IN THE CIRCUIT COURT OF MILLER COUNTY, ARKANSAS

LANE'S GIFTS AND COLLECTIBLES, L.L.C., et al., INDIVIDUALLY AND AS CLASS REPRESENTATIVES ON BEHALF OF ALL SIMILARLY SITUATED PERSONS,	§	
	§	**Civil Action No.: CV-2005-52-1**
Plaintiffs,	§	**JUDGE GRIFFIN**
v.	§	
YAHOO! INC., ET AL.	§	
Defendants.	§	
	§	**NATIONAL CLASS ACTION**

DEFENDANT GOOGLE INC.'S OMNIBUS RESPONSE TO OBJECTIONS

INTRODUCTION

Defendant Google, Inc. ("Google") submits this omnibus response to the objections to the Plaintiffs' and Google's settlement. The Plaintiffs and Google (collectively, "the Settling Parties") have separately filed a joint Brief in Support of Final Approval of the Settlement, and for Entry of Order, Judgment, and Rule 54(b) Certificate, which sets forth why the settlement more than meets the standards for fairness and adequacy that the Arkansas Supreme Court articulated in Ballard v. Martin, 349 Ark. 564, 574 (2002).

Considering the size of the settlement class that the Court certified, a remarkably small number of class members have objected to the settlement—only 51 objections, or an objection rate of just a tiny fraction of a percent. What's more, while such a low rate of objections would be remarkable in any class-action settlement, it is especially startling in this case, since from almost the moment the settlement was announced, it has been the subject of a coordinated attack by a group of plaintiffs' attorneys who filed copycat click-fraud lawsuits against Google and Yahoo! in California, and who recently settled their suit with Yahoo!. Their attacks have included, among other things, repeated, egregious mischaracterizations of the settlement terms

to the courts and to the media, in an effort to manufacture criticism of the settlement. Their efforts have failed. The overwhelming majority of class members are participating in the settlement, and the arguments raised by the few who have objected, including those orchestrated by the California plaintiffs' attorneys, present no basis for this Court to reverse its preliminary finding that "the terms of the settlement are fair, adequate, and reasonable."

For these reasons, as well as those set forth in the Settling Parties' joint brief, Google respectfully urges the Court to finally approve the settlement.

BACKGROUND

A. The Settlement Negotiations and Settlement

As the Court is aware, after the Court ordered the Settling Parties to mediate, they conducted intensive negotiations over a period of months, and finally were able to reach a settlement. The Honorable Layn R. Phillips (ret.), the mediator who oversaw the negotiations, has submitted an Affidavit describing the settlement process, and stating that "[t]here is no doubt in my mind that the parties' settlement is the product of vigorous and independent advocacy and arms-length negotiation conducted in good faith." Affidavit of Layn R. Phillips ¶ 8. Retired Judge Phillips also states in his Affidavit that, based upon his knowledge of the issues in dispute, his review of the materials provided to him and presented at the mediation session, the rigor of the negotiations, and the benefits achieved in the settlement, he believes that the terms of the settlement are "fair and adequate."[1] Id.

B. Objections to the Settlement

In its Order preliminarily approving the settlement, the Court authorized all class members who objected to the settlement to submit their objections in writing. As noted, despite the large size of the class, only 51 class members submitted written objections. For the Court's convenience, an Appendix that compiles the objections submitted by class members is submitted

[1] The terms of the settlement are by now familiar to the Court, and are described in the Settling Parties' joint brief in support of final approval. Accordingly, Google does not reiterate them here.

with this Response.[2]

Of the 51 objections, ten—or nearly 20%—were submitted by class members who reside outside the United States, and who presumably lack familiarity with the American legal system. (See Tab Nos. 3, 4, 5, 11, 19, 22, 25, 39, 41, and 45 in the Appendix of Class Members' Objections.) Eight of the 51 objections—or nearly 16%—objected to the attorneys' fees provision only, and did not take issue with any other aspect of the settlement. (See Tab Nos. 3, 6, 7, 11, 18, 21, 42, and 51.) Further, one of the objectors objected on the ground that Google should have to pay nothing, because Google has done nothing wrong, and should not be liable. (See Tab No. 39, stating that "Google provides their advertisers with the means of limiting damages from worthless and fraudulent responses to what can be considered to be within the normal range of risk that exists in all advertising.")[3] Another one, who objected only to the attorneys' fees provision, apparently holds the same view, since he wrote that he is "very happy with Google's advertising program." (See Tab No. 51.) And three others objected, in part, on the ground that this case cannot properly be certified as a class action—a fact which, if true, would prevent any recovery by the class. (See Tab Nos. 40, 43, 49.)

As noted, a number of the objections to the settlement are associated with the attorneys who, after this action was commenced, filed their own copycat click-fraud lawsuits against Google and Yahoo! in California. As this Court is aware, since shortly after the Court preliminarily approved the settlement, the California plaintiffs and their counsel have attacked

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[2] While the Court invited any class member to submit a written objection, it forbade parties who are not class members from doing so. See Order Preliminarily Approving Class Settlement, Approving Class Notice, and Scheduling Fairness Hearing ("Preliminary Approval Order") at ¶ 7 ("Persons who are not Class Members have no right to, and cannot, object to the Settlement at the Final Settlement Hearing or in writing, regardless of whether they file and serve a timely objection.") Nevertheless, a number of parties who opted out of the settlement and are not class members did submit objections. Those objections by non-class members are not properly before the Court, and Google moves to strike them from the record.

[3] The assertion that Google has done nothing wrong was echoed by advertisers who opted out of the settlement. For example, Defendant AOL, which together with its affiliates accounts for more than 70 of the 565 opt outs, wrote that it opted out because "Google Advertisers are not victims of click fraud." See Affidavit of David J. Silbert Ex. D. Similarly, David Mitchell, a Google advertiser from Crowley, Texas, wrote that "There is no way to catch [all click fraud.] But unlike retailers, pay-per-click advertisers can limit the money risked for each click and for each day. . . . Businesses should treat pay-per-click advertising like any other type of advertising. . . . [I]f it's costing more to advertise than your resulting profit, STOP ADVERTISING." See Affidavit of David J. Silbert Ex. E.

the settlement in numerous ways, including moving to intervene in this action, and filing a separate lawsuit in Miller County, Kinney v. Lane's Gifts & Collectibles, LLC, et al. (Case No. CV-2006-177-1), which charges that the plaintiffs in this case are inadequate class representatives because they "have placed their (and their attorneys') interests ahead of the interests of the Class." (Kinney Compl. at p.7.)

In addition to these measures, the California plaintiffs' attorneys have tried to induce class members to opt out or object to the settlement by egregiously mischaracterizing the settlement's terms. For example, in an interview posted on the Internet, one of the California attorneys is quoted as describing the settlement's claim process as follows:

> Once [the class member's] claim is accepted, they will receive about 0.5% of the money which they are owed—meaning that if it is accepted that they were ripped off for, let's say, $10,000, they will receive a coupon for a discount on future advertisement with Google for $50. . . . If Google chooses to accept that the claimant has been damaged to the tune of $10,000, it will issue a coupon to that claimant for $50.

(See Affidavit of David J. Silbert, Ex. A.) The California attorneys have made similar allegations numerous times, including in multiple press releases attacking the settlement. Id.

These allegations, however, are absolutely false. The settlement does not give Google the discretion to "choose to accept that the claimant has been damaged." Indeed, whether Google believes that the claimant has suffered any click fraud at all has no bearing on the claim. Under the settlement, so long as the claimant certifies in a valid claim that he believes his ads were affected by click fraud, Google is required to accept that claimant's claim for his pro rata share of the fund. Similarly, the California attorneys' repeated statements to the media—and to this Court—that the $90 million settlement fund will cover "only 0.5% of the damages" is not only egregiously false, it is absurd. The California attorneys take the position that the "damages" are 200 times $90 million, or **$18 billion**, which is more revenue than Google has received in its entire existence. There is no conceivable theory under which anything close to all of Google's revenue—let alone more than all of Google's total revenue—could be attributed to invalid clicks.

Not content with spreading false information to pollute public perception about the

settlement, the California attorneys have also issued statements to the media blasting the Arkansas Plaintiffs' attorneys, and boasting about the California attorneys interference with the Court-ordered settlement discussions between the Arkansas Plaintiffs and Yahoo!. For example, in an article printed recently in a legal newspaper, one of the California attorneys derided Class Counsel in this case as "one of the most outrageous groups of lawyers I've ever encountered," and trumpeted that, "we prevented [the Arkansas plaintiffs] from settling the Yahoo case." See Affidavit of David J. Silbert Ex A.

While the California plaintiffs' attorneys continue to attack the settlement that the parties achieved in this action, they have entered into their own settlement with Yahoo! in a parallel class action pending in Los Angeles. Because the California attorneys hold out the Yahoo! settlement as a model for what a click-fraud settlement should be, the terms of that settlement are instructive as a basis for comparison.

C. The Yahoo! Settlement

Like the settlement in this case, the Yahoo! settlement creates a procedure for class members to claim an award for alleged click fraud. Unlike this case, however, in which all class members may submit claims, in the Yahoo! settlement only a fraction of them may do so. The class period in the Yahoo! settlement begins on January 1, 1998, and class members must release Yahoo! from liability during that entire period. (See Affidavit of David J. Silbert, Ex. B at ¶¶ 23 and 30). But class members may not request any reimbursement at all for ads placed during the majority of the class period. Instead, they may request reimbursement only for ads placed with Yahoo! since January 1, 2004. Class members who stopped using Yahoo! before 2004 may not make a claim at all. Id. at ¶ 32(v). Thus, for the six-year period from 1998 through 2003, members of the Yahoo! class must release all of their claims against Yahoo!, but they lack the right even to request any compensation in exchange.[4]

[4] In the settlement in this case, in contrast, the release covers a far shorter period—beginning January 1, 2002—and class members may submit claims for settlement proceeds with respect to all pay-per-click ads placed with Google during that period. There is no time period for which class members must grant a release, but lack the right to claim an award from the settlement fund.

For the fraction of Yahoo! class members who are permitted to request an award, Yahoo! does not agree to pay **anything** on their claims. Instead, under the settlement, Yahoo! agrees only to "conduct an investigation" of their claims. Id. at ¶ 32v(g) and (h). Yahoo! retains full discretion to decide whether to pay the claim at all, and if so, how much to pay. Further, the only criterion specified in the agreement that Yahoo! "may" apply in its investigation is to analyze clicks dating back to 2004 using Yahoo!'s current technology. Id. Thus, if Yahoo!'s technology has not substantially changed, or is inadequate, as the plaintiffs allege, class members would simply be denied relief. And while the California attorneys tout a provision for independent review of the claim, that review is severely limited. The reviewer is empowered to consider only whether Yahoo! "followed adequate processes and procedures" in analyzing the claim; he is expressly forbidden from making "any independent determination whether any particular claim is valid or whether any particular click is click fraud." Id. at ¶ 32v(k). Thus, the Yahoo! settlement has exactly the feature that the California attorneys falsely criticized the settlement before this Court for having—for a claimant to be compensated, Yahoo! must "accept" that the claimant has been damaged. This contrasts directly with the settlement here, where class members need only certify that they believe their ads were affected by click fraud to claim their full share of the $90 million fund, and where Google's belief that their ads in fact were not affected has no bearing on their claim.

Should Yahoo! decide to pay claims submitted by Yahoo! class members, it will do so in the form of credits to the advertisers' accounts, as in the settlement in this case. Id. at ¶ 32(v)(g). A small number of Yahoo! advertisers may receive a refund instead of credits, but only if they stopped advertising with Yahoo! more than two years before Yahoo! accepted their claim. Id. Considering that they must have placed ads with Yahoo! after January 1, 2004 even to be eligible to submit a claim, this means that only class members who advertised, and then stopped advertising, within a brief window have even the possibility of receiving a refund—a number that is likely to be exceedingly small.

The Yahoo! settlement also includes other terms which the California attorneys have touted, but which confer no tangible benefit on class members. For example, Yahoo! agrees to "work with third parties in an effort to develop industry-wide standards that define click fraud," but the agreement does not say who these third parties will be, nor state what the "work" will consist of, nor require the "work" to lead to any results. Id. at 32iv. Similarly, Yahoo! agrees to select three advertisers, provide them with whatever information Yahoo! chooses, and then "permit the advertisers to provide feedback to members of Yahoo!'s traffic quality team." Id. at 32iii. While Yahoo! will permit the three advertisers to provide feedback, it is not required to do anything in response to it.

Finally, the attorneys' fees provision in the Yahoo! settlement also contrasts with the one in this case. Whereas the fees provision in this case (like in most class-action settlements) provides that the Court will set the fees—and thus requires class counsel to demonstrate the value that the settlement confers upon the class, and the court to determine the appropriate compensation for their efforts—the Yahoo! settlement eliminates this requirement, and sets a pre-determined award of fees and costs to class counsel of just under $5 million. Id. at ¶ 32(vi).

With this background, Google now turns to responding to the substantive objections that have been raised by the California attorneys and the small number of additional objectors.

ARGUMENT

D. The $90 million settlement fund is fair, adequate and reasonable

The California attorneys and certain other objectors contend that the $90 million settlement amount is inadequate. While that objection is meritless in its own right, it rings particularly hollow after the announcement of the California plaintiffs' settlement with Yahoo!, in which Yahoo! itself will decide how many credits (or in a small number of cases, refunds) it will award to the subgroup of class members who are permitted to request reimbursement, and in which the remaining class members will receive no compensation at all. In the settlement before this Court, the $90 million settlement fund is more than fair and adequate.

1. **The size of the fund is fair, adequate and reasonable**

The "primary measure of fairness" in evaluating a class settlement is "the strength of the case for the plaintiffs on the merits, balanced against the amount offered in the settlement." Ballard v. Martin, 349 Ark. 564, 574, 79 S.W.3d 838, 844 (2002). As this Court is aware, in this case, the merits are heavily disputed, starting with the fundamental issue of the prevalence of undetected "click fraud." Those who object to the amount of the settlement merely assume that undetected click fraud is pervasive, and that they could prove this at trial. But Google contends that class members could never prove such a claim, because Google aggressively roots out click fraud, using highly sophisticated techniques and processes, and minimizes any impact it has on advertisers. Indeed, Dr. Alex Tuzhilin, the independent expert who reviewed Google's systems and processes for combating click fraud as part of the settlement, criticized the published reports of supposed click-fraud statistics on which the objectors rely, noting in his report that most of them have questionable methodologies and assumptions, and "would not stand hard scientific scrutiny."

Further, while the Plaintiffs would hold Google liable for any fraudulent click that passes through its defenses, Google's contracts require—at the most—only that Google use reasonable efforts to combat fraudulent clicks, and Dr. Tuzhilin's independent report has now confirmed that Google has done so. Dr. Tuzhilin, a professor of Information Systems at New York University, spent weeks interviewing Google personnel and reviewing extensive amounts of information. His report, which is submitted with the Settling Parties' joint brief in support in approval, confirms that Google's efforts have in fact been reasonable. The report notes, for example, that Google's click fraud personnel are "well-qualified and highly competent to perform their jobs," and that Dr. Tuzhilin has "examined investigative activities of the Google Click Quality team and can attest that it consists of a group of highly professional employees who do their investigations carefully and professionally." Dr. Tuzhilin's report provides an independent value to the class by confirming that Google's efforts have been reasonable.

Google has also asserted other legal defenses to the Plaintiffs' claims, which Google contends would mandate a judgment in its favor. Among other things, Google's contracts explicitly disclaim all express and implied warranties, and further provide that advertisers agree to waive all claims relating to charges unless claimed within 60 days after the charge. See Exs. C and D. Such contractual time limitations are regularly enforced under both California and Arkansas law. See Hambrecht & Quist Venture Partners v. American Medical Int'l, Inc., 38 Cal. App. 4th 1532, 1547 (1995) ("In general, California courts have permitted contracting parties to modify the length of otherwise applicable statute of limitations, whether the contract has extended or shortened the limitations period."); Ferguson v. Order of United Commercial Travelers of America, 307 Ark. 452, 455, 821 S.W.2d 30, 32 (1991) ("It has long been the rule in Arkansas that parties are free to contract for a limitation period which is shorter than that prescribed by the applicable statute of limitations."). In fact, over 100 years ago, the Arkansas Supreme Court upheld as reasonable a 60-day waiver provision stamped on the face of Western Union's telegrams in light of "the character of the business and the great number of messages sent over the lines of a telegraph company, and the importance of early information of claims, to enable the company to keep an account of its transactions." Western Union Tel. Co. v. Dougherty, 15 S.W. 468, 468 (Ark. 1891).

Considering that the merits of the case are heavily disputed, both legally and factually, a settlement fund of $90 million is unquestionably fair, adequate, and reasonable. This is readily apparent from the proceedings in this case, and even more apparent in light of the Yahoo! settlement, which grants Yahoo! the discretion to decide the amount of credits or refunds it will award, and bars a large portion of class members from receiving any recovery.

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2. Payment in the form of credits, as advertisers explicitly agreed in their contracts, is fair, adequate and reasonable

While the California plaintiffs' attorneys have agreed to awards of credits in the Yahoo!

settlement, they have objected to awards of credits in this settlement, as have certain other objectors. However, this settlement structure has been frequently used, and it is particularly appropriate in this case, where the class members expressly agreed that any refund they might receive would be in the form of credits.

Even where class members had not expressly agreed to receive refunds in the form of credits, courts have upheld numerous settlement payments in this form. For example, in In re Cuisinart Food Processor Antitrust Litigation, 1983-2 Trade Cas. (CCH) P65,680, 1983 U.S. Dist. LEXIS 12412 (D. Conn. October 24, 1983), the court overruled an objection that "the settlement gives to each class member, instead of cash, a coupon which requires further purchase from defendant Cuisinart, in order to realize value." Id. at *23 (citing several cases in which "courts have approved settlements which give class members a benefit in a form other than a cash recovery"). Similarly, in Ohio Public Interest Campaign v. Fisher Foods, Inc., 546 F. Supp. 1 (N.D. Ohio 1982), the court approved a settlement in which payment was to be made in the form of certificates to be redeemed by purchases from the defendants. Id. at 11; see also New York v. Nintendo of Am., 775 F. Supp. 676, 681-82 (S.D.N.Y. 1991) (approving settlement in the form of coupons).

Moreover, as noted, in this case class members expressly agreed in their contracts that any refund they might receive would be in the form of advertising credits. See Silbert Decl. Ex. D ("Refunds (if any) are . . . only in the form of advertising credit for Google Properties."). Given that the class members specifically agreed to accept any refunds in the form of advertising credits, it is entirely fair and reasonable that the settlement award is in that form.

In light of the heavily contested claims, the findings of the Tuzhilin report, the terms of the contracts at issue, and the contrast with the terms that the objecting California attorneys approved in the Yahoo! settlement, the $90 million settlement fund is unquestionably fair, adequate and reasonable.

E. Notice of the settlement more than satisfied the minimum standards of due process

Contrary to the claims of the California attorneys and a small number of other objectors,

the notice of the settlement in this case was more than adequate, as the Affidavits of both Lisa Poncia, an employee of the administrator who effected the notice, and Joseph Fisher, an expert on class notice, attest.

As the Arkansas Supreme Court held in Ballard v. Martin, 349 Ark. 564, 79 S.W.3d 838 (2002), "[t]he mechanics of notice to class members is left to the discretion of the trial court and is subject only to the reasonableness standard of due process." Id. at 586, 79 S.W.3d at 852 (citing Grunin v. Int'l House of Pancakes, 513 F.2d 114, 121 (8th Cir. 1975)). In Ballard, objectors complained that many of the class members did not receive notice before the fairness hearing. Nevertheless, the court held that "the notice given comported with minimum standards of due process." Id. at 599, 79 S.W.3d at 853.

The court in Ballard adopted the Eighth Circuit's standards in the Grunin case as the applicable law for determining both the fairness of a proposed class settlement, and the adequacy of notice to class members. See 349 Ark. at 574-88, 79 S.W.3d at 844-53. In Grunin, the Eighth Circuit held that notice to the class by mail was adequate, and refused to require additional notice by publication, even though "approximately one-third of the class members were not reached by the mailing." Id. at 121 (emphasis added).

Thus, "[c]ourts have consistently recognized that due process does not require that every class member receive actual notice." In re Prudential Ins. Co. of Am. Sales Practices Litig., 177 F.R.D. 216, 231 (D. N.J. 1997) (citing cases). Rather, "[d]ue process and Rule 23 merely require good faith compliance with the presumptively valid notice procedures ordered by the court." Id. (emphasis added) (quoting In re VMS Ltd. Pshp. Sec. Litig., No. 90 C 2412, 1995 U.S. Dist. LEXIS 8079, at *4 (N.D. Ill. June 12, 1995)); see also Langford v. Devitt, 127 F.R.D. 41, 44 (S.D.N.Y. 1989) ("As a result of the court's role in setting notice procedures, compliance with the procedure so ordered is all that is ordinarily expected of the class counsel.").

Here, there is no question that Google complied with the notice procedures ordered by this Court. In fact, Google did more than this Court required in order to provide the best notice practicable. As described in the Declaration of Lisa A. Poncia ("Poncia Decl."), Google retained

Gilardi & Co. LLC ("Gilardi"), the nation's largest sole-purpose administrator of class- and mass-action settlements, to assist in various aspects of administering the settlement, including providing notice to class members, receiving and processing opt-out forms, and administering the claims process set forth in the agreement.

Under this Court's Preliminary Approval Order, Google was required to send notice via electronic mail ("email"), using the most current email address in Google's electronic records that the class member registered with Google in connection with its purchase of online advertising from Google. See Settlement Agreement ¶ 40. While this Court-ordered procedure contemplates sending notice only to the most recently registered address for each class member, Google and Gilardi decided to provide notice even more broadly, and to send the notice to all e-mail addresses registered by a class member contained in Google's electronic records, including older e-mail addresses. Poncia Decl. ¶ 3.

The subject line of the Notice email was "Important Legal Notice Regarding Your Google AdWords Account." The body contained a short paragraph that described the settlement and a link to the settlement website. And the email contained an attachment of the *Notice of Pendency and Settlement of Class Action, Settlement Hearing and Claims Procedure* ("Long Form Notice"). Poncia Decl. ¶¶ 3 and 4.

Although Google was not required by this Court to translate the notice into other languages, it did so. The short paragraph was repeated in the following 21 languages: German, Chinese (Simplified), Chinese (Traditional), Japanese, Dutch, French, Spanish, Italian, Danish, Portuguese (Brazil), Turkish, Swedish, Polish, Hebrew, Finnish, Norwegian, Korean, Russian, English (U.K.), Czech, and Hungarian. Within the text of the short paragraph there was a link to an email address to which individuals could send a request for a copy of the Long Form Notice in any of the 21 languages. Poncia Decl. ¶ 4.

In some cases, Gilardi received automated responses to the email, some of which indicated that the user had a new forwarding address. In all cases where a forwarding address was provided, Gilardi sent the email to the new address, as prescribed by the settlement

agreement and this Court's order. *See* Settlement Agreement ¶ 40. Gilardi also received some notifications that the email had been directed to a folder for "spam" which gave the opportunity to bypass the spam filter, for example by typing in a special code or replying with a particular phrase in the re: line. In those cases, Gilardi did whatever was requested so that the email notice would be delivered to the intended recipient's mailbox. Gilardi also re-sent 74,591 email notices to intended recipients whose email addresses ended in "gmail.com" and "googlemail.com," and for whom Google had information that the first email notice had been directed to the intended recipient's spam folder. Poncia Decl. ¶¶ 8 and 9.

According to the statistics available from the e-mail server, of the two sets of email notices, there was a combined error rate of just 4.04%. Poncia Decl. ¶ 11. As both Ms. Poncia and Joseph Fisher, an expert on notice who was not involved with the notice program here, have declared, this error rate compares very favorably to other notice campaigns, whether they used email or U.S. mail. For example, in other e-mail campaigns conducted by Gilardi, the error rate has been 6% or higher, and for notices sent via regular mail, Gilardi typically receives anywhere from 5% to 25% of the notices returned as undeliverable from by the U.S. Postal Service. Poncia Decl. ¶¶ 12 and 13. Similarly, Mr. Fisher has seen the undeliverable rate of mailed paper notices to exceed 20% of the class list mailed, even when the class list was updated prior to mailing using the NCOA (National Change of Address) service as licensed by the U.S. Postal Service. Declaration of Joseph M. Fisher ("Fisher Decl.) ¶ 7. The low error rate in this case is particularly notable when one considers that Google deliberately sent notice to all e-mail addresses registered by a class member—including older addresses that are more likely to be outdated—instead of sending the notice only to the class member's most recently registered address, which is all that the Court-ordered notice procedure required.

Some objectors complain that a small percentage of the class may not have received or read the notice because their email address changed, or because they believed that the email was "junk mail," or "spam," or because filters on their email programs identified the notice as such. But a class notice sent via the U.S. Postal Service may also be mistakenly identified as "junk

mail" and discarded, or sent to an outdated address, or simply lost. As the court noted in Peters v. Nat'l R.R. Passenger Corp., 966 F.2d 1483 (D.C. Cir. 1992), "[d]espite technological advances, the mail is not one hundred percent reliable." Id. at 1486. Indeed, as noted above, the notice sent by U.S. mail in Grunin failed to reach a third of the class members, but still satisfied the standards of due process. Similarly, in Trist v. First Federal Savings & Loan Association, 89 F.R.D. 1, 3 (E.D. Pa. 1980), the court held that notice was adequate despite the fact that notice did not reach approximately 13 percent of the class either because it was returned as undeliverable by the Post Office, or was never sent at all, due to a clerical error. Id. at 2-3. As Ms. Poncia and Mr. Fisher declare, it is not unusual to see undeliverable rates of 20% or more with regular mail. See Poncia Decl. ¶ 13; Fisher Decl. ¶ 7. Thus, there can be no doubt that the notice in this case—which reached a far higher percentage of the class—was more than adequate.

Some of the objectors also argue that the rules of civil procedure require notice by U.S. mail, rather than email. But Rule 23 says nothing of the kind. It simply states that "notice of such proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs." Ark. R. Civ. P. 23(e). Here, the Court directed that notice be sent by email, ruling that such notice "meets the requirements of Arkansas Rule of Procedure 23(c) and due process, and is the best notice practicable under the circumstances and shall constitute due and sufficient notice to all persons entitled thereto." Order Preliminarily Approving Class Settlement, Approving Class Notice, and Scheduling Fairness Hearing ¶ 3. That ruling was entirely correct, particularly given that email is the principal means of communication between Google and its customers, who are required to provide an email address to Google when they sign up, and are accustomed to receiving information by email and over the Internet—they are, after all, Internet advertisers. See, e.g., Rio Properties, Inc. v. Rio International Interlink, 284 F.3d 1007, 1017-18 (9th Cir. 2002).

In Rio, the Ninth Circuit upheld the trial court's order approving the use of email for service of process under Federal Rule of Civil Procedure 4(f), which, like class notice, is subject

to the reasonableness standard of due process. Id. at 1016. Indeed, the court held that email was the best method of service given that the defendant, like the class members here, had "embraced the modern e-business model." Id. at 1017. As the court observed, the Constitution "does not require any particular means of service of process, only that the method selected be reasonably calculated to provide notice and an opportunity to respond. In proper circumstances, this broad constitutional principle unshackles the federal courts from anachronistic methods of service and permits them entry into the technological renaissance." Id. Thus, "[n]o longer must process be mailed to a defendant's door when he can receive complete notice at an electronic terminal inside his very office. . . ." Id. (quoting New Eng. Merchs. Nat'l Bank v. Iran Power Generation & Transmission Co., 495 F. Supp. 73, 80 (S.D.N.Y. 1980)); see also Broadfoot v. Diaz (In re Int'l Telemedia Assoc.), 245 B.R. 713, 719-20 (Bankr. N.D. Ga. 2000) (authorizing service via email); Ryan v. Brunswick Corp., No. 02-CV-0133E(F), 2002 U.S. Dist. LEXIS 13837, at *9-10 (same).

Further, it is simply not the case, as some objectors have asserted, that courts have not previously approved the use of email to provide notice of a class-action settlement. They have. See Fisher Decl. ¶ 8. For example, the United States District Court for the Northern District of California approved email notice in the Paypal case, which is similar to this one in that the class consisted of those who used an Internet service. See Fisher Decl. Ex. A. Similarly, the Bankruptcy Court of the Eastern District of New York has also approved sending notice of a pending settlement by email. See id. Ex. B. And in still another case, the United States District Court for the Northern District of California approved a settlement that provided for notice by email, with notice by regular mail only to class members for whom the defendant did not have an email address. See id. Ex. C. In his Declaration, Mr. Fisher provides his expert opinion that "the distribution in appropriate cases of class action notices by electronic communication may constitute the best notice practicable to class members under the circumstances," and that "email notice was appropriate in this case." Id. ¶¶ 9 and 10.[5]

[5] Nor is it a valid objection to assert that some class members may not have opened the email or its attachment due

Accordingly, contrary to the assertions of a small number of objectors, the notice more than satisfied the standards of due process.

F. The claim form is fair and reasonable

A few objectors complain that the claim form asks claimants to identify the percentage of their total advertising expenditures associated with keywords that they believe were affected by click fraud. Some objectors assert that they cannot state, on penalty of perjury, that they believe keywords were affected by click fraud. But if they are unwilling to state that they believe their ads were affected by click fraud, they could not press a claim in this Court, or any other court. The claim form merely requires them to certify their belief that they're entitled to an award. If they do so, Google will not review their click history to dispute whether their ads were actually affected. Again, this stands in stark contrast with the terms of the Yahoo! settlement, where Yahoo! is allowed to decide whether it will make an award of credits or a refund in response to a claim, and where a large portion of class members are not even allowed to request an award.

G. The objection to the attorneys' fees is misplaced, as this Court will determine the amount that is fair and reasonable

As noted, eight of the 51 objections concerned only the settlement's attorneys' fees provision. Under the terms of the agreement, however, the actual amount of fees and costs awarded (subject to the $30 million cap) is committed to the sound discretion of this Court. See Settlement Agreement ¶ 35 ("Class Counsel shall be paid attorneys' fees and costs, in an amount determined by the Court. (the 'Fees Award'); Butt v. Evans Law Firm, 351 Ark. 566 (2003). Thus, the Court need not be concerned with objections that the attorneys' fees provision is unreasonable, since the Court is empowered to set the amount of fees and costs in whatever amount it finds appropriate.

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to supposed security concerns. If it were enough to assert that recipients may refuse to open emails, then no form of email notice would be adequate, yet as set forth above, courts have repeatedly approved such notice. Moreover, in this case there was no need to open the attachment, since the email also provided a link to a website that contained the same information. See Poncia Decl. Ex. A. And if anyone had a concern about the legitimacy of the Notice on the website, they easily could have searched on the Internet (using Google, of course) and found Google's post on its blog confirming the legitimacy of the Notice.

II. CONCLUSION

For these reasons, as well as those set forth in the Settling Parties' joint brief in support of approval, Google respectfully urges the Court to finally approve the settlement.

Respectfully submitted,

By: _____

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was served upon each of the following counsel as noted below on July 21, 2006.

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