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Committee on Rules of Practice and Procedure
Thurgood Marshall Building
Administrative Office of the United States Courts
One Columbus Circle NE
Washington D.C. 20544

COMMENT

to the

ADVISORY COMMITTEE ON CIVIL RULES
and the
RULE 23 SUBCOMMITTEE

concerning

Cy Pres Awards in Class Action Settlements Under Rule 23
on behalf of

The National Legal Aid and Defender Association,
The Association of Pro Bono Counsel (APBCo),
The Legal Aid Association of California,
The Chicago Bar Foundation,
The Legal Foundation of Washington and
The Texas Access to Justice Foundation

This submission by National Legal Aid and Defender Association, the Association of Pro Bono Counsel (APBCo) the Legal Aid Association of California, the Chicago Bar Foundation, the Legal Foundation of Washington and the Texas Access to Justice Foundation is to provide the Advisory Committee on the Federal

Rules of Civil Procedure and the Rule 23 Subcommittee with observations and suggestions on *cy pres* awards in Rule 23 class action settlements.

INTRODUCTION

What should be done with any undistributed residue of settlement funds in a class action? The practical and efficient answer is court-approved *cy pres* distributions to appropriate organizations. This well-recognized procedural device has come under recent attack by a small cluster of academics and organizations as part of a broader opposition to Rule 23 class actions. The attacks on *cy pres* distributions point to a handful of controversial awards, argue from these anecdotes that there is a larger problem and then propose the limitation or complete elimination of *cy pres* awards.

Those attacks ask this Committee to ignore the well-settled case law favoring *cy pres* awards in general, the solid basis for *cy pres* awards to legal services organizations in particular, and the rules and procedures already in place for courts to address problems in the process for awarding *cy pres* distributions.

This submission addresses the following subjects concerning *cy pres* awards in class actions:

1. *Cy pres* awards are an established and appropriate device in class action settlement administration.
2. Legal service organizations and foundations are appropriate *cy pres* recipients. In particular, (a) federal courts regularly approve *cy pres* awards for access to justice; (b) *cy pres* awards for legal services fit well within the ALI principles; (c) state statutes and court rules authorize *cy pres* awards to legal services organizations and foundations – and any

proposed revision of Rule 23 should do the same; (d) *cy pres* awards for legal services and foundation do provide access to justice.

3. Courts have developed best practices for the appropriate use of *cy pres* awards. In particular, (a) compensation of class members should come first; (b) *cy pres* awards are also appropriate where cash distributions to class members are not feasible; (c) *cy pres* award recipients should reasonably approximate the interests of the class – which legal services organizations do – but overly literal application of the *cy pres* doctrine in class actions would be a mistake; (d) procedures already in place address conflicts of interest and any appearance of impropriety.

This comment on c*y pres* awards and Rule 23 is a joint submission by the nation's leading pro bono and legal services organizations and foundations, described in Exhibit A. *Cy pres* awards in class action settlements provide a critical funding source for legal services organizations and foundations. Funding through *cy pres* awards is especially important for legal services organizations because of the dramatic decline in federal and state funding for legal aid and IOLTA (Interest on Lawyer Trust Accounts) funding. Without sufficient funding from other sources such as *cy pres* awards in class actions, legal services organizations and foundations will not have the resources to meet the need for access to justice by the underprivileged and disadvantaged in our country.

I. *CY PRES* AWARDS ARE AN ESTABLISHED AND APPROPRIATE DEVICE IN CLASS ACTION SETTLEMENT ADMINISTRATION

Cy pres awards in class action settlements are a positive solution to a practical problem. *Cy pres* awards are usually court-ordered distributions of the residual funds from class action settlements or judgments that, for various reasons, are unclaimed or cannot be distributed to the class members. It is not uncommon for excess funds to remain after a distribution to class members. Residual funds are often the result of an inability to locate class members or class members failing or declining to file claims or cash settlement checks. Such funds are also generated when it is "economically or administratively infeasible to distribute funds to class members if, for example, the cost of distributing individually to all class members exceeds the amount to be distributed." *In re Baby Prods. Antitrust Litig.*, 708 F.3d 163, 169 (3rd Cir. 2013).

In such circumstances, three primary options are available for disposition of the remaining funds – reversion to the defendant, escheat to the state or a *cy pres* award. Courts have consistently preferred the distribution of residual funds through *cy pres* awards over the other options – and consistently rejected a fourth option of awarding unclaimed residual funds to already fully compensated class members. *See Klier v. Elf Autochem N. Am., Inc.*, 658 F.3d 468, 475 (5th Cir. 2011) and *In re Pharm. Indus. Average Wholesale Price Litig.*, 588 F.3d 24, 34-36 (1st Cir. 2009). It is well-established that a federal district court "does not abuse its discretion by approving a class action settlement agreement that includes a *cy pres* component directing the

distribution of excess settlement funds to a third party to be used for a purpose related to the class injury." *In re Baby Prods. Antitrust Litig.*, 708 F.3d at 172. Other leading appellate decisions supporting class action *cy pres* awards include *In re Lupron Mktg. & Sales Practices Litig.*, 677 F.3d 21, 38-39 (1st Cir. 2012); *Masters v. Wilhelmina Model Agency, Inc.*, 473 F.3d 423, 436 (2d Cir. 2007); and *United States ex rel. Houck v. Folding Carton Admin. Comm.*, 881 F.2d 494, 502 (7th Cir. 1989).

The American Law Institute's Principles of Law of Aggregate Litigation ("ALI Principles") specifically recognize the use of *cy pres* awards in class actions. The ALI Principles explain that "many courts allow a settlement that directs funds to a third party when funds are left over after all individual claims have been satisfied . . . [and] some courts allow a settlement to require a payment only to a third party, that is, to provide no recovery at all directly to class members." ALI Principles § 3.07 cmt. a (2010); *see also* 3 Alba Conte & Herbert B. Newberg, *Newberg on Class Actions* § 10:17 (4th ed. 2012) ("When all or part of the common fund is not able to be fairly distributed to class members, the court may determine to distribute the unclaimed funds with a *cy pres* . . . approach.").

II. LEGAL SERVICE ORGANIZATIONS ARE APPROPRIATE *CY PRES* RECIPIENTS

A. Federal Courts Regularly Approve *Cy Pres* Awards for Access to Justice

Federal and state courts throughout the country have long recognized organizations that provide access to justice for underserved and disadvantaged people

as appropriate beneficiaries of *cy pres* distributions from class action settlements and judgments. *See Jones v. Nat'l Distillers*, 56 F. Supp. 2d 355, 359 (S.D.N.Y. 1999) (listing multiple cases where a class action *cy pres* distribution for legal aid was found appropriate); *see also* Thomas A. Doyle, *Residual Funds in Class Action Settlements: Using "Cy Pres" Awards to Promote Access to Justice*, The Federal Lawyer, July 2010, at 26, 26-27 (examples of class action *cy pres* awards that improved access to justice for indigent persons).

The basis for *cy pres* awards to legal services organizations is one of the common underlying premises for all class actions: which is to make access to justice a reality for people who otherwise would not otherwise obtain the protections of the justice system. *See, e.g. Lessard v. City of Allen Park*, 470 F. Supp. 2d 781, 783-84 (E.D. Mich. 2007) ("The Access to Justice fund is the 'next best' use of the remaining settlement monies in this case, because both class actions and Access to Justice programs facilitate the supply of legal services to those who cannot otherwise obtain or afford representation in legal matters.") (internal citation omitted); *In re Folding Carton Antitrust Litig.*, MDL No. 250, 1991 U.S. Dist. LEXIS 2553, at **7-8 (N.D. Ill. Mar. 5, 1991) (approving a *cy pres* distribution to establish a program to increase access to justice "for those who might not otherwise have access to the legal system").

B. *Cy Pres* Awards For Legal Services Fit Well Within The ALI Principles

This access to justice nexus falls squarely within one of the ALI Principles: "there should be a presumed obligation to award any remaining funds to an entity that resembles, in either composition or purpose, the class members or their interests." ALI Principles § 3.07 cmt. b. Applying the ALI Principles:

> [L]egal aid or [access to justice] organizations are always appropriate recipients of *cy pres* or residual fund awards in class actions because no matter what the underlying issue is in the case, every class action is always about access to justice for a group of litigants who on their own would not realistically be able to obtain the protections of the justice system.

Bob Glaves & Meredith McBurney, Cy Pres *Awards, Legal Aid and Access to Justice: Key Issues In 2013 and Beyond*, 27 Mgmt. Info. Exch. J., 24, 25 (2013); *see also* Robert E. Draba, *Motorsports Merchandise: A Cy Pres Distribution Not Quite "As Near As Possible,"* 16 Loy. Consumer L. Rev. 121, 122 (2004) (the rationale for approving *cy pres* distributions to legal services organizations, like the purpose of the class action device, is "to protect the legal rights of those who would otherwise be unrepresented").

C. State Statutes and Court Rules Authorize *Cy Pres* Awards to Legal Services Organization – and any Proposed Revision of Rule 23 Should Do the Same

In addition to the many federal and state court decisions approving the use of *cy pres* awards to legal services organizations, a growing number of states have adopted statutes or court rules codifying the principle that *cy pres* distributions to organizations promoting access to justice are *always* an appropriate use of residual funds in class

actions.[1] A schedule summarizing these state statutes and court rules is attached as Exhibit B.

These state statutes and court rules begin with the general premise that *cy pres* distributions of residual funds are proper and useful, then specify appropriate *cy pres* recipients including or limited to organizations that promote access to justice for low-income individuals. Several state statutes and rules actually *require a* minimum or baseline distribution to legal services organizations. Because these statutes and court

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[1] *See* California Code of Civil Procedure § 384 (authorizing payment of residual class action funds to California nonprofits that provide civil legal services to low-income individuals); Hawaii Civil Procedure Rule 23(f) (gives the courts discretion to approve distribution of residual funds to Hawaii nonprofits that provide legal assistance to indigent individuals); 735 ILCS 5/2-807 (2008) (requiring distribution of at least 50% of residual funds to organizations that improve access to justice for low-income Illinois residents); Ind. R. Trial P. 23(F)(2) (requiring distribution of at least 25% of residual funds to the Indiana Bar Foundation); La S. C. Rule XLIII Part Q. (promoting distribution of residual funds to the Louisiana Bar Foundation); Me. R. Civ. P. 23(f) (2) (requiring that residual funds be distributed to the Maine Bar Foundation); Mass. R. Civ. P. 23(e) (permitting distribution of residual funds to Massachusetts nonprofits that provide legal services to low-income individuals); Neb. Rev. Stat. 25-319 (requiring distribution of residual funds to the Nebraska Legal Aid and Services Fund); N.M. Dist. Ct. R. C.P. 1-023(G)(2) (permitting payment of residual funds to New Mexico nonprofits that provide civil legal services to low-income individuals); N.C. Gen. Stat. § 1-267.10 (requiring equal distribution of residual funds between the Indigent Person's Attorney Fund and the North Carolina State Bar for the provision of civil services for indigents); ORCP 23(O) (directing 50% of residual funds to Oregon Legal Service Program); Pa. R. Civ. P. Ch. 1700 (directing distribution of at least 50% of residual funds to the Pennsylvania IOLTA Board to promote the delivery of civil legal assistance); S.D. Codified Laws § 16-2-57; (requires at least 50% of residual funds be distributed to the South Dakota Commission on Equal Access to Our Courts); Tenn. Code Ann. § 16-3-821 (authorizing the distribution of residual funds to the Tennessee Voluntary Fund for Indigent Civil Representation); Washington Supreme Court Civil Rule 23(f) (requires distribution of at least 25 percent of residual funds to the Legal Foundation of Washington to promote access to the civil justice system for low-income residents).

rules establish a presumption or requirement that residual funds will be distributed to legal services organizations, they make clear that such organizations are distinct from other charitable causes that have drawn legitimate concerns about their nexus to the interests of the class members. In other words, the state statutes and court rules all recognize the connection between access to justice through legal aid and through class action procedures and also demonstrate a clear public policy favoring *cy pres* awards to legal services organizations.[2]

If this Committee decides to suggest revisions to Rule 23 concerning *cy pres* awards, any proposed revisions should adopt the same approach as these state statutes and rules and formally recognize that legal services providers are appropriate organizations to receive *cy pres* awards.

D. *Cy Pres* Awards for Legal Services Do Provide Access to Justice

The colorful arguments that *cy pres* awards are a sham or a waste of money do not apply to *cy pres* awards to legal services organizations. Legal services organizations across the country protect and preserve the basic necessities of life – food, shelter, health care, safety and education – for millions of Americans. Whether awarded by a federal court order or pursuant to a state statute or rule, class action *cy pres* distributions to legal services organizations are widely recognized as a successful

[2] The same public policy is evident in the many state statutes and court rules providing that income earned in attorney trust accounts will be pooled and used to fund legal services.

mechanism to further access to the justice system. *See, e.g.,* Daniel Blynn, Cy Pres *Distributions: Ethics & Reform*, 25 Geo. J. Legal Ethics 435, 438 (2012) (*cy pres* distributions to specific legal services organizations have advanced legal services); Calvin C. Fayard, Jr. & Charles S. McCowan, Jr., *The Cy Pres Doctrine: "A Settling Concept,"* 58 La. B.J. 248, 251 (2011) (*cy pres* awards made to Louisiana legal services organizations will promote access to the courts); Danny Van Horn & Daniel Clayton, *It Adds Up: Class Action Residual Funds Support Pro Bono Efforts*, 45 Tenn. B.J. 12, 13-14 (2009) (*cy pres* awards to legal services organizations benefit class members in a similar way to Rule 23 – both provide access to the justice system).

III. COURTS HAVE DEVELOPED BEST PRACTICES FOR THE APPROPRIATE USE OF *CY PRES* AWARDS

In the course of approving and reviewing thousands of class action settlements, federal courts have developed what amount to a set of best practices for using the *cy pres* doctrine in the class action context. Those best practices more than adequately address the occasional problems with particular *cy pres* awards. The few bad examples and all of the concerns which opponents of *cy pres* awards trot out to argue against all *cy pres* awards can readily be dealt with by applying existing procedures, not by rewriting Rule 23.[3]

[3] For a detailed discussion of these problems and best practices, *see* Wilber H. Boies and Latonia Haney Keith, "Class Action Settlement Residue and *Cy Pres* Awards: Emerging Problems and Practical Solutions," 21 Va. J. Soc. Pol'y & L. 269 (2014), attached as Exhibit C and available at http://www.vjspl.org/wp-content/uploads/2014/03/3.25.14-Cy-Pres-Awards_STE_PP.pdf. That article

A. Compensation of Class Members Should Come First

Critics of *cy pres* awards argue as though *cy pres* awards are used instead of distributions to class members. That argument is a straw man which ignores the established requirements and procedures for getting class settlement funds into the hands of class members first. Indeed, when funds are left over after a first round distribution to class members, the ALI Principles express a policy preference that residual funds should be distributed among the class members until class members recover their full losses, unless such further distributions are not practical:

> If the settlement involves individual distributions to class members and funds remain after distribution (because some class members could not be identified or chose not to participate), the settlement should presumptively provide for further distributions to participating class members unless the amounts involved are too small to make individual distributions economically viable or other specific reasons exist that would make such further distributions impossible or unfair.

ALI Principles § 3.07(b).

As the ALI Principles recognize, when further distributions to class members are not feasible, the court has discretion to order a *cy pres* distribution. *Id.* at § 3.07 cmt. a. Consistent with this principle, many courts have articulated a reasonable requirement that a *cy pres* distribution is permissible only when it is not feasible to make distributions in the first instance or to make further distributions to class

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discusses in detail the various arguments by *cy pres* award opponents claiming that *cy pres* awards in class actions are unconstitutional or violate the Rules Enabling Act – and explains why those arguments have *never* been adopted by any court. Also see *In re Baby Products Antitrust Litigation*, 708 F.3d 163, 173 (3rd Cir. 2013) (rejecting Rules Enabling Act argument against *cy pres* awards).

members. *Id.*; *see In re Pharm. Indus. Average Wholesale Price Litig.*, 588 F.3d 24, 35 (1st Cir. 2009); *Wilson v. Southwest Airlines, Inc.*, 880 F.2d 807, 812-13 (5th Cir. 1989). To enforce this requirement, appellate courts appropriately reverse district court *cy pres* awards in cases that fail to make feasible payments first to class members. *See Molski v. Gleich,* 318 F.3d, 954-55 (9th Cir. 2003) (rejecting settlement with *cy pres* awards but no provision for payments to class members who had significant disability accommodations claims); *Mirfasihi v. Fleet Mortg. Corp.*, 356 F.3d 781, 784 (7th Cir. 2004) (rejecting a settlement because it failed to compensate one subset of class members individually); *Klier v. Elf Autochem North America, Inc.*, (district court abused its discretion by approving a class action settlement that included a *cy pres* distribution to charities of unused funds from one subclass instead of distributing such funds to the members of a different subclass).[4] 658 F.3d at 479.

B. *Cy Pres* Awards Are Also Appropriate Where Cash Distributions to Class Members Are Not Feasible

Not every class action settlement produces a significant monetary benefit for class members. The ALI Principles and leading cases recognize that there is also a proper place for the application of the *cy pres* doctrine in class action settlements when plaintiffs allege that defendants engaged in misconduct on a wide scale which results

[4] While often cited by critics of *cy pres* distributions, the *Klier* opinion actually did not reject *cy pres* awards in class actions. Rather, the Fifth Circuit clearly acknowledged that "[i]n the class-action context, a *cy pres* distribution is designed to be a way for a court to put any unclaimed settlement funds to their 'next best compensation use, e.g., for the aggregate, indirect, prospective benefit of the class.'" *Id.* at 474.

in only *de minimis* claims of damages to individual class members. *See generally,* ALI Principles § 3.07 cmt. a. (recognizing court authority to approve class action settlements that provide for cash payments to third parties with no direct cash recovery to class members). In *Nachshin v. AOL*, for example, a settlement was approved where the defendant's maximum liability if the class were certified and a money judgment entered was $2 million, which meant that each of some 66 million class members would have been entitled a recovery of only three cents, making any distribution to the class members cost prohibitive. 663 F.3d at 1037. *See also Lane*, 696 F.3d 821 (9th Cir. 2012) (noting objectors' concession that direct monetary payments to the class would be *de minimis* and were therefore infeasible); *Hughes v. Kore of Indiana Enter., Inc.*, 731 F.3d 672, 676 (7th Cir. 2013) (endorsing a *cy pres* award with no payments to class members, stating "class action litigation, like litigation in general, has a deterrent as well as a compensatory objective").

C. *Cy Pres* Award Recipients Should Reasonably Approximate the Interests of the Class – Which Legal Services Organizations Do – But Overly Literal Application of the *Cy Pres* Doctrine in Class Actions Would be a Mistake

When further distributions to class members are not feasible, either because remaining funds cannot be distributed cost-effectively or because of the minimal value of the claims on an individual class member basis, the question becomes how to determine which entities are appropriate recipients of a *cy pres* distribution. The ALI Principles say that recipients should be those "whose interests reasonably approximate

those being pursued by the class" and, if no such recipients exist, "a court may approve a recipient that does not reasonably approximate the interests" of the class. ALI Principles § 3.07(c); *see also In re Lupron Mktg. & Sales Practices Litig.*, 677 F.3d at 33; *Nachshin*, 663 F.3d at 1039. However, federal courts should and do reject settlements which propose *cy pres* awards to organizations which seem to be chosen at random – or are nothing better than favorite charities of the counsel or parties or the district judge.

It is generally agreed that organizations with objectives directly related to the claims at issue in a class action are appropriate *cy pres* recipients. But a narrow limitation of *cy pres* recipients tied to the precise claims or relief in the class action has its own problems, both theoretically and practically, and ignores the established practice and sound basis for *cy pres* awards to legal services organizations that (like the class action mechanism) provide access to justice.[5]

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[5] This issue of the narrowly limited scope of organizations to receive *cy pres* awards is particularly apparent in the 9th Circuit of Court of Appeals, where the settlement in *Facebook* was widely publicized and widely criticized because the Court of Appeals approved a settlement to a new "tailor made" foundation created to receive a large *cy pres* distribution. *Lane v. Facebook, Inc.*, 696 F.3d 811 (9thCir. 2012). Chief Justice Roberts used the denied certiorari petition in *Facebook* as the occasion for a statement raising basic questions about *cy pres* awards that the Supreme Court has never addressed. *Marek v. Lane*, 134 S.Ct. 8, 187 L. Ed.2d 392 (2013)(statement of Chief Justice Roberts). An amicus brief submitted by a number of legal services organizations to address the narrow limitation issue in another Facebook case pending appeal in Ninth Circuit is attached as exhibit D. *Fraley, et al. v. Facebook*, (consolidated appeal No. 13-16919 (9th Cir. pending).

As to legal principles, narrowly limiting *cy pres* recipients to the exact claims in a class action takes too literal a view of how the *cy pres* doctrine is used in the class action context. Class actions present the built-in practical problem of what to do with any undistributed settlement residue, and the use of the *cy pres* doctrine to distribute settlement residue is really just a convenient analogy.[6] In a class action settlement, there is no underlying trust which a deceased settler has created for a specified purpose that has become unfeasible. Rather, the *cy pres* doctrine has been borrowed as a device to facilitate the efficient administration of complex class actions. As the Seventh Circuit pointed out in *Mirfasihi v. Fleet Mortgage Corp.*, the *cy pres* device is used in class actions "for a reason unrelated to the trust doctrine" to prevent the defendant from "walking away from the litigation scot-free because of the unfeasibility of distributing the proceeds of the settlement." 356 F.3d at 784. Punishment aside, using the *cy pres* doctrine gives settling parties and district judges a useful procedural device to solve the recurring practical problem of what to do with undistributed funds.

In actual practice, far from dealing with a specific bequest in a will or trust, class action litigants are resolving a complex lawsuit by a settlement in which the defendant denies liability and disposing of residual funds is typically only a small

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[6] The term *cy pres* derives from the Norman French phrase, *cy pres comme possible*, meaning "as near as possible," and the *cy pres* doctrine originally was a rule of construction used to save a testamentary gift that would otherwise fail. *In re Airline Ticket Comm'n Antitrust Litig.*, 268 F.3d 619, 625 (8th Cir. 2001).

(albeit important) detail of settlement administration. And while defendants are primarily interested in concluding the case being settled, they also have a legitimate interest in how residual funds are used. For example, the settling defendant in a case about telephone services pricing may be unwilling to stipulate to a *cy pres* award to an organization that campaigns against high telephone bills. Seen in this practical light, a narrow focus on finding *cy pres* recipients which work on the exact subject of the specific asserted claims may actually be a barrier to negotiating a class action settlement. *Cy pres* awards to legal services organizations provide a recognized and practical solution to avoid the problems of awards to unsuitable recipients and awards that seem to "target" settling defendants.

D. Procedures Already in Place Address Conflicts of Interest and any Appearance of Impropriety

When carefully examined, the attacks on *cy pres* awards are actually broad extrapolations from particular settlement with debatable *cy pres* awards. Courts reviewing *cy pres* awards should of course look carefully at whether there is any reason to question the propriety of particular *cy pres* awards. However, there are already rules and procedures in place to deal with suggestions of impropriety – and dealing with those issues does not require any change in Rule 23.

Courts have recognized, for example, that a potential conflict of interest exists between class counsel and their clients because *cy pres* distributions may increase a settlement fund as a basis for plaintiffs' attorneys' fees, without increasing the direct

benefit to the class. *In re Baby Prods. Antitrust Litig.*, 708 F.3d at 173. Opponents say this is a reason to end all *cy pres* awards. A straightforward and better solution already exists to address this issue: if the presiding judge is concerned that class counsel may lack incentive to vigorously pursue compensation for class members, the court can and should "subject the settlement [and the distribution process] to increased scrutiny." *Id.*

There is also a legitimate concern that the prospect of *cy pres* distributions can improperly motivate lawsuit parties and their counsel to steer unclaimed funds to recipients that advance their own agendas. *See In re Lupron Mktg. & Sales Practices Litig.*, 677 F.3d at 38; *Nachshin*, 663 F.3d at 1039. To deal with this concern, courts should evaluate whether any of the parties or counsel involved in the litigation has any significant affiliation with or would personally benefit from the distribution to the proposed *cy pres* recipients. Such an analysis is not unduly burdensome for the district court to undertake and addresses this concern about abuse without any need to rewrite Rule 23.

Finally, critics of *cy pres* awards also worry about judicial involvement in making *cy pres* awards. In legal ethics terms, "the specter of judges and outside entities dealing in the distribution and solicitation of settlement money may create the appearance of impropriety." *Nachshin*, 663 F.3d at 1039. This concern is also easily addressed. To avoid criticism of judges, it is preferable practice that the parties or counsel (rather than the court) propose the charities to receive any *cy pres* distribution and that the

settlement agreement proposes specific *cy pres* awards (rather than leaving the question for resolution by a district judge at some point after the settlement is approved).

As to ground rules to limit the role of the district judge, a sound approach is already spelled out in the ALI Principles: "[a] cy pres remedy should not be ordered if the court . . . has *significant* prior affiliation with the intended recipients that would raise substantial questions about whether the selection of the recipient was made on the merits." ALI Principles, § 3.07 cmt. b (emphasis added). If necessary, the statutes governing judicial recusal can be applied. For example, in *Nachshin,* one objector attacked the district judge who approved the parties' settlement agreement because her husband was a board member of one of the proposed *cy pres* recipients. The Ninth Circuit firmly rejected this attack, applying the test for recusal under 28 U.S.C. § 455(a) ("whether a reasonable person with knowledge of all the facts would conclude that the judge's impartiality might reasonably be questioned") and finding that "there is no reason to believe [the judge's husband] (as one of 50 volunteer board members) would himself realize a significant benefit" from the proposed award."). *Nachshin*, 663 F.3d at 1041-42

In short, there are good reasons for careful court review of what organizations receive proposed *cy pres* awards – and there are reliable procedures already in place for conducting that review without rewriting Rule 23.

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This comment is respectfully submitted on behalf of The National Legal Aid and Defender Association, The Association of Pro Bono Counsel (APBCo), The Legal Aid Association of California, The Chicago Bar Foundation, The Legal Foundation of Washington and The Texas Access to Justice Foundation.

By: /s/ Wilber H. Boies

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EXHIBIT A – SUBMITTING ORGANIZATIONS

The National Legal Aid and Defender Association is the largest national nonprofit organization dedicated to ensuring access to justice for the poor through the nation's civil legal aid and defender programs. NLADA has more than 700 program members nationwide. NLADA's members include civil legal aid providers who are funded by a variety of sources, including *cy pres* awards, to address the overwhelming need for access to justice among the nation's poor. NLADA works with its member organizations, the American Bar Association and other access to justice organizations to encourage *cy pres* awards to organizations which address the huge justice gap for low-income persons in the civil justice system in the United States.

The Association of Pro Bono Counsel (APBCo) is a membership organization of over 135 partners, counsel, and practice group managers who run pro bono practices in more than 85 of the country's largest law firms. APBCo is dedicated to improving access to justice by serving as a unified voice for the national law firm pro bono community. APBCo member firms provide millions of hours of pro bono assistance each year to low-income clients throughout the United States and depend on the expertise of legal services organizations to help manage successful pro bono programs at the nation's largest law firms (in addition to the legal service organizations' provision of direct legal services).

The Legal Aid Association of California is a statewide membership association of more than 80 public interest law nonprofits which provide free civil legal services to low-income people and communities throughout California. LAAC member organizations provide legal assistance on a broad array of substantive issues and serve a wide range of low-income and vulnerable populations. LAAC and its members receive *cy pres* awards in class action settlements.

The Chicago Bar Foundation, the Texas Access to Justice Foundation and the Legal Foundation of Washington provide guidance, coordination and grants to organizations which provide civil legal services to low-income people and communities. Their grants and programs provide legal assistance on a broad array of substantive issues and serve a wide range of low-income and vulnerable populations. These foundations receive *cy pres* awards in class action settlements which are used to fund legal services programs and provide grants to legal services organizations in Illinois, Washington and Texas.

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EXHIBIT B

ABA RESOURCE CENTER
for Access to Justice Initiatives

Legislation and Court Rules Providing for Legal Aid to Receive Class Action Residuals*

First draft prepared 10/29/07; Most recent update 10-17-14

California

Legislature amended Section 384 of the California Code of Civil Procedure to permit payment of class action residuals "to nonprofit organizations or foundations to support projects that will benefit the class or similarly situated persons, or that promote the law consistent with the objectives and purposes of the underlying cause of action, to child advocacy programs, or to nonprofit organizations providing civil legal services to the indigent.

Effective date: January 1, 1994.

Amount received to date: It is unknown how much is generated specifically because of the statute. California legal aid programs received at least $9,017,000 in 2012.

Implementation work and analysis: Cy Pres Manual prepared in 2014. Many legal aid providers in California actively solicit cy pres contributions.

For more information, please contact: Stephanie Choy, Managing Director, Legal Services Trust Fund Program, State Bar of California, stephanie.choy@calbar.ca.gov, 415/538-2249.

Connecticut

The Connecticut Supreme Court amended Sec. 9-9 of the Connecticut Superior Court Rules in 2014 to state that ".....Any order, judgment or approved settlement in a class action that establishes a process for identifying and compensating members of the class may designate the recipient or recipients of any such residual funds that may remain after the claims payment process has been completed. In the absence of such designation, the residual funds shall be disbursed to the organization administering the program for the use of interest on lawyers' client funds pursuant to General Statutes 51-81c for the purpose of funding those organizations that provide legal services for the poor in Connecticut."

Effective Date: January 1, 2015

Amount received to date: None

Implementation work and analysis:

For more information, please contact: Steve Eppler-Epstein, Executive Director, Connecticut Legal Services, suppler-epstein@connlegalservices.org, 860/344-0447, ext. 109

Hawaii

The Hawaii Supreme Court amended Rule 23 of Hawaii's Rules of Civil Procedure, in January, 2011, to state that "....it shall be within the discretion of the court to approve the timing and method of distribution of residual funds and to approve the recipient(s) of residual funds, as agreed to by the parties, including nonprofit tax exempt organizations eligible to receive assistance from the indigent legal assistance fund under HRS section 607-5.7 (or any successor provision) or the Hawaii Justice Foundation, for distribution to one or more of such organizations. Judges may approve the distribution of residual funds to legal aid organizations or to the Hawaii Justice Foundation to disburse to one or more of such organizations."

Effective date: July 1, 2011

Amount received to date: In 2013, legal aid providers received $130,000 of $450,000 total cy pres funds awarded in state pursuant to rule. $124,000 received in 2014 through 6/30/14.

Implementation work and analysis: In 2011, the Hawaii Access to Justice Commission prepared a Toolkit.

For more information, please contact: Bob LeClair, Executive Director, Hawaii Justice Foundation, hjf@hawaii.rr.com, 808/537-3886

Illinois

Legislature amended Section 5 of the Code of Civil Procedure to add new Section 2-807 (735 ILCS 5/2-807), to establish a presumption that residual funds in class actions will go towards organizations that improve access to justice for low-income Illinois residents. Courts have the discretion to award up to 50% of the funds to other organizations that serve the public good as part of a settlement if the court finds good cause to do so, but at least 50% of these funds must go to support legal aid.

Effective date: July 1, 2008

Amount received to date: Approximately $5,300,000 in 2013FY. This includes awards made pursuant to the legislation and others.

Implementation work and analysis: The Chicago Bar Foundation has developed educational materials and sample language that they distribute to area judges, class action lawyers and other relevant parties (e.g., claims administrators). CBF website provides detailed information.

For more information, please contact: Bob Glaves, Executive Director, Chicago Bar Foundation, bglaves@chicagobar.org,

Indiana

New language in Rule 23 of the Indiana Rules of Civil Procedure, adopted by the Indiana Supreme Court, reads, in part: "In matters where the claims process has been exhausted and residual funds remain, not less than twenty-five percent (25%) of the residual funds shall be disbursed to the Indiana Bar Foundation to support the activities and programs of the Indiana Pro Bono Commission and its pro bono districts. The court may disburse the balance of any residual funds beyond the minimum percentage to the Indiana Bar Foundation or to any other entity for purposes that have a direct or indirect relationship to the objectives of the underlying litigation or otherwise promote the substantive or procedural interests of members of the certified class."

Effective date: January 1, 2011

Amount received to date: $2,069.59

Implementation work and analysis: Completed education campaign. Discussed federal courts local rule. Rule is seen as influencing local federal courts.

For more information, please contact: Andrew Homan, Indiana Pro Bono Commission, ahoman@inbf.org, 317/269-7863.

Kentucky

The Kentucky Supreme Court amended Civil Rule 23 to direct at least 25% of residual funds of any class action award to civil legal aid. Funds are to be maintained by the Kentucky IOLTA Board of Trustees and distributed to legal aid programs in accordance with a formula based on poverty population.

Effective date: January 1, 2014

Amount received to date: None; see implementation date.

Implementation work and analysis: The new rule has been published in the state bar magazine and judges will be advised of the new rule at their annual colleges.

For more information, please contact: Judge Roger Crittenden (ret.), Chair, Kentucky Access to Justice Commission, rlcrittenden@fewpb.net

Louisiana

The Louisiana Supreme Court enacted Rule XLIII, which states in part: "In matters where the claims process has been exhausted and Cy Pres Funds remain, such funds may be disbursed by the trial court to one or more non-profit or governmental entities which support projects that will benefit the class or similarly situated persons consistent with the objectives and purposes of the underlying causes of action on which relief was based, including the Louisiana Bar Foundation

for use in its mission to support activities and programs that promote direct access to the justice system."

Effective date: September 24, 2012

Amount received to date:

Plans for implementation:

For more information, please contact:

Maine

The Maine Supreme Judicial Court has amended Civil Rule 23(f)(2) as follows: "The parties may agree that residual funds be paid to an entity whose interests reasonably approximate those being pursued by the class. When it is not clear that there is such a recipient, unless otherwise required by governing law, the settlement agreement should provide that residual fees, if any, be paid to the Maine Bar Foundation to be distributed in the same manner as funds received from interest on lawyers trust accounts….."

Effective date: March 1, 2013

Amount received to date: Neither the MBF nor any legal aid provider has received an award since the rule's effective date. MBF received $58,708 in 2012.

Plans for implementation: MBF and providers to talk about heightening awareness of the new rule.

For more information, please contact: Diane Scully, Executive Director, Maine Bar Foundation, dscullly@mbf.org, 207/622-3477.

Massachusetts

New language in Rule 23 of the Massachusetts Rules of Civil Procedure, adopted by the Supreme Judicial Court of Massachusetts, reads, in part: "In matters where the claims process has been exhausted and residual funds remain, the residual funds shall be disbursed to one or more nonprofit organizations or foundations (which may include nonprofit organizations that provide legal services to low income persons) which support projects that will benefit the class or similarly situated persons consistent with the objectives and purposes of the underlying causes of action on which relief was based, or to the Massachusetts IOLTA Committee to support activities and programs that promote access to the civil justice system for low income residents of the Commonwealth of Massachusetts."

Effective date: January 1, 2009

Amount received to date: Since June, 2011, $1,605,000 has been received; $343,000 to IOLTA and the balance to individual legal aid programs.

Implementation work and analysis: IOLTA staff have provided judges and court clerks throughout the state with a brochure and other materials regarding the rule change.

For more information, please contact: Jayne Tyrrell, Executive Director, Massachusetts IOLTA Committee, jtyrrell@maiolta.org, 617/723-9093.

Montana

The Montana Supreme Court amended Rule 23 of the Montana Rules of Civil Procedure to state that "In matters where the claims process has been exhausted and residual funds remain, not less than fifty percent (50%) of the residual funds shall be disbursed to an Access to Justice Organization to support activities and programs that promote access to the Montana civil justice system. The court may disburse the balance of any residual funds beyond the minimum percentage to an Access to Justice Organization or to another non-profit entity for purposes that have a direct or indirect relationship to the objectives of the underlying litigation or otherwise promote the substantive or procedural interests of members of the certified class."

Effective date: January 1, 2015

Amount received to date: None (see effective date)

Implementation work and analysis:

For more information, please contact: Amy Sings in the Timber, Executive Director, Montana Justice Foundation, asings@mtjustice.org, 406/523-3920.

Nebraska

The Nebraska Legislature amended section 30-3839 of Revised Statutes Cumulative supplement, 2012, to provide that: "Prior to the entry of any judgment or order approving settlement in a class action described in section 25-319, the court shall determine the total amount that will be payable to all class members if all class members are paid the amount to which they are entitled pursuant to the judgment or settlement. The court shall also set a date when the parties shall report to the court the total amount that was actually paid to the class members. After the report is received, the court, unless it orders otherwise to further the purposes of the underlying cause of action, shall direct the defendant to pay the sum of the unpaid residue to the Legal Aid and Services Fund".

Effective date: April, 2014

Amount received to date: None

Implementation work and analysis:

For more information, please contact:

New Mexico

The New Mexico Supreme Court adopted new language in Rule 23 of the New Mexico Rules of Civil Procedure: The new language provides that residual class action funds may be distributed to non-profit organizations that provide legal services to low income persons, the IOLTA program, the entity administering the pro hac vice rule and/or educational entities that provide training, teaching and legal services that further the goals of the underlying causes of action on which relief was based. Funds also may go to other non-profit organizations that support projects that benefit the class or similarly situated persons consistent with the goals of the underlying causes of action on which relief was based.

Effective date: May 11, 2011

Amount received to date: $10,000 to Equal Access to Justice (a combined private bar campaign for 5 NM legal aid programs) through the Access to Justice Commission. May have been awards to individual programs as well.

Implementation work and analysis: Holding a CLE on cy pres at the 2013 annual bench & bar conference - panelists include judges and private attorneys. The purpose of the CLE is two-fold: 1) educate and inform; and 2) establish a committee.

For more information, please contact:

North Carolina

Legislature amended Subchapter VIII of Chapter 1 of the General Statutes to add new Article 26B, which reads, in part: "Prior to the entry of any judgment or order approving settlement in a class action established pursuant to Rule 23 of the Rules of Civil Procedure, the court shall determine the total amount that will be payable to all class members, if all class members are paid the amount to which they are entitled pursuant to the judgment or settlement. The court shall also set a date when the parties shall report to the court the total amount that was actually paid to the class members. After the report is received, the court, unless it orders otherwise consistent with its obligations under Rule 23 of the Rules of Civil Procedure, shall direct the defendant to pay the sum of the unpaid residue, to be divided and credited equally, to the Indigent Person's Attorney Fund and to the North Carolina State Bar for the provision of civil legal services for indigents."

Effective date: October 1, 2005

Amount received to date: Awards received by IOLTA and disbursed to legal aid programs pursuant to division described in rule: 2007=$18,000; 2010=$2,200; 2011=$33,000; 2013=$528,000 (plus an additional direct award of $130,000 for a total of $658,000 for 2013). Individual legal aid programs also have received awards.

Implementation work and analysis: In 2012, the North Carolina Access to Justice Commission prepared a toolkit.

For more information, please contact: Evelyn Pursley, Executive Director, North Carolina IOLTA, epursley@ncbar.gov, 919/828-0477.

Pennsylvania

The Supreme Court of Pennsylvania has revised Chapter 1700 of the Rules of Civil Procedure, directing that at least 50% of residual funds in a given class action shall be disbursed to the Pennsylvania IOLTA Board to support activities and programs which promote the delivery of civil legal assistance. The balance may go to IOLTA, or to another entity for purposes that have a direct or indirect relationship to the objectives of the underlying class action, or which otherwise promote the substantive or procedural interests of the members of the class.

Effective date: July 1, 2012

Amount received to date: In fiscal year ended June 30, 2013, cy pres revenue to IOLTA totaled $78,010. In fiscal year ended June 30, 2014, revenue totaled $2,282,191. Individual legal aid programs also have received awards.

Implementation work and analysis: IOLTA developed a toolkit that has been distributed to Pennsylvania trial judges. They also are working on an educational plan for the class action bar and the federal and state trial bench.

For more information, please contact: Stephanie Libhart, Assistant Director, Lawyer Trust Account Board, stephanie.libhart@pacourts.us, 717/238-2001.

South Dakota

Legislature approved Section 16-2-57 of its codified laws on the settlement of class action lawsuits to provide that "Any order settling a class action lawsuit that results in the creation of a common fund for the benefit of the class shall provide for the distribution of any residual funds to the Commission on Equal Access to Our Courts. However, up to fifty percent of the residual funds may be distributed to one or more other nonprofit charitable organizations that serve the public good if the court finds there is good cause to approve such a distribution as part of the settlement."

Effective date: 2008

Amount received to date: There have been 3 payments to date; paid to the Commission on Equal Access to Our Courts, which disbursed the funds to legal aid providers.

Implementation work and analysis: There are relatively few class action cases in South Dakota.

For more information, please contact: Thomas Barnett, Executive Director and Secretary Treasurer, State Bar of South Dakota, thomas.barnett@sdbar.net, 605/224-7554.

Tennessee

Legislature amended the Tennessee Code Annotated, Title 16, Chapter 3, Part 8, to create the Tennessee Voluntary Fund for Indigent Civil Representation and authorize it to receive contributions from several sources, including: "The unpaid residuals from settlements or awards in class action litigation in both state and federal courts, provided any such action has been certified as a class action under Rule 23 of the Tennessee Rules of Civil Procedure or Rule 23 of the Federal Rules of Civil Procedure;" In 2009, Rule 23.08 was amended to clarify that judges and parties to class actions may enter into settlement decrees providing for unclaimed class action funds to be paid to the Tennessee Voluntary Fund for Indigent Civil Representation.

Effective date: September 1, 2006

Amount received to date: None

Implementation work and analysis:

For more information, please contact: Ann Pruitt, Executive Director, Tennessee Alliance for Legal Services, apruitt@tals.org, 615/627-0956

Washington

New language in Rule 23, adopted by the Washington Supreme Court, reads, in part: "Any order entering a judgment or approving a proposed compromise of a class action certified under this rule that establishes a process for identifying and compensating members of the class shall provide for the disbursement of any residual funds. In matters where the claims process has been exhausted and residual funds remain, not less than twenty-five percent (25%) of the residual funds shall be disbursed to the Legal Foundation of Washington to support activities and programs that promote access to the civil justice system for low income residents of Washington State. The court may disburse the balance of any residual funds beyond the minimum percentage to the Legal Foundation of Washington or to any other entity for purposes that have a direct or indirect relationship to the objectives of the underlying litigation or otherwise promote the substantive or procedural interests of members of the certified class."

Effective date: January 3, 2006

Amount received: In 2013, received $6,196,718 due to Rule 23, out of total cy pres receipts of $15,935,503.

Implementation work and analysis: Staff and volunteers of the Legal Foundation of Washington and LAW Fund continually educate judges and lawyers about the rule and about the value of using cy pres to benefit access to justice through gifts to the Legal Foundation of Washington.

For more information, please contact: Caitlin Davis Carlson, Executive Director, Legal Foundation of Washington, caitlindc@legalfoundation.org, 206/624-2536, ext 288.

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EXHIBIT C

CLASS ACTION SETTLEMENT RESIDUE AND *CY PRES* AWARDS: EMERGING PROBLEMS AND PRACTICAL SOLUTIONS

Wilber H. Boies*
Latonia Haney Keith**

ABSTRACT

Class action settlements often present the court and parties with the practical problem of disposing of residual funds that remain after distributions to class members. The cy pres *doctrine is a well-recognized device that permits the court to designate suitable organizations to receive such funds. Recently, academics, judges, practitioners, and professional objectors have mounted a multi-faceted attack on this device, ranging from constitutional and ethical concerns to appeals challenging specific awards. This Article first describes the use of* cy pres *awards in class action settlements and explains why the constitutional, statutory, and ethical objections are unfounded. This Article then addresses other concerns that have been raised about particular awards by suggesting a principled and practical approach to* cy pres *awards. Finally, this Article explains why public interest and legal services organizations—organizations focused on providing access to the justice system for disenfranchised individuals—are appropriate* cy pres *recipients and avoid many of the problems raised by other potential recipients.*

CONTENTS

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INTRODUCTION

Class action litigation settlements commonly include a settlement fund provided by the settling defendants to be distributed among class members. The distribution by a class action administrator often leaves a residue of undistributed funds, and consequently, the practical question of what to do with those residual funds. The standard solution is a court order for a *cy pres* award providing that the residual funds will be distributed to charities or other nonprofit organizations proposed by the parties and approved by the court.

In recent years, c*y pres* awards in class actions have attracted multi-faceted attacks from academics, judges, practitioners, and professional objectors, ranging from constitutional challenges to ethical concerns. Additionally, there has been considerable criticism of *cy pres* awards to particular recipients. Part I of this Article provides an overview of the historical roots and application of the *cy pres* doctrine in class action settlements. Part II addresses the constitutional and statutory arguments against the *cy pres* doctrine in the class action arena. Part III discusses criticisms of problematic *cy pres* awards, identifies categories of concerns with the awards, and suggests solutions to avoid potential problems, including making *cy pres* awards to public interest and legal aid organizations.

I. *CY PRES*—ITS ORIGINS & APPLICATION IN CLASS ACTION SETTLEMENTS

Cy pres awards are distributions of the residual funds from class action settlements or judgments (and occasionally from other proceedings, such as probate and bankruptcy matters) that, for various reasons, are unclaimed or cannot be distributed to the class members or

other intended recipients. The term *cy pres* derives from the Norman-French phrase, *cy pres comme possible*, meaning "as near as possible."[1] Originating at least as early as sixth-century Rome, the *cy pres* doctrine has its roots in the laws of trusts and estates, operating to modify charitable trusts that specified a gift that had been granted to a charitable entity that no longer existed, had become infeasible, or was in contravention of public policy.[2] In such instances, courts transferred the funds to the next best use that would satisfy "as nearly as possible" the trust settlor's original intent.[3]

When class actions are resolved through settlement or judgment, it is not uncommon for excess funds to remain after a distribution to class members. Residual funds are often a result of the inability to locate class members or class members failing or declining to file claims or cash settlement checks.[4] Such funds are also generated when it is "economically or administratively infeasible to distribute funds to class members if, for example, the cost of distributing individually to all class members exceeds the amount to be distributed."[5]

In these circumstances, three primary options exist for distributing the remaining funds: (i) reversion to the defendant, (ii) escheat to the state, or (iii) a *cy pres* award.[6] In recent years, courts have consistently (and understandably) preferred the distribution of residual funds through *cy pres* awards over the other options. Reversion to the defendant undermines the deterrent effect of class actions. While escheat to the state overcomes this concern, it benefits only the local government rather

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[1] EDITH L. FISCH, CY PRES DOCTRINE IN THE UNITED STATES 1 (1950).

[2] *Id.* at 3; 3 ALBA CONTE & HERBERT B. NEWBERG, NEWBERG ON CLASS ACTIONS § 10:17 (4th ed. 2012) [hereinafter NEWBERG ON CLASS ACTIONS].

[3] FISCH, *supra* note 1, at 1.

[4] This is an indirect result of the 1966 amendments to the Federal Rule of Civil Procedure 23, which altered class action practice by adopting automatic inclusion in, rather than exclusion from, a non-mandatory class for class members who do not opt out of a class. *See* FED. R. CIV. P. 23. Those amendments increased the number of class actions in which courts and counsel are faced with how to handle residual funds from class awards and settlements.

[5] *In re* Baby Prods. Antitrust Litig.,708 F.3d 163, 169 (3d Cir. 2013).

[6] Courts have consistently rejected a fourth option of awarding unclaimed residual funds to already fully compensated class members. *See* Klier v. Elf Atochem N. Am., Inc., 658 F.3d 468, 475 (5th Cir. 2011) ("Where it is still logistically feasible and economically viable to make additional pro rata distributions to class members, the district court should do so, except where an additional distribution would provide a windfall to class members with liquidated-damages claims that were 100 percent satisfied by the initial distribution."); *In re* Pharm. Indus. Average Wholesale Price Litig., 588 F.3d 24, 34–36 (1st Cir. 2009) (rejecting the argument that claimants are entitled to receive a windfall of any unclaimed residual money regardless of whether they have already been compensated for their losses).

than the class of persons with claims in the class action.[7] *Cy pres* awards, on the other hand, preserve the deterrent effect and allow courts to distribute residual funds to charitable causes that reasonably approximate the interests pursued by the class action for absent class members who have not received individual distributions.[8]

II. GETTING PAST THE SMOKE SCREEN—*CY PRES* AWARDS IN CLASS ACTIONS ARE CONSTITUTIONAL

The *cy pres* doctrine was first introduced into the class action context in 1974 in *Miller v. Steinbach*.[9] It is now well-established that a federal district court "does not abuse its discretion by approving a class action settlement agreement that includes a *cy pres* component directing the distribution of excess settlement funds to a third party to be used for a purpose related to the class injury."[10] Despite such precedent, certain academics and practitioners have questioned the constitutionality of *cy pres* awards in the class action context and argued that using the *cy pres*

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[7] *In re Baby Prods. Antitrust Litig.*, 708 F.3d at 172. Moreover, state seizure of class action residue would complicate resolution of class actions by restricting the options available to parties attempting to resolve complex disputes. The Texas Supreme Court recently heard oral argument in an appeal from an order allowing the State of Texas to intervene to invalidate, and assert an interest in, a *cy pres* component of a class action settlement agreement. The state argued that the residue should be reserved for class members in the Texas Unclaimed Property Fund for three years, after which it would escheat to the state. State v. Highland Homes, Ltd., No. 08-10-00215-CV, 2012 WL 2127721 (Tex. App. Jun. 13, 2012), *appeal granted*, No. 08-10-00215-CV (Tex. Aug. 23, 2013).

[8] *Cy pres* awards may be granted to an organization with a mission directly tied to the underlying statutes at issue in the class action. In a case where AOL allegedly inserted footers containing promotional messages in its e-mails, the Ninth Circuit referenced "non-profit organizations that work to protect internet users from fraud, predation, and other forms of online malfeasance" as appropriate *cy pres* recipients. Nachshin v. AOL, LLC, 663 F.3d 1034, 1041 (9th Cir. 2011). Courts may also grant *cy pres* awards to legal services and public interest organizations. *See* discussion *infra* Part III.F.

[9] Miller v. Steinbach, No. 66 Civ. 356, 1974 U.S. Dist. LEXIS 12981, at *3-4 (S.D.N.Y. Jan. 3, 1974) (approving the parties' settlement agreement in a case that alleged the terms of a merger were unfair and acknowledging that the court was "applying a variant of the cy pres doctrine at common law").

[10] *In re Baby Prods. Antitrust Litig.*, 708 F.3d at 172; *see also* Lane v. Facebook, Inc., 696 F.3d 811, 817–18 (9th Cir. 2012) (affirming trial court's distribution of settlement funds to entities that promoted online privacy and security in response to plaintiffs' allegations of privacy violations); *In re Pharm. Indus. Average Wholesale Price Litig.*, 588 F.3d at 33–36 (holding the trial court did not abuse its discretion in approving a settlement that would distribute excess funds to charitable organizations funding cancer research or patient care); United States *ex rel.* Houck v. Folding Carton Admin. Comm., 881 F.2d 494, 502 (7th Cir. 1989) (recognizing that the court has broad discretion in identifying appropriate uses of *cy pres* distribution of residual settlement funds).

doctrine in class actions violates Article III of the United States Constitution, the Rules Enabling Act, and procedural due process.[11] These arguments have not fared well in the courts.

A. ARTICLE III CASE-OR-CONTROVERSY REQUIREMENT

Opponents of *cy pres* distributions in class actions argue that a court-imposed payment of unclaimed class funds from one private party to another party whose rights are not being adjudicated in the lawsuit violates the case-or-controversy requirement set forth in Article III of the United States Constitution.[12] The supposed violation occurs because the redistribution of unclaimed funds to charities transforms "the judicial process from a bilateral private rights adjudicatory model into a trilateral process . . . wholly unknown to the adjudicatory structure contemplated by Article III."[13]

Arguing that *cy pres* distributions impermissibly forge a trilateral relationship mischaracterizes what actually happens in class action settlements. In order to resolve class action litigation, district courts must first approve the settlement and then oversee the distribution of settlement funds. Whether such funds are distributed back to the defendant, to the state or to charitable recipients, a court tasked with distributing residual funds merely performs an administrative act to finally resolve a dispute between adverse parties by ordering the distribution of such funds.[14]

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[11] The most notable opponents to the application of the *cy pres* doctrine in the class action context are Professor Martin H. Redish of Northwestern University School of Law and legal activist Ted Frank, who is the founder of the Center for Class Action Fairness.

[12] U.S. CONST. art. III, § 2.

[13] Martin H. Redish et al., *Cy Pres Relief and the Pathologies of the Modern Class Action: A Normative and Empirical Analysis*, 62 FLA. L. REV. 617, 641 (2010); *see* Joshua L. Gayl, *The Question Facing Class Action Defense Counsel: To Cy Pres or Not to Cy Pres?*, FOR THE DEFENSE, Nov. 2011, at 16, 18–20.

[14] *See generally* FED. R. CIV. P. 23; MANUAL FOR COMPLEX LITIGATION (FOURTH) § 13.1 at 167–82 (2004); NEWBERG ON CLASS ACTIONS, *supra* note 2, § 10:16; *see also* Ira Holtzman, C.P.A. v. Turza, 728 F.3d 682, 689 (7th Cir. 2013) (remanding the district court's order of a *cy pres* award as premature, but stating that "[o]nce the court knows what funds are available for distribution, it should (if necessary) reconsider how any remainder will be applied," including potentially ordering and distributing a *cy pres* award); *In re Baby Prods. Antitrust Litig.*, 708 F.3d at 172–74 (stating "[s]ettlements are private contracts reflecting negotiated compromises. The role of a district court is not to determine whether the settlement is the fairest possible resolution . . . . The Court must determine whether the compromises reflected in the settlement—including those terms relating to the allocation of settlement funds—are fair,

The only judicial recognition of this academic argument is in a concurring opinion in a Fifth Circuit case where the majority ordered changes to the *cy pres* award but did not reject using the device. In that concurrence in *Klier v. Elf Atochem North America, Inc.*,[15] Judge Edith H. Jones raised the concern that *cy pres* distributions may implicate Article III's standing requirements because distributions to non-parties to the "original litigation may confer standing to intervene in the subsequent proceedings should the distribution somehow go awry."[16] The obvious response is that a charitable recipient of a *cy pres* award obtains a vested interest in such funds. Once this interest is established, the charitable organization should be entitled to participate in any court action that would affect its expected receipt of the funds. Accordingly, the recipient organization would have standing to contest any action affecting its claim, and the case-or-controversy requirement would be fully satisfied (if necessary).[17] In any event, Judge Jones' concern was not shared by the other judges in *Klier*—or by other courts.

Notably, academics advancing challenges to the application of the *cy pres* doctrine in class actions on constitutional grounds generally admit that those challenges are of no concern in the settlement context. As acknowledged by Professor Martin H. Redish, "[w]hen *cy pres* relief is voluntarily imposed by the parties themselves . . . it is not properly attributable to the class action court and therefore Article III's

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reasonable, and adequate when considered from the perspective of the class as a whole," and holding that "a district court does not abuse its discretion by approving a class action settlement agreement that includes a *cy pres* component directing the distribution of excess settlement funds to a third party").

[15] 658 F.3d 468, 480–82 (5th Cir. 2011).

[16] *Id.* at 481.

[17] As mentioned in Section I, the *cy pres* doctrine originated in the laws of trusts and estates, where courts recognize the standing of claimants. *See* NEWBERG ON CLASS ACTIONS, *supra* note 2, § 11:20. In the charitable trust arena, courts acknowledge the standing of potential beneficiaries when they must determine whether to exercise their *cy pres* power. *See, e.g.*, *In re* Trustco Bank, 929 N.Y.S.2d 707, 711 (N.Y. Sup. Ct. 2011) ("[T]he issue of standing and who has the right to appear and participate as a party in any given case is commonly addressed at the outset of the litigation . . . to protect the interests of all parties, [and] to avoid prejudice. . . . This approach is all the more appropriate in *cy pres* proceedings, where the issues of whether to apply *cy pres* and how to apply it are interrelated."). Similarly in class actions, courts typically allow *cy pres* award recipients and claimants to participate in proceedings regarding the award. See Motion for Leave to File a Request for Designation of a *Cy Pres* Distribution, *In re* Motorola Sec. Litig., No. 03 C 287 (N.D. Ill., Mar. 5, 2013), and Application of Illinois Bar Foundation for a *Cy Pres* Award, *In re* Motorola Sec. Litig., No. 03 C 287 (N.D. Ill., Mar. 5, 2013), for an example of *cy pres* award recipients participating in the proceedings before the award and the court's subsequent opinion, *In re* Motorola Sec. Litig., No. 03 C 287, slip op. at 2 (N.D. Ill., Mar. 5, 2013).

requirements are not implicated."[18] In other words, class action settlement agreements fashioned by the parties that select appropriate charitable organizations as *cy pres* recipients of any unclaimed funds circumvent the case-or-controversy argument because the parties, and not the court, establish the interests of the third parties.[19]

The Article III concerns and challenges raised by Professor Redish and Judge Jones are theoretical arguments repeated in other recent articles about a device used in hundreds of cases every year. No federal district court has rejected a class action settlement or a proposed *cy pres* distribution because of purported issues related to the interplay between the Article III case-or-controversy requirement and *cy pres* distributions. We are aware of no district court that has even found it necessary to justify its approval of a class action settlement by addressing these professed issues. What initially appears to be one-sided support for these Article III arguments in recent articles is, in reality, only the sound of one hand clapping. The absence of counterarguments against Article III criticisms of class action *cy pres* distributions in actual court opinions does not demonstrate court acceptance of these arguments. It simply demonstrates that federal courts have not found such arguments of concern.

B. Rules Enabling Act

The Rules Enabling Act prohibits courts from using a rule of procedure to abridge, modify, or enlarge a substantive right.[20] Applied in the class action context, rules of civil procedure therefore cannot grant a class more rights than its members would have had if they had filed individual lawsuits. Opponents of *cy pres* awards argue that a court-imposed payment of unclaimed settlement funds from a defendant to a third party transforms the class members' private cause of action into a civil penalty.[21] Stated another way, they argue that a class award becomes a civil penalty that modifies the substantive right contained in the underlying cause of action, if and when an unclaimed award is

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[18] Redish et al., *supra* note 13, at 643.

[19] Interestingly, critics of *cy pres* awards do not advance Article III violation arguments when contemplating unclaimed funds escheating to the state; their primary concerns with that option are that escheat to the state is "tantamount to fining the defendant," and there is no guarantee that the state will "necessarily use funds obtained by escheat for purposes reasonably related to the subject matter of a lawsuit, or for compensating the silent class members." Gayl, *supra* note 13, at 21 (citing Redish et al., *supra* note 13, at 639, 665).

[20] 28 U.S.C. § 2072 (2006) (providing that the "Supreme Court shall have the power to proscribe general rules of practice and procedure and rules of evidence for cases in the United States district courts[,] . . . [and] [s]uch rules shall not abridge, enlarge or modify any substantive right").

[21] *See* Redish et al., *supra* note 13, at 644–46; Gayl, *supra* note 13, at 19.

distributed to a third party. In this way, class action *cy pres* awards supposedly violate the Rules Enabling Act.

Courts have rejected this argument. Congress has approved the aggregation of private causes of action in class actions to allow plaintiffs to recover compensatory damages for their injuries.[22] *Cy pres* distributions serve that purpose—albeit imperfectly—by substituting other relief for that direct compensation[23] and are, in practice, only a device for the court to administer the last stage of the settlement of a complex case.[24] As the Third Circuit noted:

> Because "a district court's certification of a settlement simply recognizes the parties' deliberate decision to bind themselves according to mutually agreed-upon terms without engaging in any substantive adjudication of the underlying causes of action," we do not believe the inclusion of a *cy pres* provision in a settlement runs counter to the Rules Enabling Act.[25]

In other words, no Rules Enabling Act issues arise when a district court merely orders that the parties comply with the terms of their settlement agreement.

There are broader problems with the Rules Enabling Act attack. Even ardent opponents of class action *cy pres* awards concede that, rather than transforming underlying substantive law claims into a civil fine, the disposition of unclaimed property is a "legal issue wholly distinct from the substantive law enforced in the suit that [gives] rise to the unclaimed award in the first place."[26] Moreover, the courts have gained comfort from the guidelines established by the American Law Institute, which both respect the Rules Enabling Act as the "ever-antecedent and overarching limitation on class-action litigation,"[27] and

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[22] *See In re* Baby Prods. Antitrust Litig., 708 F.3d 163, 173 (3d Cir. 2013) (citation omitted).

[23] *See id.* at 169.

[24] *See generally* Wilson v. Southwest Airlines, Inc., 880 F.2d 807 (5th Cir. 1989) (treating *cy pres* distribution as a matter of the federal court's inherent equitable discretion); Van Gemert v. Boeing Co., 739 F.2d 730, 737 (2d Cir. 1984) (stating as support for its decision to make a *cy pres* distribution of unclaimed class action award that "trial courts are given broad discretionary powers in shaping equitable decrees").

[25] *In re Baby Prods. Antitrust Litig.*, 708 F.3d at 173 n.8 (citation and quotations omitted).

[26] *See* Redish et al., *supra* note 13, at 646.

[27] Klier v. Elf Atochem N. Am., Inc., 658 F.3d 468, 474 (5th Cir. 2011).

conclude that *cy pres* distributions are permissible when it is not feasible to make distributions to the class.[28]

C. Constitutional Due Process

Critics of *cy pres* awards also argue that attorneys' fees based, in part, on the amount of any *cy pres* distribution[29] threaten to "unconstitutionally undermine[] the due process obligation of those representing absent class members to vigorously advocate on their behalf and defend their legal rights."[30] *Cy pres*, as the argument goes, "creates an insidious incentive for class counsel to shirk their responsibility" and therefore "encourages exorbitant fees for class counsel at the expense of the absent class members, who are left with zero compensation."[31]

No one disputes that there have been class actions in which district court fee awards to plaintiffs' counsel have not been in the best interest of plaintiff class members, but few of those cases involve *cy pres* awards. For example, the Ninth Circuit recently vacated a district-court approved settlement, in part because attorneys' fees that likely amounted to 38.9% of the total class settlement fund were "excessive."[32] The court noted that the true valuation of a settlement "must be examined with great care to eliminate the possibility that it serves only the 'self-interests' of the attorneys and the parties, and not the class, by assigning a dollar number to the fund that is fictitious."[33] Likewise, in *In re Dry*

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[28] PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION § 3.07 cmt. a (2010) [hereinafter ALI PRINCIPLES].

[29] Critics of *cy pres* awards argue that "whenever a settlement agreement includes a *cy pres* component, the fees awarded to class counsel should be tied to the value of money and benefits actually redeemed by the injured class members—not the theoretical value of the *cy pres* remedy." John H. Beisner et al., *Cy Pres: A Not So Charitable Contribution to Class Action Practice*, U.S. CHAMBER INST. FOR LEGAL REFORM 19, (2010), *available at* http://ilr.iwssites.com/uploads/sites/1/cypres_0.pdf.

[30] Redish et al., *supra* note 13, at 650; *see also* Gayl, *supra* note 13, at 20 (arguing that even if plaintiffs' lawyers fulfill their ethical obligations to advocate for compensation of individual class members, the mere "temptation to ignore their responsibilities still violates due process").

[31] Beisner et al., *supra* note 29, at 18; *see also* Gayl, *supra* note 13, at 17 ("Plaintiffs' counsel often misuse the *cy pres* doctrine to generate large attorneys' fees and positive publicity, bastardizing the purpose of the doctrine.").

[32] Dennis v. Kellogg Co., 697 F.3d 858, 867–68 (9th Cir. 2012) (finding $2 million in attorneys' fees excessive where such fees would be drawn from a settlement fund that totaled $5.14 million).

[33] *Id.* at 868; *see also In re* Bluetooth Headset Prods. Liab. Litig., 654 F.3d 935, 943 (9th Cir. 2011) (vacating the district court's approval of a settlement agreement which included $1.6 million in attorneys' fees on a fee application

Max Pampers Litigation,[34] the Sixth Circuit reversed the district court's approval of a settlement agreement that provided unnamed class members a "medley of injunctive relief," while awarding class counsel a fee of $2.73 million, despite the fact that the counsel "did not take a single deposition, serve a single request for written discovery, or even file a response to [Proctor & Gamble's] motion to dismiss."[35] The Sixth Circuit held that the settlement agreement gave "'preferential treatment' to class counsel 'while only perfunctory relief to unnamed class members.'"[36] These opinions correctly stress that which is patently obvious: such legal fee awards should not be approved and are subject to objections and reversal on appeal. But a few outlier cases and bad actors should not taint all class actions, which are an invaluable tool for parties who need to resolve complex disputes.

As to *cy pres* awards and plaintiffs' attorneys' fees, critics argue that *cy pres* "eliminat[es] the allegedly injured class members' rights to recover compensation directly, most likely without their knowledge."[37] One important corrective for this supposed problem is adequate notice to class members. Federal Rule of Civil Procedure 23(c)(2)(B) requires district courts to "direct to class members the best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort."[38] For an opinion directly addressing this notice issue, see *In re Vitamin Cases*,[39] where the court held that *cy pres* distribution of the entire class action award to charitable organizations did not violate the procedural due process rights of the plaintiff class members.[40] The court explained that "[procedural due process] does not guarantee any particular procedure but . . . require[s] only notice reasonably calculated to apprise interested parties of the pendency of the action affecting their property interest and an opportunity to present their objections."[41]

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with "duplicative entries, excessive charges for most categories of services, a substantial amount of block billing, and use of an inflated hourly rate . . . .").

[34] 724 F.3d 713 (6th Cir. 2013).

[35] *Id.* at 718.

[36] *Id.* at 721 (quoting Vassalle v. Midland Funding LLC, 708 F.3d 747, 755 (6th Cir. 2013)).

[37] Gayl, *supra* note 13, at 20.

[38] FED. R. CIV. P. 23(c)(2)(B).

[39] 132 Cal. Rptr. 2d 425 (Cal. Ct. App. 2003).

[40] *Id.* at 432.

[41] *Id.* (citations and internal quotation marks omitted); *see also* Charron v. Pinnacle Grp. N.Y. LLC, 874 F. Supp. 2d. 179, 191 (S.D.N.Y. 2012) ("[A] Rule 23 Notice will satisfy due process when it describes the terms of the settlement generally, and informs the class about the allocation of attorneys' fees, and provides specific information regarding the date, time, and place of the final approval hearing." (internal quotations and citations omitted)); Zimmer Paper Prods., Inc. v. Berger & Montague, P.C., 758 F.2d 86, 90 (3d Cir. 1985)

As to the specific question of counting *cy pres* distributions in the calculation base for legal fee awards to plaintiffs' counsel, the misuse of the *cy pres* doctrine to justify higher attorneys' fees for plaintiffs' lawyers than the actual recovery for the class might suggest is rare. The courts have procedures in place to evaluate the reasonableness of attorneys' fees,[42] and if necessary, the power to decrease a requested fee award where there is "reason to believe that counsel has not met its responsibility to seek an award that adequately prioritizes direct benefit to the class."[43] And if the presiding judge fears or observes that class counsel may lack incentive to vigorously pursue individualized compensation for absent class members, she "should subject the settlement to increased scrutiny,"[44] and may reject the proposed settlement agreement. Such safeguards protect against any inclination of class counsel to maximize their own financial gain at the expense of the class.

As with the Article III attacks, critics mounting due process attacks seem to concede that their arguments do not really apply to class actions that are settled. Such critics acknowledge, for example, that "[i]f *cy pres* is to have any application in class action cases, it should only be available in the settlement context . . . ."[45] As the application of the *cy pres* doctrine occurs overwhelmingly in the settlement rather than the judgment context, this concession cannot be overlooked because it demonstrates that concerns as to the constitutionality and procedural validity of the *cy pres* doctrine in class actions are often overstated and a distraction from the more significant discussion about the appropriate application of the doctrine (as discussed in Part III below).[46]

("[N]otice 'must be such as is reasonably calculated to reach interested parties' and 'apprise [them] of the pendency of the action.'" (quoting Mullane v. Cent. Hanover Bank & Trust Co., 339 U.S. 306, 314, 318 (1950)) (second alteration original)).

[42] Courts regularly use one of two methods (and sometimes both as a cross-check) to ensure the reasonableness of attorneys' fees: a percentage-of-recovery method or a lodestar method. The lodestar method provides a convenient measurement for reasonableness, "'calculat[ing] fees by multiplying the number of hours expended by some hourly rate appropriate for the region and for the experience of the lawyer.'" *In re* Baby Prods. Antitrust Litig., 708 F.3d 163, 176 (3d Cir. 2013) (quoting *In re* Gen. Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig., 55 F.3d 768, 819 n.37 (3d Cir. 1995)).

[43] *Id.* at 178 (suggesting the metric for determining attorneys' fees for class counsel should not include monetary amounts that do not directly benefit plaintiff class members).

[44] *Id.* at 173.

[45] Beisner et al., *supra* note 29, at 19.

[46] *See* Redish et al., *supra* note 13, at 661 ("[S]ince 2000, the majority of class action *cy pres* awards are associated with cases that were certified solely for the purposes of settlement."); Beisner et al., *supra* note 29, at 15 ("[T]he use of *cy*

III. USING THE *CY PRES* DOCTRINE—BAD EXAMPLES AND BEST PRACTICES

In addition to constitutional and statutory arguments, academics, practitioners, and the general media have expressed skepticism about how the *cy pres* doctrine is being used in the class action context. Critics consistently argue the following:

> [*C*]*y pres* settlements do not compensate class members; they are used as a means to justify attorneys' fees for the plaintiffs' lawyers; they invite judges to abuse their authority by enriching nonprofits with which they have personal ties at the expense of the allegedly injured class members; and they permit plaintiffs' lawyers and defendants to collude to ensure that the plaintiffs' lawyers get paid, while permitting the defendants to limit their liability by not paying the purportedly injured class members.[47]

The critics point to the few cases in which certain district courts misapplied or allegedly abused the doctrine as proof that *cy pres* is "an invitation to wild corruption of the judicial process"[48] and is "'an abused concept'"[49] that should be avoided in class actions.[50] Much of the discourse, however, misconstrues the case law by viewing reversals on

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pres has generally been restricted to the class action settlement context (in part because few class actions have historically been tried to verdict).").

[47] David L. Balser et al., *Are* Cy Pres *Settlements Really 'Faux Settlements'? Analyzing Recent Criticism of* Cy Pres *Funds in Class Settlements*, 13 CLASS ACTION LITIG. REP. (BNA) 1080, 1081 (2012); *see also* Adam Liptak, *When Lawyers Cut Their Clients Out of the Deal*, N.Y. TIMES, Aug. 12, 2013, http://www.nytimes.com/2013/08/13/us/supreme-court-may-hear-novel-class-action-case.html?_r=2& (quoting David B. Rivkin, Jr., the lead lawyer on the petition for certiorari to the United States Supreme Court in *Lane v. Facebook* as stating "Cy pres awards only increase the risk of collusion, because they facilitate settlements that are cheaper and easier for defendants, still provide high fees for class attorneys, but sell class members down the river.").

[48] Adam Liptak, *Doling Out Other People's Money*, N.Y. TIMES, Nov. 26, 2007, http://www.nytimes.com/2007/11/26/washington/26bar.html?_r=0.

[49] Jessie Kokrda Kamens, *Class Action Objectors Defend Their Role in Settlement Process at ABA Conference*, 80 U.S. LAW WK. (BNA No. 15) 534, 535 (Oct. 25, 2011) (quoting Darrell Palmer, a serial objector and panelist on a panel entitled "Class Action Objectors – Are They Protectors of Absent Class Members or Merely Gadflies?" held during the American Bar Association's 15th Annual National Institute on Class Actions).

[50] *See* Liptak, *supra* note 48 (characterizing court-ordered *cy pres* distribution of unclaimed class action awards as "[a]llowing judges to choose how to spend other people's money . . ."); Gayl, *supra* note 13, at 20 (asserting that *cy pres* makes bad doctrine for class actions).

appeal of a few dubious *cy pres* awards as evidence that *cy pres* is "bad doctrine for class actions."[51]

The application of the *cy pres* doctrine in class actions, as with any other doctrine throughout legal history, has evolved as courts have faced complex and unique facts and circumstances in each particular case. As such, it is of no surprise and certainly not unusual that some awards have been reversed on appeal. The vast majority of such reversals are not for "abusing" the *cy pres* doctrine (i.e., using *cy pres* for personal gain for counsel or judges). Rather, most reversals are due to the misapplication of the doctrine within the particular circumstances of the case (e.g., failure to compensate class members or misalignment between the interests of the class members and the interests of the *cy pres* recipients). While addressing these problems, federal courts have remained firm that the *cy pres* doctrine is valid in the class action context.[52] The American Law Institute's Principles of Law of Aggregate Litigation ("ALI Principles") agrees and provides key guidance on the application of *cy pres* awards in class actions, which is respected and generally followed by the courts.[53] The ALI Principles acknowledge that "many courts allow a settlement that directs funds to a third party when funds are left over after all individual claims have been satisfied . . . [and] some courts allow a settlement to require a payment only to a third party, that is, to provide no recovery at all directly to class members."[54] The question

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[51] Gayl, *supra* note 13, at 20.

[52] *See, e.g.*, *In re* Baby Prods. Antitrust Litig., 708 F.3d 163, 172 (3d Cir. 2013) ("[A] district court does not abuse its discretion by approving a class action settlement agreement that includes a *cy pres* component directing the distribution of excess settlement funds to a third party to be used for a purpose related to the class injury."); *In re* Lupron Mktg. & Sales Practices Litig., 677 F.3d 21, 38–39 (1st Cir. 2012) (affirming class action *cy pres* distribution to charitable recipient); Nachshin v. AOL, LLC, 663 F.3d 1034, 1038 (9th Cir. 2011) ("In the context of class action settlements, a court may employ the *cy pres* doctrine to put the unclaimed fund to its next best compensation use . . . ." (citation and internal quotations omitted)); Klier v. Elf Atochem N. Am., Inc., 658 F.3d 468, 475 n.15 (5th Cir. 2011) ("[*C*]*y pres* awards are appropriate only when direct distributions to class members are not feasible . . . ." (citation and internal quotations omitted)); Masters v. Wilhelmina Model Agency, Inc., 473 F.3d 423, 436 (2d Cir. 2007) ("[T]he purpose of Cy Pres distribution [in the class action context] is to put the unclaimed fund to its *next best* compensation use . . . ." (emphasis in original) (citation and internal quotations omitted)).

[53] ALI PRINCIPLES, *supra* note 28, § 3.07 cmt. a; *see also* NEWBERG ON CLASS ACTIONS, *supra* note 2, § 10.17; *In* re *Baby Prods. Antitrust Litig.*, 708 F.3d at 172–73; *In re Lupron Mktg. & Sales Practices Litig.*, 677 F.3d at 32; *Klier*, 658 F.3d at 474 n.14.

[54] ALI PRINCIPLES, *supra* note 28, § 3.07 cmt. a; *see also* NEWBERG ON CLASS ACTIONS, *supra* note 2, § 10.17 ("When all or part of the common fund is not able to be fairly distributed to class members, the court may determine to distribute the unclaimed funds with a *cy pres* . . . approach.").

then becomes how to appropriately apply the *cy pres* doctrine in any given case.[55] The answer can be found in a few best practices that have emerged from court decisions addressing *cy pres* awards.

A. Compensation of Class Members Should Come First

With respect to funds left over after a first-round distribution to class members (from uncashed checks, for example), the ALI Principles express a policy preference that residual funds should be redistributed to other class members until they recover their full losses, unless such further distributions are not practical:

> If the settlement involves individual distributions to class members and funds remain after distribution (because some class members could not be identified or chose not to participate), the settlement should presumptively provide for further distributions to participating class members unless the amounts involved are too small to make individual distributions economically viable or other specific reasons exist that would make such further distributions impossible or unfair.[56]

As the ALI Principles recognize, when further distributions to class members are not feasible, the court has discretion to order a *cy pres* distribution, which puts the settlement funds to their next-best use by providing an indirect benefit to the class.[57] Based on this guidance, many

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[55] Chief Justice John Roberts recently raised this question in a statement published with the order denying certiorari in a class action where the Ninth Circuit upheld a settlement agreement that provided no individual recovery, but rather a significant *cy pres* remedy whereby Facebook would establish a new charitable foundation focused on funding organizations dedicated to educating the public about online privacy. Lane v. Facebook, Inc., 696 F. 3d 811 (9th Cir. 2012), *cert. denied*, Marek v. Lane, 134 S. Ct. 8 (2013). Chief Justice Roberts was critical of the parties' approach: "Facebook thus insulated itself from all class claims arising out from the Beacon episode by paying plaintiffs' counsel and the named plaintiff some $3 million and spending $6.5 million to set up a foundation in which it would play a major role." *Marek*, 134 S. Ct. 8 (statement of Roberts, C.J.). His statement suggested the Supreme Court should, in a suitable case, address fundamental issues about *cy pres* remedies in class action litigation, including: "when, if ever, such relief should be considered; how to assess its fairness as a general matter; whether new entities may be established as part of such relief; if not, how existing entities should be selected; what the respective roles of the judge and parties are in shaping a *cy pres* remedy; [and] how closely the goals of any enlisted organization must correspond to the interests of the class." *Id.*

[56] ALI PRINCIPLES, *supra* note 28, § 3.07(b).

[57] *Id.* at § 3.07 cmt. a; NEWBERG ON CLASS ACTIONS, *supra* note 2, § 10.17.

courts have articulated a reasonable requirement: that a *cy pres* distribution of residual funds to a third party is permissible only when it is not feasible to make distributions to class members in the first instance or to make further distributions to class members.[58]

Appellate courts have appropriately reversed district court grants of *cy pres* awards that fail to make feasible payments to class members first. In *Klier v. Elf Atochem North America, Inc.*, for example, the Fifth Circuit held that a district court abused its discretion by approving a class action settlement that included a *cy pres* distribution of unused funds to charities instead of distributing such funds to the members of the class.[59] In that case, the plaintiffs alleged that they were exposed to toxic chemicals emitted by an agrochemicals plant owned by the defendant.[60] Eventually, the parties reached a settlement under which the defendant would pay $41.4 million to three subclasses of individuals: those who lived or worked near the plant and suffered from at least one specified health malady (Subclass A); those who were exposed to the toxins but had not yet manifested any health problems (Subclass B); and those who experienced a diminution in the value of their property proximate to the plant (Subclass C).[61] After distributing the funds to the subclasses, approximately $830,000 of Subclass B funds went unused.[62] After the parties agreed that it was not economically feasible to distribute the remaining unused funds to Subclass B, the defendant proposed the court issue a *cy pres* award to various entities, including five local charities.[63] A member of Subclass A opposed the defendant's proposed *cy pres* distribution, arguing that the remaining Subclass B funds should be distributed to members of Subclass A, "whose members

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[58] ALI PRINCIPLES, *supra* note 28, § 3.07 cmt. a; *see, e.g.*, *Lane*, 696 F.3d at 821 (acknowledging objectors' concession that direct monetary payments to the plaintiff class of the remaining settlement funds would be *de minimis*, and therefore infeasible); *In re* Pharm. Indus. Average Wholesale Price Litig., 588 F.3d 24, 35 (1st Cir. 2009) (noting that "few settlements award 100 percent of a class member's losses, and thus it is unlikely in most cases that further distributions to class members would result in more than 100 percent recovery" and endorsing the district court's insistence that the "settlement pay class members treble damages [as provided by the underlying antitrust statute] before any money is distributed through cy pres" (quoting PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION § 3.07 cmt. b (Apr. 1, 2009) (proposed final draft))); Wilson v. Southwest Airlines, Inc., 880 F.2d 807, 812–13 (5th Cir. 1989) (finding class members could not assert an equitable claim to unclaimed settlement funds because all class members who came forward had been paid the full amount of their liquidated back-pay damages).

[59] Klier v. Elf Atochem N. Am., Inc., 658 F.3d 468, 479 (5th Cir. 2011).

[60] *Id.* at 471–73.

[61] *Id.* at 472.

[62] *Id.*

[63] *Id.* at 473.

were the most grievously injured and had not been fully compensated."[64] The district court disagreed.

On appeal, the Fifth Circuit reversed, holding that the district court abused its discretion by issuing a *cy pres* award rather than distributing the funds to Subclass A.[65] Relying primarily on the ALI Principles, the Fifth Circuit concluded that because the settlement agreement contained no provision allowing a *cy pres* distribution, such a distribution is permissible "only if it is not possible to put those funds to their very best use: benefitting the class members directly."[66] Thus, "Subclass B's failure to fully draw down the medical-monitoring fund did not constitute an abandonment or relinquishment by the class of its property interest in the settlement," and as it was feasible to make a further distribution to Subclass A, a *cy pres* distribution was inappropriate.[67]

While often cited by critics of *cy pres* distributions, the *Klier* opinion did not reject *cy pres* awards in class actions. Rather, the court clearly acknowledged that "[i]n the class-action context, a *cy pres* distribution is designed to be a way for a court to put any unclaimed settlement funds to their 'next best compensation use, e.g., for the aggregate, indirect, prospective benefit of the class.'"[68] Moreover, the *Klier* court did not "[hold] that settling defendants have a more equitable right to unclaimed funds than a charity when the property-interest-defining settlement agreement doesn't include a contrary directive."[69] Rather, the court noted that, absent any provision to the contrary in a settlement agreement, the defendant "would *appear* to have a greater claim to the funds than a charity,"[70] because the overriding objective to any class settlement is to compensate the class members.[71] The conclusion of the *Klier* court was *not* that *cy pres* distributions have no role in class actions, but rather that "there is no occasion for charitable gifts, and *cy pres* must remain offstage" if it is feasible to provide further distributions to the class.[72]

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[64] *Id.* at 476.
[65] *Id.* at 480.
[66] *Id.* at 475.
[67] *Id.* at 479.
[68] *Id.* at 474.
[69] Gayl, *supra* note 13, at 17.
[70] *Klier*, 658 F.3d at 477 (emphasis added).
[71] *Id.*
[72] *Id.* at 479; *see also* Mirfasihi v. Fleet Mortg. Corp., 356 F.3d 781, 784 (7th Cir. 2004) (rejecting a settlement because it was feasible to compensate class members individually). *But see In re* Baby Prods. Antitrust Litig., 708 F.3d 163, 173 (3d Cir. 2013) (stating that *cy pres* distributions are "most appropriate where further individual distributions are economically infeasible[,]" but refusing to hold that such distributions are only appropriate in this context).

B. Cy Pres Recipients Should Reasonably Approximate the Interests of the Class

Once *cy pres* is onstage, the question becomes how to determine which charitable entities are appropriate recipients of a *cy pres* distribution. The ALI Principles state that recipients should be those "whose interests reasonably approximate those being pursued by the class," and if no such recipients exist, "a court may approve a recipient that does not reasonably approximate the interests" of the class.[73]

Courts evaluate whether distributions to proposed *cy pres* recipients "reasonably approximate" the interest of the class members by considering a number of factors, including:

> the purposes of the underlying statutes claimed to have been violated, the nature of the injury to the class members, the characteristics and interests of the class members, the geographical scope of the class, the reason why the settlement funds have gone unclaimed, and the closeness of the fit between the class and the *cy pres* recipient.[74]

Applying this reasonable approximation test, the First Circuit upheld a *cy pres* distribution approved by a district court in *In re Lupron* by noting that the settlement agreement expressly contemplated a *cy pres* distribution and holding that the *cy pres* beneficiary—a prostate cancer research and treatment center—was an appropriate recipient because the alleged wrongdoing the plaintiffs sought to correct in the class action was overcharging cancer patients for the drug Lupron.[75]

In perhaps a narrower interpretation of the reasonable approximation test, the Ninth Circuit has stated that *cy pres* distributions must be "guided by the objectives of the underlying statute and the interests of the silent class members."[76] The Ninth Circuit has enforced this interpretation in several recent cases where rationale for the proposed *cy pres* recipients seemed attenuated or otherwise questionable.[77] In

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[73] ALI PRINCIPLES, *supra* note 28, § 3.07(c).

[74] *In re* Lupron Mktg. & Sales Practices Litig., 677 F.3d 21, 33 (1st Cir. 2012).

[75] *Id.* at 36–37.

[76] Six Mexican Workers v. Ariz. Citrus Growers, 904 F.2d 1301, 1307 (9th Cir. 1990).

[77] *See, e.g.*, Dennis v. Kellogg Co., 697 F.3d 858, 865 (9th Cir. 2012) (reversing the district court-approved settlement, in part because the proposed *cy pres* distribution to a charity that feeds the indigent had little or nothing to do with the consumer protection laws at issue in the lawsuit); *Six Mexican Workers*, 904 F.2d at 1301, 1304, 1308–09 (invalidating a *cy pres* distribution to the Inter-American Fund for "indirect distribution to Mexico," because the distribution

Nachshin v. AOL, LLC,[78] the Ninth Circuit addressed whether a district court abused its discretion by approving a class settlement that allowed AOL to make contributions to several charities in lieu of any compensation to the class members for allegedly inserting footers containing promotional messages in its e-mails.[79] Under the settlement agreement, AOL would alter its allegedly improper practices and contribute $25,000 apiece to the Federal Judicial Center Foundation, the Legal Aid Foundation of Los Angeles, and the Boys and Girls Club of America (split between the Los Angeles and Santa Monica chapters).[80]

After the district court approved the settlement and the *cy pres* distributions, a class member appealed, arguing that the *cy pres* recipients were not reasonably related to the issue in the case.[81] The Ninth Circuit agreed. According to the Ninth Circuit, the *cy pres* awards were not appropriately aligned with the objectives of the underlying statutes on which the plaintiffs based their claims, namely "breach of electronic communications privacy, unjust enrichment, and breach of contract, among others, relating to AOL's provision of commercial e-mail services."[82]

While the *Nachshin* court rejected the proposed *cy pres* awards, it did so because the parties and the district court had selected, in its view, inappropriate *cy pres* beneficiaries—not because *cy pres* relief is improper in the class action context. To the contrary, the Ninth Circuit clearly acknowledged that a *cy pres* distribution would be appropriate if the "selection of *cy pres* beneficiaries [were] tethered to the nature of the lawsuit and the interests of the silent class members."[83]

C. Cy Pres Awards Are Appropriate Where Cash Distributions to Class Members Are Not Feasible

The *Nachshin* decision is also important because it approved application of the *cy pres* doctrine in class actions in which plaintiffs allege that defendants engaged in misconduct on a wide scale, which resulted in only *de minimis* damages to individual class members but significant damages in the aggregate. The *Nachshin v. AOL* settlement was structured so that AOL would not pay any money to the approximately 66 million class members.[84] Because AOL's maximum

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failed to "serve the goals of the statute and protect the interests of the silent class members" who were undocumented workers).

[78] 663 F.3d 1034 (9th Cir. 2011).

[79] *Id.* at 1036, 1040.

[80] *Id.* at 1040.

[81] *Id.* at 1037–38.

[82] *Id.* at 1040.

[83] *Id.* at 1039.

[84] *Id.* at 1037.

liability if the class were certified and a judgment entered was $2 million, each class member would be entitled only to approximately three cents, which the Ninth Circuit described as "a cost-prohibitive distribution to the plaintiff class."[85]

Similarly, in *Lane v. Facebook, Inc.*, the Ninth Circuit upheld a class settlement agreement which involved a significant *cy pres* remedy (with no individual class recovery) whereby Facebook would establish a new charitable foundation dedicated to educating the public about online privacy.[86] The use of the *cy pres* award in these situations benefited both the defendants and the class members, as it permitted the defendants to cost-effectively resolve a case that would have been expensive to defend and allowed class plaintiffs to force the defendants to change its allegedly improper practices and pay a penalty for engaging in those practices.

Moreover, the Seventh Circuit recently reversed and remanded a district court's decertification order in a consumer class action case on the grounds that while the class recovery is small, this alone is not sufficient grounds to deny class certification.[87] The court explained that a case in which the individual claim is small is "the type of case in which class action treatment is most needful"; and a *cy pres* award "would amplify the effect of the modest damages in protecting consumers."[88]

These opinions contradict critics' assertions that *cy pres* "facilitates 'faux' class actions," in which "injured victims do not receive compensation, but the victims' lawyers and the representative plaintiffs are rewarded qui tam action-style creating the illusion of compensation to the injured class."[89] Settlements with *cy pres* awards can and should be used to resolve class actions in which defendants allegedly engage in wide-scale misconduct that results in only *de minimis* damages to the individual class members. In this context, the ALI Principles recognize that courts do approve class action settlements that provide for cash payments to third parties with no direct cash recovery to class members.[90]

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[85] *Id.*

[86] Lane v. Facebook, Inc., 696 F.3d 811 (9th Cir. 2012), *cert. denied*, Marek v. Lane, 134 S. Ct. 8 (2013).

[87] Hughes v. Kore of Ind. Enter., Inc., No. 13-8018, 2013 WL 4805600, at *3, *5 (7th Cir. Sept. 10, 2013).

[88] *Id.*

[89] Gayl, *supra* note 13, at 19.

[90] ALI PRINCIPLES, *supra* note 28, § 3.07 cmt. a.

D. Cy Pres Distributions Should Recognize the Forum and the Geographic Make-Up of the Class

Nachshin also illustrates that the geographic make-up of the class is important (and appropriately so) in determining valid *cy pres* recipients. The *Nachshin* court expressed concern that "[a]lthough the class include[s] more than 66 million AOL subscribers throughout the United States, two-thirds of the donations [would have been] made to local charities in Los Angeles, California."[91] It therefore held that the *cy pres* distribution "fail[ed] to target the plaintiff class, because it d[id] not account for the broad geographic distribution of the class."[92]

In multi-state or national class actions, failure to take into account the geographic composition of the class is a valid concern. While a class action is typically certified, administered, and resolved in one particular location, for reasons related to the case subject matter or the parties, it is important to ensure that the remainder of a national class is likewise considered in the distribution of the *cy pres* award. A reasonable approach is to ensure that a portion of the *cy pres* distribution in a multi-state or national class action is awarded to national organizations and the remainder to charities in the local jurisdiction.[93]

E. Conflicts of Interest and the Appearance of Impropriety Should Be Avoided

Perhaps because of the history of debatable *cy pres* awards discussed above, the Ninth Circuit has cautioned that "[w]hen selection of *cy pres* beneficiaries is not tethered to the nature of the lawsuit and the interests of the silent class members, the selection process may answer to the whims and self-interests of the parties, their counsel, or the court."[94]

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[91] Nachshin v. AOL, LLC, 663 F.3d 1034, 1040 (9th Cir. 2011). It is important to note that the *Nachshin* court did not hold that a legal aid organization is *per se* an improper *cy pres* recipient. Rather, it said that in this instance there was no indication that "the small percentage of plaintiffs located in Los Angeles . . . would benefit from donations to the Boys and Girls Club of Los Angeles and Santa Monica or Los Angeles Legal Aid." *Id.* This illustrates the necessity for counsel and potential legal aid and public interest *cy pres* recipients to be mindful of and address directly the tests for *cy pres* awards in the class action context.

[92] *Id.*

[93] This approach is further supported by state statutes and court rules requiring that a certain percentage, typically up to fifty percent, of any residual funds in a class action case must go to organizations that promote or provide access to justice for low-income *local* residents in the state where the case is filed. *See* discussion *infra* Part III.F; *see, e.g.*, *In re* Motorola Sec. Litig., No. 03 C 287, slip op. at 2 (N.D. Ill., March 5, 2013).

[94] *Nachshin*, 663 F.3d at 1039.

Critics have gone further, arguing that these legitimate concerns give rise to something more sinister and underhanded:

> [*C*]*y pres* proponents should not receive the same folkloric benefit as Robin Hood stealing from the rich and giving to the poor. Instead, we should denounce applying the *cy pres* doctrine to class action settlements as walking a very thin ethical line because, in most cases, it steals from corporation, awards funds to uninjured parties, confiscates injured parties' due process rights, lines the pockets of plaintiffs' lawyers, and places courts in precarious positions.[95]

Such rhetoric inflates and overstates the concerns of the Ninth Circuit, which are easily addressed through reasoned criteria and established procedures.

Counsel, courts, and scholars have appropriately recognized that a potential conflict of interest exists between class counsel and their clients because *cy pres* distributions may increase a settlement fund, and subsequently the attorneys' fees, without increasing the direct benefit to the class.[96] As discussed above,[97] however, a straightforward solution exists to address this issue: if the presiding judge fears or observes that class attorneys may lack incentive to vigorously pursue individualized compensation for absent class members, the court can and "should subject the settlement [and the distribution process] to increased scrutiny."[98]

There is also a legitimate concern that the lure of *cy pres* distributions can improperly motivate lawsuit parties and defense or plaintiffs' counsel to steer unclaimed awards to recipients that advance their own agendas.[99] To deal with this concern, courts should take a hard look at *cy pres* beneficiaries and evaluate whether they meet the criteria discussed above and whether any of the parties involved in the litigation has significant affiliations with or would personally benefit from the distribution to the proposed *cy pres* recipients. Such an analysis is not unduly burdensome or challenging for the court to undertake and should address this concern about abuse of the doctrine.

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[95] Gayl, *supra* note 13, at 20.

[96] *In re* Baby Prods. Antitrust Litig., 708 F.3d 163, 173 (3d Cir. 2013).

[97] *See* discussion *supra* Part II.C.

[98] *In re Baby Prods. Antitrust Litig.*, 708 F.3d at 173.

[99] *See In re* Lupron Mktg. & Sales Practices Litig., 677 F.3d 21, 38 (1st Cir. 2012); *Nachshin*, 663 F.3d at 1039; *see also* Gayl, *supra* note 13, at 20; Beisner et al., *supra* note 29, at 13.

Commentators have also expressed concerns that "judicial involvement in *cy pres* awards can . . . invite unseemly interactions between charitable organizations and judges"[100] and lead to active lobbying of judges by charities.[101] In legal ethics terms, "the specter of judges and outside entities dealing in the distribution and solicitation of settlement money may create the appearance of impropriety."[102] Again, this concern is easily addressed. First, it is preferable that the parties (rather than the court) select the charities that will receive a *cy pres* distribution and ideally articulate such selection clearly in any settlement agreement. If, however, the parties fail to select the beneficiaries and the judge selects the charities, so long as the beneficiaries are chosen according to the criteria noted above[103] and their missions relate to the underlying lawsuit or the interests of the class members, these concerns over impropriety should abate.

While it is possible that a potential conflict of interest could arise between the presiding judge and the class members, such conflict of interest is unlikely if the safeguards are in place, as noted above. Critics claim that parties "often" include a *cy pres* award to a charity with which the judge or his or her family is affiliated.[104] Once again, this is an overstatement, and protections exist to address any instances of impropriety on this score. As an illustration of this concern of "judicial bias," John H. Beisner, for example, points to Judge Christina A. Snyder's refusal to recuse herself when reviewing and approving the settlement agreement in *Nachshin* because her husband was a board member of Legal Aid Foundation of Los Angeles (LAFLA), one of the proposed *cy pres* recipients.[105] The Ninth Circuit however disagreed with the appellant who objected on this very issue. As articulated by the Ninth Circuit, the test for recusal under 28 U.S.C. § 455(a) is "whether a reasonable person with knowledge of all the facts would conclude that the judge's impartiality might reasonably be questioned."[106] In this instance, despite Judge Snyder's husband's LAFLA board membership, the Ninth Circuit was clear that several points heavily weighed against Judge Snyder's recusal and obviated any appearance of impropriety:[107]

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[100] Beisner et al., *supra* note 29, at 14.

[101] Liptak, *supra* note 48.

[102] Nachshin v. AOL, LLC, 663 F.3d 1034, 1039 (9th Cir. 2011).

[103] When applying the *cy pres* doctrine in the class action context, parties and courts should (i) compensate class members first; (ii) select *cy pres* recipients that reasonably approximate the interests of the class; (iii) ensure *cy pres* distributions reflect both the forum and the geographic make-up of the class; and (iv) avoid conflicts of interest and the appearance of impropriety.

[104] Beisner et al., *supra* note 29, at 13.

[105] *Id.* at 13–14.

[106] *Nachshin*, 663 F.3d at 1041.

[107] "A cy pres remedy should not be ordered if the court . . . has *significant* prior affiliation with the intended recipients that would raise substantial questions

(i) a mediator, not Judge Snyder, with no encouragement from Mr. Snyder or LAFLA, recommended LAFLA as one of three beneficiaries; (ii) no indication existed that LAFLA board members, which include roughly fifty attorneys representing law firms, corporations, and community organizations, received financial compensation or any other remuneration for their service; and (iii) no evidence existed that the donation would benefit Mr. Snyder in any way other than allowing LAFLA to continue to provide access to justice to the indigent in Los Angeles.[108] Carefully read, *Nachshin* is another demonstration that sufficient safeguards already exist to address any ethical concerns with the application of the *cy pres* doctrine in the class action context.

F. Public Interest and Legal Services Organizations Are Appropriate Cy Pres Recipients

Organizations with objectives directly related to the underlying statutes at issue in the relevant class action are appropriate *cy pres* recipients. In *Nachshin*, for example, the Ninth Circuit spoke of "non-profit organizations that work to protect internet users from fraud, predation, and other forms of online malfeasance" as appropriate *cy pres* recipients in a case involving AOL's alleged insertion of footers containing promotional messages in its e-mails.[109] But narrowly limiting the scope of appropriate *cy pres* recipients to the precise claims in the class action (e.g., online malfeasance) has its own problems, both theoretically and practically.

As to theory, such a limited approach takes too literal a view of the *cy pres* doctrine in the class action context. The use of the *cy pres* doctrine to distribute class action residue is really just a convenient analogy. In a class action settlement, there is no underlying trust that a deceased settlor has created for a specified purpose that has become unfeasible. Rather, the *cy pres* doctrine has been borrowed as a device to facilitate the administration of complex class actions. As the Seventh Circuit pointed out in *Mirfasihi v. Fleet Mortgage Corp.*, the *cy pres* device is used in class actions "for a reason unrelated to the trust doctrine . . . to prevent the defendant from walking away from the litigation scot-free because of the infeasibility of distributing the proceeds of the settlement[.]"[110]

The practical problem with limiting *cy pres* awards to the specific claims in a class action is that a narrow focus on the subject matter of the case can unnecessarily complicate the socially desirable settlement of

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about whether the selection of the recipient was made on the merits." ALI PRINCIPLES, *supra* note 28, § 3.07 cmt. b (emphasis added).

[108] *Nachshin*, 663 F.3d at 1041–42.

[109] *Id.* at 1036–37, 1041.

[110] 356 F.3d 781, 784 (7th Cir. 2004).

large class action disputes. In actual practice, class action plaintiffs' counsel and a defendant (usually a corporation) are resolving a complex dispute by a settlement in which the defendant denies all liability, and the disposal of residual funds is typically a detail in a larger resolution. While some court opinions speak loosely of residual funds as "penalties" or "recoveries" for violations of the law, settling defendants usually see themselves as making a pragmatic business decision that specifically avoids any admission that they violated the law. Moreover, settling defendants have a practical interest in how residual funds are used. In the real world, the settling defendant in a case about telephone services pricing may be understandably unenthusiastic about a *cy pres* award to an organization that campaigns against high telephone bills.

One recognized solution to the related problems of awards to dubious recipient organizations and awards that seem to "target" the settling defendants or diminish the desire to settle is directing *cy pres* awards to public interest and legal services organizations. Federal and state courts throughout the country have long recognized organizations that provide access to justice for low-income, underserved, and disadvantaged people as appropriate beneficiaries of *cy pres* distributions from class action settlements or judgments.[111] Such awards are granted based on one of the common underlying premises for all class actions: to make access to justice a reality for people who otherwise would not be able to obtain the protections of the justice system.[112] The access to

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[111] *See, e.g.*, Lessard v. City of Allen Park, 470 F. Supp. 2d 781, 783–84 (E.D. Mich. 2007) ("The Access to Justice fund is the 'next best' use of the remaining settlement monies in this case, because both class actions and Access to Justice programs facilitate the supply of legal services to those who cannot otherwise obtain or afford representation in legal matters." (citation omitted)); Jones v. Nat'l Distillers, 56 F. Supp. 2d 355, 359 (S.D.N.Y. 1999) (listing multiple cases where a class action *cy pres* distribution designed to improve access to legal aid was appropriate); *In re* Folding Carton Antitrust Litig., MDL No. 250, 1991 U.S. Dist. LEXIS 2553, at *7-8 (N.D. Ill. Mar. 5, 1991) (approving *cy pres* distribution of the class action "Reserve Fund" to establish a program that would, *inter alia*, increase access to justice "for those who might not otherwise have access to the legal system"); *see also* Thomas A. Doyle, *Residual Funds in Class Action Settlements: Using "*Cy Pres*" Awards to Promote Access to Justice*, FED. LAW., July 2010, at 26, 27 (providing examples of approved class action settlements with *cy pres* distribution components that improved access to justice for indigent litigants).

[112] Bob Glaves & Meredith McBurney, Cy Pres *Awards, Legal Aid and Access to Justice: Key Issues in 2013 and Beyond*, 27 MGMT. INFO. EXCH. J., 24, 25 (2013) ("[L]egal aid or [Access To Justice] organizations are always appropriate recipients of *cy pres* or residual fund awards in class actions because no matter what the underlying issue is in the case, every class action is always about access to justice for a group of litigants who on their own would not realistically be able to obtain the protections of the justice system."); Doyle, *supra* note 111, at 27 (stating that the myriad of state statutes and rules enacted to "require

justice nexus falls squarely within ALI Principles' guidance that "there should be a presumed obligation to award any remaining funds to an entity that resembles, in either composition or purpose, the class members or their interests."[113] One interest of every class member in any class action in any area of the law is access to justice for a group of litigants who, on their own, would not realistically be able to seek court relief, either because it would be too inefficient to adjudicate each injured party's claim separately or because it would be cost prohibitive for each injured party to file individual claims.[114]

In addition to the case law supporting the use of *cy pres* awards to advance access to justice, a growing number of states have adopted statutes or court rules codifying the principle that *cy pres* distributions to organizations promoting access to justice are *always* an appropriate use

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residual funds to be distributed, at least in part, to legal aid projects . . . provide[s] evidence of a public policy favoring *cy pres* awards that serve the justice system").

[113] ALI PRINCIPLES, *supra* note 28, § 3.07 cmt. b.

[114] Class action *cy pres* distributions to legal aid or public interest organizations are widely recognized as an appropriate mechanism to further access to justice. *See, e.g.*, Daniel Blynn, *Cy Pres Distributions: Ethics & Reform*, 25 GEO. J. LEGAL ETHICS 435, 438 (2012) (mentioning that *cy pres* distributions that have flowed to specific legal aid organizations have advanced the legal field); Calvin C. Fayard, Jr. & Charles S. McCowan, Jr., *The Cy Pres Doctrine: "A Settling Concept,"* 58 LA. B.J. 248, 251 (2011) (discussing how *cy pres* awards made to local legal aid organizations will promote access to civil litigation, in part, by funding and coordinating a pro bono panel utilizing local attorneys); *Cy Pres Nets $162,000 for Justice Foundation*, MONT. LAW., May 2005, at 24, 24 (noting that a significant *cy pres* distribution to the Montana Justice Foundation will help fund legal aid for indigent individuals); Danny Van Horn & Daniel Clayton, *It Adds Up: Class Action Residual Funds Support Pro Bono Efforts*, 45 TENN. B.J. 12, 13–14 (2009) (identifying legal aid organizations which have received residual *cy pres* funds because of the indirect benefit they provide to class members, which is similar to the central purpose for which FED. R. CIV. P. 23 was designed–access to justice); Nina Schuyler, *Cy Pres Awards–A Windfall for Nonprofits*, S.F. ATT'Y, Spring 2007, at 26, 27–28 (lauding the charitable efforts the Volunteer Legal Services has provided to low-income residents); Bradley A. Vauter, *The Next Best Thing: Unclaimed Funds from Class Action Settlements Could Benefit Low-Income Consumers by Deposits in State Bar of Michigan Access to Justice Development Fund*, 80 MICH. B.J. 68, 69 (2001) (advocating for Michigan's Access to Justice Fund as a recipient of unclaimed class action settlements because it benefits low-income consumers in Michigan); Robert E. Draba, Note, *Motorsports Merchandise: A Cy Pres Distribution Not Quite "As Near As Possible,"* 16 LOY. CONSUMER L. REV. 121, 122 (2004) (recognizing that the rationale for approving *cy pres* distributions to two legal aid organizations, like the purpose of the class action device, is "to protect the legal rights of those who would otherwise be unrepresented").

of residual funds in class action cases.[115] The state courts and legislatures begin with the premise that *cy pres* distributions of residual funds resulting from a class action settlement or judgment are proper and valid. From there, these state courts and legislatures specify appropriate *cy pres* recipients: charitable entities that promote access to legal aid for low-income individuals. Finally, most of these courts and legislatures then mandate a minimum baseline distribution to the pre-approved category of recipients, usually either twenty-five or fifty percent of the unclaimed class action award.[116] Because such statutes and court rules establish a

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[115] *See, e.g.*, CAL. CIV. PROC. CODE § 384 (2002) (permitting payment of residual class action funds to nonprofit organizations that provide civil legal services to low-income individuals); HAW. R. CIV. P. 23(f) (granting a court discretion to approve distribution of residual class action funds, specifically to nonprofit organizations that provide legal assistance to indigent individuals); 735 ILL. COMP. STAT. 5/2-807 (2008) (requiring distribution of at least fifty percent of residual class action funds to organizations that improve access to justice for low-income Illinois residents); IND. R. TRIAL P. 23(F)(2) (requiring distribution of at least twenty-five percent of residual class action funds to the Indiana Bar Foundation to support the activities and programs of the Indiana Pro Bono Commission and its *pro bono* districts); KY. R. CIV. P. 23.05(6) (requiring distribution of at least twenty-five percent of residual funds to the Kentucky IOLTA Fund Board of Trustees to support activities and programs that promote access to civil justice for low-income Kentucky residents); MASS. R. CIV. P. 23(e) (permitting distribution of residual class action funds to nonprofit organizations that provide legal services to low income individuals consistent with the objectives of the underlying causes of action on which relief was based); N.M. DIST. CT. R. CIV. P. 1-023(G)(2) (permitting payment of residual class action funds to nonprofit organizations that provide civil legal services to low income individuals); N.C. GEN. STAT. § 1-267.10 (2005) (requiring equal distribution of residual class action funds between the Indigent Person's Attorney Fund and the North Carolina State Bar for the provision of civil services for indigents); PA. R. CIV. P. 1716 (directing distribution of at least fifty percent of residual class action funds to the Pennsylvania IOLTA Board to support activities and programs which promote the delivery of civil legal assistance, permitting distribution of the balance to an entity that promotes either the substantive or procedural interests of the class members); S.D. CODIFIED LAWS § 16-2-57 (2008) (requiring at least fifty percent of residual funds be distributed to the Commission on Equal Access to Our Courts); TENN. CODE ANN. § 16-3-821 (2009) (creating the Tennessee Voluntary Fund for Indigent Civil Representation and authorizing the fund to receive contributions of unpaid residuals from settlements or awards in class action litigation in both federal and state courts); WASH. SUPER. CT. CIV. R. 23(f)(2) (requiring distribution of at least twenty-five percent of residual class action funds to the Legal Foundation of Washington to support activities and programs that promote access to the civil justice system for low income residents).

[116] *See* HAW. R. CIV. P. 23(f); 735 ILL. COMP. STAT. 5/2-807 (2008); IND. R. TRIAL P. 23(F)(2); KY. R. CIV. P. 23.05(6); PA. R. CIV. P. 1716; S.D. CODIFIED LAWS § 16-2-57 (2008); WASH. SUPER. CT. CIV. R. 23(f)(2). Importantly, these statutes and rules do not require that one hundred percent of the residual funds go to *local* legal services organizations. In national class actions, state court

presumption that any residual funds in class action settlements or judgments will be distributed to public interest or legal aid organizations, they make clear that legal services organizations are distinct from other charitable causes that have drawn legitimate concerns regarding a lack of nexus with the interests of the class members. In other words, the statutes and rules recognize the connection between access to justice through legal aid and through class action procedures.

CONCLUSION

Class action litigation has become an important device for resolving a wide range of disputes between individual plaintiffs and corporate defendants. *Cy pres* awards of undistributed class action settlement residue are an important part of the settlement process. Distributing funds to appropriate recipients is a practical variant of the *cy pres* device long recognized in trust law and is generally accepted as preferable to returning undistributed funds to the settling defendants or escheat of those funds to the state.

Critics of *cy pres* awards in class actions have raised several arguments that are often overstated and have not been recognized by the courts. *Cy pres* awards do not violate the case-or-controversy requirement in Article III of the U.S. Constitution. They do not violate the Rules Enabling Act. And they do not infringe constitutional due process rights of class members. Though potential for misapplication of the doctrine and abuse exists, legitimate concerns can be addressed through recognized court procedures.

There has also been considerable recent criticism of specific *cy pres* awards, and several awards have been reversed on appeal. As discussed in this Article, problems concerning specific awards can be anticipated and avoided by following a few simple rules: (1) compensation of class members should come first; (2) *cy pres* recipients should reasonably approximate the interests of the class; (3) *cy pres* awards are appropriate where cash distributions to class members are not feasible; (4) *cy pres* distributions should recognize the geographic make-up of the class; (5) conflicts of interest and the appearance of impropriety should be avoided; and (6) public interest and legal services organizations should be considered as appropriate *cy pres* recipients. Following these simple rules should minimize controversies about an effective and important mechanism for class action administration.

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judges are free to grant at least a portion of the *cy pres* award to appropriate *national* organizations, such as national public interest or legal services organizations, thereby avoiding the problem raised in *Nachshin* of inappropriate *cy pres* awards to local organizations in national class actions. *See* discussion *infra* Part III.D.

* * *

EXHIBIT D

Appeal No. 13-16919
(Consolidated with No. 13-16918, 13-16819, 13-16929, 13-17028, 13-17097)

IN THE
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Angel Fraley, et al.
Plaintiffs-Appellees

C.M.D., et al.
Intervenors-Plaintiffs-Appellees

Wendy Lally, et al.
Objectors-Appellants

v.

Facebook, Inc.
Defendant-Appellee

On Appeal from the United States District Court
for the Northern District of California

BRIEF OF *AMICI CURIAE* IN SUPPORT OF NEITHER PARTY ON BEHALF OF NATIONAL LEGAL AID AND DEFENDER ASSOCIATION, ASSOCIATION OF PRO BONO COUNSEL, LOS ANGELES COUNTY BAR ASSOCIATION, ALAMEDA COUNTY BAR ASSOCIATION, AND LEGAL AID ASSOCIATION OF CALIFORNIA AND ITS MEMBER ORGANIZATIONS ASIAN AMERICANS ADVANCING JUSTICE – LOS ANGELES, BET TZEDEK LEGAL SERVICES, CENTER FOR HUMAN RIGHTS AND CONSTITUTIONAL LAW, DISABILITY RIGHTS CALIFORNIA, DISABILITY RIGHTS & EDUCATION DEFENSE FUND, DISABILITY RIGHTS LEGAL CENTER, IMPACT FUND, INNER CITY LAW CENTER, JUSTICE & DIVERSITY CENTER OF THE BAR ASSOCIATION OF SAN FRANCISCO, LEGAL AID OF MARIN, LEGAL AID SOCIETY – EMPLOYMENT LAW CENTER, LOS ANGELES CENTER FOR LAW & JUSTICE, NATIONAL CENTER FOR YOUTH LAW, NATIONAL HOUSING LAW PROJECT, NATIONAL SENIOR CITIZENS LAW CENTER, ONEJUSTICE, PRO BONO PROJECT OF SILICON VALLEY, PUBLIC COUNSEL, PUBLIC LAW CENTER, SAN DIEGO VOLUNTEER LAWYER PROGRAM, INC., VOLUNTEER LEGAL SERVICES CORPORATION OF THE ALAMEDA

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rules 26.1 and 29(c)(1) of the Federal Rules of Appellate Procedure, the National Legal Aid and Defender Association (NLADA), the Association of Pro Bono Counsel (APBCo), the Los Angeles County Bar Association (LACBA), Alameda County Bar Association (ACBA), and the Legal Aid Association of California (LAAC) and LAAC member organizations Asian Americans Advancing Justice – Los Angeles, Bet Tzedek Legal Services, Center for Human Rights and Constitutional Law, Disability Rights California, Disability Rights & Education Defense Fund, Disability Rights Legal Center, Impact Fund, Inner City Law Center, Justice & Diversity Center of The Bar Association of San Francisco, Legal Aid of Marin, Legal Aid Society - Employment Law Center, Los Angeles Center for Law & Justice, National Center for Youth Law, National Housing Law Project, National Senior Citizens Law Center, OneJustice, Pro Bono Project of Silicon Valley, Public Counsel, Public Law Center, San Diego Volunteer Lawyer Program, Inc., Volunteer Legal Services Corporation of the Alameda County Bar Association, and Western Center on Law & Poverty state as follows:

The NLADA is the largest national legal aid organization with more than 700 program members dedicated to ensuring access to justice for the poor through the nation's civil legal aid and defender programs. APBCo is a membership organization of over 135 partners, counsel, and practice group managers who run pro bono practices on primarily a full-time basis in more than 85 of the country's largest law firms. LACBA is one of the largest voluntary bar associations in the country with more than 20,000 members. ACBA is a voluntary bar association serving nearly 1,500 members in Alameda County. LAAC is a statewide membership association of more than 80 public interest law nonprofits, including Asian Americans Advancing Justice – Los Angeles, Bet Tzedek Legal Services, Center for Human Rights and Constitutional Law, Disability Rights California, Disability Rights & Education Defense Fund, Disability Rights Legal Center, Impact Fund, Inner City Law Center, Justice & Diversity Center of The Bar Association of San Francisco, Legal Aid of Marin, Legal Aid Society – Employment Law Center, Los Angeles Center for Law & Justice, National Center for Youth Law, National Housing Law Project, National Senior Citizens Law Center, OneJustice, Pro Bono Project of Silicon Valley, Public Counsel, Public Law Center, San Diego Volunteer Lawyer Program, Inc., Volunteer Legal Services Corporation of The Alameda County Bar Association, and Western Center on Law & Poverty, all of which provide free civil legal services to low-income individuals and communities throughout California.

Dated: June 6, 2014

By: s/Wilber H. Boies
Wilber H. Boies

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INTEREST OF *AMICI CURIAE*

The National Legal Aid and Defender Association (NLADA), the Association of Pro Bono Counsel (APBCo), the Los Angeles County Bar Association (LACBA), Alameda County Bar Association (ACBA), and the Legal Aid Association of California (LAAC) and LAAC member organizations Asian American Advancing Justice – Los Angeles, Bet Tzedek Legal Services, Center for Human Rights and Constitutional Law, Disability Rights California, Disability Rights & Education Defense Fund, Disability Rights Legal Center, Impact Fund, Inner City Law Center, Justice & Diversity Center of The Bar Association of San Francisco, Legal Aid of Marin, Legal Aid Society - Employment Law Center, Los Angeles Center for Law & Justice, National Center for Youth Law, National Housing Law Project, National Senior Citizens Law Center, OneJustice, Pro Bono Project of Silicon Valley, Public Counsel, Public Law Center, San Diego Volunteer Lawyer Program, Inc., Volunteer Legal Services Corporation of the Alameda County Bar Association, and Western Center on Law & Poverty (collectively, "LAAC Members") are public interest legal services organizations and have a substantial interest in ensuring that legal services organizations are recognized as appropriate recipients of *cy pres* awards in class action settlements.

Amici contacted all parties to this appeal, and no party objected to the filing of this amicus brief. This brief was authored entirely by counsel for the amici. This brief is submitted *pro bono*, by counsel of record. No party, or any counsel for a party,

authored this brief, in whole or in part, nor did any party, party's counsel or any other person or entity contribute money to fund the preparation or submission of this brief.

Cy pres awards in class action settlements provide a critical funding source for legal services organizations. Funding through *cy pres* awards is especially important for legal services organizations because of the dramatic decline in federal and state funding for legal aid and IOLTA (Interest on Lawyer Trust Accounts) funding as a result of the economic recession. Without sufficient substitute funding from sources such as *cy pres* awards in class actions, legal services organizations will not have the resources to meet the need for access to justice by the underprivileged and disadvantaged in our country. It is therefore critical that this Court acknowledge that legal services organizations are appropriate recipients of *cy pres* awards as part of providing further guidance to district courts through the opinion in this appeal.

The NLADA is the largest national nonprofit organization dedicated to ensuring access to justice for the poor through the nation's civil legal aid and defender programs. NLADA has more than 700 program members; 103 of these members provide civil legal assistance on a local or statewide basis in the Ninth Circuit. NLADA's members include civil legal aid providers who are funded by a variety of sources, including *cy pres* awards, to address the overwhelming need for access to justice among the nation's poor. NLADA works with its member organizations, the American Bar Association and other access to justice organizations to encourage *cy*

pres awards to organizations which address the huge justice gap for low-income persons in the civil justice system in the United States.

APBCo is a membership organization of over 135 partners, counsel, and practice group managers who run pro bono practices in more than 85 of the country's largest law firms. APBCo has 17 members based in and some 40 members with law firm offices within the Ninth Circuit. APBCo is dedicated to improving access to justice by serving as a unified voice for the national law firm pro bono community. APBCo member firms provide millions of hours of pro bono assistance each year to low-income clients throughout the United States. The members of APBCo rely on the expertise of legal services organizations to help manage successful pro bono programs at the nation's largest law firms, to screen and refer pro bono clients, and to provide training and on-going mentoring and to support and structure innovative programs that meet the needs in their communities - all in addition to the legal service organizations' provision of direct legal services.

LACBA is one of the largest voluntary bar associations in the country, with more than 20,000 members. As part of its mission to advance justice and meet the professional needs of lawyers, LACBA has been a long-time supporter and sponsor of legal services for the poor. The Los Angeles County Bar Foundation, which supports LACBA's work, has received *cy pres* awards in both state and federal class action settlements.

ACBA is a voluntary bar association serving nearly 1,500 members in Alameda County. ACBA's mission is to promote excellence in the legal profession and to facilitate equal access to justice. All of its charitable and pro bono work is directed towards expanding legal services for low-income and underserved communities. The Volunteer Legal Services Corporation of ACBA has received *cy pres* awards in class action settlements.

LAAC is a statewide membership association of more than 80 public interest law nonprofits which provide free civil legal services to low-income people and communities throughout California. LAAC member organizations, including the LAAC Members who have joined as amici, provide legal assistance on a broad array of substantive issues and serve a wide range of low-income and vulnerable populations. LAAC and its members receive *cy pres* awards in class action settlements.

SUMMARY OF ARGUMENT

The role of an amicus is to assist this Court in making a thorough and even-handed analysis of the legal issues before it. To that end, amici submitting this brief in support of neither party believe it helpful to present a broader perspective on *cy pres* awards in class actions than is found in the briefs of the parties. This amicus submission will not argue the specifics of whether the district court's decision should be affirmed or reversed and remanded. This brief will instead (a) present an analysis of the factors that courts should examine in reviewing proposed *cy pres* awards in class action settlements and (b) discuss reasons why this Court should explicitly recognize that legal services organizations are appropriate recipients of *cy pres* awards.

In a Statement which accompanied the Supreme Court order denying the certiorari petition for review of this Court's 2012 *Lane v. Facebook* decision, Chief Justice Roberts pointed out that the Supreme Court has never addressed:

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

Marek v. Lane, 134 S.Ct. 8, 9, 187 L. Ed.2d 392 (Mem) (2013) (statement of Chief Justice Roberts). Those questions are inherent in every court opinion approving, affirming or reversing a class action settlement involving a *cy pres* award. The purpose

of this amicus submission is to suggest a systematic approach to addressing those questions.

Cy pres awards serve legitimate public purposes and facilitate the resolution of complex class litigation. While such awards should be consistent with clearly identified best practices, the availability and effectiveness of *cy pres* awards should not be eroded by unreasonably narrow and mechanical constraints or tests.

Among the issues that courts should consider before making *cy pres* awards are (1) the objective of compensating class members first, (2) the feasibility of distributing settlement proceeds to class members, (3) whether *cy pres* recipients reasonably approximate the interests of the class, (4) the significance of the location of the litigation and geographic make–up of the class, and (5) avoiding conflicts of interest or the appearance of impropriety in *cy pres* distributions.

Finally, the courts should give careful consideration to the important role of legal services organizations which provide representation to countless individuals who seek access to justice. Legal services organizations serve the same purpose as class actions in our legal system: to protect the legal rights of those who would otherwise be unrepresented. Stated simply, legal services organizations are appropriate recipients of *cy pres* awards.

ARGUMENT: LEGAL SERVICE ORGANIZATIONS ARE GENERALLY APPROPRIATE *CY PRES* RECIPIENTS

I. THIS COURT'S *CY PRES* DECISIONS HAVE NOT ADDRESSED *CY PRES* AWARDS TO LEGAL SERVICES ORGANIZATIONS

A. This Court's C*y Pres* Decisions

This Court has been presented with a sequence of appeals in which objectors raised arguments against both the structure of proposed class action settlements and the choice of *cy pres* recipients. In the opinions deciding those cases, this Court has addressed the propriety of settlements without cash distributions to class members and has approved or rejected specific selections of *cy pres* recipients. This Court has not expressly addressed *cy pres* awards to legal services organizations as an effective device in class action administration which also serves broader public interests.

The first of this Court's widely cited opinions about *cy pres* awards is *Six Mexican Workers v. Arizona Citrus Growers*, 904 F.2d 1301 (9th Cir. 1990). That case was not actually a class action settlement, but rather involved a $1.8 million statutory damages judgment for violating the Farm Labor Contractors Registration Act. The district court ordered distribution of the damages award to some 1,300 undocumented Mexican workers, with any unclaimed funds to be distributed through a *cy pres* award to the Interamerican Fund for "human assistance projects" in Mexico. *Id.* at 1307. This Court, after a discussion of the difference between fluid recoveries (to persons dealing with the defendant in the future who are not necessarily class members) and *cy pres* awards, *id.* at 1305, offered the following general guidance to the district courts:

"The district court's choice among distribution options should be guided by the objectives of the underlying statute and the interests of the silent class members," *id.* at 1307. Applying this general rule, this Court found that the case was appropriate for a *cy pres* distribution, instead of escheat to the federal government or reversion to the defendants. *Id.* at 1307-09. However, this Court reversed and remanded the case because the *cy pres* proposal "benefits a group far too remote from the plaintiff class of Mexican workers," for social services in areas "where the class members may live" through an organization with no substantial record of service. In short, "the plan does not adequately target the plaintiff class and fails to provide adequate supervision over distribution." *Id.* at 1309.

Thirteen years after *Six Mexican Workers*, this Court rejected a disability public accommodations class action settlement with a *cy pres* component in *Molski vs. Gleich*, 318 F.3d 937 (9th Cir. 2003). This Court found that the district court abused its discretion by approving a settlement which provided injunctive relief and legal fees, but no right to opt out and no notice to class members that substantial monetary damages claims were being released. *Id.* 956. This Court specifically found that *cy pres* awards to sixteen disability organizations were inappropriate where there was no evidence that individual damages claims by class members would be too burdensome to prove or too costly to distribute. *Id.* at 954-55.

In re Bluetooth Headset Products Liability Litigation, 654 F.3d 935 (9th Cir. 2011), is frequently cited among this Court's recent opinions reversing and remanding class

action settlements with *cy pres* awards. But the *In re Bluetooth* opinion did not specifically address *cy pres* awards. Instead, this Court remanded the case because the settlement agreement involved no significant relief for the class (adding "acoustic safety information" to Bluetooth packaging), provided for significant attorneys' fees and presented several "warning signs" of a suspicious settlement. *Id.* at 947-48. This Court directed the district court to reconsider the attorneys' fees award, with no discussion about the proposed *cy pres* awards. *Id.* at 949-50.

Nachshin v. AOL, LLC, 663 F.3d 1034 (9th Cir. 2011), is widely cited for the approval of class action settlements with no cash component for class members – and also for the idea that *cy pres* awards in national class actions should not go only to local organizations. *See generally In re Baby Prods. Antitrust Litig.*, 708 F.3d 163, 180 (3d Cir. 2013); *Ira Holtzman, C.P.A. v. Turza*, 728 F.3d 682, 689 (7th Cir. 2013). *Nachshin* involved consumer fraud claims about "footers" inserting promotional messages into email sent to AOL subscribers. 663 F.3d at 1036. The agreed remedy was notices to AOL members, with no cash settlement fund for class members. *Id.* at 1037. With a maximum potential unjust enrichment recovery of $2 million and a class of 66 million AOL subscribers, a cash distribution of settlement proceeds to class members (three cents per class member) was not feasible. *Id.* at 1036-1037. After agreeing with a mediator that they could not identify any charitable organization related to the on-line advertising issues in the case, the parties decided on $25,000 *cy pres* awards to the Boys and Girls Club of America Los Angeles and Santa Monica chapters, the Legal Aid

Foundation of Los Angeles (LAFLA) and the Federal Judicial Center Foundation. This Court reversed and remanded the case for reconsideration of the *cy pres* awards, applying this test:

> *Cy pres* distributions must account for the nature of the plaintiffs' lawsuit, the objectives of the underlying statutes, and the interests of the silent class members, including their geographic diversity. The *cy pres* distributions here do not comport with our *cy pres* standards. While the donations were made on behalf of a nationwide plaintiff class, they were distributed to geographically isolated and substantively unrelated charities.

Id. at 1036. Notably, there was no separate discussion of the *cy pres* award to LAFLA or whether legal services organizations are generally appropriate recipients of *cy pres* awards.

Dennis v. Kellogg Co., 697 F.3d 858 (9th Cir. 2012), involved consumer fraud claims about cereal advertising. The class settlement provided for payments to cereal purchasers capped at $15 per class member from a $2.75 million settlement fund, with any undistributed funds going to unidentified charities, and a $5 million distribution of Kellogg food items to "charities that feed the indigent." *Id.* at 862-863. This Court reversed and remanded, pointing out that "[n]ot just any worthy recipient can qualify to be an appropriate *cy pres* beneficiary," because "we require that there be a 'driving nexus between the plaintiff class and the *cy pres* beneficiaries.'" *Id.* at 865 (citing *Nachshin*, 663 F.3d at 1038). The opinion suggested that appropriate *cy pres* recipients for this case were not charities that feed the needy, but organizations dedicated to protecting consumers. *Id.* at 867.

Most recently, in *Lane v. Facebook, Inc.*, 696 F.3d 811 (9th Cir. 2012), this Court approved a settlement that seems to have been tailor made to fit the tests this Court applied in rejecting the settlements in *Nachshin* and *Dennis*. The claims concerned allegedly illegal collection and use of information about on-line activities of Facebook participants without their permission. *Id.* at 817. Facebook agreed to permanently terminate the particular program (but not the practice of collecting such information) and to donate $6.5 million to establish a new foundation which would give grants to organizations involved in educating consumers about on-line information protection. *Id.* The settlement agreement provided for a Facebook officer as one of three directors of the new foundation – and for the plaintiffs' class counsel and defense counsel to be its "board of legal advisors." *Id.* This Court found that the proposed *cy pres* award properly accounted for the factors outlined in *Nachshin*, because the remedy "bears a direct and substantial nexus to the interests of absent class members," and rejected the objections, finding that the board of directors appointment and legal counsel arrangements were the "offspring of compromise," and that the new foundation would use funds to benefit class members (unlike the *Six Mexican Workers* situation). *Id.* at 820-22.

Judge Kleinfeld's dissent argued that "[t]his settlement perverts the class action into a device for depriving victims of remedies for wrongs, while enriching both the wrongdoers and the lawyers purporting to represent the class." *Id.* at 826. A rehearing en banc was denied, but with a dissenting opinion by six other judges of this

Court that was critical of the *cy pres* award. *Lane v. Facebook, Inc.*, 709 F.3d 791 (9th Cir. 2013).

B. Questions That Need to be Addressed

This Court's decision in *Lane v. Facebook* was recently questioned by Chief Justice Roberts in a separate statement filed with the order denying a petition for certiorari: "Facebook thus insulated itself from all class claims arising from the Beacon episode by paying plaintiffs' counsel and the named plaintiffs some $4 million and spending $6.5 million to set up a foundation in which it would play a major role." *Marek v. Lane*, 134 S.Ct., at 9. Chief Justice Roberts suggested that the Supreme Court should use an appropriate certiorari petition as the occasion to address a number of questions about class action settlements involving *cy pres* awards. The questions from Chief Justice Roberts are quoted, *supra at* p. 5.

This Court's series of opinions beginning with *Six Mexican Workers* has resulted in a more critical review of proposed *cy pres* awards by district courts, *see, e.g. In re Hydroxycut Marketing and Sales Practices Litigation,* Nos . 09 MD 2087 09 CV 1088, 2013 WL 6086933 (S.D. Cal. Nov. 19, 2013); more appeals to this Court, *see e.g., Milans v. Netflix, 13-15723 (appeal pending);* and more criticism in the press, *see e.g.*, Daniel Fischer, *Appeals Court Oks Facebook Settlement That Pays Lawyers And 'Bespoke' Charity*, FORBES (Feb. 27, 2013). Chief Justice Roberts' statement inviting future certiorari petitions about *cy pres* awards will predictably encourage more objections and more appeals. This presents a situation in which additional guidance from this Court will be

useful for the parties settling class actions and the district courts reviewing those settlements.

One important question not specifically addressed in this Court's sequence of class action settlement opinions is *cy pres* distributions to legal services organizations on the basis that legal services organizations have a direct and substantial nexus to the interests of settling class members in every class action. This approach has been endorsed by federal and state courts and formally adopted by a growing number of state statues and court rules. *See infra* Section III. This appeal presents an opportunity for this Court to address this recurring issue and to provide district courts with clear guidance regarding *cy pres* awards for legal services organizations.

II. *CY PRES* AWARDS ARE AN ESTABLISHED AND APPROPRIATE DEVICE IN CLASS ACTION SETTLEMENT ADMINISTRATION

Cy pres awards in class action settlements are a positive solution to a practical problem. *Cy pres* awards are usually distributions of the residual funds from class action settlements or judgments that, for various reasons, are unclaimed or cannot be distributed to the class members. It is not uncommon for excess funds to remain after a distribution to class members. Residual funds are often a result of the inability to locate class members or class members failing or declining to file claims or cash settlement checks. Such funds are also generated when it is "economically or administratively infeasible to distribute funds to class members if, for example, the

cost of distributing individually to all class members exceeds the amount to be distributed." *In re Baby Prods. Antitrust Litig.*, 708 F.3d at 169.

In such circumstances, three primary options are available for disposition of the remaining funds – reversion to the defendant, escheat to the state or a *cy pres* award. Courts have consistently preferred the distribution of residual funds through *cy pres* awards over the other options.[1] This Court specifically elected to approve *cy pres* awards instead of escheat or reversion in *Six Mexican Workers*, 904 F.3d at 307-309.

It is now well-established that a federal district court "does not abuse its discretion by approving a class action settlement agreement that includes a *cy pres* component directing the distribution of excess settlement funds to a third party to be used for a purpose related to the class injury." *In re Baby Prods. Antitrust Litig.*, 708 F.3d at 172. Leading appellate decisions supporting class action *cy pres* awards include *In re Lupron Mktg. & Sales Practices Litig.*, 677 F.3d 21, 38-39 (1st Cir. 2012); *Masters v. Wilhelmina Model Agency, Inc.*, 473 F.3d 423, 436 (2d Cir. 2007); *Klier v. Elf Autochem N. Am., Inc.*, 658 F.3d 468, 475 (5th Cir. 2011); and *United States ex rel. Houck v. Folding Carton Admin. Comm.*, 881 F.2d 494, 502 (7th Cir. 1989).

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[1] Courts have consistently rejected a fourth option of awarding unclaimed residual funds to already fully compensated class members. *See Klier v. Elf Autochem N. Am., Inc.*, 658 F.3d 468, 475 (5th Cir. 2011); *In re Pharm. Indus. Average Wholesale Price Litig.*, 588 F.3d 24, 34-36 (1st Cir. 2009).

The American Law Institute's Principles of Law of Aggregate Litigation ("ALI Principles") provide guidance on the use of *cy pres* awards in class actions. The ALI Principles explain that "many courts allow a settlement that directs funds to a third party when funds are left over after all individual claims have been satisfied . . . [and] some courts allow a settlement to require a payment only to a third party, that is, to provide no recovery at all directly to class members." ALI Principles § 3.07 cmt. a (2010); *see also* 3 Alba Conte & Herbert B. Newberg, *Newberg on Class Actions* § 10:17 (4th ed. 2012) ("When all or part of the common fund is not able to be fairly distributed to class members, the court may determine to distribute the unclaimed funds with a *cy pres* . . . approach."). This Court acknowledged the guidance set forth by the ALI Principles in *Nachshin*, 663 F.3d at 1039 n.2.

III. COURTS HAVE DEVELOPED BEST PRACTICES FOR THE APPROPRIATE USE OF *CY PRES* AWARDS

In the course of approving and reviewing class action settlements, courts have developed what amount to a set of best practices for using the *cy pres* doctrine in the class action context. Amici suggest that those best practices should be applied in this appeal and, most importantly, reflected in this Court's opinion for the future guidance of the district courts in class action settlement administration.[2]

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[2] For additional discussion of these best practices, *see* Wilber H. Boies and Latonia Haney Keith, "Class Action Settlement Residue and *Cy Pres* Awards: Emerging Problems and Practical Solutions," 21 Va. J. Soc. Pol'y & L. 269 (2014), available at http://www.vjspl.org/wp-content/uploads/2014/03/3.25.14-Cy-Pres-Awards_STE_PP.pdf.

A. Compensation of Class Members Should Come First

When funds are left over after a first round distribution to class members, the ALI Principles express a policy preference that residual funds should be distributed to the class members until they recover their full losses, unless such further distributions are not practical:

> If the settlement involves individual distributions to class members and funds remain after distribution (because some class members could not be identified or chose not to participate), the settlement should presumptively provide for further distributions to participating class members unless the amounts involved are too small to make individual distributions economically viable or other specific reasons exist that would make such further distributions impossible or unfair.

ALI Principles § 3.07(b).

As the ALI Principles recognize, when further distributions to class members are not feasible, the court has discretion to order a *cy pres* distribution. *Id.* at § 3.07 cmt. a. However, many courts have articulated a reasonable requirement that a *cy pres* distribution is permissible only when it is not feasible to make distributions in the first instance or to make further distributions to class members. *Id.*; *see In re Pharm. Indus. Average Wholesale Price Litig.*, 588 F.3d 24, 35 (1st Cir. 2009); *Wilson v. Southwest Airlines, Inc.*, 880 F.2d 807, 812-13 (5th Cir. 1989).

Appellate courts have appropriately reversed district court grants of *cy pres* awards that fail to make feasible payments first to class members. This Court did exactly that in *Molski v. Gleich*, *supra* p. 8, rejecting a settlement which made no provision for payments to class members who had significant disability

accommodations claims 318 F. 3rd at 954-55. In *Klier v. Elf Autochem North America, Inc.*, the Fifth Circuit took the same approach to a case with subclasses, holding that the district court abused its discretion by approving a class action settlement that included a *cy pres* distribution to charities of unused funds from one subclass instead of distributing such funds to the members of a different subclass. 658 F.3d at 479. While often cited by critics of *cy pres* distributions, the *Klier* opinion did not reject *cy pres* awards in class actions. Rather, the court clearly acknowledged that "[i]n the class-action context, a *cy pres* distribution is designed to be a way for a court to put any unclaimed settlement funds to their 'next best compensation use, e.g., for the aggregate, indirect, prospective benefit of the class.'" *Id.* at 474; *see also Mirfasihi v. Fleet Mortg. Corp.*, 356 F.3d 781, 784 (7th Cir. 2004) (rejecting a settlement because it failed to compensate one subset of class members individually).

B. *Cy Pres* Awards Are Appropriate Where Cash Distributions to Class Members Are Not Feasible

Not every class action settlement produces a significant monetary benefit for class members. Leading cases recognize that there is also a proper place for the application of the *cy pres* doctrine in class actions in which plaintiffs allege that defendants engaged in misconduct on a wide scale which results in only *de minimis* claims of damages to individual class members. *See generally*, ALI Principles § 3.07 cmt. a. (recognizing courts' ability to approve class action settlements that provide for cash payments to third parties with no direct cash recovery to class members). In

Nachshin, for example, AOL's maximum liability if the class were certified and a money judgment entered was $2 million, which meant that each of some 66 million class members would have been entitled a recovery of only three cents, making any distribution to the class members cost prohibitive. 663 F.3d at 1037. A settlement with no distribution to participants and only a change in business practice and a *cy pres* award in that situation benefitted both AOL and the class members. This Court's approval of the settlement permitted AOL to resolve a case that would have been expensive to defend – and allowed class plaintiffs to force AOL to change allegedly improper business practices. *See also Lane*, 696 F.3d at 821 (noting objectors' concession that direct monetary payments to the class would be *de minimis* and were therefore infeasible); *Hughes v. Kore of Indiana Enter., Inc.*, 731 F.3d 672, 676 (7th Cir. 2013) (endorsing a *cy pres* award with no payments to class members, stating "class action litigation, like litigation in general, has a deterrent as well as a compensatory objective").

C. *Cy Pres* Award Recipients Should Reasonably Approximate the Interests of the Class

When further distributions to class members are not feasible, either because any remaining funds cannot be distributed cost-effectively or because of the minimal value of the claims on an individual class member basis, the question becomes how to determine which entities are appropriate recipients of a *cy pres* distribution. The ALI Principles say that recipients should be those "whose interests reasonably approximate

those being pursued by the class" and, if no such recipients exist, "a court may approve a recipient that does not reasonably approximate the interests" of the class. ALI Principles § 3.07(c); *see also In re Lupron Mktg. & Sales Practices Litig.*, 677 F.3d at 33; *Nachshin*, 663 F.3d at 1039. Federal courts should and do reject settlements which propose *cy pres* awards to organizations which seem to be chosen at random – or are nothing better than favorite charities of the counsel or parties.

D. Legal Services Organizations Are Appropriate *Cy Pres* Recipients

It is generally agreed that organizations with objectives directly related to the claims at issue in the class action are appropriate *cy pres* recipients. But a narrow limitation of *cy pres* recipients tied to the precise claims in the class action has its own problems, both theoretically and practically, and ignores the established practice of *cy pres* awards to legal services organizations that – like the class action mechanism – provide access to justice.

1. Overly Literal Application of the *Cy Pres* Doctrine In Class Actions Is Problematic

Narrowly limiting *cy pres* recipients to the exact claims in a class action takes too literal a view of the *cy pres* doctrine in the class action context. The use of the *cy pres* doctrine to distribute class action residue is really just a convenient analogy. The term *cy pres* derives from the Norman French phrase, *cy pres comme possible*, meaning "as near as possible," and the *cy pres* doctrine originally was a rule of construction used to save a testamentary gift that would otherwise fail. *In re Airline Ticket Comm'n Antitrust Litig.*,

268 F.3d 619, 625 (8th Cir. 2001). But in a class action settlement, there is no underlying trust which a deceased settler has created for a specified purpose that has become unfeasible. Rather, the *cy pres* doctrine has been borrowed as a device to facilitate the administration of complex class actions. As the Seventh Circuit pointed out in *Mirfasihi v. Fleet Mortgage Corp.*, the *cy pres* device is used in class actions "for a reason unrelated to the trust doctrine" to prevent the defendant from "walking away from the litigation scot-free because of the unfeasibility of distributing the proceeds of the settlement." 356 F.3d at 784.

In actual practice, rather than dealing with a specific bequest in a will or trust, class action litigants are resolving a complex lawsuit by a settlement in which the defendant denies liability and disposing of residual funds is typically only a small (albeit important) detail of settlement administration. And while defendants are primarily interested in concluding the case being settled, they do have a legitimate interest in how residual funds are used. For example, the settling defendant in a case about telephone services pricing may be unwilling to stipulate to a *cy pres* award to an organization that campaigns against high telephone bills. Seen in this practical light, this Court's recent focus on finding *cy pres* recipients which work on the exact subject of the specific asserted claims may actually be a barrier to negotiating a class action settlement.

2. Federal Courts Approve *Cy Pres* Awards For Access to Justice

Approving *cy pres* awards to legal services organizations is a recognized solution to avoid the problems of awards to unsuitable recipients and awards that seem to "target" settling defendants. Federal and state courts throughout the country have long recognized organizations that provide access to justice for underserved and disadvantaged people as appropriate beneficiaries of *cy pres* distributions from class action settlements or judgments. *See Jones v. Nat'l Distillers*, 56 F. Supp. 2d 355, 359 (S.D.N.Y. 1999) (listing multiple cases where a class action *cy pres* distribution designed to improve access to legal aid was found appropriate); *see also* Thomas A. Doyle, *Residual Funds in Class Action Settlements: Using "Cy Pres" Awards to Promote Access to Justice*, The Federal Lawyer, July 2010, at 26, 26-27 (providing examples of class action *cy pres* awards that improved access to justice for indigent litigants).

Such awards to legal services organizations are based on one of the common underlying premises for all class actions, which is to make access to justice a reality for people who otherwise would not be able to obtain the protections of the justice system. *See, e.g. Lessard v. City of Allen Park*, 470 F. Supp. 2d 781, 783-84 (E.D. Mich. 2007) ("The Access to Justice fund is the 'next best' use of the remaining settlement monies in this case, because both class actions and Access to Justice programs facilitate the supply of legal services to those who cannot otherwise obtain or afford representation in legal matters.") (internal citation omitted); *In re Folding Carton Antitrust Litig.*, MDL No. 250, 1991 U.S. Dist. LEXIS 2553, at **7-8 (N.D. Ill. Mar. 5,

1991) (approving a *cy pres* distribution to establish a program to increase access to justice "for those who might not otherwise have access to the legal system").

This access to justice nexus falls squarely within the ALI Principles: "there should be a presumed obligation to award any remaining funds to an entity that resembles, in either composition or purpose, the class members or their interests." ALI Principles § 3.07 cmt. b. This is because one general interest of every class member is access to justice for persons who on their own would not realistically be able to seek court relief, either because it would be too inefficient for the court to adjudicate each injured party's claim separately or because it would be cost prohibitive for each injured party to pursue individual claims:

> [L]egal aid or [access to justice] organizations are always appropriate recipients of *cy pres* or residual fund awards in class actions because no matter what the underlying issue is in the case, every class action is always about access to justice for a group of litigants who on their own would not realistically be able to obtain the protections of the justice system.

Bob Glaves & Meredith McBurney, Cy Pres *Awards, Legal Aid and Access to Justice: Key Issues In 2013 and Beyond*, 27 Mgmt. Info. Exch. J., 24, 25 (2013); *see also* Robert E. Draba, *Motorsports Merchandise: A Cy Pres Distribution Not Quite "As Near As Possible,"* 16 Loy. Consumer L. Rev. 121, 122 (2004) (the rationale for approving *cy pres* distributions to legal services organizations, like the purpose of the class action device, is "to protect the legal rights of those who would otherwise be unrepresented").

3. State Statutes and Court Rules Mandate *Cy Pres* Awards to Legal Services Organization for Access to Justice

In addition to the many federal and state court decisions approving the use of *cy pres* awards to advance access to justice, a growing number of states have adopted statutes or court rules codifying the principle that *cy pres* distributions to organizations promoting access to justice are *always* an appropriate use of residual funds in class action cases. In this circuit, California Code of Civil Procedure § 384 specifically authorizes payment of residual class action funds to California nonprofits that provide civil legal services to low-income individuals; Hawaii Civil Procedure Rule 23(f) gives the courts discretion to approve distribution of residual funds to Hawaii nonprofits that provide legal assistance to indigent individuals; and Washington Supreme Court Civil Rule 23(f) *requires* distribution of at least 25 percent of residual funds to the Legal Foundation of Washington to promote access to the civil justice system for low-income residents.[3]

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[3] *See also* 735 ILCS 5/2-807 (2008) (requiring distribution of at least 50% of residual funds to organizations that improve access to justice for low-income Illinois residents); Ind. R. Trial P. 23(F)(2) (requiring distribution of at least 25% of residual funds to the Indiana Bar Foundation); La S. C. Rule XLIII Part Q. (promoting distribution of residual funds to the Louisiana Bar Foundation); Me. R. Civ. P. 23(f)(2) (requiring that residual funds be distributed to the Maine Bar Foundation); Mass. R. Civ. P. 23(e) (permitting distribution of residual funds to Massachusetts nonprofits that provide legal services to low-income individuals); Neb. Rev. Stat. 25-319 (requiring distribution of residual funds to the Nebraska Legal Aid and Services Fund); N.M. Dist. Ct. R. C.P. 1-023(G)(2) (permitting payment of residual funds to New Mexico nonprofits that provide civil legal services to low-income individuals); N.C. Gen. Stat. § 1-267.10 (requiring equal distribution of residual funds between the Indigent Person's Attorney Fund and the North Carolina State Bar for the provision

These state statutes and court rules begin with the premise that *cy pres* distributions of residual funds are proper and valid, then specify appropriate *cy pres* recipients including or limited to entities that promote access to justice for low-income individuals and, in several state statutes and rules, mandate a minimum baseline distribution to the category of legal services organizations. Because these statutes and rules establish a presumption or requirement that residual funds will be distributed to legal services organizations, they make clear that such organizations are distinct from other charitable causes that have drawn legitimate concerns about their nexus to the interests of the class members. In other words, the state statutes and court rules (a) recognize the connection between access to justice through legal aid and through class action procedures and (b) demonstrate a clear public policy favoring *cy pres* awards to legal services organizations.[4]

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of civil services for indigents); Pa. R. Civ. P. Ch. 1700 (directing distribution of at least 50% of residual funds to the Pennsylvania IOLTA Board to promote the delivery of civil legal assistance); S.D. Codified Laws § 16-2-57; (requires at least 50% of residual funds be distributed to the South Dakota Commission on Equal Access to Our Courts); Tenn. Code Ann. § 16-3-821 (authorizing the distribution of residual funds to the Tennessee Voluntary Fund for Indigent Civil Representation).

[4] State statutes and rules enacted to "require residual funds to be distributed, at least in part, to legal aid projects" provide "evidence of a public policy favoring *cy pres* awards that service the justice system." Doyle, *supra* p. 21, at 27. The same public policy is also evident in the many state statutes and court rules providing that income earned in attorney trust accounts will be pooled and used to fund legal services. *See e.g.*, http://www.calbar.ca.gov/Attorneys/MemberServices/IOLTA.aspx.

4. *Cy Pres* Awards For Legal Services Do Provide Access To Justice

Whether awarded by a federal court order or pursuant to a state statute or rule, class action *cy pres* distributions to legal services organizations are widely recognized as an appropriate and successful mechanism to further access to justice. *See, e.g.*, Daniel Blynn, Cy Pres *Distributions: Ethics & Reform*, 25 Geo. J. Legal Ethics 435, 438 (2012) (*cy pres* distributions to specific legal services organizations have advanced legal services); Calvin C. Fayard, Jr. & Charles S. McCowan, Jr., *The* Cy Pres *Doctrine: "A Settling Concept,"* 58 La. B.J. 248, 251 (2011) (*cy pres* awards made to Louisiana legal services organizations will promote access to the courts); Danny Van Horn & Daniel Clayton, *It Adds Up: Class Action Residual Funds Support Pro Bono Efforts*, 45 Tenn. B.J. 12, 13-14 (2009) (*cy pres* awards to legal services organizations benefit class members in a similar way to Fed. R. Civ. P. 23 – providing access to justice). Legal services organizations in this Circuit and across the country protect and preserve the basic necessities of life – food, shelter, health care, safety and education for millions of Americans for whom legal services organizations are not just one means of access to justice; they are the *only* means.

E. *Cy Pres* Distributions Should Recognize Both the Forum and the Geographic Make-Up of the Class

In multi-state or national class actions, both the geographic composition of the class and connections of the case to the forum are significant factors for the court in addressing class certification issues and later *cy pres* distributions.

It is important to recognize that even a national class action is certified, administered and settled in one particular jurisdiction for a reason. Cases are filed and resolved in particular courthouses because of factors such as a concentration of persons claiming an injury or the headquarters of the defendant. Major class actions are often administered in a forum selected by the Judicial Panel on Multidistrict Litigation, which carefully weighs the connections of different jurisdictions to national class actions.

In this context, courts do approve *cy pres* awards to local entities in the settlement of national class actions. A reasonable approach to this issue is to provide that some *cy pres* distribution in a multi-state or national class action be awarded to organizations in the local jurisdiction as well as to national organizations. Many counsel and courts have followed this approach. A recent example is *In re Motorola Securities Litigation*, a MDL case with significant *cy pres* awards to both local legal services organizations and national charities. No. 03 C 287, slip op. at 2 (N.D. Ill., March 5, 2013) (copy included with brief pursuant to FRAP 32.1); *see also Jones v. National Distillers*, 56 F. Supp.2d 355, 359 (S.D.N.Y. 1999) (citing *Superior Beverage Co. v. Owens-Illinois, Inc.* 827 F. Supp. 477, 478-479 (N.D. Ill. 1993)); *In re Motorsports Merchandise Antitrust Litigation*, 160 F. Supp. 2d 1392, 1394 (N.D. Ga. 2001).

Cy pres awards to appropriate local organizations are strongly supported by the state statutes and court rules requiring that a pre-set percentage (up to 50%) of any residual funds go to organizations that promote access to justice for low-income local

residents. *See supra* Section III, D.3. One result of those statutes and rules is that many national class actions in urban jurisdictions, such as the Los Angeles County Superior Court and the Circuit Court of Cook County (Chicago), are administered in a regime in which a significant percentage of *cy pres* awards in national class actions goes to local legal services agencies where the case is litigated and settled.

Finally, it would be an unnecessary burden on busy district court judges if they were required to wrap up class action settlements by applying complex tests for how to allocate residual funds across the country in every "national" class action. This is a subject best left to the discretion of district judges familiar with the circumstances of the class action being settled.

F. Procedures Are in Place to Address Conflicts of Interest and the Appearance of Impropriety

Courts reviewing *cy pres* awards should of course look carefully at whether there is any substance to attacks on the impropriety of particular *cy pres* awards. This Court's recent *cy pres* opinions have dealt with those appropriate concerns by narrowly tying the *cy pres* award to the claims being settled. However, there are rules and procedures in place to deal with suggestions of impropriety that do not require the nexus of *cy pres* recipients to be so narrowly tailored.

Courts have recognized, for example, that a potential conflict of interest exists between class counsel and their clients because *cy pres* distributions may increase a settlement fund as a basis for plaintiffs' attorneys' fees, without increasing the direct

benefit to the class. *In re Baby Prods. Antitrust Litig.*, 708 F.3d at 173. A straightforward solution exists to address this issue: if the presiding judge is concerned that class counsel may lack incentive to vigorously pursue individualized compensation for absent class members, the court can and should "subject the settlement [and the distribution process] to increased scrutiny." *Id.*

There is also a legitimate concern that the prospect of *cy pres* distributions can improperly motivate lawsuit parties and their counsel to steer unclaimed awards to recipients that advance their own agendas. *See In re Lupron Mktg. & Sales Practices Litig.*, 677 F.3d at 38; *Nachshin*, 663 F.3d at 1039. To deal with this concern, courts should evaluate whether any of the parties or counsel involved in the litigation has any significant affiliation with or would personally benefit from the distribution to the proposed *cy pres* recipients. Such an analysis is not unduly burdensome for the court to undertake and should address this concern about abuse.

Finally, critics of *cy pres* awards also worry about judicial involvement in making *cy pres* awards. In legal ethics terms, "the specter of judges and outside entities dealing in the distribution and solicitation of settlement money may create the appearance of impropriety." *Nachshin*, 663 F.3d at 1039. This concern is also easily addressed. To avoid criticism of judges, it is preferable that the parties or counsel (rather than the court) propose the charities to receive any *cy pres* distribution and that the settlement agreement proposes specific *cy pres* awards (rather than leave the issue for resolution by a district judge at some point after the settlement is approved).

As to ground rules for the role of the district judge, as noted in the ALI Principles, "[a] cy pres remedy should not be ordered if the court . . . has *significant* prior affiliation with the intended recipients that would raise substantial questions about whether the selection of the recipient was made on the merits." ALI Principles, § 3.07 cmt. b (emphasis added). Only if necessary, the statutes governing judicial recusal can be applied. For example, in *Nachshin*, one objector attacked the district judge who approved the parties' settlement agreement because her husband was a board member of one of the proposed *cy pres* recipients. This Court firmly rejected this attack, applying the test for recusal under 28 U.S.C. § 455(a) ("whether a reasonable person with knowledge of all the facts would conclude that the judge's impartiality might reasonably be questioned") and finding that, "there is no reason to believe [the judge's husband] (as one of 50 volunteer board members) would himself realize a significant benefit" from the proposed award."). *Nachshin*, 663 F.3d at 1041-42

In short, there are good reasons for careful court review of proposed *cy pres* awards – and there are reliable procedures in place for conducting that review without overly restricting the organizations that can receive *cy pres* awards.

CONCLUSION

While appellate courts should carefully scrutinize *cy pres* awards, it is equally important for this Court to give the district courts sound general guidance for considering *cy pres* awards as part of the fairness hearing in a Rule 23 class action settlement. That guidance should include the widely recognized criteria discussed in this amicus brief: (1) compensation of class members should come first; (2) *cy pres* awards are appropriate where cash distributions to class members are not feasible; (3) *cy pres* awards should reasonably reflect the interests of the class; (4) legal services organizations should always be considered as appropriate *cy pres* recipients; (5) *cy pres* distributions should recognize both the geographic scope of the class and connections of the case to the forum; and (6) conflicts of interest and the appearance of impropriety can be avoided by applying recognized rules.

Amici urge this Court to endorse these simple rules to minimize controversies about an effective and important mechanism for class action administration. We particularly urge this Court to expressly recognize that legal services organizations are appropriate recipients of *cy pres* awards in class actions.

Dated: June 6, 2014

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This petition complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) because the petition contains 6,438 words, excluding the parts of the petition exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

The petition complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because the petition has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Garamond typeface.

The petition complies with 9th Cir. R. 25-5(e), as it is a PDF generated from the original word processing file.

Dated: June 6, 2014

By: s/Wilber H. Boies

Wilber H. Boies

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 June 6, 2014.

Participants in the case who are registered CMECF users will be served by the appellate CM/ECF system.

By: s/Wilber H. Boies

Wilber H. Boies

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

In Re:	)	
	)	**No. 03 C 287**
MOTOROLA SECURITIES LITIGATION	)	**Judge Rebecca R. Pallmeyer**

ORDER

Several years ago, this court approved the terms of an agreement to settle a securities fraud action brought on behalf of a class of investors in Motorola common stock. Following *pro rata* distributions to tens of thousands of class members, there remains $334,060.60 in the settlement fund. The parties agree this amount is insufficient to justify a third *pro rata* distribution and seek the court's approval of *cy pres* distribution to a charitable cause.

As this court has previously observed, the Seventh Circuit has not articulated explicit criteria for a district court's *cy pres* distribution of residual settlement funds, and has recognized that the court has broad discretion in identifying appropriate uses of such funds. *Houck on Behalf of U.S. v. Folding Carton Admin. Comm.*, 881 F.2d 494, 502 (7th Cir. 1989). Other courts have suggested that *cy pres* distributions be aimed at recipients "whose interests reasonably approximate those being pursued by the class." *In re Lupron Marketing and Sales Practices Litig.*, 677 F.3d 21, 32 (1st Cir. 2012) (quoting Am. Law Inst., PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION §3.07(c) (2009)); *see also Klier v. Elf Atochem North America, Inc.*, 658 F.3d 468, 474 (5th Cir. 2011) ("a *cy pres* distribution is designated to . . . put any unclaimed settlement funds to their next best compensation use, e.g., for the aggregate, indirect, prospective benefit of the class") (internal quotation marks and citation omitted).

The court received several requests from organizations seeking *cy pres* distribution funds. Following the guidance offered by the American Law Institute, the court directed counsel to identify charitable organizations whose objectives "reasonably approximate" those of the Plaintiff Class. Counsel's efforts to provide such information were helpful in identifying organizations that promote and protect interests relevant to the matters at issue here. The court also acknowledges and agrees that charitable efforts that are "closer to home" (located in Illinois, where the case was litigated and where Motorola is located) are also worthy of consideration. Without endorsing the notion that mobile phone use has any relationship to brain tumors, the court also acknowledges and accedes to the request of counsel that a portion of the *cy pres* funds be directed to brain research and support for the victims of such tumors.

In sum, having reviewed attorney submissions, the court hereby awards sums as follows (descriptions of each recipient were provided by counsel or are available on line):

Recipient	Description	Sum awarded
Americans for Financial Reform	A project of the Leadership Conference Education Fund, the AFR is committed to sustaining an accountable, fair, and secure financial system.	$ 50,000
National Conference on Public Employee Retirement Systems	The NCPERS is the largest trade association for public sector pension funds in the United States and Canada; it works to promote and protect pensions for public sector stakeholders.	$ 50,000
Chicago Lawyers Committee for Civil Rights Under the Law	The Lawyers Committee is a non-profit organization that brings class actions on behalf of the poor, mostly in Cook County, Illinois.	$ 50,000
Legal Assistance Foundation	LAF is a non-profit provider of general legal services to the poor in Cook County.	$ 50,000

Chicago Bar Foundation	The Foundation is the charitable arm of the Chicago Bar Association; it makes grants to access-to-justice initiatives.	$100,000
American Brain Tumor Association	(ABTA) is a non-profit organization dedicated to providing support services and programs to brain tumor patients and their families, as well as the funding of brain tumor research. Although headquartered in Chicago, Illinois, the research efforts of the organization have a national impact.	$15,000
Motorola Mobility Foundation	The MMF makes investments in communities around the world, "focused on bringing [Motorola] talent, technology and financial resources into 18 countries, supporting programs and projects that promote education, community improvements and health and wellness."	Any funds remaining after the above distributions

Plaintiff's motion to approve final accounting and make final disbursement [586] is granted. Petitioners Legal Assistance Foundation and Chicago Bar Foundation's motions for distribution [590, 597] are also granted. The court thanks counsel for their patience and courtesy in awaiting the court's ruling on this distribution.

ENTER:

Dated: March 5, 2013

REBECCA R. PALLMEYER
United States District Judge