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6
7 UNITED STATES DISTRICT COURT
8 NORTHERN DISTRICT OF CALIFORNIA

9
10 IN RE: JUUL LABS, INC. MARKETING, SALES
PRACTICES, AND PRODUCTS LIABILITY
11 LITIGATION,

Case No. 19-md-02913-WHO

**REILLY STEPHENS' RESPONSE TO
OBJECTION OF MATTHEW MURPHY,
CADE BEAUPARLANT, AND MARIANNE
SAVAGE**

12
13 This Document Relates to:
ALL CLASS ACTIONS

Judge: Hon. William H. Orrick
Courtroom: 2, 17th Floor
Date: August 9, 2023
Time: 2:00 P.M.

1 In accordance with the Preliminary Approval Order (Dkt. 3779 at 12), Objector Reilly Stephens hereby
2 responds to the objection of Matthew Murphy, Cade Beuparlant, and Marianne Savage on behalf of “M.”
3 (“PHAI Objectors”). *See* Dkt. 4062. While Stephens “adopts any objections not inconsistent with [his own],”
4 Dkt. 4063 at 2, what PHAI Objectors propose—a siphoning off \$30 million in direct relief, or 11.8% of the
5 gross settlement, to fund nonprofit research—is so patently unlawful as to merit a disclaiming response. Dkt.
6 4063 at 1.

7 The Court must reject PHAI’s proposed settlement revision for at least two reasons. First, PHAI
8 Objectors ask this Court to fundamentally alter the terms of the proposed settlement, a power it does not
9 possess. *See Evans v. Jeff D.*, 475 U.S. 717, 726 (1986); *Officers for Justice v. Civil Serv. Comm’n of San Francisco*, 688
10 F.2d 615, 630 (9th Cir. 1982). Second, *cy pres* is simply impermissible, unless or until there is no feasible means
11 to directly disburse funds to the class. *See Nachshin v. AOL, LLC*, 663 F.3d 1034, 1036 (9th Cir. 2011); *accord*
12 *Principles of the Law of Aggregate Litigation* § 3.07 (Am. Law Inst. 2010). Because PHAI Objectors propose
13 *cy pres* at the expense of direct and admittedly feasible payments to class members, their proposal is unlawful
14 and must be rejected.

15 “Neither the district court[s] nor [the appellate] court[s are] empowered to rewrite the settlement agreed
16 upon by the parties.” *Officers for Justice*, 688 F.2d at 630. “[T]he power to approve or reject a settlement
17 negotiated by the parties before trial does not authorize the court to require the parties to accept a settlement
18 to which they have not agreed.” *Evans*, 745 U.S. at 726. Courts “may not delete, modify, or substitute certain
19 provisions,” *Officers for Justice*, 688 F.2d at 630, for the “authority to administer a class-action settlement derives
20 from Rule 23,” a purely procedural device. *Klier v. Elf Atochem N. Am., Inc.*, 658 F.3d 468, 475 (5th Cir. 2011);
21 *Rawa v. Monsanto Co.*, 934 U.S. F.3d 862, 871 (8th Cir. 2019) (“District courts do not rewrite settlement
22 agreements.”). In flagrant disregard of *Evans* and *Officers for Justice*, PHAI Objectors ask this Court to take \$30
23 million, not from Class Counsel—who seek an exorbitant \$76.5 million fee (*see* Stephens Obj. (Dkt. 4063))—
24 but from the class itself, to finance nonprofit research. *See* Dkt. 4062 at 1. Simply put, this is not within the
25 power of the Court. Plaintiffs “request that the district court redraft the terms of the agreement to allow for
26 an alternative method of fund distribution.” *Rawa*, 934 F.3d at 871. But the Court is not a legislator on the
27 appropriations committee, and the proposed settlement is not a draft piece of legislation. The Court cannot
28 rearrange the settlement proceeds without overstepping its authority under Rule 23, which “wisely” confines

1 the judicial role to approval or disapproval. *Evans*, 745 U.S. at 726-27. “In short, the settlement must stand or
 2 fall as a whole.” *Officers for Justice*, 688 F.2d at 630. If “[a]bsent such a provision [as that proposed], the
 3 Settlement is [rendered] unfair, inadequate, and ... unreasonable,” Dkt. 4062 at 3, then the Court has but one
 4 option: deny final settlement approval.

5 But PHAI Objectors’ grievance is meritless. *Cy pres* is a last resort, not a first resort; it cannot lawfully
 6 supplant direct class recovery because “[c]lass members are not indifferent to whether funds are distributed to
 7 them or *cy pres* recipients.” *In re Baby Prods. Antitrust Litig.*, 708 F.3d 163, 178 (3d Cir. 2013). *Cy pres* “took the
 8 judiciary ‘to the utmost verge of the law’ even before it was applied to class actions.” *Keepseagle v. Perdue*, 856
 9 F.3d 1039 (D.C. Cir. 2017) (Brown, J., dissenting) (quoting *Jackson v. Phillips*, 96 Mass. 539, 574 (Mass. 1867)).
 10 PHAI Objectors treat “*cy pres*” as though it were a dirty word—the term appears not once in their fourteen-
 11 page objection. That’s curious, but unsurprising. After all, *cy pres* “is a very troublesome doctrine,” *Six (6)*
 12 *Mexican Workers v. Ariz. Citrus Growers*, 904 F.2d 1301, 1312 (9th Cir. 1990) (Fernandez, J., concurring), with
 13 the potential to generate “conflicts of interest,” “incentives for collusion,” and “the [] appearance of [judicial]
 14 impropriety.” *In re Google Inc. St. View Elec. Comms. Litig.*, 21 F.4th 1102, 1123 (9th Cir. 2021) (Bade, J.,
 15 concurring). More fundamentally, there’s an “abiding debate about the lawfulness of Article III courts to permit
 16 *cy pres* distributions,” *Poblano v. Russell Cellular Inc.*, 2021 U.S. Dist. LEXIS 108796, *5 (M.D. Fla. Jun. 10, 2021),
 17 or whether such distributions ever count any form of class benefit. *See Frank v. Gaos*, 139 S. Ct. 1041, 1047
 18 (Thomas, J., dissenting); *Baby Prods.*, 708 F.3d at 173 (describing the “indirect benefit” of *cy pres* as “at best
 19 attenuated and at worst illusory”).

20 Given the risks, the Ninth Circuit has a “strong preference for distribution to class members instead
 21 of *cy pres* distributions.” *Reid v. I.C. Sys.*, 2021 U.S. Dist. LEXIS 166517, *8 (D. Ariz. Sept. 2, 2021); *In re Anthem*
 22 *Inc. Data Breach Litig.*, 327 F.R.D. 299, 333 (N.D. Cal. 2018) (Koh, J.) (describing “the law’s general preference
 23 for *cy pres* awards to be limited to scenarios where it is not feasible to make further distributions to class
 24 members”); *see, e.g., Connor v. J.P. Morgan Chase Bank, N.A.*, 2021 U.S. Dist. LEXIS 65011, *3 (S.D. Cal. Apr. 2,
 25 2021) (approving secondary class member distribution even though settlement had provided for *cy pres*);
 26 *Camberis v. Ocwen Loan Servicing LLC*, 2018 U.S. Dist. LEXIS 198108, at *8 (N.D. Cal. Nov. 20, 2018) (ordering
 27 secondary distribution over *cy pres*, where settlement was silent). This Circuit has wisely confined class *cy pres* to
 28 “**unclaimed or non-distributable**” funds only. *Nachshin*, 663 F.3d at 1036 (emphasis added). “[T]he

1 settlement should presumptively provide for further distributions to participating class members unless the
 2 amounts involved are too small to make individual distributions economically viable or other specific reasons
 3 exist that would make such further distributions impossible or unfair.” American Law Institute, PRINCIPLES
 4 OF THE LAW OF AGGREGATE LITIGATION § 3.07(b). “[A] *cy pres* distribution to a third party of unclaimed
 5 settlement funds is permissible only when it is not feasible to make further distributions to class members.”
 6 *Klier*, 658 F.3d at 475 (internal quotations omitted). Conversely, *cy pres* “is not appropriate” where “the
 7 settlement is distributable to class members.” *Hofmann v. Dutch LLC*, 317 F.R.D. 566, 578 (S.D. Cal. 2016).
 8 Here, the settlement proceeds are neither unclaimed nor non-distributable—**this alone takes *cy pres* off the**
 9 **table**. For starters, the settlement proceeds remain to be distributed, and as such, there aren’t—nor could there
 10 be—any residual or unclaimed dollars. If, after *all* feasible distributions are made, there remain residual funds,
 11 then those dollars might become a candidate for *cy pres*, provided the terms of the settlement so permit. While
 12 this Circuit has also countenanced *cy pres* in the context of *cy pres*-exclusive settlements,¹ the present case is self-
 13 evidently *not cy pres*-exclusive. That being so, *cy pres* is simply off the table.

14 PHAI Objectors invoke Judge Polster for the proposition that “any settlement ... should ... ‘do
 15 something meaningful to abate th[e youth vaping crisis]’ and reduce its adverse public health impact rather
 16 than simply ‘moving money around.’” Dkt. 4062 at 7 (quoting Transcript of Record at 09:15:51 and 09:23:37,
 17 *In re Nat’l Prescription Opiate Litig.*, MDL No. 2804, No. 1:17-CV-2804 N. Dist. Ohio (Jan. 9, 2018)). Setting
 18 aside that the Sixth Circuit has consistently rebuked that court’s reading of the law,² there are two glaring
 19 problems with this line of argument. First, PHAI fundamentally misapprehends the core purpose of class
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21 _____
 22 ¹ In *In re Google Inc. St. View*, for example, the class was so large and the verification process so costly
 23 as to render *any* direct distributions to the class infeasible. 21 F.4th at 1115. Under such circumstances, “the
 24 district court [did not] abuse[] its discretion by approving the [exclsuive] use of *cy pres* payments.” *Id.* Here,
 25 however, the proposed settlement agreement correctly provides for direct distributions to class members.

26 ² See, e.g., *In re Nat’l Prescription Opiate Litig.*, 927 F.3d 919, 924, 929, 933 (6th Cir. 2019) (finding abuse
 27 of discretion in the district court’s efforts to leverage a settlement between the parties); *In re Nat’l Prescription*
 28 *Opiate Litig.*, 956 F.3d 838, 844 (6th Cir. 2020) (issuing writ of mandamus and commenting that “MDLs are
 not some kind of judicial border country, where the rules are few and the law rarely makes an appearance”); *In*
re Nat’l Prescription Opiate Litig., 976 F.3d 664, 676 (6th Cir. 2020) (“The district court’s course of action neither
 fully satisfied the critical fairness concerns of Rule 23(b)(3), nor respected the important differences between
 litigation classes and settlement classes.”).

1 Dated: July 21, 2023

Respectfully submitted,

2 /s/ Neville S. Hedley

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PROOF OF SERVICE

I hereby certify that on this day I electronically filed the foregoing Objection using the CM/ECF filing system thus effectuating service of such filing on all ECF registered attorneys in this case.

DATED this 21st day of July 2023

/s/ Neville S. Hedley
Neville S. Hedley

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