claims to the proposed settlement award.

A district court must first evaluate the plaintiffs' claims and compare the value of those claims, which is a function of their likelihood of success and the plaintiffs' likely recovery should they succeed, with the proposed settlement amount. *See Molski*, 318 F.3d at 953-54 & n.23 (noting the disparity between the settlement amount and the displaced damages claims and concluding that "the consent decree permits [the defendant] to escape potential liability of $500 million . . . in exchange for $195,000 in tax-deductible donations"); *Mirfasihi v. Fleet Mortg. Co.*, 356 F.3d 781, 786 (7th Cir. 2004) (discussing a "district judge's duty in a class action settlement situation to estimate the litigation value of the claims of the class and determine whether the settlement is a reasonable approximation of that value"); *see also In re Traffic Executive Ass'n-E. R.R.s*, 627 F.2d 631, 633 (2d Cir. 1980) (noting that the district court is "required to explore the facts sufficiently to make an intelligent comparison between the amount of the compromise and the probable recovery"); *In re Gen. Motors Corp. Pick-Up Truck Fuel Tank Prod. Liab. Litig.*, 55 F.3d at 806; *In re Microsoft Corp. Antitrust Litig.*, 185 F. Supp. 2d 519, 526-27 (D. Md. 2002) (comparing the value of the claims to the value of the cy pres settlement).

The district court here made no meaningful effort to evaluate the plaintiffs' claims. It did not separately consider the five causes action; it did not identify which of the causes of action might have merit or, if none have merit, why; it did not consider the range of recovery under the various causes of action; and it did not compare the range of possible litigation outcomes to the proposed settlement award.

Its only findings regarding the strength of the claims generally are that they "implicate factual issues that would likely be vigorously disputed" and "raise novel legal theories with little in the way of prior decisions to assist in gauging the likelihood of success." ER 15. Regarding the likely recovery under these claims and the relationship between that recovery and the proposed settlement award, the court stated only that "[i]n light of [the] litigation risks and in the context of settlements involving claims of infringement of consumers' privacy rights, the $9.5 million offered in settlement is substantial." ER 15-16. This summary analysis is inadequate.

Particularly troubling is the district court's dismissive treatment of the claims under the Video Protection Privacy Act. The VPPA provides that "[a] video tape service provider who knowingly discloses, to any person, personally identifiable information concerning any consumer of such provider shall be liable to the aggrieved person . . . not less than liquidated damages in an amount of

$2,500." 18 U.S.C. § 2710(b), (c)(2)(A). Defendant Blockbuster is undeniably a video tape service provider, and plaintiffs allege that Blockbuster knowingly disclosed to third parties personally identifiable information about its customers.

The district court's treatment of the VPPA claims was perfunctory at best. The court reasoned that "[t]he representative Plaintiffs' claims are typical of the claims of the members of the Settlement Class" because "[a]lthough some claims of some Settlement Class Members arise from statutes unique to the third-party Beacon Merchants with whom they interacted, the more salient characteristic of the Class is the Beacon nexus and the statutory claims, such as the Electronic Communications Privacy Act (ECPA), common to all Class Members." *Id.* at 13. The district court never explained why the "more salient" characteristic of the class is the Beacon nexus. If a subclass has more valuable claims than the class as a whole, then the representative plaintiffs' claims are not typical of the class as a whole.

Indeed, if Blockbuster's arguments in its Brief in Support of the Settlement are any indication, the VPPA claims are quite strong. Blockbuster argued below that it did not provide personally identifiable information to third parties but merely to the consumer him- or herself through the medium of Facebook. ER 39-40. But Blockbuster did not use Facebook as a medium through which to communicate with a consumer. Rather, it sent information to Facebook itself, ER

136, and that information was sent by Facebook to additional third parties. For this reason, Blockbuster's Facebook-as-email analogy fails.

Blockbuster also argued that it did not transmit "personally identifiable" information to Facebook "but simply transmitted certain activity notifications to consumers' Facebook Accounts[,] . . . [which] may or may not have been sufficient to identify the consumer." ER 40-41. But the plaintiffs' complaint states that "[b]oth Facebook and Facebook Beacon Activated Affiliates collected and retained personally identifiable information on persons who utilized their respective websites. The 'cookies' used on both Facebook and Facebook Beacon Activated Affiliates could confirm the personal identity of the common member." ER 135. Moreover, Blockbuster must have known that Facebook would routinely be able to match its "activity notifications" to individual Facebook users. Were it otherwise, the Beacon Program would not have worked as advertised. ER 133-34 (letter from Facebook to Beacon Affiliates explaining that the Beacon Program would "[a]llow your customers to share with their friends the actions they take on your website").

In addition, Blockbuster argued that its disclosure was "incident to the ordinary course of business" because it was no more than "order fulfillment" and "request processing," which the VPPA permits. ER 41-42. This argument fails for the same reason its first argument fails. Blockbuster was not sending secure, email-like messages to its customers through the medium of Facebook. It was

using the Beacon Program to market to the friends of Facebook users by sharing the Facebook users' rental history. To call this "order fulfillment" or "request processing" would strip the VPPA of all substance.

Finally, Blockbuster argued that it received consumers' consent for any disclosures that might have occurred. ER 42-43. But as Facebook founder Mark Zuckerberg acknowledged, the Beacon Program began as an opt-out program, ER 142-43, which shared users' personal information without receiving their affirmative consent. Objector Ginger McCall, for example, never opted in to the Beacon Program or authorized Facebook or Blockbuster to share her video rental information. ER 45.

The settling parties further support their argument that the VPPA claims are meritless by citing plaintiffs' counsel in *Harris v. Blockbuster*, who has "concluded that the relief proposed in the Settlement Agreement is the best practical relief to the Class." DE 110. But plaintiffs' lead counsel in *Harris* passionately made the opposite argument in his motion to intervene and in the hearing on that motion. *See* DE 39 at 9 (claiming that "the terms of the proposed settlement are contrary to public policy and are unfair, inadequate, and unreasonable"); ER 67 ("We have very serious concerns that the VPPA causes of this are the integral part of this and those class members have very different rights and remedies available to them and much stronger than the rest of the class."). Indeed, much of the hearing on the

motion to intervene focused on whether the class should not be certified because the claims of the named representatives are different in kind from the VPPA claims. ER 68, 71-74. The district court rejected this argument on the ground, among others, that it was being raised prematurely and that counsel should raise the issue in the form of an objection to final approval of the settlement. ER 68-69, 65. But without any material change in the terms of the settlement agreement, the *Harris* plaintiffs' counsel did an about face, deciding that the settlement he had lambasted was now fair and applying for a fee award out of the *Lane* settlement fund.

In sum, it appears that, at the very least, an unknown number of the 3.6 million class members belong to a subclass with promising claims under the VPPA, a statute that provides for minimum damages of $2500 per person per occurrence. The district court abused its discretion by failing to undertake any meaningful analysis of the value of these claims.

2. The settling parties did not show that a cy pres remedy is appropriate.

Cy pres awards can only substitute for direct class compensation upon a showing by the settling parties that "direct distributions to class members are not feasible—either because class members cannot be reasonably identified or because distribution would involve such small amounts that, because of the administrative costs involved, such distribution would not be economically viable." American

Law Institute, Principles of the Law of Aggregate Litigation, § 3.07 (2010); *see Six Mexican Workers*, 904 F.2d at 1305 ("When a class action involves a large number of class members but only a small individual recovery, the cost of separately proving and distributing each class member's damages may so outweigh the potential recovery that the class action becomes unfeasible. Fluid recovery or 'cy pres' distribution avoids these difficulties by permitting aggregate calculation of damages, the use of summary claim procedures, and distribution of unclaimed funds to indirectly benefit the entire class."); *Molski*, 318 F.3d at 955 (noting that the settlement must fail because "there is no evidence that proof of individual claims would be burdensome or that distribution of damages would be costly").[12]

A district court cannot determine whether the settling parties have satisfied this burden before it evaluates the plaintiffs' claims and determines that the proposed settlement amount is fair. Only after a district court concludes that a proposed settlement amount is fair can it determine whether distribution of *that amount* would be feasible.

Here, the proposed settlement amount has no relationship to the value of the plaintiffs' claims. The district court found "substantial" the $9.5 million award

[12] This Court's decisions in *In re Hotel Telephone Charges* and *Six Mexican Workers* cast some doubt on whether cy pres can ever be used to avoid the burden of determining actual damages. *See In re Hotel Tel. Charges*, 500 F.2d 86, 90 (9th Cir. 1974); *Six Mexican Workers*, 904 F.2d at 1307. But *Molski* suggests it is an open question whether a cy pres remedy is permitted for this reason. The Court need not resolve the issue in this case.

without reference to the number of plaintiffs or the value of their claims. ER 15-16. Assuming the fairness of the award, the settling parties argued that after removing attorneys' fees and the costs of distribution, each class member would receive a check for $1.12, and "[t]his *de minimis* amount can be used more effectively in mass as a cy pres benefit." DE 110 at 19-20.

But if, for example, even one percent of the 3.6 million class members have claims under the VPPA, and even if those plaintiffs have only a 25 percent likelihood of success, the total damages under the VPPA, discounted by their likelihood, would be $22.5 million. A settlement award based on that amount could surely be distributed to the hypothetical subclass. Because neither the district court nor the settling parties meaningfully evaluated the plaintiffs' claims, the settling parties could not have shown that distribution of a settlement award based in part on the value of those claims would be infeasible.

II. The Settlement Is Not Fair, Reasonable, And Adequate.

Part I showed that the district court's review of the settlement constituted an abuse of discretion. In addition, this settlement fails as a matter of law. In exchange for their release of claims, the absent class members would receive two alleged benefits: the cy pres award and the termination of the Beacon Program. These alleged benefits are deficient and illusory, respectively. Accordingly, the proposed settlement should have been rejected by the district court.

A. The Cy Pres Award Recipient Is Unacceptable.

This Court should reject a proposed cy pres distribution that "fails to provide the 'next best' distribution." *Six Mexican Workers*, 904 F.2d at 1308. The recipient of the cy pres award here contains a structural conflict of interest, has no "record of service," *id.* at 1308-09, and will be plagued by the inefficiencies of an upstart organization. For these reasons, the cy pres award is not the "next best" way of using the settlement funds.

The recipient of the cy pres award is a Facebook-founded organization run in part by Facebook's chief lobbyist. *See supra* pp. 10-11. This structural conflict of interest presents an unacceptable risk that the organization will avoid taking actions that run counter to Facebook's interests. As the district court acknowledged, "the director associated with Facebook may reasonably be expected to exercise his influence against the Foundation taking any actions that would clearly and directly harm Facebook . . . ." ER 18. This fact should itself be fatal to the settlement agreement. In addition, the proposed organization's structure creates a risk that, in the district court's words, "the Foundation will be a mere publicity tool for Facebook." *Id.* Although the district court found "no persuasive showing" that this risk will be the case, that finding has the burden backward: the settling parties must prove to the court that the cy pres recipient is a legitimate one.

As this Court has held, the burden of proving that a cy pres recipient is acceptable rests on the settling parties, that burden cannot be satisfied if the cy pres recipient does not have a substantial record of service. In *Six Mexican Workers*, this Court considered the propriety of a cy pres award to the Inter-American Fund (IAF). 904 F.2d at 1307. The Court expressed concern about how the funds would be used and whether the class members would be the primary beneficiaries of their use. *Id.* at 1308-09. It concluded that "[t]he tool for the distribution, the IAF, is not an organization with a substantial record of service" and was therefore unacceptable. *Id.*; *see also In re Mexico Money Transfer Litig. (W. Union & Valuta)*, 164 F. Supp. 2d 1002, 1031 (N.D. Ill. 2000), a*ff'd sub nom. In re Mexico Money Transfer Litig.*, 267 F.3d 743 (7th Cir. 2001) ("The proposed *cy pres* fund here will be administered by a board that includes representatives from leading Latino charitable groups with substantial records of service . . . ." (discussing *Six Mexican Workers*)); *In re Lease Oil Antitrust Litig. (No. II)*, MDL 1206, 2007 WL 4377835 (S.D. Tex. Dec. 12, 2007) ("Finally, the Court has worked with the Center for Energy and Environmental Resources at the University of Texas for over three years . . . and has found this organization to be highly competent, professional and economical with its funds." (citing *Six Mexican Workers*)); Brief of Defendant-Appellee at 27, *Nachshin v. AOL, LLC*, No. 10-55129 (9th Cir. Aug. 19, 2010) (distinguishing *Six Mexican Workers* on the ground that "the charitable

organization disapproved of in that case lacked a proven track record or any defined purpose").

The proposed Facebook-founded organization has no record of service at all, let alone a substantial one. This failing poses several problems. First, the settling parties cannot satisfy their burden of proving that the organization will not be beholden to Facebook. *See* American Law Institute, Principles of the Law of Aggregate Litigation, § 3.07 ("A cy pres remedy should not be ordered if the court or any party has any significant prior affiliation with the intended recipient that would raise substantial questions about whether the selection of the recipient was made on the merits."). Moreover, as in *Six Mexican Workers*, this Court has no way of knowing whether the organization, with its vague promise to "fund projects and initiatives that promote the cause of online privacy, safety, and security," ER 86, will in fact benefit the class. Without a record of service, the risk that the proposed recipient will be a mere publicity tool for Facebook is unacceptable.

Finally, founding a new organization under these circumstances is unnecessarily inefficient. Numerous independent, non-profit groups already exist to do precisely what Facebook claims its organization will do. A non-exhaustive list of such organizations includes the Electronic Frontier Foundation, the Privacy Rights Clearinghouse, the Center for Digital Democracy, the World Privacy Forum, and the Electronic Privacy Information Center. In a letter to the district

court, the Rose Foundation—a grant-making public charity that frequently handles cy pres awards—explained the "inefficient and needlessly expensive" process of setting up a new settlement foundation. ER 32. In addition to the initial start-up costs, which "could significantly exceed $50,000," and the annual administrative costs, the relatively poorly endowed organization would soon have to navigate the expensive dissolution process. *Id.* Moreover, the new organization would begin at the bottom of the "learning curve in terms of developing grantmaking procedures." *Id.* These needless expenses come directly from the funds owed to the class members. As the Seventh Circuit has described this wasteful process, creating a foundation that adds nothing to those that already exist "would be carrying coals to Newcastle." *In re Folding Carton Antitrust Litig.*, 744 F.2d 1252, 1254 (7th Cir. 1984).

B. The Beacon Program Has Long Been Effectively Terminated.

The Settlement Agreement states that "within sixty (60) days of the Preliminary Approval Date, Facebook shall terminate the Beacon program in its entirety." ER 87. In reality, the Beacon Program was terminated long ago. *See supra* pp. 6-7. Indeed, in the preliminary approval hearing in this case, Judge Seeborg stated: "As I understand it, unless this is wrong, that everyone seems to suggest that that program is no more. Now, you know, you don't need injunctive relief if the program has been terminated." ER 70. There is no evidence that

anything resembling the program that gave rise to the plaintiffs' complaints continues to exist. Accordingly, Facebook's agreement to terminate the Beacon Program provides no benefit to the class.

III. The Class Notice Was Insufficient.

As a general rule, a "court must direct notice in a reasonable manner to all class members who would be bound by the proposal." Fed. R. Civ. P. 23(e)(1). Class members have a due process right to notice and an opportunity to be excluded from the action. *See Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1024 (9th Cir. 1998). "Notice is satisfactory if it 'generally describes the terms of the settlement in sufficient detail to alert those with adverse viewpoints to investigate and to come forward and be heard.'" *Churchill Vill., LLC v. Gen. Elec.*, 361 F.3d 566, 575 (9th Cir. 2004) (quoting *Mendoza v. Tucson Sch. Dist. No. 1*, 623 F.2d 1338, 1352 (9th Cir. 1980)). But what is reasonable for one type of settlement agreement might not be reasonable for another. Settlement agreements in which class members release potentially meritorious claims for nothing are unconventional, and the notice should reflect this unconventionality.

Notice here was insufficient for at least two reasons. First, it did not sufficiently describe the value of the claims that class members would be releasing. For example, it did not mention that the VPPA prohibits video tape service providers from distributing their customers' personally identifiable information to

third parties or that the VPPA provides for $2500 per person per occurrence in statutory damages.

Second, the notice did not accurately describe what the class members would receive in exchange for the release of their claims. Most problematic is the notice's failure to mention that Facebook's chief lobbyist would be a director and co-president of the foundation. Although the foundation's Articles of Incorporation includes the identities of the foundation's directors and officers, it was first posted on the settlement website on January 25, 2010, one week prior to the February 1 opt-out deadline. ER 38. Moreover, the notice gives the misleading impression that its promise to terminate the Beacon Program is a meaningful concession. ER 100 ("Under the Settlement Agreement, Facebook will terminate the Beacon program within 60 days of Preliminary Approval[.]").

CONCLUSION

For the foregoing reasons, the district court's approval of the settlement must be vacated.

Respectfully submitted,

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October 14, 2010

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STATEMENT OF RELATED CASES

Object-Appellant Ginger McCall is aware of one related case currently pending before this Court. That case, No. 10-16398, has already been consolidated with this appeal.

CERTIFICATE OF COMPLIANCE WITH RULE 32(a)(7)(C)

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), I certify that the foregoing brief is proportionately spaced, has a type-face of 14 points, and as calculated by my word-processing software (Microsoft Word) contains 9,046 words.

October 14, 2010

/s/ Michael H. Page

Michael H. Page

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on October 14, 2010.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

/s/ Michael H. Page

Michael H. Page