IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

IN RE: URETHANE ANTITRUST LITIGATION	)	**No. 04-MD-1616-JWL**
This Document Relates To: The Polyether Polyol Cases	)	

PLAINTIFFS' MOTION FOR APPROVAL OF *CY PRES* DISTRIBUTION OF REMAINING SETTLEMENT FUNDS

Class Plaintiffs, through their counsel, move the Court for an Order approving the *cy pres* distribution of the residual settlement funds to American Antitrust Institute. Class Plaintiffs also request permission to make distributions to AAI without further leave of Court to the extend additional funds become available. In support of this Motion, Class Plaintiffs reply upon and incorporate by reference the facts and legal arguments set forth in the accompanying Memorandum of Law.

Dated: February 12, 2021

Respectfully submitted,

/s/ Robert W. Coykendall

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CERTIFICATE OF SERVICE

I hereby certify that on this 12th day of February, 2021, I caused the foregoing Motion for Approval of *Cy Pres* Distribution of Remaining Settlement Funds to be filed electronically with the Clerk of the Court by using the CM/ECF system which will send notice of electronic filing to all counsel who have registered for receipt of documents filed in this matter.

/s/ Robert W. Coykendall
Robert W. Coykendall

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IN RE: URETHANE ANTITRUST LITIGATION	)	**No. 04-MD-1616-JWL**
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PLAINTIFFS' MEMORANDUM IN SUPPORT OF MOTION FOR APPROVAL OF *CY PRES* DISTRIBUTION OF REMAINING SETTLEMENT FUNDS

I. INTRODUCTION AND FACTUAL BACKGROUND

After distributing more than $550 million from the Dow Settlement Fund to the Urethane class members, just $38,020.85 in settlement funds remain undistributed.[1] Distribution of these funds will be the last step in the administration of the Dow Settlement Agreement.

Pursuant to the Court's Order – Plan of Allocation of Judgment Funds,[2] Plaintiffs file this motion for approval of a *cy pres* distribution of the balance of the Settlement Fund to the American Antitrust Institute ("AAI"). *Cy pres* distribution of class action settlement funds is a

[1] Out of the $38,020.85 in settlement amounts remaining, only $8,030.54 reflect uncashed class member checks. The remaining $29,990.31 reflect administrative fees, contingencies and taxes that were budgeted for but not expended.

[2] "The distribution of any funds allocable to Class members that remain unclaimed, after due allowance of a period for late claims, shall be determined by the Court at that time, upon submissions by any interested parties. The Court concludes that that determination is most appropriately made at that time, as the amount of unclaimed funds may bear on that determination. At the expiration of the claims period, Class Counsel shall file a motion stating the amount of the unclaimed funds and recommending a method of distribution of those funds, and the Court will then set a deadline for any responses or comments from interested parties." Order – Plan of Allocation of Judgment Funds (ECF No. 2963, 7/26/13).

settled method of distribution where, as here, the balance remaining in a settlement fund after individual distributions is too small to warrant further distributions to the class. The AAI is a charitable organization devoted to promoting competition that protects consumers, businesses, and society, and is a fitting recipient for the residual funds from this nationwide price-fixing case.

II. ARGUMENT

"The authority to make *cy pres* grants to dispose of the remainder of a class action settlement fund is well established." *Glen Ellyn Pharmacy, Inc. v. La Roche-Posay, LLC*, No. 11 C 968, 2012 WL 619595, at *1 (N.D. Ill. Feb. 23, 2012). "Courts in every circuit, and appellate courts in most, have approved the use of cy pres for unclaimed class action awards." 4 Newberg on Class Actions § 12:32 (5th ed. 2014). In antitrust class actions similar to this one, courts routinely order *cy pres* awards of residual settlement funds. *See* Minute Entry, *Kleen Products LLC v. Packaging Corp. of America,* No. 10-cv-5711 (N.D. Ill. May 29, 2020), ECF No. 1481 (attached hereto as Ex. A); *Superior Beverage Co. v. Owens-Illinois, Inc.*, 827 F. Supp. 477, 480 (N.D. Ill. 1993) (ordering *cy pres* distribution of more than $2 million in residual class funds).[3]

Cy pres contributions are particularly suitable where additional disbursements to class members are impractical or do not make economic sense. *See In re Citigroup Inc. Sec. Litig.*, 199 F. Supp. 3d 845, 848 (S.D.N.Y. 2016) ("[*C*]*y pres* designations should be made only when it is 'not feasible to make further distributions to class members'" (internal citations omitted) (quoting *In re BankAmerica Corp. Sec. Litig.*, 775 F.3d 1060, 1064 (8th Cir. 2015)).[4] The

[3] *See also In re Visa Check/MasterMoney Antitrust Litig.*, No. 96-CV-5238 (JG), 2011 WL 5029841, at *8-9 (E.D.N.Y. Oct. 24, 2011); *In re Motorsports Merch. Antitrust Litig.*, 160 F. Supp. 2d 1392, 1395 (N.D. Ga. 2001).

[4] *See also Heekin v. Anthem, Inc.*, No. 05-cv-01908, 2012 WL 5472087, at *4-5 (S.D. Ind. Nov. 9, 2012) ("Courts in the Seventh Circuit routinely approve of settlement agreements that contemplate the use of *cy pres* contributions to dispose of settlement funds that cannot, as a

American Law Institute, in its Principles of the Law of Aggregate Litigation, provides that a distribution should be made to class members until "the amounts involved are too small to make individual distributions economically viable" (ALI Principles § 3.07(b)).

Here, any further distribution to the class would be economically impractical and unlikely to substantially benefit Class Members. As an initial matter, a substantial amount of the remaining funds likely would be consumed by the administrative costs associated with a class action distribution to more than 700 class members, including the costs associated with encouraging class members to cash their distribution checks. Based on the previous distributions in this case, these administrative costs likely will be in the range of $20,000, consuming more than half of the remaining funds. Taking into account the administrative costs, most of the checks distributed to class members would be extremely small, averaging under $25, with many checks under $10. Based on past experience in this case, such a distribution would result in a significant number of uncashed checks given the relatively small amount of most checks and the size and sophistication of the claimants. When faced with similar circumstances, courts have concluded that *cy pres* treatment of remaining settlement funds was appropriate.[5] Accordingly, Class Counsel believe that the remaining settlement funds of $38,020.85 should be distributed under the *cy pres* doctrine.

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practical matter, be distributed to class members."); *Goodman v. Crittenden Hosp. Ass'n*, No. 14- cv-229, 2018 U.S. Dist. LEXIS 155520, at *2 (E.D. Ark. Sep. 11, 2018).

[5] *See* Plaintiffs' Motion for Cy Pres Distribution of Remaining Funds and Minute Entry approving Plaintiffs' Motion, *Kleen Products LLC v. Packaging Corp. of America,* No. 10-cv-5711 (N.D. Ill. May 29, 2020), ECF Nos. 1479, 1481 (Ex. A hereto) (Court approves *cy pres* distribution of approximately $294,000 where an additional distribution would have resulted in approximately 1,866 potential claimants receiving distributions with a median value of $34.10. Motion at p. 4).

In determining an appropriate *cy pres* recipient, "both case law and ALI Principles support the use of the 'reasonable approximation' test to determine whether an organization's interests are sufficiently aligned with the interests of the class." *In re Universal Service Fund Telephone Billing Practices Litig.*, No. 02-MD-1468-JWL, 2013 WL 2476587, at *3 (D Kansas, June 7, 2013).[6] Courts have "identified a number of factors for consideration as to whether distributions reasonably approximate the interests of the class: the purposes of the underlying statutes claimed to have been violated; the nature of the injury to the class members; the characteristics and interests of the class members; the geographical scope of the class; the reasons why the funds have gone unclaimed; and the closeness of the fit between the class and the *cy pres* recipient." *Id.*, at *3, citing *In re Lupron Mkt'g and Sales Practices Litig.*, 677 F.3d 21, 33 (1st Cir. 2012).

"[M]ost circuits require that there be a connection -- or nexus -- between the harm that the plaintiffs have suffered and the benefit the *cy pres* distribution will provide." Newberg on Class Actions § 12.33. In antitrust cases, courts have approved *cy pres* awards "geared toward 'combating harms similar to those that injured the class members.'" *In re Motorsports Merch. Antitrust Litig.*, 160 F. Supp. 2d 1392, 1395 (N.D. Ga. 2001), quoting *Jones v. National Distillers,* 56 F. Supp. 2d 355, 358 (S.D.N.Y. 1999).[7]

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[6] ALI Principles § 3.07(c) ("The court, when feasible, should require the parties to identify a recipient whose interests reasonably approximate those being pursued by the class.").

[7] *See also In re Publ'n Paper Antitrust Litig.*, 04 MD 1631, 2009 WL 2351724, at *2 (D. Conn. July 30, 2009) ("Because the plaintiffs' claims here are based on antitrust injury, the next best use for the settlement funds is to disburse those funds to charitable institutions designed to guard against antitrust injury and protect consumers.").

The American Antitrust Institute, "a titan in the antitrust arena,"[8] is an ideal recipient for the residual settlement amounts in this nationwide antitrust price-fixing action. AAI is a national charitable organization devoted to promoting competition that protects consumers, businesses, and society. AAI serves the public through research, education, and advocacy on the benefits of competition and the use of antitrust enforcement as a vital component of national and international competition policy.

AAI's work has particular relevance to the class in this price-fixing case. Among other things, AAI has advocated to ensure that Section 1 of the Sherman Act affords adequate cartel deterrence and victim compensation.[9] AAI has conducted extensive work on the damaging effects of cartels and the importance of private antitrust remedies in deterring such conduct. Research by AAI has shown that current cartel fines inadequately deter collusion, and that higher fines or more aggressive enforcement are necessary to protect cartel victims.[10] AAI sponsored

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[8] *Conrad v. Jimmy John's Franchise, LLC*, No. 18-cv-00133, 2019 WL 2754864, *3 (S.D. Ill. May 21, 2019).

[9] *See, e.g.*, *Senior Fellow John M. Connor Unpacks the Auto-Parts Supercartel in New AAI White Paper – Makes Major Observations About Cartel Enforcement*, Am. Antitrust Inst. (July 16, 2019); *AAI Warns Supreme Court Against Shielding Foreign Export Cartels from Antitrust Scrutiny*, Am Antitrust Inst. (Mar. 5, 2018); *AAI Asks Eleventh Circuit to Preserve Full Damages for Overcharges* (Feb. 1, 2017); *AAI Urges Less Restrictive Approach to Evaluating Circumstantial Evidence in Price Fixing Cases*, Am. Antitrust Inst. (July 26, 2016); *AAI Continues to Request U.S. Sentencing Commission Double Cartel Fines*, Am. Antitrust Inst. (July 17, 2015); *AAI Asks DOJ to Strengthen Agreements in Criminal Antitrust Pleas*, Am. Antitrust Inst. (Dec. 30, 2014).

[10] *See, e.g.*, John M. Connor & Robert H. Lande, *Cartels as Rational Business Strategy: Crime Pays*, 34 Cardozo L. Rev. 427 (2012) (originally published as AAI Working Paper No. 11-08); *see also* John M. Connor & Robert H. Lande, *Not Treble Damages: Cartel Recoveries Are Mostly Less Than Single Damages*, 100 Iowa L. Rev. 1997 (2015).

first-of-its-kind empirical research detailing the benefits of private antitrust enforcement.[11]

The interests of AAI and its focus on the antitrust laws and Section 1, in particular, are aligned with the interests of the *Urethane* class in this price-fixing class action. AAI's efforts to support competition and strengthen the antitrust laws provide the necessary connection or nexus with the antitrust claims that were at the heart of this case. As the court in the *Terozosin* antitrust litigation concluded in awarding *cy pres* funds to AAI, "the mission of the AAI, which is to promote competition that protects consumers, businesses, and society, is directly related to the underlying antitrust violations at issue." *La. Wholesale Drug Co. v. Abbott Labs. (In re Terazosin Hydrochloride Antitrust Litig.)*, No. 99-MDL-1317-SEITZ, 2016 U.S. Dist. LEXIS 101399, at *10 (S.D. Fla. Aug. 1, 2016).

This connection is further evidenced by the fact that AAI is routinely awarded *cy pres* distributions in antitrust cases, most recently in the *Containerboard Antitrust Litigation*. *See* Minute Entry, (Ex. A hereto).[12] As Judge Gleeson of the Eastern District of New York noted in approving a *cy pres* award from another antitrust settlement, "AAI has made significant

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[11] *See* American Antitrust Institute & University of San Francisco School of Law, The Vital Role of Private Antitrust Enforcement in the U.S.: Commentary on the 2018 Antitrust Annual Report: Class Action Filings in Federal Court (May 14, 2019), *available at* https://www.antitrustinstitute.org/wp-content/uploads/2019/05/AAI_USF-Commentary_2018-Antitrust-Class-Action-Report_Final_5.14.19.pdf; Robert H. Lande & Joshua P. Davis, *Benefits from Private Antitrust Enforcement: An Analysis of 40 Cases*, 42 U. S. F. L. Rev. 879 (2008) (originally published as a Report of the American Antitrust Institute); *see also* Joshua P. Davis & Robert H. Lande, *Toward an Empirical and Theoretical Assessment of Private Antitrust Enforcement*, 36 Seattle U. L. Rev. 1269 (2013).

[12] *See also Seaman v. Duke Univ.*, No. 1:15-CV-462 (M.D. N.C. Sept. 24, 2019) ("AAI is an obvious choice as the *cy pres* recipient; it has been chosen as such in a number of other cases.") (Ex. B hereto); *In re Publ'n Paper Antitrust Litig.*, 04 MD 1631, 2009 WL 2351724, at *2 (D. Conn. July 30, 2009); *La. Wholesale Drug Co. v. Abbott Labs.*, 2016 U.S. Dist. LEXIS 101399, at *10.

contributions to the development and enforcement of the antitrust laws and will no doubt make effective use of the funds it receives." *Visa Check*, 2011 WL 5029841, at *9.[13]

After more than 16 years of litigation, Class Counsel cannot imagine a more fitting use for these remaining funds than furthering the AAI's work towards protecting and strengthening the antitrust laws.

III. CONCLUSION

Considering the impracticality of a further distribution, Class Counsel request that the Court approve *cy pres* distribution of the residual settlement funds totaling $38,020.85 to AAI. Class Counsel also request permission to make distributions to AAI without further leave of Court to the extent additional funds become available.

[13] The ALI Principles of the Law of Aggregate Litigation provides that a "*cy pres* remedy should not be ordered if the court or any party has any significant prior affiliation with the intended recipient that would raise substantial questions about whether the selection of the recipient was made on the merits." ALI Principles § 3.07 (cmt. b). Roberta Liebenberg of co-lead counsel Fine Kaplan and Black is a member of the Board of Directors of AAI, but this affiliation raises no substantial questions relating to Class Counsel's *cy pres* recommendation in this case. The simple fact is that AAI is the preeminent organization in the field of antitrust advocacy and that is why Class Counsel is recommending AAI as the *cy pres* recipient. Indeed, it is precisely because of its high standing in the field that many of the leading antitrust practitioners have associations with AAI, both on its Board of Directors and Advisory Board and as active members. AAI's success in its field should not diminish its appropriateness as a *cy pres* recipient. *See Seaman v. Duke Univ.*, No. 1:15-CV-462 (M.D. N.C. Sept. 24, 2019) (Class counsel's membership on AAI advisory board did not raise "substantial questions" because "[m]ost importantly, AAI is an obvious choice as the *cy pres* recipient; it has been chosen as such in a number of other cases.") (Ex. B hereto). To provide additional safeguards, Ms. Liebenberg was not involved in any way in Class Counsel's discussions or its determination to recommend AAI as the *cy pres* recipient herein.

Dated: February 12, 2021

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CERTIFICATE OF SERVICE

I hereby certify that on this 12th day of February, 2021, I caused the foregoing Memorandum in Support of Motion for Approval of *Cy Pres* Distribution of Remaining Settlement Funds to be filed electronically with the Clerk of the Court by using the CM/ECF system which will send notice of electronic filing to all counsel who have registered for receipt of documents filed in this matter.

/s/ Robert W. Coykendall
Robert W. Coykendall

EXHIBIT A

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

KLEEN PRODUCTS LLC, *et al.*, individually and on behalf of all those similarly situated, Plaintiffs, v. INTERNATIONAL PAPER, *et al.*, Defendants.	Case No. 1:10-cv-05711 Hon. Harry D. Leinenweber

PLAINTIFFS' MOTION FOR *CY PRES* DISTRIBUTION OF REMAINING SETTLEMENT FUNDS TO THE AMERICAN ANTITRUST INSTITUTE AND THE UNIVERSITY OF CHICAGO SCHOOL OF LAW

I. INTRODUCTION

Plaintiffs brought this class action to challenge Defendants' alleged conspiracy to fix prices of Containerboard Products sold in the United States between February 15, 2004 and November 8, 2010. Ultimately, all but two Defendants settled with Plaintiffs. The case concluded with the Seventh Circuit's affirmance of summary judgment in favor of the non-settling Defendants. On October 17, 2017 the Court approved the plan of distribution for the net available settlement funds (ECF Nos. 1410, 1411). Thereafter, Class Counsel and the claims administrator, A.B. Data, Ltd. ("A.B. Data"), worked diligently to distribute settlement funds to Class Members.

To date, roughly 99.9% of the more than $250,000,000 in net available settlement funds has been distributed to Class Members through two rounds of distributions and other ongoing efforts, but $294,100.05 remains unclaimed. That total unclaimed amount is expected to increase due to anticipated federal and state tax refunds and additional accrued interest. In the view of Class

Counsel and the claims administrator it is not economically sound at this stage to engage in a third round of distributions of the remaining amount because the median value of outgoing checks would be only $34.10 and, given the size and sophistication of many claimants, it is expected that a large percentage of those checks will go uncashed. Accordingly, Class Counsel requests that the remaining funds be distributed under the *cy pres* doctrine to the American Antitrust Institute ("AAI") and the University of Chicago School of Law in equal amounts.

II. RELEVANT PROCEDURAL HISTORY AND DISTRIBUTION EFFORTS

Plaintiffs filed a Consolidated Amended Complaint on November 8, 2010, alleging that Defendants[1] engaged in an agreement, combination, or conspiracy to fix, raise, elevate, maintain, or stabilize prices of Containerboard Products sold in the United States.

On September 3, 2014, the Court granted Final Approval of the PCA Settlement for $17.6 million and other consideration. On May 21, 2015, the Court granted Final Approval of the Norampac Settlement for $4.8 million and other consideration.

On March 26, 2015, the Court certified a class to litigate the merits of this case (the "Class"), which was affirmed by the Seventh Circuit Court of Appeals on August 4, 2016.[2] On October 17, 2017, the Court granted Final Approval of the settlement with Defendants IP, TIN, and WY for $354 million and other considerations. At the same time, the Court approved the plan of distribution for all net available settlement funds.

[1] Defendants included Packaging Corporation of America ("PCA"), Norampac (also referred to as Cascades Canada, Inc./Norampac Holdings U.S., Inc.), International Paper Company ("IP"), Temple-Inland Inc. (now known as Temple-Inland LLC), TIN Inc. (now known as TIN LLC) (collectively, "TIN"), Weyerhaeuser Company ("WY"), Georgia-Pacific LLC ("GP"), and WestRock CP, LLC (formerly known as Smurfit-Stone Container Corporation) ("WestRock"), as well as their predecessor companies and subsidiaries or affiliates that sold Containerboard Products in the United States during the Class Period.

[2] The Class includes: All persons who purchased Containerboard Products directly from any of the Defendants or their subsidiaries or affiliates for use or delivery in the United States during the Certified Class Period of February 15, 2004 through November 8, 2010.

On November 20, 2018, A.B. Data issued payments totaling $166,583,820.67 to 9,622 eligible Class Members. *See* **Exhibit A** (Declaration of Steven J. Straub Regarding Distribution of the Settlement Fund ("Straub Decl.")) at ¶4. Consistent with the Court's February 5, 2019 Order (ECF No. 1457), A.B. Data accepted late claims received before July 15, 2018, and perfected claims and correspondence received between July 15, 2018 and September 25, 2018. *Id.* at ¶5. It also affirmed its determinations in connection with the first distribution. *Id.* From the first distribution, 353 checks totaling $394,319.24 remained uncashed, representing approximately 0.2% of the total distribution. *Id.* at ¶8. This amount was combined with the remaining settlement funds before the second distribution. *Id.* at ¶10.

During the initial claims process, A.B. Data reissued and re-mailed checks to Class Members when (i) the original check was returned with a forwarding address; (ii) the original check was returned without a forwarding address but A.B. Data obtained an updated address for the Class Member; or (iii) the Class Member requested a new check because the original check was stale-dated, lost, or damaged. *Id.* at ¶6. A.B. Data also attempted to locate Class Members with uncashed checks by telephone and/or email on a monthly basis. *Id.* at ¶7.

Pursuant to the Court's May 1, 2019 Order, A.B. Data conducted a second distribution. *Id.* at ¶9. On July 19, 2019, A.B. Data issued checks to 9,987 Class Members totaling $85,747,726.13. *Id.* at ¶10. A.B. Data followed the same procedure concerning undeliverable and uncashed checks outlined above. *Id.* at ¶11. After the second distribution, as of March 6, 2020, 509 checks totaling $349,907.88 remained uncashed. *Id.* at ¶12.

During the second distribution, A.B. Data was contacted by certain claimants who had not cashed their first distribution checks. *Id.* at ¶13. Pursuant to the Court's Order, A.B. Data reissued fourteen initial distribution payments totaling $58,688.13 upon requests from these Class

Members. *Id.* This amount was deducted from the uncashed amount following the second distribution. Finally, after commencement of the second distribution, A.B. Data received a refund of $2,888.30 from a Class Member that was added to the Settlement Fund. *Id.* at ¶14, n.1.

All checks from the initial and second distributions are now void, including all reissued checks. *Id.* at ¶14. The current balance of the settlement fund is $294,100.05, which represents roughly 0.1% of the total amount to be distributed to Class Members. *Id.* Consistent with its standard practice, A.B. Data considers this amount "unclaimed funds" because the checks have remained uncashed past their void date. *Id.* at ¶15.

A.B. Data estimates that a third distribution of unclaimed funds would result in approximately 1,866 potential claimants receiving distributions with a median value of $34.10. *Id.* at ¶17. A.B. Data predicts a third distribution will result in a significant number of uncashed checks given the relatively low amount of most checks and the sophistication of the claimants. *Id.*

III. ARGUMENT

"The authority to make *cy pres* grants to dispose of the remainder of a class action settlement fund is well established." *Glen Ellyn Pharmacy, Inc. v. La Roche-Posay, LLC*, No. 11 C 968, 2012 U.S. Dist. LEXIS 23936, at *2 (N.D. Ill. Feb. 23, 2012). "In modern usage, the *cy pres* doctrine has become a flexible tool that allows a court to use its broad equitable powers to make funds available to public interest, charitable, educational and other public service organizations." *In re Scouring Pads Antitrust Litig.*, MDL 985, 93 C 6594, 1995 U.S. Dist. LEXIS 6380, at *1 (N.D. Ill. May 11, 1995).

Courts routinely order *cy pres* awards of residual settlement funds in antitrust litigation. *See Superior Beverage Co. v. Owens-Illinois*, 827 F. Supp. 477, 480 (N.D. Ill. 1993) (ordering *cy*

pres distribution of more than $2 million in residual class funds).[3] *Cy pres* contributions are particularly suitable where additional disbursements to class members are impractical or do not make economic sense. *Heekin v. Anthem, Inc*., No. 1:05-cv-01908-TWP-TAB, 2012 U.S. Dist. LEXIS 160864, at *11-12 (S.D. Ind. Nov. 9, 2012); *Goodman v. Crittenden Hosp. Ass'n*, No. 3:14-cv-229-DPM, 2018 U.S. Dist. LEXIS 155520, at *2 (E.D. Ark. Sep. 11, 2018).

Here, a third distribution is economically impractical and unlikely to substantially benefit Class Members. If required to conduct a third distribution, A.B. Data estimates it would send checks with a median value of only $34.10 to approximately 1,866 claimants. Straub Decl. at ¶17. Given the sophistication of the potential claimants and relatively small amount of most checks, A.B. Data believes a large portion of these checks will go uncashed. *Id.* This opinion is reinforced by the fact that A. B. Data had to make significant efforts through two distributions to locate claimants and reissue and re-mail checks where the amounts involved were significantly greater than the amounts that would be made in a third distribution. *Id.* at ¶¶4-17. Accordingly, Class Counsel believe that the remaining settlement funds of $294,005.10 should be distributed under the *cy pres* doctrine.

AAI is an ideal recipient is routinely awarded *cy pres* distributions in antitrust cases.[4] As Judge Gleeson of the Eastern District of New York noted in approving a *cy pres* award from

[3] *See also In re Visa Check/MasterMoney Antitrust Litig.*, No. 96-CV-5238 (JG), 2011 U.S. Dist. LEXIS 122680, at *31 (E.D.N.Y. Oct. 24, 2011); *In re Pool Prods. Distribution Mkt. Antitrust Litig.*, No. 2328, 2015 U.S. Dist. LEXIS 97578, at *29 (E.D. La. July 27, 2015); *In re Motorsports Merch. Antitrust Litig*., 160 F. Supp. 2d 1392, 1395 (N.D. Ga. 2001); *In re Mexico Money Transfer Litig*., 164 F. Supp. 2d 1002, 1031 (N.D. Ill. 2000).

[4] *See In re Visa Check/MasterMoney Antitrust Litig*., No. 96-CV-5238 (JG), 2011 U.S. Dist. LEXIS 122680, at *32 (E.D.N.Y. Oct. 24, 2011); *see also In re Publ'n Paper Antitrust Litig*., No. 3:04 MD 1631 (SRU), 2009 U.S. Dist. LEXIS 66654, at *24 (D. Conn. July 30, 2009); *La. Wholesale Drug Co. v. Abbott Labs. (In re Terazosin Hydrochloride Antitrust Litig.)*, No. 99-MDL-1317-SEITZ, 2016 U.S. Dist. LEXIS 101399, at *10 (S.D. Fla. Aug. 1, 2016).

another antitrust settlement, "AAI has made significant contributions to the development and enforcement of the antitrust laws and will not doubt make effective use of the funds it receives." *Visa Check*, 2011 U.S. Dist. LEXIS 122680, at *9.

AAI will use the *cy pres* award here to further the purpose of promoting competition. AAI is an independent, nonprofit organization devoted to promoting competition that protects consumers, businesses, and society. *See* **Exhibit B** (Declaration of Diana L. Moss ("Moss Decl.")) at ¶3. Concerning price-fixing cases, AAI advocates to ensure that Section 1 of the Sherman Act affords adequate cartel deterrence and victim compensation and has conducted extensive work on the damaging effects of cartels and the importance of private antitrust remedies in deterring such conduct. *Id.* at ¶12. AAI will use the funds to support private antitrust enforcement of the antitrust laws generally, including against cartels. *Id.* at ¶13. Alternatively, if directed by the Court, AAI would segregate the *cy pres* award to fund educational activities and research directed specifically at the role of private enforcement in detecting, preventing, and punishing cartel behavior. *Id.*

The University of Chicago School of Law is also an appropriate recipient of the *cy pres* funds. *See, e.g.*, *Superior Beverage*, 827 F. Supp. at 480. Indeed, the Law School has received *cy pres* funds in numerous other cases. *See* **Exhibit C** (Declaration of Thomas Miles on Behalf of University of Chicago School of Law in Support of Application for *Cy Pres* Distribution ("Miles Decl.")) at ¶5. The Law School is committed to using its share of *cy pres* funds here "to create an opportunity for students interested in antitrust issues to enhance their knowledge and understanding of the antitrust laws by assisting Law School faculty with research projects, co-authoring papers, and participating in similar academic pursuits in this field." Miles Decl. at ¶4. Notably, although the proposed use of the settlement funds in this case are committed for an antitrust purpose, "[f]unds remaining in antitrust cases have been awarded to law schools to

support programs having little or no relationship to antitrust law, competition, or the operation of our economy." *Superior Beverage*, 827 F. Supp. at 479. *See also Scouring*, 1995 U.S. Dist. LEXIS 6380, at *1.

IV. CONCLUSION

Considering the impracticality of a third distribution and nexus between the purpose of the litigation and the recipients' intended uses, Class Counsel request that the Court approve equal *cy pres* distributions of the residual settlement funds totaling $147,050.03 to each of AAI and the University of Chicago School of Law. Class Counsel also request permission to make proportionate distributions to both recipients without further leave of Court to the extent additional funds become available.

Dated: March 10, 2020

Respectfully submitted,

/s/ Michael J. Freed

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UNITED STATES DISTRICT COURT
FOR THE Northern District of Illinois − CM/ECF LIVE, Ver 6.3.2
Eastern Division

Kleen Products LLC, et al.

Plaintiff,

v.

Case No.: 1:10−cv−05711
Honorable Harry D. Leinenweber

Packaging Corporation of America, et al.

Defendant.

NOTIFICATION OF DOCKET ENTRY

This docket entry was made by the Clerk on Friday, May 29, 2020:

MINUTE entry before the Honorable Harry D. Leinenweber: Plaintiffs' unopposed Motion for Cy Pres Distribution of Remaining Settlement Funds to the American Antitrust Institute and the University of Chicago School of Law [1478] is granted. Mailed notice (maf)

ATTENTION: This notice is being sent pursuant to Rule 77(d) of the Federal Rules of Civil Procedure or Rule 49(c) of the Federal Rules of Criminal Procedure. It was generated by CM/ECF, the automated docketing system used to maintain the civil and criminal dockets of this District. If a minute order or other document is enclosed, please refer to it for additional information.

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EXHIBIT B

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

DANIELLE SEAMAN, individually and on behalf of all others similarly situated, Plaintiff, v. DUKE UNIVERSITY; DUKE UNIVERSITY HEALTH SYSTEM, Defendants.	1:15-CV-462

ORDER GRANTING FINAL APPROVAL OF PROPOSED CLASS ACTION SETTLEMENT

Plaintiff Dr. Danielle Seaman seeks final approval of a class action settlement with Duke University and Duke University Health System, hereinafter collectively referenced as "Duke." The Court held a final fairness hearing on September 24, 2019. Counsel for all parties appeared, and Class Members had an opportunity to appear. The Court has considered the motion, all other papers filed concerning that motion, and other pertinent documents and pleadings and has heard from counsel and all interested parties. The Court will grant Plaintiff's motion, enter final judgment, and dismiss this action with prejudice.

Unless otherwise defined herein, all terms that are capitalized herein shall have the meanings ascribed to those terms in the Settlement Agreement. The Court makes the following Findings under Federal Rule of Civil Procedure 23:

Fairness, Reasonableness, and Adequacy

1. The Court finds and concludes that the Settlement and proposed Plan of Allocation are fair, reasonable, and adequate and satisfy the criteria for final approval under Federal Rule of Civil Procedure 23 based on these facts and this analysis.

a. "It has long been clear that the law favors settlement." *United States v. Manning Coal Corp.*, 977 F.2d 117, 120 (4th Cir. 1992). This is particularly true in class actions. *Reed v. Big Water Resort, LLC*, No. 2:14-cv-01583-DCN, 2016 WL 7438449, at *5 (D.S.C. May 26, 2016) (noting the "strong judicial policy in favor of settlements, particularly in the class action context") (citation and internal quotation marks omitted); 4 William H. Rubenstein, NEWBERG ON CLASS ACTIONS § 13.44 & n.1 (5th ed. 2018) ("Newberg") (collecting cases).

b. The Court previously granted preliminary approval of the Settlement, finding that it was fair, reasonable, and adequate, and that the Court was likely to grant final approval of the Settlement pursuant to Federal Rule of Civil Procedure 23(e)(2). *See* Doc. 366. Notice to the Class was distributed on July 2, 2019, pursuant to the Court-approved notice plan. *See* Doc. 373 ¶ 3. The Class had 30 days to object or, if eligible, to opt-out of the Settlement. There were no objections, *id*. at ¶ 11, and, as reported by counsel at the fairness hearing, fewer than 20 Class Members opted out. Taking account of all the information learned during the notice process, the Court now decides whether or not to give final approval of the settlement. *See Newberg* § 13:1.

c. A class settlement may be approved if it is "fair, reasonable, and adequate . . . ." Fed. R. Civ. P. 23(e)(2); *In re Jiffy Lube Sec. Litig.*, 927 F.2d 155, 158 (4th Cir. 1991). "In applying this standard, the Fourth Circuit has bifurcated the analysis into consideration of fairness, which focuses on whether the proposed settlement was negotiated at arm's length, and adequacy, which focuses on whether the consideration provided the class members is sufficient." *Beaulieu v. EQ Indus. Servs., Inc.*, No. 5:06-CV-00400-BR, 2009 WL 2208131, at *23 (E.D.N.C. July 22, 2009) (citing *Jiffy Lube*, 927 F.2d at 158–59).

d. A four-factor test is applied to determine the fairness of a proposed settlement: "(1) the posture of the case at the time the proposed settlement was reached, (2) the extent of discovery that had been conducted, (3) the circumstances surrounding the settlement negotiations, and (4) counsel's experience in the type of case at issue." *Id.* at *24.

e. All four fairness factors favor approval here. The Settlement was reached after extensive adversarial litigation, including adjudication of Defendants' motions to dismiss and their attempted petition for appellate review; extensive fact and expert discovery; litigation of Plaintiff's motion for class certification; and thoroughly briefed *Daubert* and summary judgment motions, in which over two dozen briefs were filed and a full-day of oral argument was held. Doc. 366 at 3. The substantial progress made in this case set the stage for these settlement negotiations. Counsel for both sides had sufficient information to evaluate the costs and benefits of settlement at this juncture.

The parties' negotiations were adversarial, arm's-length, and occurred through many discussions that required more than a year to complete. The negotiations were facilitated through the capable work of a neutral third-party mediator, Jonathan Harkavy. The United States also participated in the settlement negotiations, significantly contributing to the discussion of potential injunctive relief and facilitating an agreement it could join. Finally, counsel for Dr. Seaman have extensive experience in antitrust and class action litigation.

f. The Court assesses the adequacy of the Settlement through the following factors: "(1) the relative strength of the plaintiffs' case on the merits, (2) any difficulties of proof or strong defenses the plaintiffs would likely encounter if the case were to go to trial, (3) the expected duration and expense of additional litigation, (4) the solvency of the defendants and the probability of recovery on a litigated judgment, and (5) the degree of opposition to the proposed settlement." *Beaulieu*, 2009 WL 2208131, at *26 (citing *Jiffy Lube*, 927 F.2d at 158; *Horton v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 855 F. Supp. 825, 829–30 (E.D.N.C. 1994)).

g. As to the first and second factors, Dr. Seaman has adequately explained both the strengths and risks associated with continued litigation of her claims and trial. In particular, though Dr. Seaman had strong evidence of liability as to her personal claim, Duke was prepared to introduce contrary evidence that the alleged no-poach agreement either did not exist or was not in force during the Class Period. Additionally, even assuming Dr. Seaman prevailed on liability at trial, a substantial open

question remained whether the Court would limit the expert testimony of Dr. Leamer to reduce his largest projected damages estimate of $315 million to a much lower amount by, for example, requiring him to exclude income derived from the Duke's Physician Diagnostic Clinic ("PDC") or damages that the Court concludes fall outside the Class Period. Further, Duke was prepared to challenge Dr. Leamer's use of the University of Texas as a benchmark for calculating antitrust damages. If the jury or the Court had agreed with Duke, it would have reduced Dr. Leamer's estimate significantly, or eliminated it entirely. Finally, there were still pending *Daubert* and summary judgment motions for the Court to adjudicate, which could have been dispositive. In light of these risks, the $54.5 million monetary recovery in the Settlement as well as the injunctive relief reflect a strong result for the Class. The proposed allocation plan is fair and reasonable as it will compensate class members on a pro rata basis according to the degree of alleged harm they suffered.

h. As to the third factor, the parties were near trial and were fully informed about the strengths and weaknesses of the evidence. The trial would involve considerable time and expense of the parties and the Court and would have risked the chance of no recovery for the Class. The Settlement guarantees Class Members significant monetary and injunctive relief.

i. The fourth factor is irrelevant because there is no indication that Duke would be unable to satisfy a judgment.

j. The fifth factor, the degree of opposition to the Settlement, can now be evaluated because the Class has had an opportunity to comment in response to the notice program. Out of thousands of Class Members, not a single person objected to the Settlement, the proposed allocation plan, the proposed request for attorney's fees and reimbursement of costs, or the proposed service award for Dr. Seaman. *See* Doc. 373 ¶ 11. Furthermore, only a small number of the Class Members exercised their right to opt out of the Class, with almost all the Class Members choosing to release their claims against Duke in exchange for relief under the Settlement. The lack of objections and the small number of exclusion requests are a strong indication of widespread support for the Settlement, and that the Settlement is fair, reasonable, and adequate. *See In re Mills Corp. Sec. Litig.*, 265 F.R.D. 246, 257 (E.D. Va. 2009) ("[A]n absence of objections and a small number of opt-outs weighs significantly in favor of the settlement's adequacy."); *Flinn v. FMC Corp.*, 528 F.2d 1169, 1173 (4th Cir. 1975) ("The attitude of the members of the class, as expressed directly or by failure to object, after notice, to the settlement, is a proper consideration for the trial court . . . .").

k. The Court therefore concludes that the Settlement and proposed Plan of Allocation are fair, reasonable, and adequate and satisfy the criteria for final approval under Federal Rule of Civil Procedure 23.

Notice to Class Members

2. The Class notice was delivered by mail and e-mail to all Class Members. Doc. 373 at ¶ 3. In accordance with Rule 23(c)(2)(B), the notices clearly explained Class

Members' rights, including the nature of the action, the Class definition, the legal issues, Class Members' rights to make an appearance with an attorney, Class Members' right to request exclusion, Class Members' right to object to the Settlement, and the binding effect of a Class judgment. *See e.g.*, Doc. 373-1. The Notice also apprised Class Members of Class Counsel's intent to request one-third of the common fund as attorney's fees, to request reimbursement of costs, and to request a service award for Dr. Seaman. *Id.*

3. Notice was also given through a case-specific website that published all relevant litigation documents and settlement notices, and which received over 3,298 unique visits. *See* Doc. 373 at ¶ 4. Additionally, the Settlement Administrator established a toll-free telephone number and handled calls from over 215 Class Members concerning the Settlement. *Id*. at ¶ 9.

4. The notice program effectively informed Class Members of their rights, was the best practicable under the circumstances, and complied with all due process requirements. *See* Fed. R. Civ. P. 23(e)(1)(B) (notice must be given to class "in a reasonable manner"); *Domonoske v. Bank of Am., N.A.*, 790 F. Supp. 2d 466, 472 (W.D. Va. 2011) ("In the context of a class action, the due process requirements of the Fifth Amendment require reasonable notice combined with an opportunity to be heard and withdraw from the class.") (citation and quotation omitted).

Designation of *Cy Pres* Recipient

5. "[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." *Klier v. Elf Atochem N. Am., Inc*., 658 F.3d 468, 474 (5th Cir. 2011) (quotation omitted); *Decohen v. Abbasi, LLC*, 299 F.R.D. 469, 476 n.15 (D. Md. 2014). The doctrine does not require "that settling parties select a *cy pres* recipient that the court or class members would find ideal," but rather only that there be "a substantial nexus to the interests of the class members" in light of "the nature of the plaintiffs' lawsuit, the objectives of the underlying statutes, and the interests of the silent class members." *Lane v. Facebook, Inc.*, 696 F.3d 811, 821 (9th Cir. 2012) (citation and quotation omitted).

6. In determining whether a sufficient nexus exists to justify the approval or appointment of a potential *cy pres* beneficiary, many circuits have considered a number of factors, including: "the purposes of the underlying statutes, the nature of the injury to the class members, the characteristics and interests of the class members, the geographical scope of the class, the reasons why the settlement funds have gone unclaimed and the closeness of the fit between the class and the *cy pres* recipient." *In re Polyurethane Foam Antitrust Litig.*, 178 F. Supp. 3d 621, 623 (N.D. Ohio 2016) (quoting *In re Lupron Mktg. and Sales Practices Litig.*¸ 677 F.3d 21, 33 (1st Cir. 2012); *see, e.g In re: Google Inc. Cookie Placement Consumer Privacy Litig.* , 934 F.3d 316, 322 n. 2, n.3 (3d Cir. 2019); *In re BankAmerica Corp. Secs. Litig.*, 775 F.3d 1060, 1067 (8th Cir.

2015); *Nachshin v. AOL, LLC*, 663 F.3d 1034, 1039–40 (9th Cir. 2011); *In re Lease Oil Antitrust Litig. (No. II)*¸ 2008-1 Trade Cas. (CCH) ¶ 76041, 2007 WL 4377835, at *21 (S.D. Tex. 2007); *Schwartz v. Dallas Cowboys Football Club, Ltd.*, 362 F. Supp. 2d 574, 576–77 (E.D. Pa. 2005) (finding *cy pres* beneficiary, NFL YET Centers, was appropriate for antitrust violations involving "NFL Sunday Ticket," but distributions to a student legal clinic did not have sufficient nexus); *Newberg* § 12.33 ("[M]ost circuits require that there be a connection—or nexus—between the harm . . . and the benefit. . . .").

7. *Cy pres* is generally preferable to allowing unclaimed funds to escheat to the state or revert to the defendant because "it preserves the class action's deterrent effect and (at least theoretically) more closely tailors the distribution to the interests of class members." *In re Google*, 934 F.3d at 327 (citations and punctuation omitted); *see, e.g.*, *In re Lupron*, 677 F.3d at 32–33 (noting that returning the funds to the defendant "would undermine the deterrence function of class actions and the underlying substantive law") (citation omitted).

8. Pursuant to the parties' Settlement, a *cy pres* distribution is only contemplated if further redistribution of unclaimed funds to Class Members would not be economically feasible. Doc. 359-1 at 26. Neither the parties nor the Court expect this distribution to be large.

9. In the Settlement Agreement, Dr. Seaman proposed the American Antitrust Institute and Duke proposed Habitat for Humanity as appropriate *cy pres* recipients. *Id.* After the Settlement, the parties had further discussions about the *cy pres* recipient. Doc.

376 at ¶ 2. In the motion for final approval, the plaintiff suggested the American Association of University Professors ("AAUP") as a *cy pres* recipient, Doc. 375 at 19–20, because counsel for the plaintiff serves on AAI's Advisory Board and wished to avoid any apparent conflict of interest, Doc. 376 at ¶ 2.[1] Class Counsel has submitted evidence as to the nature of the work of both AAI and AAUP and as to how those organizations would use any *cy pres* funds. Doc. 379; Doc. 380. Despite an invitation, *see* Text Order entered September 17, 2019, Duke has submitted no evidence about Habitat for Humanity.

10. Both AAUP and AAI are non-profit groups which do work related to the subject matter of this case. AAI works specifically in the antitrust field, Doc. 379 at ¶ 3, and AAUP works on behalf of faculty in higher education, Doc. 380 at 3–5, like the class members here. Each would be an appropriate *cy pres* recipient, as they each do work in a field with a nexus to this case.

11. Based on common knowledge, the Court is aware that Habitat does work benefitting the larger community. But there is no evidence that Habitat's work is related to the antitrust issues in this case or to the university world in which this case arose, and at the fairness hearing counsel for Duke agreed there was no real nexus to this case.

[1] It appears that Duke may have made other suggestions for the *cy pres* recipient during discussions with plaintiff's counsel, Doc. 376 at ¶ 2, and Duke did offer another alternative during the Fairness Hearing but has not presented any evidence in support of those recipients.

12. Designation of a *cy pres* recipient with ties to plaintiff's counsel can raise concerns, but it is not necessarily an automatic bar, nor should it be.[2] Here, there is nothing to indicate that Class Counsel's role at AAI has resulted in an inappropriate *cy pres* recommendation. Class Counsel's role at AAI is narrow, as he is one of a large number of people on an advisory board and that board has no decision-making authority. Doc. 379 at ¶ 14. Class Counsel has been forthcoming about his role at AAI, and Class Counsel will not receive any benefit if AAI is selected as the *cy pres* recipient. Most importantly, AAI is an obvious choice as the *cy pres* recipient; it has been chosen as such in a number of other cases. *See* Doc. 379 at ¶ 10. While there may be other groups with a nexus to the claims in this case, no one has identified a group with a closer nexus.

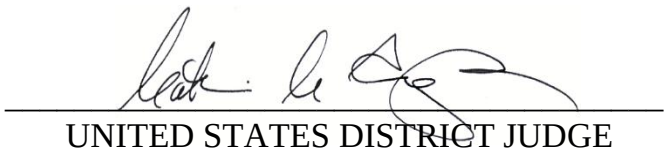
13. Given the purposes of the underlying statutes, the nature of the injury to the class members, the characteristics and interest of the class members, the geographical scope of the class, the reasons why settlement funds have gone unclaimed and the closeness of the fit between the class and the *cy pres* recipient, the Court concludes that AAI is the more appropriate *cy pres* recipient because it was listed in the Settlement Agreement as a suggested recipient, there have been no objections to its selection, and because AAI has done extensive work in the area of no-poach agreements like the one at issue here.

[2] One court has held on very different facts that approval of a recipient requires an extra layer of examination to insure the recipient was chosen on the merits. *See In re: Google*, 934 F.3d, at 330–331. The Court need not decide if such an "extra layer" is required here, as even if it is, AAI is an appropriate *cy pres* recipient and its selection raises no "substantial questions" about the merits of the decision. *Id.* at 331.

14. Should unclaimed funds remain for which further redistribution would be economically unfeasible, the Settlement Administrator is authorized to disburse those funds to the AAI.

For these reasons and based on the record before it, it is **ORDERED** that the plaintiff's motion, Doc. 374, is **GRANTED** and the Settlement is approved as fair, reasonable and adequate. Judgment will be entered accordingly.

This the 24th day of September, 2019.



UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

IN RE: URETHANE ANTITRUST LITIGATION	)	**No. 04-MD-1616-JWL**
This Document Relates To: The Polyether Polyol Cases	)	

[PROPOSED] ORDER

This matter is before the Court pursuant to Plaintiffs' Motion for Approval of *Cy Pres* Distribution of Remaining Settlement Funds. Upon consideration of such motion, it is hereby ORDERED as follows:

1. The motion is GRANTED.

2. More than $550 million has been distributed from the Dow Settlement Fund to the Urethane class members. Approximately $38,020.85 in settlement funds remain undistributed.

3. Further distribution to the class would be economically impractical and unlikely to substantially benefit Class Members. *Cy pres* distribution of the remaining settlement funds therefore is appropriate.

4. The American Antitrust Institute ("AAI") is an appropriate recipient of the remaining settlement funds. The interests of AAI and its focus on the antitrust laws and Section 1 are aligned with the interests of the *Urethane* class in this price-fixing class action.

5. Class Counsel shall direct the settlement administrator to deliver the remaining settlement funds as set forth above to the American Antitrust Institute.

6. In addition, Class Counsel may direct the settlement administrator to make distributions to AAI without further leave of Court to the extent additional funds become available.

IT IS SO ORDERED.

Dated this ____ day of _____, 2021, at Kansas City, Kansas.

_____
John W. Lungstrum
United States District Court