

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA**

IN RE GOOGLE LLC STREET VIEW
ELECTRONIC COMMUNICATIONS
LITIGATION,

Case No. 3:10-md-02184-CRB

CLASS ACTION

**REQUEST FOR DESIGNATION OF A
CY PRES DISTRIBUTION**

The Electronic Privacy Information Center (“EPIC”) respectfully requests that the Court designate EPIC to receive a share of the *cy pres* fund established under the parties’ proposed settlement agreement.

About EPIC

EPIC is one of the leading consumer privacy organizations in the United States. Established in 1994 to focus public attention on emerging privacy issues. EPIC has led numerous campaigns to safeguard the privacy of Internet users in general and users of Google’s services in particular. EPIC advocates for consumer privacy through comprehensive complaints to the Federal Trade Commission and the Federal Communications Commission, amicus briefs for federal and state courts, testimony and statements for Congressional committees, and educational publications including privacy references books and EPIC’s website.

As many courts have recognized, EPIC is “well-suited to be a *cy pres* recipient in [a] privacy case.” *Perkins v. LinkedIn Corp.*, No. 13-cv-4303, 2016 WL 613255, at *11 (N.D. Cal. Feb. 16, 2016). As the *cy pres* doctrine requires, in privacy class actions, EPIC is aligned with the interests of class members and the underlying purpose of the litigation.

EPIC's Work to Protect the Interests of Class Members

EPIC's particular work to protect the privacy of individuals subject to Google's street view surveillance, the central claim in the settlement before this Court, provides a compelling reason to designate EPIC as a *cy pres* recipient in this matter. EPIC was the lead privacy organization concerning oversight of Google's Street View program. And District Courts in this Circuit have recognized that Google often seeks to exclude EPIC from *cy pres* settlements precisely because EPIC is an effective advocate for the interests of class members. *See, e.g., In re Google Buzz Privacy Legislation*, No 10-cv-672, 2011 WL 7460099 (N.D. Cal. June 2, 2011) (modifying the proposed settlement agreement to include EPIC as a *cy pres* recipient after Google sought to exclude EPIC from a settlement in which EPIC was the lead advocate for class members).

EPIC was the first organization to draw public attention to the privacy risks of Street View. EPIC advocated specifically for greater privacy protections since the program began. In 2010, EPIC launched a comprehensive resource on the privacy investigations into Street View to assist regulators understand the various efforts to safeguard privacy. EPIC, *Investigations of Google Street View* (2019).¹ EPIC set up, maintained, and updated a resource that summarized all of the global investigations that were underway and identified the actions that many countries were taking to protect individuals from Google's invasive practices. *Id.* The first inquiries into Street View came from the Canadian Privacy Commissioner in 2007, who "expressed concern that [Google's] Street View photograph-taking activities may not have been in compliance with Canada's Personal Information Protection and Electronic Documents Act (PIPEDA)." *Id.* Other

¹ <https://epic.org/privacy/streetview/>.

countries soon followed suit. *Id.* (providing a comprehensive timeline of investigations into Google Street View).

By 2009, Google was forced to halt or modify its Street View operations in England, Greece, Japan, and Canada. *Id.* Meanwhile, in the United States, a Pennsylvania couple sued Google for operating the vehicles on their private property. *Boring v. Google*, 362 Fed. Appx. 273 (3d Cir. 2010). The company ultimately agreed to pay nominal damages for their unlawful trespass. Jason Kincaid, *'Boring' Couple Beats Google In Court, Gets \$1 Settlement*, TechCrunch (Dec. 1, 2010).² Google's Street View privacy practices were under close scrutiny by EPIC well before 2010, when the "SpiFi" story broke and this case was subsequently filed

Following an investigation by a German data protection official, which revealed that Google's Street View cars were collecting private data and communications from wireless networks, EPIC wrote to the Federal Communications Commission urging the agency to open an investigation, citing possible violations of the Communications Act and the Wiretap Act. Letter from Marc Rotenberg, Executive Director, EPIC, to Julius Genachowski, Chairman, Fed. Comm'n's Comm'n (May 18, 2010).³ In 2010, EPIC said the Commission should "turn its attention to the significant communications privacy issues arising from Google Street View."

EPIC's call for an investigation was echoed by members of the House of Representatives Energy and Commerce Committee and Judiciary Committee. *See* EPIC, *Investigations of Google Street View, supra*. The investigations spread quickly in 2010, and EPIC pushed for oversight of Google both in the United States and abroad. *See* EPIC, *Previous Top News: 2010* (highlighting 19 separate developments in the Google Street View investigations). As a result of these efforts, three separate federal agencies opened investigations into Google's practices: the FCC, the FTC,

² <https://techcrunch.com/2010/12/01/boring-google-streetview/>.

³ https://epic.org/privacy/cloudcomputing/google/EPIC_StreetView_FCC_Letter_05_21_10.pdf.

and the Department of Justice. The *New York Times* noted that EPIC specifically helped launch the investigations of Street View in the United States. Edward Watt, *F.C.C. Investigates Google Street View*, N.Y. Times (Nov. 10, 2010) (“The F.C.C. inquiry was prompted at least in part by a complaint about Google’s actions by the Electronic Privacy Information Center, a public interest research group.”).⁴

And EPIC continued to push for oversight of Google’s Street View program. After months of inaction by the FTC, EPIC filed a Freedom of Information Act request and then a lawsuit seeking disclosure of records related to the Google Street View investigation. Complaint, *EPIC v. FTC*, No. 11-881 (D.D.C. filed May 12, 2011). The FTC ultimately disclosed to EPIC a closing letter and other investigatory files. EPIC, *EPIC Settles Street View Case with Trade Commission* (Aug. 26, 2011).⁵ These records called into question whether the FTC was taking the investigation seriously. EPIC, *FTC: Investigating Google Street View is a “Waste of Summer”* (Jan. 20, 2011).⁶

EPIC also organized a briefing on the Google Street View issue at the U.S. Capitol with privacy and security experts alongside current and former FTC officials. EPIC, *EPIC Briefing to Explore Google Street View and Wi-Fi Privacy* (May 18, 2011). Meanwhile, the FCC announced that it had opened an investigation “to determine whether Google’s actions were inconsistent with any rule or law within the Commission’s jurisdiction” following EPIC’s 2010 complaint. EPIC, *FCC Confirms Google Street View Investigation* (July 8, 2011).⁷ EPIC also filed an amicus brief in this case prior to the Court’s denial on Google’s first motion to dismiss, Br. of

⁴ <https://www.nytimes.com/2010/11/11/technology/11google.html>.

⁵ <https://epic.org/2011/08/epic-settles-street-view-case.html>.

⁶ <https://epic.org/2011/01/ftc-investigating-google-stree.html>.

⁷ <https://epic.org/news/2011/default.html>.

Amicus Curiae EPIC, ECF. No. 78, and on appeal to the Ninth Circuit. EPIC, *Joffe v. Google* (2019).⁸

When the FCC fined Google a de minimis \$25,000 for failing to cooperate with the federal investigation, EPIC called for greater scrutiny. The day after the FCC fine was announced, EPIC sent a letter to the Attorney General asking the Department of Justice to investigate whether Google's interception and collection of private wireless data violated the Wiretap Act. Letter from Marc Rotenberg, EPIC Executive Director, Alan Butler, EPIC Appellate Advocacy Counsel, & David Jacobs, EPIC Consumer Protection Fellow, to Hon. Eric Holder, Attorney General of the United States (Apr. 17, 2012).⁹ EPIC then filed a FOIA request seeking disclosure of the FCC's unredacted report from the Google Street View investigation. EPIC, *EPIC Demands Details of Federal Communications Commission's Google Investigation* (Apr. 19, 2012).¹⁰ Google released the unredacted report less than two weeks later. EPIC, *Following EPIC FOIA Request to FCC, Google Releases "Spy-Fi" Report* (Apr. 30, 2012);¹¹ David Streitfeld, *Data Harvesting at Google Not a Rouge Act, Report Finds*, N.Y. Times (Apr. 28, 2012).¹² EPIC also uncovered a statement by a Google official to the FCC that claimed the Department of Justice had "conducted and long ago completed its own thorough examination of the facts;" EPIC filed a FOIA request with the DOJ seeking disclosure of documents related to the agency's investigation into Google. EPIC, *EPIC Pursues Justice Department Records of Google Street View Investigation* (Apr. 27, 2012).¹³ EPIC later recommended that Congress conduct a comprehensive review of federal privacy law to address the issues raised in the Google

⁸ <https://epic.org/amicus/google-street-view/>.

⁹ <https://epic.org/privacy/streetview/EPIC-Google-SV-Ltr-DOJ-4-17-12.pdf>.

¹⁰ <https://epic.org/2012/04/epic-demands-details-of-federa.html>.

¹¹ <https://epic.org/2012/04/following-epic-foia-request-to.html>.

¹² <https://www.nytimes.com/2012/04/29/technology/google-engineer-told-others-of-data-collection-fcc-report-reveals.html>.

¹³ <https://epic.org/2012/04/epic-pursues-justice-dept-reco.html>.

Street View matter. EPIC, *EPIC Highlights Need for Broad Reform of Federal Privacy Law* (Mar. 18, 2013).¹⁴

By 2013, Google conceded “violated people’s privacy during its Street View mapping project when it casually scooped up passwords, e-mail and other personal information from unsuspecting computer users.” David Streitfeld, *Google Concedes that Drive-By Prying Violated Privacy*, N.Y. Times, Mar. 12, 2013.¹⁵ The company agreed to settle a case brought by 38 states, end the interception of wi-fi communications, improve its privacy practices, and pay a seven million dollar fine.¹⁶ *Id.* The New York Times noted that “Complaints have led to multiple enforcement actions in recent years and a spate of worldwide investigations into the way the mapping project also collected the personal data of private computer users.” *Id.* The *Times* noted that EPIC’s Marc Rotenberg supported the outcome:

Marc Rotenberg of the Electronic Privacy Information Center said the agreement was “a significant privacy decision by the state attorneys general,” adding that “it shows the ongoing importance of the states’ A.G.’s in protecting the privacy rights of Internet users.”

Id.

The Court’s Obligation to Scrutinize *Cy Pres* Distributions

In a class action settlement involving the distribution of funds to *cy pres* beneficiaries, the Court has an obligation to make an independent determination about the fairness and adequacy of the proposed settlement. As the Ninth Circuit has explained,

Not just any worthy recipient can qualify as an appropriate *cy pres* beneficiary. To avoid the “many nascent dangers to the fairness of the distribution process,” we require that there be “a driving nexus between the plaintiff class and the *cy pres* beneficiaries.” *Nachshin*, 663 F.3d at 1038. A *cy pres* award must be “guided by (1) the objectives of the underlying statute(s) and (2) the interests of the silent class members,” *id.* at 1039, and must not benefit a group “too remote from the plaintiff

¹⁴ <https://epic.org/news/2013/default.html>.

¹⁵ <https://www.nytimes.com/2013/03/13/technology/google-pays-fine-over-street-view-privacy-breach.html>.

¹⁶ Among the obligations included in the State AG settlement were educational ads and YouTube videos explaining how people can encrypt their data on their wireless networks.

class,” *Six Mexican Workers*, 904 F.2d at 1308. Thus, in addition to asking “whether the *class settlement*, taken as a whole, is fair, reasonable, and adequate to all concerned,” we must also determine “whether the *distribution* of the approved class settlement complies with our standards governing *cy pres* awards.” *Nachshin*, 663 F.3d at 1040 (internal quotation marks omitted).

Dennis v. Kellogg Co., 697 F.3d 858, 865 (9th Cir. 2012).

EPIC satisfies the two key requirements for a distribution of *cy pres* funds in a consumer privacy case: (1) EPIC is aligned with the interests of class members and (2) EPIC advances the aims of the underlying litigation. EPIC has spent more than 10 years working on the specific issue that is of interest to all class members: oversight of Google’s Street View privacy practices. There is perfect alignment between EPIC’s work and the interests of the class members. And EPIC continues to advocate and act as a champion for the privacy rights of Internet users. EPIC also advances the aims of the underlying litigation by advocating for privacy enhancing techniques and challenging invasive business practices by Google and other Internet companies.

There can be no question that EPIC meets the criteria to be a *cy pres* beneficiary in this case. Indeed, an exclusion of EPIC as a *cy pres* beneficiary could call into question the fairness of the settlement. For example, in *In re Google Buzz Privacy Litigation*, No. 10-cv-672, 2011 WL 7460099 (N.D. Cal. June 2, 2011), Judge Ware modified a proposed settlement to include EPIC as a *cy pres* beneficiary given that there was no “good cause to exclude EPIC from the list of recipients.” *Id.* at * 1.

Courts have approved EPIC as a *cy pres* recipient in many consumer privacy cases. Recently, in *Perkins v. LinkedIn Co.*, No. 13- 4304, 2016 WL 613255 (N.D. Cal. Feb. 16, 2016), the court found that EPIC is a “well-established and respected organization within the field of internet privacy” and is thus “well-suited to be a *cy pres* recipient.” Other courts have also approve distributions to EPIC:

- *Picchi v. Comenity Bank*, No. 11-61797 (S.D. Fla.)

- Perkins v. LinkedIn Corp., No. 13-4304 (N.D. Cal.)
 - Kensington Physical Therapy, Inc. v. Jackson Therapy Partners, LLC, No. 11-2467 (D. Md.)
 - Legg v. Laboratory Corp., No. 14-61543 (D. Md.)
 - Ashley Madison Consumer Data Sec. Breach Litig., No. 15-MD-2669 (E.D. Mo.)
- (More examples are at epic.org/cy-pres).

EPIC will use the *cy pres* funds to support its work to protect the privacy rights of consumers. EPIC will inform consumers of emerging privacy risks. EPIC will advocate for consumers at the FTC, FCC, in the courts, and in Congress. This work includes the preparation of detailed comments for federal agencies, testimony and statements for Congressional committees, amicus briefs for federal state courts. EPIC will publish leading resources for consumers, such as the *Privacy Law Sourcebook*.¹⁷ EPIC will make useful information available at our website—epic.org (also privacy.org)—which is one the top-rated privacy websites in the world.

EPIC has an expert staff, with ten attorneys specializing in privacy-related issues, including members of the bar of California, D.C., Maryland, Massachusetts, and New York. EPIC’s attorneys are also barred in most of the appellate courts in the United States, and the United States Supreme Court.

EPIC is also widely recognized for good management practices and effective use of funding received. EPIC receives top marks from the leading evaluators of non-profit practices, Charity Navigator (“Four Stars”) and Network for Good (“Gold”), for accountability and transparency. And EPIC directs 88% of revenue to program activities.

¹⁷ Privacy Law Sourcebook (Marc Rotenberg ed. 2018), available at <https://epic.org/bookstore/pls2018/>.

To maintain its independence, EPIC also receives no funding from any company. That makes *cy pres* awards to EPIC particularly appropriate as there is no conflict with any potential defendant in a consumer privacy matter.

Conclusion

Currently before this Court is a proposed settlement and distribution of *cy pres* funds in a case concerning privacy violations and Google Street View. As set out above, EPIC has led the effort to address the privacy risks arising from Street View for almost a decade. EPIC has pursued this work diligently, purposefully, and fairly. EPIC is clearly aligned with purpose of the litigation and the interests of the class members.

EPIC respectfully asks this Court to designate EPIC as one of the *cy pres* recipients.

Dated: September 3, 2019

Respectfully Submitted,

By: /s/ Alan Jay Butler

Alan Jay Butler

ELECTRONIC PRIVACY
INFORMATION CENTER
Alan Jay Butler
1718 Connecticut Avenue, N.W.
Suite 200
Washington, D.C. 20009
Telephone: (202) 483-1140
Facsimile: (202) 483-1248
Email: butler@epic.org

*Attorney for the Electronic Privacy
Information Center (EPIC)*