No. 13-2620

IN THE
UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

In re: BankAmerica Corporation Securities Litigation

David P. Oetting, Class Representative,

Plaintiffs-Appellant

v.

Green Jacobson, P.C.

Appellee

On Appeal from the United States District Court
for the Eastern District of Missouri, St. Louis

BRIEF OF *AMICI CURIAE* NATIONAL LEGAL AID AND DEFENDER ASSOCIATION AND THE ASSOCIATION OF PRO BONO COUNSEL

Wilber H. Boies, P.C.
Latonia Haney Keith
Timothy M. Kennedy
McDermott Will & Emery LLP
227 West Monroe Street
Chicago, IL 60606
(312) 372-2000
Email: bboies@mwe.com

Eric J. Magnuson
Robins, Kaplan, Miller & Ciresi L.L.P.
800 LaSalle Avenue
Minneapolis, MN 55402
(612) 349-8548
Email: EJMagnuson@rkmc.com

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rules 29(c)(1) and 26.1 of the Federal Rules of Appellate Procedure and 8th Cir. R. 26.1A, the National Legal Aid and Defender Association (NLADA) and the Association of Pro Bono Counsel (APBCo) state as follows:

The NLADA is a 501 (c)(3) non-profit corporation with more than 700 program members. APBCo is a membership organization of over 125 partners, counsel, and practice group managers who run pro bono practices on primarily a full-time basis in 85 of the country's largest law firms.

DATED: October 11, 2013

By: s/Wilber H. Boies

Wilber H. Boies

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INTEREST OF *AMICI CURIAE*

The National Legal Aid and Defender Association (NLADA), established in 1911, is the largest national organization dedicated to ensuring access to justice for the poor through the nation's civil legal aid and defender systems. NLADA is a 501 (c)(3) non-profit corporation with more than 700 program members. NLADA's members include civil legal aid providers who are funded by a variety of sources to address the overwhelming need for access to justice among the nation's poor. Fifty-five of these member programs provide civil legal assistance on a local or statewide basis in the states in the Eighth Circuit.

NLADA provides a broad range of technical assistance, communications, training and advocacy to its members regarding resources for civil legal aid, including the importance and effective use of *cy pres* funds. Residual funds in class action litigation provide critical access to justice for thousands of low-income Americans. A number of states have adopted statutes or court rules at the state level providing for the allocation of residual funds to ensure access to the nation's civil justice system. NLADA has promoted the adoption of such rules nationwide and has provided training and technical assistance to its members on these issues NLADA supports *cy pres* awards across the country and works with its member organizations, the American Bar Association and other access to justice organizations to promote *cy pres* awards to address the huge justice gap for low-income persons that exists in the civil justice system in the United States.

The Association of Pro Bono Counsel (APBCo) is a membership organization of over 125 partners, counsel, and practice group managers who run pro bono practices in 85 of the country's largest law firms. Founded in 2006, APBCo is dedicated to improving access to justice by advancing the model of the full-time law firm pro bono partner or counsel, enhancing the professional development of pro bono counsel, and serving as a unified voice for the national law firm pro bono community. APBCo has several members within the Eighth Circuit and, through its advocacy, supports law firms within the circuit who currently do not have a full time lawyer or manager running their pro bono practices.

Annually, APBCo member firms provide millions of hours of pro bono assistance to low-income clients throughout the United States. The members of APBCo rely on the expertise of legal aid providers to help manage successful pro bono programs at the nation's largest law firms. Rarely do law firm pro bono professionals accept a direct legal services client who has not been screened by a legal aid organization and whose issues have not been expertly analyzed and evaluated by an experienced legal aid lawyer. Additionally, APBCo members often depend on legal aid organizations to provide training and on-going mentoring and support – an infrastructure that is in addition to the legal service organizations' provision of direct legal services to their own clients.

Cy pres residual awards in class action litigation provide a critical funding source for legal aid and access to justice organizations. NLADA and APBCo are especially

concerned about a potential decrease in *cy pres* awards to public interest and legal services organizations because federal and state funding for legal aid has declined dramatically in recent years. There have also been drastic reductions in IOLTA (Interest on Lawyer Trust Accounts) funding as a result of the economic recession. Without sufficient substitute funding from sources such as residual *cy pre*s awards, legal services and public interest organizations will not have the resources to serve as a critical foundation upon which law firm pro bono programs rely to help meet the need for access to justice by the underprivileged and disadvantaged in our country.

The National Aid and Defenders Association and The Association of Pro Bono Counsel, respectfully submit to this Court this *amicus curiae* brief pursuant to Federal Rule of Appellate Procedure 29(a).[1] Both appellant and appellee have consented to the filing of this *amici curiae* brief.

[1] This brief was authored entirely by counsel for the amici. 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. This brief is submitted *pro bono,* by counsel of record.

SUMMARY OF ARGUMENT

The role of an amicus is to assist the court in making a thorough and even-handed analysis of the legal issues before it. To that end, amici in this case believe that it is necessary to present a counterpoint to the overstated and incomplete discussion of the law found in the appellant's brief. This amicus submission will not argue the specifics of whether the district court's decision should be affirmed or reversed and remanded; it will instead strive to present an analysis of the factors that the district court properly examined in reaching its decision.[2]

Cy pres awards serve a number of legitimate public purposes and facilitate the resolution of complex class litigation. Such distributions 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.

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 remaining settlement proceeds to class members, (3) whether *cy pres* recipients reasonably approximate the interests of the class, (4) the significance of the location

[2] As is evident from a "Preliminary Statement" in the appeal brief (at pgs. 18-19), appellant's counsel Mr. Frank (through his "Center for Class Action Fairness") is a well-known activist opposing the application of the *cy pres* doctrine in class action litigation across the country. Although Mr. Frank and his current client are clearly entitled to advocate the law as they see it, we believe that the Court should receive a balanced explication of the law to assist it in addressing the issues before it.

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 public interest and legal services organizations in providing representation to countless individuals who seek access to justice through pro bono and legal aid representation and are often impacted by the very type of legal claims addressed in class action litigation. Stated simply, legal services organizations are in many cases appropriate recipients of *cy pres* distributions.

We do not undertake to rebut appellant's challenge to the specifics of the district court proceedings and decision. We do note, however, that the order authorizing the *cy pres* distribution reflects consideration of a number of factors to support that distribution, specifically:

- The members of the class had already received two distributions pursuant to the terms of the settlement agreement among the parties. Addendum 1-12, pp. 1, 4-5.
- A *cy pres* distribution was specifically contemplated in the class notice and the order approving the settlement agreement in 2004. Addendum 1-12, pp. 4-5.
- Further distribution to class members was not feasible, because identification of class members to receive an additional third distribution would be difficult after so many years, and a distribution of the residue of approximately $2.7 million out of an initial global settlement amount of $490 million dollars would not be cost effective or further the interests of the class. Addendum 1-12, pp. 4-5
- Whether to make a *cy pres* award on a local basis or a national basis. Addendum 1-12, pp. 7-8.

– Whether the distribution of residual settlement funds to a legal aid organization was appropriate in this securities fraud class action because the *cy pres* distribution will assist future victims of fraud. Addendum 1-12, pp. 8-9

As set forth below, these considerations by the district court are all among the factors that should be considered by a court in making or reviewing a *cy pres* distribution of surplus settlement funds.

ARGUMENT[3]

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

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. 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. Such funds are also generated when it is "economically or administratively infeasible to distribute funds to class members if, for example, the

[3] The points presented in this amicus brief were derived in large part from an article authored by amici counsel Wilber H. Boies and Latonia Haney Keith, entitled "Class Action Settlement Residue and *Cy Pres* Awards: Emerging Problems and Practical Solutions," which will be published in the February 2014 issue of the *Virginia Journal of Social Policy and the Law*.

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 (3d 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. 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 is said to undermine the deterrent effect of class actions. While escheat to the state overcomes this concern, it benefits the government but benefits the public in only the most attenuated and indirect way. *Cy pres* awards allow courts to distribute residual funds to groups or institutions that reasonably approximate or benefit the interests pursued by the class action for class members.

The *cy pres* doctrine was first employed in a federal court class action in 1974 in *Miller v. Steinbach,* No. 66 Civ. 356, 1974 U.S. Dist. LEXIS 12981, at *3 (S.D.N.Y. Jan. 3, 1974) (approving the parties' settlement agreement in a case alleging the terms of a merger were unfair and acknowledging that the court was "applying a variant of the cy pres doctrine at common law"). 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) ("*Airline Ticket Comm'n I*"). As this Court explained in *Airline Ticket Comm'n I:*

> Courts have also utilized cy pres distributions where class members "are difficult to identify or where they change constantly," or where there are unclaimed funds. *Powell,* 119 F.3d at 706. "In these cases, the court, guided by the parties' original purpose, directs that the unclaimed funds be distributed 'for the indirect prospective benefit of the class.'" *Id.* (quoting 2 Newberg and A. Conte, *Newberg on Class Actions,* § 10.17 at 10-41 (3d ed. 1991)); *see also Democratic Cent. Comm.,* 84 F.3d at 455 (cy pres distributions to "the next best class").

Id. at 625.

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. This Court endorsed the use of *cy pres* awards in proper circumstances in 2001 and 2002 in *Airline Ticket Comm'n I*, 268 F.3d 619 (8th Cir. 2001), and *Airline Ticket Comm'n Antitrust Litig.*, 307 F.3d 679 (8th Cir. 2002) ("*Airline Ticket Comm'n II*"), and before that in *Powell v. Georgia Pacific Corp.,* 119 F.3d 703 (8th Cir. 1997). For appellate decisions supporting class action *cy pres* awards in other circuits, see, e.g., *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 Autochem N. Am., Inc.*, 658 F.3d 468, 475 (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 . . . .") (citation and internal quotations omitted); *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).

The American Law Institute's Principles of Law of Aggregate Litigation ("ALI Principles") provide respected and generally followed guidance on the application of *cy pres* awards in class actions. *See* ALI Principles § 3.07 cmt. a. 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. BEST PRACTICES FOR THE APPROPRIATE USE OF THE *CY PRES* DOCTRINE IN CLASS ACTIONS

The application of the *cy pres* doctrine in class actions has evolved as courts have faced complex and unique circumstances in particular cases. In the course of addressing these cases, courts have developed what amount to a set of best practices for using the *cy pres* doctrine in the class action context. The purpose of this amicus brief is to provide this Court with an overview of those best practices and suggest that they should be applied in this appeal (and, importantly, reflected in this Court's opinion for the future guidance of the district courts in class action settlement administration).

A. Compensation of Class Members Should Come First

When funds are left over after a first round distribution to class members (from un-cashed checks, for example), 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 of residual funds to a third party is permissible only when it is not feasible to make distributions in the first instance or to make further distributions to class members. ALI Principles § 3.07 cmt a. See, *e.g., Lane v. Facebook, Inc.*, 696 F.3d 811, 821 (9th Cir. 2012) (noting objectors' concession that direct monetary payments to the plaintiff class of the remaining settlement funds would be de minimis, and were therefore infeasible); *In re Pharm. Indus. Average Wholesale Price Litig.*, 588 F.3d 24, 35 (1st Cir. 2009) (explaining that this policy preference is motivated by a concern 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 a "settlement pay class members treble damages [as provided by the underlying antitrust statute] before any money is distributed through *cy pres*") (quoting ALI Principles § 3.07 cmt. b (Apr. 1, 2009) (proposed final draft)).[4]

[4] Courts have consistently rejected a fourth option of awarding unclaimed residual funds to already fully compensated class members. *Klier v. Elf Autochem 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

Appellate courts have appropriately reversed district court grants of *cy pres* awards that fail to make feasible payments first to class members. *See 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); 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 that context). In *Klier v. Elf Autochem 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 to charities of unused funds from one subclass instead of distributing such funds to the members of a different subclass within the class. 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.

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to receive a windfall of any unclaimed residual money regardless of whether they have already been compensated for their losses); *Wilson v. Southwest Airlines, Inc.*, 880 F.2d 807, 812-13 (5th Cir. 1989) (class members could not assert an equitable claim to the unclaimed settlement funds after being paid the full amount of their liquidated back-pay damages).

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

The *cy pres* distribution in this case comes after almost $300 million in distributions to class members. Not every class action produces such a significant monetary benefit for plaintiff class members. The 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* damages to individual class members but significant damages in the aggregate. *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). An example is the settlement in *Nachshin v. AOL, LLC*, which provided for changes in AOL's business practices and a small cash settlement. 663 F.3d at 1036-37. 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 only to approximately three cents, making any distribution to the class members cost prohibitive. *Id.* at 1037. The use of the *cy pres* award in that situation benefitted both AOL and the class members. It permitted AOL cost-effectively to resolve a case that would have been expensive to defend and allowed class plaintiffs to force AOL to change allegedly improper emailing practices. Also see *Hughes v. Kore of Indiana Enterprise,* No. 13-8018, -- F.3d --, 2013 WL 4805600 (7th Cir. Sept. 10, 2013) (pointing out that "class action litigation,

like litigation in general, has a deterrent as well as a compensatory objective" and endorsing a *cy pres* award of $10,000 in damages to a "consumer protection charity" with no payments to class members).[5]

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

When further distributions to class members are not feasible, either because of the *de minimis* value of the recovery on an individual class member basis, or because any remaining sum cannot be distributed cost-effectively or fairly, 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). Applying those principles, courts evaluate whether distributions to proposed *cy pres* recipients "reasonably approximate" the interest of the class members by considering a number of factors, including:

[5] This very recent 7th Circuit opinion by Judge Posner endorsing a *cy pres* award to a public interest organization was released after appellant's brief was filed. Appellant's brief does cite *eight times* another recent 7th Circuit opinion in *Ira Holtzman, C.P.A. v. Turza,* Nos. 11-3188 & 11-3746, 2013 U.S. App. Lexis 17811 (7th Cir. 2013), in which Judge Easterbrook was critical of *cy pres* awards – but that was *in dicta* in an opinion finding that any *cy pres* award was "premature" and remanding the case for consideration of the proper remedy. The suggestion in appellant's brief that affirming a *cy pres* award in this appeal "would create a circuit split" with the 7th Circuit is not supported by the actual holdings in *Kore of Indiana* and *Holtzman v. Turza. See* App. Br. at 30.

> [T]he 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.

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

This Court has already addressed this particular best practice for *cy pres* awards in the *Airline Ticket Comm'n Antitrust Litig.* class action appeals. In *Airline Ticket Comm'n I,* this Court endorsed the use of *cy pres* distributions, but reversed an award to three Minnesota law schools and other Minnesota charities and remanded the case for the district court "to make a distribution more closely related to the origin of this nationwide class action case" about travel agent commissions. 268 F.3d at 626. Then, in *Airline Ticket Comm'n II,* this Court reversed a *cy pres* award to a public interest law group and remanded with directions for a *cy pres* award to Virgin Island and Puerto Rican travel agents – who had the same claims as class members but were technically outside the settlement class definition and had not received any part of a 50-state settlement distribution.[6] 307 F.3d at 683.

[6] While affirming the district court ruling that these travel agents were not within the wording of the class definition, this Court essentially concluded that travel agencies in Puerto Rico and the U.S. Virgin Islands were clearly the next best recipients of the funds, because they had exactly the same claims as class members. *Airline Ticket Comm'n II,* 307 F.3d at 683. This correctly decided but factually unusual case hardly puts this Court "in the forefront of discouraging abusive unfettered *cy pres,"* as suggested in the appeal brief at 17.

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

It is generally agreed that organizations with objectives directly related to the underlying 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 the 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. 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 781, 784 (7th Cir. 2004).

In 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 all liability and in which disposing of residual funds is typically only a small (albeit important) detail of settlement administration. Defendants settle because they want finality, but without an adjudication of liability on their part (directly or by inference). While some court opinions speak loosely of residual funds as "penalties" or "recoveries" for violations of the law, settling defendants are not paying penalties and usually see themselves as making a pragmatic business decision that specifically avoids any admission that they violated the law. And while settling defendants are primarily interested in concluding the instant litigation, they do have some future interest in how residual funds are used. In the real world, the settling defendant in a case about telephone services pricing may be understandably not enthused about a *cy pres* award to an organization that campaigns against high telephone bills. Similarly, the parties to the carefully negotiated settlement agreement resolving the securities class action in this case certainly did not agree on a *cy pres* award to a law school program focusing on prosecuting securities fraud claims (the fallback proposal from appellant). See Appellant's Brief pp. 38-39.

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

Making *cy pres* awards to public interest and legal services organizations is a recognized solution to avoid the problems of awards to dubious recipients and awards that seem to "target" the settling defendants. 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.[7]

Such awards to public interest and legal aid 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.") (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 *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").

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

[7] *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 approved class action settlements with *cy pres* distribution components that improved access to justice for indigent litigants).

resembles, in either composition or purpose, the class members or their interests." ALI Principles § 3.07 cmt. b. 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 to adjudicate each injured party's claim separately or because it would be cost prohibitive for each injured party to file 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) (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").

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

In addition to federal and state 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 of residual funds in class action cases.[8] The state statutes and court rules 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 states specify appropriate *cy pres* recipients – charitable entities that promote access to legal aid for low-income individuals. Finally, most of

[8] In this circuit, South Dakota requires at least 50% of residual funds be distributed to the Commission on Equal Access to Our Courts. S.D. Codified Laws § 16-2-57. *See also* Cal. Code Civ. Proc. § 384 (permitting payment of residual class action funds to nonprofit organizations in California that provide civil legal services to low-income individuals); Haw. R. Civ. P. Rule 23(f) (granting a court discretion to approve distribution of residual class action funds, specifically to nonprofit organizations in Hawaii that provide legal assistance to indigent individuals); 735 ILCS 5/2-807 (2008) (requiring distribution of at least 50% 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 25% 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); Mass. R. Civ. P. 23(e) (permitting distribution of residual class action funds to nonprofit organizations in Massachusetts 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. C.P. 1-023(G)(2) (permitting payment of residual class action funds to nonprofit organizations in New Mexico that provide civil legal services to low income individuals); N.C. Gen. Stat. § 1-267.10 (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. Ch. 1700 (directing distribution of at least 50% 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); Tenn. Code Ann. § 16-3-821 (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. CR 23(f) (requiring distribution of at least 25% 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).

these state statutes and rules mandate a minimum baseline distribution to the pre-approved category of legal aid recipients, usually either 25 or 50 percent of the unclaimed class action award. Because such laws establish a 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 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 statutes and court rules recognize the connection between access to justice through legal aid and through class action procedures.[9]

4. *Cy Pres* Awards 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 aid and public interest 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 aid organizations have

[9] 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* note 7 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. In Missouri, for example, the provisions of Supreme Court Rule of Professional Conduct 4-1.155 recognize the purpose of the IOTLA program: "providing a source of funds to support civil legal services to the poor, improving the administration of justice, and promoting other programs for the benefit of the public … ." Mo. S. Ct. R. 4-1.155 comt. 3.

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) (discussing how *cy pres* awards made to local legal aid organizations will promote access to the courts, in part by funding and coordinating a pro bono panel utilizing local attorneys); 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*, 33 San Francisco Att'y 26, 27-28 (2007) (lauding the assistance that Volunteer Legal Services has provided to low-income residents); *Cy Pres Nets $162,000 for Justice Foundation*, 30-May Mont. Law. 24, 24 (2005) (noting that a significant *cy pres* distribution to the Montana Justice Foundation will help fund legal aid for indigent individuals).

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

In multi-state or national class actions, 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. In this case, the district court did address these issues and explained the reasons for approving a *cy pres* award to a local organization.

As a general matter, it is important to recognize that even a national class action is certified, administered and resolved 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 home office of the defendant. Major class actions (including this case) are typically 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 cases. *See 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)(approving grant from unclaimed class settlement to legal aid entity); See also *In re Motorsports Merchandise Antitrust Litigation*, 160 F. Supp. 2d 1392, 1394 (N.D. Ga. 2001).[10]

It is a reasonable approach to this issue to provide that some *cy pres* distribution in a multi-state or national class action be awarded to organizations in the local jurisdiction. Many counsel and courts have followed this approach. A recent example in a national class action is *In re Motorola Securities Litigation,* a MDL case with a

[10] This Court rejected *cy pres* awards only to local institutions in Minnesota in a national class action in *Airline Ticket Comm'n I*, 268 F.3d at 626, where there was a clearly identified alternative recipient with nearly identical interests as the class members, and the district court failed to find a particular connection between the case and Minnesota. By contrast, here there is no clear alternative recipient, and the district court in this case considered this issue directly and found such links to the forum.

significant *cy pres* award to local legal services organizations. *In re Motorola Securities Litigation*, No. 03 C 287, slip op. at 2 (N.D. Ill., March 5, 2013) (copy included with brief pursuant to FRAP 32.1 and 8th Cir. Rule 32.1A).

This approach is firmly supported by the state statutes and court rules requiring that a pre-set percentage (typically up to 50%) 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. See discussion *infra* Part II D. One result of those statutes is that the many national class actions in the Circuit Court of Cook County (Chicago) and the Los Angeles Superior Court are administered in a regime in which a significant percentage of *cy pres* awards go to local legal services agencies where the case is litigated and settled.

Finally, we note that the wide dispersion of federal court class actions which are filed around the country – and those assigned to courts throughout the country by the Judicial Panel on Multi-District Litigation – results in a wide dispersion of class actions settlements in which *cy pres* awards to local organization will "even out" over time. It would be an unnecessary burden on busy district court judges if they were required to wrap up class action settlements by adhering to complex tests for how to allocate residual funds across the country in every class action.

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

In an unfortunate litigation tactic, objectors to class action *cy pres* awards commonly suggest that some untoward considerations have led to the *cy pres* award. Appellant's counsel has followed that playbook in this appeal. But rather than accept blanket assertions of bias or favoritism, courts reviewing *cy pres* awards should look carefully at whether there is any substance to allegations so freely made. In that review, there are recognized rules and procedures in place to deal with suggestions of impropriety in this aspect of class action settlement administration.

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, and subsequently the attorneys' fees, without increasing the direct benefit to the class. *In re Baby Prods. Antitrust Litig.*, 708 F.3d 163, 173 (3d Cir. 2013). 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." *In re Baby Prods. Antitrust Litig.,* 708 F.3d at 173.

There is also a legitimate concern that the prospect of *cy pres* distributions can improperly motivate parties to a lawsuit 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 21, 38 (1st Cir. 2012); *Nachshin*, 663 F.3d at 1039. To deal with this concern, courts should take a careful look at *cy pres* beneficiaries and evaluate whether any of the parties 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 or challenging for the court to undertake and should address this concern about abuse of the doctrine.

Finally, opponents 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. Initially, it is preferable that the parties or counsel (rather than the court) propose the charities to receive a *cy pres* distribution, and that the settlement agreement provide for *cy pres* awards (which was done in this case). Where the parties or counsel fail to propose the beneficiaries and the judge selects the charities, so long as the beneficiaries fall within the criteria discussed above, concerns over impropriety abate.

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." § 3.07 cmt. b

(emphasis added). Only if necessary, the statutes governing judicial recusal can be applied.

These are practical tests that are far better than following appellant's suggestions of "improper" contacts leading to demands for additional discovery about letters submitted in support of requests for *cy pres* awards in this case.[13] After all, the *cy pres* device is useful to bring a final conclusion to long-running class actions; rhetorical insinuations of misconduct made in objections to *cy pres* awards should not be allowed to prolong closed cases.

CONCLUSION

Class action litigation is an important vehicle for resolving a wide range of disputes between large numbers of individual plaintiffs and single defendants. *Cy pres* awards of undistributed settlement proceeds are an important part of the class action settlement process. Distributing those funds to appropriate recipients is generally recognized as preferable to returning undistributed funds to the settling defendants or escheat of those funds to the state.

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[13] The suggestions of improper *ex parte* communications and argument about a supposed "ethical morass" at pgs. 23-24 in the appeal brief filed by Mr. Frank and his Center for Class Action Fairness are low roads that appellant's counsel has taken before. In *Nachshin v. AOL. LLC,* Mr. Frank and his organization 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 tactic, 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." *Nachshin*, 663 F.3d at 1041. This Court should take the same approach.

While appellate courts should carefully scrutinize such distributions, they should not interfere needlessly with the judgment and discretion of the trial court, particularly where that court recognizes and strives to apply well-recognized criteria in formulating its *cy pres* plan: (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* recipients should reasonably reflect the interests of the class (but they are not members of the class and need not mirror the class precisely or always directly); (4) *cy pres* distributions should recognize both the geographic make-up of the class and connections of the case to the forum; (5) conflicts of interest and the appearance of impropriety should be avoided by applying recognized rules; (6) and public interest and legal services organizations should be considered as appropriate *cy pres* recipients.

We urge this Court to endorse these simple rules to minimize controversies about an effective and important mechanism for class action administration.

Dated:

Respectfully submitted,

Wilber H. Boies, P.C.
Latonia Haney Keith
Timothy M. Kennedy
McDermott Will & Emery LLP
227 West Monroe Street
Chicago, IL 60606
(312) 372-2000

Eric J. Magnuson
Robins, Kaplan, Miller & Ciresi L.L.P.
800 LaSalle Avenue
Minneapolis, MN 55402
(612) 349-8548

CERTIFICATE OF COMPLIANCE

This petition complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) and 8th Cir. R. 28A(c) because the petition contains 5,123 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.

This brief complies with 8th Cir. R. 28(A)(h) because the PDF file has been scanned for viruses by McAfee Virus Scan and is said to be virus-free by that program.

Dated: October 11, 2013

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 Eighth Circuit by using the appellate CM/ECF system on October 11, 2013.

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

ADDENDUM

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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.

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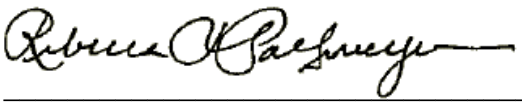

REBECCA R. PALLMEYER
United States District Judge

Dated: March 5, 2013