

No. 17-01480

**IN THE
UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT**

In re: Google, Inc. Cookie Placement Consumer Privacy Litigation

On Appeal from the United States District Court
for the District of Delaware

**MOTION FOR LEAVE TO FILE BRIEF OF AMICI CURIAE
NATIONAL LEGAL AID AND DEFENDER ASSOCIATION; THE
ASSOCIATION OF PRO BONO COUNSEL; PHILADELPHIA BAR
FOUNDATION; COMMUNITY LEGAL SERVICES; PENNSYLVANIA
LEGAL AID NETWORK, INC.; LEGAL SERVICES OF NEW JERSEY;
AND COMMUNITY LEGAL AID SOCIETY, INC.**

NOT IN SUPPORT OF EITHER PARTY

M. Duncan Grant
Robert E. Fay
Joseph A. Sullivan
Pepper Hamilton LLP
3000 Two Logan Square
Philadelphia PA 19103
215.981.4000
Attorneys for Amici Curiae

National Legal Aid and Defender Association (NLADA), the Association of Pro Bono Counsel (APBCo), the Philadelphia Bar Foundation (PBF), Community Legal Services (CLS), the Pennsylvania Legal Aid Network, Inc. (PLAN), Legal Services of New Jersey (LSNJ), and Community Legal Aid Society, Inc. (CLASI) respectfully move this Court, pursuant to Federal Rule of Appellate Procedure 29(a)(3), for leave to file the brief submitted herewith, as *amici curiae*.

As more fully described in the brief, *amici* are not-for-profit organizations or membership groups devoted to ensuring that low-income individuals throughout this Circuit and across the United States receive equal access to justice. *Cy pres* distributions from class action settlements and other legal actions support the work that *amici* perform on behalf of those who may otherwise lack the means to pursue justice on their own.

Amici do not take a position on whether the district court's decision to approve the class action settlement in this matter should be affirmed or reversed and remanded. Instead, they present the factors that district courts should properly examine in determining whether and to what extent to approve a *cy pres* award as part of a class action settlement, a practice this Court sanctioned in *In re Baby Products Antitrust Litigation*, 708 F.3d 163 (3d Cir. 2013).

In the attached brief, *amici* encourage the Court to consider a set of best practices for making *cy pres* awards in the context of a class action settlement. These include (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 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. *Amici* also seek to advise the Court of the reasons why legal services providers are appropriate recipients of *cy pres* distributions, particularly in class action settlements in which the settlement funds cannot be distributed economically to class members.

Amici, therefore, respectfully request that the Court grant them leave to file the accompanying brief.

Dated: July 5, 2017

Respectfully submitted,

/s/ M. Duncan Grant
M. Duncan Grant
Robert E. Fay
Joseph A. Sullivan
Pepper Hamilton LLP
3000 Two Logan Square
Philadelphia PA 19103
215.981.4000
Attorneys for Amici Curiae

No. 17-01480

**IN THE
UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT**

In re: Google, Inc. Cookie Placement Consumer Privacy Litigation

On Appeal from the United States District Court
for the District of Delaware

**BRIEF OF *AMICI CURIAE* NATIONAL LEGAL AID AND DEFENDER
ASSOCIATION; THE ASSOCIATION OF PRO BONO COUNSEL;
PHILADELPHIA BAR FOUNDATION; COMMUNITY LEGAL
SERVICES; PENNSYLVANIA LEGAL AID NETWORK, INC.; LEGAL
SERVICES OF NEW JERSEY; AND COMMUNITY LEGAL AID
SOCIETY, INC.**

NOT IN SUPPORT OF EITHER PARTY

M. Duncan Grant
Robert E. Fay
Joseph A. Sullivan
Pepper Hamilton LLP
3000 Two Logan Square
Philadelphia PA 19103
215.981.4000
Attorneys for Amici Curiae

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rules 26.1 and 29(a)(4) of the Federal Rules of Appellate Procedure, *amici curiae* state as follows:

- The National Legal Aid and Defender Association is a Section 501(c)(3) non-profit corporation with more than 700 program members who provide access to justice for low-income individuals across the country;
- Association of Pro Bono Counsel is a membership organization that currently has 211 partners, counsel, and practice group managers who run *pro bono* practices, primarily on a full-time basis, in 107 of the country's largest law firms;
- Philadelphia Bar Foundation is a Section 501(c)(3) non-profit corporation that grants funds to public interest agencies that improve access to justice in the Philadelphia area;
- Community Legal Services is a Section 501(c)(3) non-profit corporation that provides free legal services to low-income Philadelphians;
- Pennsylvania Legal Aid Network, Inc. is a Section 501(c)(3) non-profit corporation that provides leadership, funding, and support to improve the availability and quality of civil legal aid and direct legal

services for low income people and victims of domestic violence in Pennsylvania, through a consortium of independent legal aid organizations.

- Legal Services of New Jersey is a Section 501(c)(3) non-profit corporation that operates statewide in New Jersey, coordinating the efforts of five regional legal services providers, and seeking to secure equal substantive and procedural justice for all economically disadvantaged people.
- Community Legal Aid Society, Inc., is a Delaware-based Section 501(c)(3) non-profit corporation operating in each of Delaware's three counties and committed to providing equal justice to individuals who have low incomes or disabilities, or who are age 60 or over.

No publicly held corporation owns 10% or more of the stock of any of the *amici*.

DATED: July 5, 2017

By: /s/M. Duncan Grant
M. Duncan Grant

TABLE OF CONTENTS

CORPORATE DISCLOSURE STATEMENT i

TABLE OF CONTENTS..... iii

TABLE OF AUTHORITIES v

INTEREST OF *AMICI CURIAE* 1

SUMMARY OF ARGUMENT 5

ARGUMENT 6

I. *CY PRES* AWARDS ARE AN ESTABLISHED AND APPROPRIATE DEVICE IN CLASS ACTION SETTLEMENT ADMINISTRATION..... 6

II. BEST PRACTICES FOR THE APPROPRIATE USE OF THE *CY PRES* DOCTRINE IN CLASS ACTIONS..... 10

A. Compensation of Class Members Should Come First 10

B. *Cy Pres* Awards Are Appropriate Where Cash Distributions to Class Members Are Not Feasible..... 12

C. The Interests of *Cy Pres* Award Recipients Should Reasonably Approximate the Interests of the Class 14

D. *Cy Pres* Distributions Should Recognize Both the Forum and the Geographic Make-Up of the Class 16

E. Conflicts of Interest and the Appearance of Impropriety Should Be Avoided..... 17

F. Public Interest and Legal Services Organizations Are Appropriate *Cy Pres* Recipients..... 20

1. Overly Literal Application of the *Cy Pres* Doctrine In Class Actions Is Problematic 20

2. Federal Courts Approve *Cy Pres* Awards For Access to Justice..... 22

3. Multiple State Statutes and Court Rules Mandate *Cy Pres* Awards for Access to Justice 23

4. *Cy Pres* Awards Provide Access To Justice 25

CONCLUSION..... 26
CERTIFICATES OF COMPLIANCE..... 1
CERTIFICATE OF SERVICE 3

TABLE OF AUTHORITIES

	Page(s)
CASES	
<i>Hill v. Welch (In re FAO Inc. Sec. Litig.)</i> , 2015 U.S. Dist. LEXIS 144693 (E.D. Pa. Oct. 23, 2015).....	17
<i>Hughes v. Kore of Ind. Enter.</i> , 731 F.3d 672 (7th Cir. 2013).....	14
<i>In re Airline Ticket Comm’n Antitrust Litig.</i> , 268 F.3d 619 (8th Cir. 2001) ...	8, 9, 16
<i>In re Baby Products Antitrust Litig.</i> , 708 F.3d 163 (3d Cir. 2013)	passim
<i>In re Folding Carton Antitrust Litig.</i> , MDL No. 250, 1991 U.S. Dist. LEXIS 2553 (N.D. Ill. Mar. 5, 1991).....	23
<i>In re Linerboard Antitrust Litig.</i> , MDL No. 1261, 2008 U.S. Dist. LEXIS 77739 (E.D. Pa. Oct. 3, 2008).....	17
<i>In re Lupron Mktg. & Sales Practices Litig</i> , 677 F.3d 21 (1st Cir. 2012).....	9, 16, 18, 20
<i>In re Pharm. Indus. Average Wholesale Price Litig.</i> , 588 F.3d 24 (1st Cir. 2009)	11, 12
<i>In re Polyurethane Foam Antitrust Litig.</i> , 178 F. Supp. 3d 621 (N.D. Ohio 2016)	16
<i>Klier v. Elf Atochem N. Am., Inc.</i> , 658 F.3d 468 (5th Cir. 2011)	9, 11, 12
<i>Lane v. Facebook, Inc.</i> , 696 F.3d 811 (9th Cir. 2012).....	11, 14, 19
<i>Lessard v. City of Allen Park</i> , 470 F. Supp. 2d 781 (E.D. Mich. 2007).....	23
<i>Masters v. Wilhelmina Model Agency, Inc.</i> , 473 F.3d 423 (2d Cir. 2007).....	9
<i>Mirfasihi v. Fleet Mortg. Corp.</i> , 356 F.3d 781 (7th Cir. 2004)	12, 21
<i>Nachshin v. AOL, LLC</i> , 663 F.3d 1034 (9th Cir. 2011).....	9, 13, 14, 19, 20
<i>Perkins v. LinkedIn Corp.</i> , 2016 U.S. Dist. LEXIS 18649 (N.D. Cal. Feb. 16, 2016)	19

<i>United States ex rel. Houck v. Voiding Carton Admin. Comm.</i> , 881 F.2d 494 (7th Cir. 1989).....	9
<i>Vasco v. Power Home Remodeling Grp., LLC</i> , 2016 U.S. Dist. LEXIS 141044 (E.D. Pa. Oct. 12, 2016).....	17
<i>Wilson v. Sw. Airlines, Inc.</i> , 880 F.2d 807, 812-13 (5th Cir. 1989)	12
FEDERAL RULES OF APPELLATE PROCEDURE	
Rule 29	4
STATE STATUTES & COURT RULES	
Cal. Code Civ. Proc. § 384	24
Haw. R. Civ. P. Rule 23(f).....	24
735 ILCS 5/2-807 (2008)	24
Ind. R. Trial P. 23(F)(2).....	24
Mass. R Civ. P. 23(e)	25
N.C. Gen. Stat. § 1-267.10.....	25
Pa. R. Civ. P. 1716.....	24
S.D. Codified Laws § 16-2-57	25
Tenn. Code Ann. § 16-3-821	25
OTHER AUTHORITIES	
3 Alba Conte & Herbert B. Newberg, <i>NEWBERG ON CLASS ACTIONS</i> § 10:17 (4th ed. 2012).....	9
American Law Institute’s <i>Principles of Law of Aggregate Litigation</i> § 3.07.....	passim
Bob Glaves & Meredith McBurney, <i>Cy Pres Awards, Legal Aid and Access to Justice: Key Issues In 2013 and Beyond</i> , 27 <i>MGMT. INFO. EXCH. J.</i> , 24 (2013).....	24

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. BAR J. 68, 69 (2001)27

Calvin C. Fayard, Jr. & Charles S. McCowan, Jr., *The Cy Pres Doctrine: “A Settling Concept,”* 58 La. B.J. 248 (2011).....26

Thomas A. Doyle, *Residual Funds in Class Action Settlements: Using “Cy Pres” Awards to Promote Access to Justice*, THE FEDERAL LAWYER, July 2010, 26.....26

Daniel Blynn, *Cy Pres Distributions: Ethics & Reform*, 25 GEO. J. LEGAL ETHICS 435 (2012)26

Danny Van Horn & Daniel Clayton, *It Adds Up: Class Action Residual Funds Support Pro Bono Efforts*, 45 TENN. BAR J. 12 (2009)27

Delaware Bar Foundation, Information for Lawyers,
<http://www.delawarebarfoundation.org/information-for-lawyers>.....26

Wilber H. Boies & Latonia Haney Keith, *Class Action Settlement Residue and Cy Pres Awards: Emerging Problems and Practical Solutions*, VA. J. OF SOC. POL’Y & LAW 267 (2014)6

INTEREST OF *AMICI CURIAE*

Amici share a common interest in ensuring that *cy pres* distributions from class action litigation and other sources remain available to support the legal work that they or their member organizations conduct on behalf of low-income individuals both throughout the Circuit and across the United States. *Cy pres* residual awards in class action litigation provide a critical funding source for legal aid and access-to-justice organizations. *Amici* 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 low interest rates associated with the economic recession. Without sufficient supplemental funding from sources such as residual *cy pres* awards, legal services and public interest organizations will be at risk of not having the resources required to serve their clients adequately and of not being able to commit sufficient time to co-counseling with lawyers in law firm *pro bono* programs, all with the objective of helping to meet the need for access to justice by the underprivileged and disadvantaged in our country.

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's members include civil legal aid providers who are funded by a variety of sources, including *cy pres* distributions, to address the overwhelming need for access to justice among the nation's poor. 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.

Founded in 2006, the Association of Pro Bono Counsel (APBCo) is a membership organization that currently has 211 partners, counsel, and practice group managers who run *pro bono* practices in 107 of the country's largest law firms. The members of APBCo rely on the expertise of legal aid providers in representing low-income clients through their successful *pro bono* programs at their respective firms. APBCo members, whose firms provide millions of hours of *pro bono* legal services in the aggregate every year, often co-counsel with legal services and public interest organizations, and depend on legal aid organizations to identify clients in need, provide training and lend ongoing support.

The Philadelphia Bar Foundation (PBF) is the only foundation in Philadelphia that supports the city's legal services community. In the past five years, PBF has provided over \$3 million in grants to 35 nonprofit legal aid organizations in Philadelphia. PBF and the legal aid organizations it supports rely

on *cy pres* awards to promote equal access to justice for low-income Philadelphians.

Philadelphia-based Community Legal Services (CLS) is a nationally-recognized model for providing legal services to low-income individuals. CLS, which assists approximately 10,000 clients a year, relies in part on *cy pres* distributions to fund its national advocacy on employment, consumer rights, elder law, health care, mortgage, disability, public benefits, family law, and housing issues. Unlike many legal services organizations, CLS does not accept federal Legal Services Corporation funding and is therefore permitted to bring class action lawsuits on behalf of its underprivileged clients.

Pennsylvania Legal Aid Network, Inc. (PLAN) is a statewide consortium of independent regional and specialized legal aid programs that provide civil legal assistance to more than 70,000 Pennsylvanians per year. PLAN works to secure additional funding for its constituent members, including through *cy pres* distributions.

Legal Services of New Jersey (LSNJ) coordinates the legal services programs in the State of New Jersey, which consist of five regional legal services providers. Collectively, these legal services providers assist approximately 47,000 clients per year, and have assisted over 2.4 million people in the last 50 years in a wide range of substantive areas, including consumer protection, foreclosure

defense, domestic violence and family law issues, laborer and farmworker rights, taxpayer assistance, veterans' rights, and access to healthcare and government benefits.

Founded in 1946, Community Legal Aid Society, Inc. (CLASI) offers free civil legal service to low-income individuals across Delaware. CLASI represents Delawareans in matters relating to disability benefits, elder law, housing discrimination, domestic violence, access to medical care, and immigrant rights.

Amici respectfully submit to this Court this brief pursuant to Federal Rule of Appellate Procedure 29(a)(3).¹

¹ In accordance with Fed. R. App. P. 29(a)(4)(E), the undersigned counsel represent that this brief was authored entirely by counsel for the *amici*. No party, no counsel for a party, and no other person or entity contributed money to fund the preparation or submission of this brief. The brief has been drafted, and is being submitted, on a no-fee basis by counsel of record.

SUMMARY OF ARGUMENT

The role of any *amicus curiae* is to assist a court in conducting a thorough and even-handed analysis of the legal issues before it. This *amicus* submission does not take a position on whether the district court's decision to approve the class action settlement in this matter should be affirmed or reversed and remanded. Instead, it presents the factors that the *amici* believe that district courts should properly examine as best practices in determining whether and to what extent to approve a class action settlement that includes a *cy pres* award.

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 in determining whether to order *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 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, which itself is often provides access to justice for those who would otherwise not be able to effectively pursue their interests individually. Stated simply, legal services organizations are in many cases appropriate recipients of *cy pres* distributions, particularly in class action settlements in which the settlement funds cannot be distributed economically to class members.

ARGUMENT²

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

² The points presented in this *amicus* brief were derived in large part from Wilber H. Boies & Latonia Haney Keith, *Class Action Settlement Residue and Cy Pres Awards: Emerging Problems and Practical Solutions*, VA. J. OF SOC. POL'Y & LAW 267 (2014). Consistent with their interest in ensuring that federal courts apply these principles in making *cy pres* awards, the *amici* here have advanced the position set forth in this brief in similar form in other courts.

funds to remain after a distribution to class members. Residual funds are often a result of the inability to locate class members or of class members failing or declining to file claims or cash settlement checks. As this Court acknowledged recently, 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 Products 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. *See id.* at 172. In recent years, courts have consistently preferred the distribution of residual funds through *cy pres* awards over the other options. A court may sensibly reason that reversion to the defendant blunts the deterrent effect of the class action settlement. *See id.* While escheat to the state would overcome that concern, it would benefit the public in only the most attenuated and indirect way.³ *See id.* *Cy pres* awards, in contrast, allow courts to distribute residual funds

³ A further argument against escheat is that many states that would benefit from escheat have determined that a more appropriate use of residual settlement funds is distribution to *cy pres* recipients, and specifically, community legal services providers. *See infra* § II.F.3.

directly to groups or institutions whose interests and goals are aligned with the interests that the named class representatives pursued for the benefit of the class.

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. *See In re Airline Ticket Comm’n Antitrust Litig.*, 268 F.3d 619, 625 (8th Cir. 2001) (“*Airline Ticket Comm’n I*”). As the Court of Appeals for the Eighth Circuit explained:

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. 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. at 625 (internal citations and quotations omitted).

It is now well-established in this Circuit 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 to be used for a purpose related to the class injury.” *In re Baby Prods.*, 708 F.3d at 172. In explicitly sanctioning the use of *cy pres* awards in proper circumstances in *In re Baby Products*, the Court joined the Courts of Appeals for the First, Second, Fifth, Seventh, Eighth, and Ninth Circuits in concluding that *cy pres* awards may properly be included in class action settlements. *See 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 Atochem N. Am., Inc.*, 658 F.3d 468, 475 (5th Cir. 2011); *United States ex rel. Houck v. Voiding Carton Admin. Comm.*, 881 F.2d 494, 502 (7th Cir. 1989); *Airline Ticket Comm'n Antitrust Litig.*, 307 F.3d 679 (8th Cir. 2002) (“*Airline Ticket Comm'n IP*”); *Nachshin v. AOL, LLC*, 663 F.3d 1034, 1038 (9th Cir. 2011).

A source that this Court consulted in *In re Baby Products*, the American Law Institute’s Principles of Law of Aggregate Litigation (“ALI Principles”), provides respected and broadly followed guidance on the application of *cy pres* awards in class actions. *See* ALI Principles § 3.07 cmt. a; *see also In re Baby Prods.*, 708 F.3d at 171-72. 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 face complex and unique circumstances in particular cases. In the course of addressing these cases, courts such as this one, have developed what amounts to a set of best practices for applying the *cy pres* doctrine in the class action context. The purpose of this *amicus* brief is to provide the Court with an overview of those best practices and to suggest that the Court reaffirm and expand the guidance of *In re Baby Products* in order to assist district courts confronting class action settlements in which distributions to class members are not economically feasible. This brief also underlines the importance in such cases of *cy pres* distributions to legal services providers, which are uniquely positioned to serve the interests of absent class members.

A. **Compensation of Class Members Should Come First**

As this Court observed, when funds are left over after a first round distribution to class members (from un-cashed checks, for example), the ALI Principles prefer that residual funds 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); *see In re Baby Prods.*, 708 F.3d at 173.

When further distributions to class members are not feasible, a court has discretion to order a *cy pres* distribution. *See* ALI Principles 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 up to full compensation. *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 not feasible); *In re Pharm. Indus. Average Wholesale Price Litig.*, 588 F.3d 24, 35 (1st Cir. 2009) (endorsing the district court's insistence that the settlement pay class members statutorily authorized treble damages before making *cy pres* distributions); ALI Principles § 3.07 cmt a.⁴

⁴ 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); *In re Pharm. Indus. Average Wholesale Price Litig.*, 588 F.3d 24, 34-36 (1st Cir. 2009); *Wilson v. Sw. Airlines, Inc.*, 880 F.2d 807, 812-13 (5th Cir. 1989). This Court suggested in *In re Baby Products* that it would reach a similar result in an appropriate case. *See* 709 F.3d at 176.

Appellate courts have appropriately reversed district court orders granting *cy pres* awards that fail to require that feasible payments to class members be made first. *See, e.g., Mirfasihi v. Fleet Mortg. Corp.*, 356 F.3d 781, 784 (7th Cir. 2004) (rejecting a settlement because it failed to compensate individually one subset of class members). 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. *Klier*, 658 F.3d at 479. Indeed, this Court acknowledged the primacy of justly compensating class members in *In re Baby Products*, when it reversed the district court's order approving a class action settlement "because [the district court] did not have the factual basis necessary to determine whether the settlement was fair to the entire class." *In re Baby Products*, 709 F.3d at 175. Specifically, the Court prudently held that the district court had erred when it approved a class action settlement containing *cy pres* distributions notwithstanding that "it did not know the amount of compensation that will be distributed directly to the class." *Id.*

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

Commentators and case law recognize that the *cy pres* doctrine is appropriately applied in class actions in which defendants purportedly engaged in misconduct on a wide scale causing only *de minimis* damages to individual class

members, but significant damages in the aggregate. *See In re Baby Prods.* 709 F.3d at 173 (“[c]y pres distributions are most appropriate where further individual distributions are economically infeasible”); *see generally* ALI Principles § 3.07 cmt. a. (recognizing courts’ power 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 the Ninth Circuit considered in *Nachshin v. AOL, LLC*, which required 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 a *cy pres* award in that situation allowed the parties to settle, to the benefit of 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.⁵ *See also*

⁵ The Ninth Circuit rejected the *cy pres* recipients selected in *Nachshin* on the grounds that they served social interests unrelated to the purposes of the underlying statutes, did not advance the interests of the absent class members, and did not reflect the class’s geographic diversity. 663 F.3d at 1039-40. The Ninth Circuit did not suggest, however, that the court on remand should consider distribution of settlement funds to class members. *See id.* at 1041 (proposing escheat to the U.S. Treasury if suitable *cy pres* recipients could not be found).

Hughes v. Kore of Ind. Enter., 731 F.3d 672 (7th Cir. 2013) (voicing approval in dicta for *cy pres* awards when the statutorily-capped damages recoverable in a class action could not economically be distributed to a class); *Lane*, 696 F.3d at 817, 821 (reflecting objectors' concession that *cy pres* was appropriate because \$6.5 million residue could not be economically distributed to class of Facebook users).

The district court here confronted a similar situation. The agreed-upon settlement amount was \$5.5 million for a class of millions. If payments to class members were made, after subtracting attorneys' fees and postage, each recipient would receive pennies apiece or less. It is unrealistic to expect recipients would cash a check for such a pittance, and if they did, it would burden banks with the administrative expenses of accepting and posting millions of such checks. A *cy pres* award, in contrast, would be concentrated and impactful.

C. The Interests of *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 sum remaining after distributions cannot be disbursed cost-effectively or fairly, the question becomes how to determine which entities are appropriate *cy pres* recipients. 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). Courts should evaluate whether distributions to proposed *cy pres* recipients “reasonably approximate” the interest of the class members by considering a number of factors, including:

[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, 677 F.3d 21, 33 (1st Cir. 2012); see *In re Polyurethane Foam Antitrust Litig.*, 178 F. Supp. 3d 621, 623 (N.D. Ohio 2016) (agreeing with objections from Center for Class Action Fairness and relying on the factors in *In re Lupron* to select a local charity satisfying the majority of those factors).

For example, in a case that focused on travel agent commissions, the Eighth Circuit reversed a *cy pres* 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.” *Airline Ticket Comm’n I*, 268 F.3d at 626.

D. 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. 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 important reasons. Cases are frequently brought in a particular jurisdiction 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 possible jurisdictions to national class actions to choose the most appropriate location. In this context, *cy pres* awards to local entities in the settlement of national class actions cases have been approved by several courts, including district courts in this Circuit. *See Vasco v. Power Home Remodeling Grp., LLC*, 2016 U.S. Dist. LEXIS 141044, *28 (E.D. Pa. Oct. 12, 2016) (approving *cy pres* distributions to national headquarters of Habitat for Humanity and Legal Aid of Southeastern Pennsylvania); *Hill v. Welch (In re FAO Inc. Sec. Litig.)*, 2015 U.S. Dist. LEXIS 144693, *3 (E.D. Pa. Oct. 23, 2015) (approving *cy pres* distribution to Philadelphia-based Community Legal Services); *In re Linerboard Antitrust Litig.*, MDL No. 1261, 2008 U.S. Dist. LEXIS 77739 (E.D.

Pa. Oct. 3, 2008) (approving *cy pres* award to the Philadelphia Bar Foundation in a multidistrict antitrust lawsuit).

Finally, *amici* submit that the wide geographic 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.

E. 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 a particular *cy pres* distribution. 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.

This Court, for example, has recognized that a potential conflict of interest may exist between class counsel and their clients, because *cy pres* distributions

may increase a settlement fund, and thereby the attorneys' fees, without increasing the direct benefit to the class. *In re Baby Prods.*, 708 F.3d at 173. A straightforward solution exists to address this issue: Any district judge concerned that class counsel lacks incentive to vigorously pursue individualized compensation for absent class members can and should "subject the settlement [and the distribution process] to increased scrutiny." *Id.* at 173.

There is also a legitimate concern that the prospect of *cy pres* distributions can improperly motivate parties and their counsel to steer unclaimed awards to recipients that advance their own agendas. *See In re Lupron*, 677 F.3d at 38; *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 (or even the judge) would personally or directly benefit from the proposed *cy pres* distributions. Such an analysis is not unduly burdensome or challenging for the court to undertake, and it should address any concern about possible abuse of the *cy pres* doctrine. *See Lane*, 696 F.3d at 821 ("We find no substance in Objectors' claim that the presence of a Facebook employee on DTF's board of directors categorically precludes DTF from serving as the entity that will distribute *cy pres* funds."); *Nachshin*, 663 at 1042 (finding the district court did not abuse its discretion in denying recusal motion when the judge's husband sat on a board of a proposed *cy pres* beneficiary, because the

judge's husband would not "himself realize a significant benefit"); *Perkins v. LinkedIn Corp.*, 2016 U.S. Dist. LEXIS 18649, *40-41 (N.D. Cal. Feb. 16, 2016) (finding that the presence of a defendant's founder on the board of a *cy pres* recipient did not disqualify that recipient, because there was no suggestion of self-dealing).

Finally, opponents of *cy pres* awards fret 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 through counsel (rather than the court) propose the charities that would receive a *cy pres* distribution, and that the settlement agreement expressly provide for *cy pres* awards (which was done in this case). Only if the parties or counsel fail to propose beneficiaries should a judge select them, and 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, the ALI Principles remind us that "[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). If necessary in an extreme and unusual case, the statutes governing judicial recusal could be brought to bear.

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

It is generally agreed that organizations with objectives directly related to the underlying issues in the class action are appropriate *cy pres* recipients. *See In re Lupron*, 677 F.3d at 33; *Nachshin*, 663 F.3d 1039-40. But narrowly limiting *cy pres* recipients based on the precise claims in the class action has its own problems, both theoretically and practically, and ignores the established, better practice of *cy pres* awards to legal services organizations that—like the class action mechanism itself in many instances—provide broader access to justice for people generally unable to assert their interests individually or without help.

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 a convenient but imperfect analogy. In a class action settlement, there is no underlying trust which 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.” 356 F.3d 781, 784 (7th Cir. 2004).

In practice, class action litigants are at some point in the litigation process seeking to resolve a complex dispute through a settlement in which the defendant denies all liability, and disposing of residual funds is typically only a small (albeit important) detail of settlement administration. While some judicial 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 a lawsuit, they do have a continuing interest in how residual funds are used. Thus, as a practical matter, a settling defendant in a case challenging the defendant’s business practices would understandably not be enthused about a *cy pres* award to an organization that campaigns against those same business practices. It can therefore matter to defendants, not only to plaintiffs, which organizations receive *cy pres* distributions.

2. Federal Courts 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 low-income, underserved and disadvantaged people as appropriate beneficiaries of *cy pres* distributions from class action settlements or judgments. 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.

Such awards to public interest and legal aid organizations are based on one of the common underlying premises of many 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 court 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, among other things,

would enhance 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. Many class actions attempt to provide access to justice for persons who on their own would not realistically be able to seek judicial 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 an individual claim:

[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).

3. Multiple 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 an appropriate use of residual funds in class action

cases.⁶ These statutes and court rules begin with the premise that *cy pres* distributions of residual funds resulting from a class action settlement or judgment

⁶ Within this Circuit, a Pennsylvania Rule of Civil Procedure requires at least 50% of residual class action funds to be distributed to the Pennsylvania IOLTA Board to support activities and programs which promote the delivery of civil legal assistance. The Rule permits distribution of the balance to an entity that promotes either the “substantive or procedural interests” of the class members. *See* Pa. R. Civ. P. 1716. Other states also have adopted statutes allowing or requiring residual funds to be distributed to organizations that provide access to justice for low-income individuals. *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) (permitting 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); S.D. Codified Laws § 16-2-57 (requiring at least 50% of residual funds be distributed to the Commission on Equal Access to Our Courts); 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).

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, many of these statutes and rules mandate a minimum baseline distribution to the pre-approved category of legal aid recipients, usually either 25% or 50% of the unclaimed class action award. By establishing a presumption that residual funds in class action settlements or judgments will be distributed to public interest or legal aid organizations, these laws and rules distinguish such organizations from other charitable causes whose nexus to the interests of the class members could legitimately be questioned. In other words, the statutes and court rules recognize the connection between access to justice, in appropriate cases, through legal aid and through class action procedures.⁷

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

⁷ 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.” 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, 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 Delaware, for example, the IOLTA program has allowed the IOLTA Board to give approximately \$23 million to legal services providers since the IOLTA program’s inception. See Delaware Bar Foundation, Information for Lawyers, <http://www.delawarebarfoundation.org/information-for-lawyers>.

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 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. BAR 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); 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. BAR 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).

CONCLUSION

Class action litigation has the potential to resolve 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 residual funds to recipients who can appropriately serve as proxies for class members' interests is generally recognized as preferable to returning undistributed funds to the settling defendants or escheating those funds to the state. That is particularly true in cases in which the corpus of the settlement is simply too small to be economically disseminated to millions of members of a settlement class.

While appellate courts should carefully scrutinize *cy pres* distributions, they should give deference to the judgment and discretion of trial courts, particularly when the trial court has recognized and striven to apply judicially endorsed criteria in formulating a *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; and (6) public interest and legal services organizations should be considered as appropriate *cy pres* recipients.

The *amici* urge the Court to endorse these principles to minimize controversies and to help foster an effective and important mechanism for class action administration.

Respectfully submitted,

/s/ M. Duncan Grant

M. Duncan Grant

Robert E. Fay

Joseph A. Sullivan

Pepper Hamilton LLP

3000 Two Logan Square

Philadelphia PA 19103

215.981.4000

Attorneys for Amici Curiae

Dated: July 5, 2017

CERTIFICATES OF COMPLIANCE

This brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) because the brief contains 5884 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f) and 3d Cir. L.A.R. 29.1(b) (with reference made to Fed. R. App. P. 29(c)(4) as it existed on August 1, 2011, the date of the most recent 3d Cir. L.A.R.).

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 Times New Roman typeface.

This brief complies with 3d Cir. L.A.R. 31.1(c) because the PDF file has been scanned for viruses by Norton Antivirus and is said to be virus-free by that program.

I further certify that, in accordance with 3d Cir. L.A.R. 31.1(c), the electronic version of this brief is identical to the text of the paper copies that will be filed with the Clerk's office.

I further certify that, in accordance with 3d Cir. L.A.R. 28.3(d), two attorneys whose names appear on this brief are members of the Bar of this Court. Specifically, M. Duncan Grant and Joseph A. Sullivan are members of the Bar of this Court.

Dated: July 5, 2017

/s/ M. Duncan Grant
M. Duncan Grant

CERTIFICATE OF SERVICE

I hereby certify that, in accordance with 3d Cir. L.A.R. 31.1(b), I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Third Circuit by using the appellate CM/ECF system on July 5, 2017.

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

By: /s/ M. Duncan Grant
M. Duncan Grant