

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND**
Southern Division

PAUL MOORE,

*

Plaintiff,

*

v.

*

**REALPAGE UTILITY
MANAGEMENT, INC.,**

*

Case No.: 8:20-CV-00927-PX

*

Hon. Paula Xinis

Defendant.

*

* * * * *

**MEMORANDUM IN SUPPORT
OF MOTION TO APPROVE *CY PRES* AWARD**

Named Plaintiff Paul Moore (“Representative Plaintiff”) submits this Memorandum of Law in Support of his Motion to Approve *Cy Pres* Award (the “Motion”).

I. INTRODUCTION

The Settlement Agreement in this case provides that if the Common Settlement Fund is not exhausted after distribution to Settlement Class members (for example, if settlement checks mailed to some Settlement Class members are not negotiated), then those remaining funds will first reimburse Defendant RealPage Utility Management, Inc. (“RUM”) for any documented settlement administration costs, and any remaining amount will be donated, with the approval of the Court, to a *cy pres* recipient. *See* ECF No. 73-1, Settlement Agreement ¶ 21(g). Given the nature of the settlement here, and the general purpose of the equitable *cy pres* remedy – *i.e.*, to benefit members of a class and the public indirectly when provision of a direct benefit is impossible or difficult to attain – the University of Maryland Francis King Carey School of Law (the “UMD Law School”) is an appropriate *cy pres* recipient.

II. BACKGROUND OF THIS CASE, AND THE PARTIES' *CY PRES* AGREEMENT

This case involves the Settlement of a consumer class action lawsuit. Representative Plaintiff alleged in the Complaint that RUM improperly assessed fees to him and other Settlement Class members to pay RUM for sending Plaintiff and Class members allocated utility bills.

The parties reached a class-wide settlement of Representative Plaintiff's claims, benefitting Settlement Class of thousands of individuals. As part of the monetary settlement, the Parties agreed that a Common Settlement Fund would be established for the benefit of the Settlement Class, and also addressed the issue of the allocation of funds from any residue remaining in the Common Settlement Fund after distribution to Class members, including checks that are not negotiated or are returned and remain undeliverable after a date set by the Court. *See* Settlement Agreement ¶ 21. Representative Plaintiff proposed that any such funds should be used to create a *cy pres* award to be paid to a non-profit organization, and the agreement to a *cy pres* fund and recipient is in paragraph 21(g) of the Settlement Agreement. *See id.* The appropriate recipient of the *cy pres* funds in this case is the UMD Law School.

A. The UMD Law School.

The UMD Law School was established in 1816.¹ It is the third-oldest law school in the nation. Beginning in the late 1970s Maryland became a pioneer in clinical law education and currently boasts one of the top clinical law programs in the United States. The clinical law program benefits under-represented Maryland consumers by providing them representation, at no cost to them, by law students who are supervised by a barred Maryland attorney. Recently,

¹ Class Counsel advise the Court that Lead Counsel for the Class, Benjamin H. Carney, is a graduate of the UMD Law School, and Class Counsel Richard S. Gordon is also a UMD Law School graduate and member of the UMD Law School's Board of Visitors.

the UMD Law School established a Professorship in Consumer Law that will teach consumer law as a substantive discipline to law students. It is expected that any *cy pres* funds distributed to the UMD Law School resulting from the settlement in this case will be used towards this initiative.

III. BENEFIT TO THE PLAINTIFF CLASS

Class Counsel have devoted substantial time and effort to considering the most appropriate *cy pres* award for the benefit of the Class, drawing on their experience in overseeing similar *cy pres* awards. The UMD Law School provides services and resources that benefit under-represented Maryland consumers and will provide a wide range of significant and long-term benefits to the Class and other citizens throughout Maryland. Additionally, the UMD Law School educates attorneys to ensure its graduates are well prepared to represent consumers like the Class members in the case. As the recipient of these proposed funds, the UMD Law School will address issues related to consumer protection, poverty, education, community services, and the representation of indigent litigants in civil cases.

The purpose of the equitable *cy pres* remedy is to benefit members of a class, and the public, indirectly when provision of a direct benefit is impossible or difficult to attain. When the proceeds of a damage award, settlement fund, or penalty cannot be returned directly to individual class members, it is appropriate for the court to distribute the funds to interested third parties who will advance and promote the interests of the class. *See e.g., Curry v. Money One Fed. Credit Union*, No. CV DKC 19-3467, 2021 WL 5839432, at *3 (D. Md. Dec. 9, 2021) (“Courts commonly approve *cy pres* distributions for unclaimed funds, such as the residue of a class settlement fund....[t]he distribution is designed to put the funds ‘to their next best compensation use, e.g., for the aggregate, indirect, prospective benefit of the class.’”) (quoting *Klier v. Elf Atochem*, 658 F.3d 468, 474 (5th Cir. 2011), citing *McDaniels v. Westlake Servs., LLC*, No. 11-cv-1837-ELH,

2014 WL 556288, at *11 (D. Md. Feb. 7, 2014); *see also Democratic Cent. Comm. v. Washington Metro. Area Transit Comm'n*, 84 F.3d 451 (D.C. Cir. 1996) (approving \$4.8 million *cy pres* fund); *In re: Motorsports Merchandise Antitrust Litigation*, 160 F. Supp. 2d 1392 (D. Ga. 2001) (approving \$2.4 million *cy pres* distribution in NASCAR price fixing case to 10 charities, including the American Red Cross and the Atlanta Legal Aid Society).

“The term ‘*cy pres*’ is derived from the Norman French expression *cy pres comme possible*, which means ‘as near as possible.’” *Democratic Cent. Comm.*, 84 F.3d at 455 n.1. The *cy pres* doctrine arose in the law of equity and originated as a rule of construction to save a testamentary charitable gift that would otherwise fail, allowing “the next best use of the funds to satisfy the testator’s intent as near as possible.” *Id.* 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 v. Georgia-Pac. Corp.*, 119 F.3d 703, 706 (8th Cir. 1997). “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, *Newberg on Class Actions*, §§ 10.17 at 10-41 (3rd ed. 1992)). *See also* Shepard, *Damage Distribution in Class Actions: Cy Pres Remedy*, 39 U. Chi. L. Rev. 448, 452 (1972).

Fluid recovery, another name for a species of *cy pres* remedy, provides a means of distributing sums which the defendant, whose wrongs produced the fund in the first place, should not be permitted to retain. Because in any sizeable class some class members will not be able to be located, other class members will die, and others will, for one reason or another, not cash their checks, there is almost always an undistributed residue.

Courts, especially in Maryland, have awarded *cy pres* remedies with some frequency. As Judge Motz observed in *In re Microsoft Corp. Antitrust Litigation*, 185 F. Supp. 2d 519 (D. Md. 2002), “the *cy pres* approach is most frequently used for the purpose of distributing the residue of a class

settlement fund.” *Id.* at 523. *See also Superior Beverage Co. v. Owens-Ill., Inc.*, 827 F. Supp. 477 (N.D. Ill. 1993) (discussing the scope of the *cy pres* doctrine, and citing other cases); *Decohen v. Abbasi, LLC*, 299 F.R.D. 469, 485 (D. Md. 2014)(approving a *cy pres* award of any uncashed checks from a class action settlement fund to be evenly divided between the Maryland Consumer Rights Coalition, Civil Justice, Inc., and the Just the Beginning Foundation).

In *State v. Levi Strauss & Co.*, 715 P.2d 564 (Cal. 1986), the California Supreme Court recognized the propriety of a *cy pres* fund recovery and distribution, including the creation of a consumer trust fund. Articulating the general principle that wrongdoing must be deterred and that deterrence requires disgorgement of ill-gotten gains, the court approved *cy pres* distribution of funds that could not be distributed to the consumers who had been overcharged.

Cy pres awards have been approved in class action settlements across the United States. *See In re Polyurethane Foam Antitrust Litig.*, 178 F. Supp. 3d 621 (N.D. Ohio 2016) (Court approved *cy pres* award of unclaimed class action settlement funds to Toledo, Ohio-based charitable organization that provided emergency family housing); *Spann v. J.C. Penney Corp.*, 211 F. Supp. 3d 1244 (C.D. Cal. 2016), *appeal dismissed sub nom. Spann v. J.C. Penney Corp., Inc.*, No. 16-56474, 2016 WL 9778633 (9th Cir. Nov. 7, 2016)(Court approved *cy pres* award of any remaining uncashed checks from a \$50,000,000⁰⁰ class action settlement to the National Consumer Law Center); *Mateo-Evangelio v. Triple J Produce, Inc.*, No. 7:14-CV-302-FL, 2017 WL 3669527, at *3 (E.D.N.C. Aug. 24, 2017)(Court approved *cy pres* award of all unclaimed settlement funds and denied Defendants’ motion for reversion); *Fraleigh v. Batman*, 638 F. App’x 594 (9th Cir.), *cert. denied sub nom. K.D. v. Facebook, Inc.*, 137 S. Ct. 68, 196 L. Ed. 2d 34 (2016)(Court approved *cy pres* award of all unclaimed class action settlement funds to recipients including organizations that focused on consumer protection, research, education regarding online privacy, safe use of social media, and protection of minors); *Caligiuri v. Symantec Corp.*, 855 F.3d 860 (8th Cir. 2017)(Court approved *cy*

pres award of all unclaimed class action settlement funds to Electronic Frontier Foundation); *Adams v. Craddock*, No. 5:13-CV-05074-PKH, 2017 WL 3770683, at *4 (W.D. Ark. Aug. 15, 2017), *report and recommendation adopted*, No. 5:13-CV-05074, 2017 WL 3749837 (W.D. Ark. Aug. 30, 2017)(Court approved *cy pres* award of unclaimed settlement funds to Benton County Public Defender’s Office).

Courts often approve *cy pres* awards of significant value and there is even some authority for applying the *cy pres* remedy to the entire damage award when each class member’s share is too small to warrant distribution. *See Gammon v. G.C. Services, Ltd. Partnership*, 162 F.R.D. 313 (N.D. Ill. 1995), *limited by Mace v. VanRu Credit Corp.*, 109 F.3d 338 (7th Cir.1997). *See also In re Microsoft Corp. Antitrust Litigation*, 185 F. Supp. 2d at 523 (noting that the *cy pres* remedy “has also been utilized as a means for distributing the entirety of a class fund where the proceeds cannot be economically distributed to the Class members”).

As discussed in *Newberg on Class Actions*, Fourth Ed.:

The *cy pres* approach, then, puts the unclaimed fund to its next best compensation use, e.g., for the aggregate, indirect, prospective benefit of the class (*aggregate cy pres distribution*). In such an event, the funds are usually paid to a third party or agency to use for designated purposes.

3 H. Newberg & A Conte, *Newberg on Class Actions* § 10.17 (4th ed.) (footnote omitted). As suggested by *Newberg*, the principles of the *cy pres* doctrine strongly point to the UMD Law School as the “next best” and appropriate recipient.

Indeed, the UMD Law School, in particular, has previously been approved as a *cy pres* recipient in connection with other consumer class action settlements. For example, in *Edge v. Stillman Law Office, LLC*, 8:21-cv-02813-TDC (D.Md. June 2, 2023) (ECF No. 87), Judge Chuang of this Court approved the UMD Law School as a *cy pres* recipient in another consumer class

action lawsuit challenging debt collection activity. This Court (Grimm, J.) also approved the UMD Law School as the recipient of *cy pres* funds in *Thomas, et al. v. Cameron Mericle, P.A., et al.*, Civil Action No. 8:18-cv-03645-PWG, a consumer class action case challenging allegedly improper use of confessed judgment notes. In *Yang, et al. v. G&C Gulf Inc., d/b/a G&G Towing, et al.*, Case No. 403885V (Cir. Ct. Montgomery Co.) (approved January 14, 2018) (Rubin, J.) the Circuit Court for Montgomery County approved the UMD Law School to receive one of four (4) *cy pres* awards. The Circuit Court for Baltimore City (Brown, J.) approved the UMD Law School as *cy pres* recipient in *Hale v. Mariner Finance, LLC*, 24-C-18-000053, a class action case challenging consumer lending practices. The Circuit Court for Baltimore County (Howe, J.) approved the UMD Law School as *cy pres* recipient in *Brown, et al. v. Deer Automotive t/a Liberty Ford*, Case No. 03-C-15-002637 OC (Cir. Ct. Baltimore Co.) (approved August 1, 2017), yet another consumer class action challenging vehicle sales practices

And in *Meredith v. Mid-Atlantic Coca-Cola Bottling Co.*, Nos. 89-00302 and 89-00525, 13 Class Action Rep. 498 (E.D. Va. May 1 and June 18, 1990) a *cy pres* remedy was used to set up an Environmental Symposium Fund at the Law School. *See also Marvin Leaf v. Toyota Motor Distributors, Inc. and Toyota Motor Sales, U.S.A., Inc.*, Case No. BC103065 (N.D. Cal., settled December 1999) (Federal Court approving \$500,000 *cy pres* to fund student loan repayment program for graduates of the University of Maryland School of Law who go to work for public interest law firms).

The proposed *cy pres* distribution in this case to the UMD Law School will assist the Law School in its important mission of educating consumer advocates and addressing the systemic problems of the poor and under-represented in the community through increasing access to effective legal services. That mission will benefit the Settlement Class members, who are all Maryland residential tenants.

IV. CONCLUSION

For the reasons set forth above, Plaintiffs respectfully request that this Court approve the creation of a *cy pres* fund, as well as the proposed *cy pres* recipient, the UMD Law School, in accordance with ¶ 21(g) of the Settlement Agreement, and enter the comprehensive proposed Final Order Approving Settlement and Certifying Settlement Class.

Respectfully submitted,

/s/ Benjamin H. Carney

Benjamin H. Carney (Fed. Bar No. 27984)

Martin E. Wolf (Fed. Bar No. 09425)

Richard S. Gordon (Fed. Bar No. 06882)

Gordon, Wolf & Carney, Chtd.

11350 McCormick Rd.

Executive Plaza 1, Suite 1000

Hunt Valley, Maryland 21204

Tel. (410) 825-2300

Fax. (410) 825-0066

bcarney@GWCfirm.com

rgordon@GWCfirm.com

**Attorneys for Representative Plaintiff and the
Settlement Class**