UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

SARA HAWES and AMY HILL, individually, and on behalf of all others similarly situated, PLAINTIFFS, v. MACY'S RETAIL HOLDINGS, INC. and MACY'S WEST STORES, INC., DEFENDANTS.	Case No.: 1:17-cv-00754 CLASS ACTION Hon. Douglas R. Cole
CASSANDRA CHIARALUCE and JONATHAN FONTAINE, individually, and on behalf of all others similarly situated, PLAINTIFFS, v. MACY'S INC, MACY'S RETAIL HOLDINGS, INC., MACY'S WEST STORES, INC. and MACYS.COM, DEFENDANTS.	Case No.: 2:20-cv-00081 CLASS ACTION Hon. Douglas R. Cole

REPLY OF THE HAMILTON LINCOLN LAW INSTITUTE TO PLAINTIFFS' RESPONSE

During the pendency of Hamilton Lincoln Law Institute's ("HLLI") motion for leave to file an amicus brief, the Court granted its motion. Accordingly, this reply does not address the now-moot issue whether to grant leave. Instead, HLLI files this brief only to respond to several merits issues the Plaintiffs raised in their amicus response which this Court has not yet addressed.

Plaintiffs' response misrepresents and misapplies caselaw, masks the Settlement's flaws, makes phantom arguments, and mistakes Public Interest Research Group ("PIRG") as non-partisan. The law is clear: The Settlement is grossly flawed, because it awards most of the funding to a partisan political actor in violation of Rule 23 and the First Amendment. Thus, this Court should DENY the proposal.

I. Plaintiffs misrepresent the relevant law governing the use of *cy pres* in class settlements.

It is a patent misrepresentation to write matter-of-factly that "every judicial circuit has approved *Cy pres* distribution." Pls' Mem. of Law in Opp. to Amicus Br. (hereinafter "Pls' Opp. to Am. Amicus Br."), ECF No. 154-3 at PageID 4542. This severely overstates the limitations courts impose on *cy pres* in class settlements.

The very cases Plaintiffs cite as "evidence" contradict their legal claim. *Id.* at PageID 4542 n.1. In *In re Baby Products Antitrust Litigation*, the Third Circuit "vacate[d] the [] settlement because the [district c]ourt was apparently unaware of the amount of the fund that would be distributed to *cy pres* beneficiaries rather than being distributed directly to the class." 708 F.3d 163, 170 (3d Cir. 2013). This should sound familiar to Plaintiffs' counsel, given the Settlement they negotiated will similarly distribute most of the Settlement to PIRG. In *Klier v. Elf Atochem North America, Inc.*, the Fifth Circuit

reversed "distributing the unused medical-monitoring funds to third-party charities" and ordered "that the funds be distributed to the subclass comprising the most seriously injured class members." 658 F.3d 468, 471 (5th Cir. 2011). And the "*cy pres*" in *Tennille v. West Union Co.* was that "the district court will release [unclaimed funds] in pro rata shares to individual States … under that State's unclaimed-property laws." 809 F.3d 555, 560 (10th Cir. 2015). This relief is actually escheat—and certainly not analogous to the Settlement in this case. *See Anderson Living Trust v. WPX Energy Production, LLC*, 306 F.R.D. 312, 412 n. 62 (D.N.M. 2015) (observing the "Tenth Circuit has never discussed cy pres relief" in detail and the doctrine "gives … damages to an interloper"); *see also Thornton v. The Kroger Co.*, No. CIV 20-1040 JB/LF, 2023 WL 6378417, at *38 n. 42 (D.N.M. Sept. 29, 2023).

Other cases from other circuits that Plaintiffs do not cite offer further discouragement of *cy pres*. *See In re BankAmerica Corp. Sec. Litig.*, 775 F.3d 1060, 1064-67 (8th Cir. 2015) (laying out strict rules for using *cy pres* and vacating the *cy pres* settlement); *Pearson v. NBTY, Inc.*, 772 F.3d 778, 784 (7th Cir. 2014) (observing *cy pres* should be "limited to money that can't feasibly be awarded to the intended beneficiaries"). Together, these cases do *not* support the conclusion that "every judicial circuit" approves of *cy pres*—instead they demonstrate that *cy pres* awards are an unpreferred and limited remedy for class action settlements. Pls' Opp. to Am. Amicus Br., ECF No. 154-3 at PageID 4542.

Plaintiffs' reliance on Third Circuit caselaw in arguing for *cy pres*'s legality is especially puzzling: That circuit holds that "barring sufficient justification, *cy pres* awards

should generally represent a small percentage of total settlement funds." *In re Baby Prods.*, 708 F.3d at 174; *see* Pls' Opp. to Am. Amicus Br., ECF No. 154-3 at Page ID 4549 (citing *In re Baby Prods.*). And as HLLI's original brief makes clear—and subsequent facts in Plaintiffs' opposition brief reveal as well, *infra* II—the Settlement as designed will award a *significant*, not "small[,] percentage of total" funds to PIRG. *In re Baby Prods.*, 708 F.3d at 174; Am. Br. of *Amicus Curiae* , ECF No. 152-1 at PageID 4393-95.

And it is false that "[t]he use of a *cy pres* component is a well-established structural component of class action settlements in this District and the Sixth Circuit." Pls' Opp. to the Am. Mot. for Leave to File Proposed *Amicus Curiae* Br. (hereinafter "Pls' Opp. to Am. Mot."), ECF No. 154 at PageID 4517. That Plaintiffs make this assertion without citing to any Sixth Circuit caselaw is not an accident—to "amicus's knowledge, other than in *Dry Max Pampers* the Sixth Circuit has never directly confronted a settlement deploying *cy pres*." Am. Br. of *Amicus Curiae*, ECF No. 152-1 at PageID 4399. Yes, HLLI acknowledges that there are district courts in the Sixth Circuit that have blessed *cy pres* as a component of a class settlement. *See* Pls' Opp. to Am. Amicus Br., ECF No. 154-3 at PageID 4542 (listing cases). But those cases did not approve settlements as nakedly designed to redistribute class money to a *cy pres* beneficiary as this one. Those cases had *cy pres* beneficiaries who came much closer to constituting "a substitute for the injured plaintiffs" than PIRG does here. Hon. Elaine Bucklo and Thomas R. Meites, *What Every Judge Should Know About a Rule 23 Settlement (But Probably Isn't Told)*, 41 NO. 3 LITIG. 18, 21 (2015). And most importantly, those cases did not present the same First Amendment issues as this one, where the *cy pres* beneficiary is a

partisan political actor. *Infra* IV.A; Am. Br. of *Amicus Curiae*, ECF No. 152-1 at PageID 4401-04.

Separately, Plaintiffs' reliance on 28 U.S.C. § 1712(e) as supportive of *cy pres* is misplaced. *See* Pls' Opp. to Am. Amicus Br., ECF No. 154-3 at PageID 4543. The Settlement is *not* a coupon settlement, so § 1712 (entitled "Coupon settlements") does not apply. Section 1712(e) itself is limited in application to "a proposed settlement under which class members would be awarded coupons[.]" And even if it did apply, § 1712(e) uses constraining language—limiting *cy pres* to "a portion of the value of unclaimed" funds—that implies a preference for direct-to-class relief even for coupon settlements. But the *cy pres* language in § 1712(e) reveals Congress knows how to permit *cy pres* relief in specific class action circumstances—thus the absence of such express statutory language for settlements like this case further supports disapproval. And § 1712(e) further deters *cy pres* under federal policy through its requirement that "any proceeds under this subsection shall not be used to calculate attorneys' fees."

Accordingly, a more accurate reading of *cy pres* caselaw and statutes reveals that *cy pres* in class settlements is limited in application and amount, debated amongst the circuit courts, and underdeveloped in the Sixth Circuit.

II. Plaintiffs' response confirms what is obvious: Most of the Settlement money will wind up in PIRG's hands.

Rather than grapple with the true state of the law, Plaintiffs try misdirection and trumpet that nearly 300,000 claims have already been filed in accordance with the proposed Settlement. *See* Pls' Opp. to Am. Amicus Br., ECF No. 154-3 at PageID 4544,

4546, 4547, and 4552. But Plaintiffs never disclose what percentage of these claims are made without proof of purchase—and thus capped at $2.50 per class member—versus made with proof of purchase (which pay $7.50 per purchase). Settlement, ECF No. 143-2 at Page ID 4108. In evaluating the legality of a settlement (and *cy pres*), the absolute dollars delivered to the class is relevant—not the aggregate number of claims. *See In re Baby Prods.*, 708 F.3d at 174 (remarking *cy pres* relief should be a "small" percentage of total relief); *Dry Max*, 724 F.3d at 720.

The omission of any breakdown for claims with versus without proof of purchase is telling. As HLLI explained in its original brief, "a negligible number of claimants will submit proof of purchase" for this Settlement. Am. Br. of *Amicus Curiae*, ECF No. 152-1 at PageID 4393-94 (citing class settlements with low-dollar claims that had <1%, and sometimes less than .1%, of total claims made with proof of purchase). Because Plaintiffs elide any breakdown of their claims, their celebration is actually a revelation: Nearly all of those 300,000 claims will only pay $2.50 in total, or ~$750,000 to the class. Even if *every* claimant had proof of purchase entitling them to a $7.50 credit (a practical impossibility), that *still* would not come close to matching the $10,500,000 allocated in the Settlement. The remainder—a significant majority of the funds—will revert to PIRG, in a direct rebuke to the limited and substitute nature of *cy pres*.

Further, the Parties started "Claims Stimulation efforts" on September 22—right after HLLI filed its original motion for leave and corresponding amicus brief. Weisbrot

Decl., ECF 153-3 at PageID 4478. The timing is curious: As soon as the Settlement is criticized as insufficiently delivering relief to the class, the Parties kick-start efforts to increase claims. Unfortunately, all the advertising in the world cannot get the Parties to achieve what the law requires: substantial relief delivered to the class. *See Dry Max*, 724 F.3d at 720.

Finally, the lack of objectors to the Settlement does not equate with class approval of the *cy pres* scheme nor settlement lawfulness. Pls' Opp. to Am. Mot., ECF No. 154 at PageID 4515-16. "[I]t is to be *expected* that class members with small individual stakes in the outcome will not file objections[.]" *Rawlings v. Prudential-Bache Properties, Inc.*, 9 F.3d 513, 516 (6th Cir. 1993) (emphasis added). This is because the individual benefit for doing so—if even successful—is miniscule relative to the time and effort required. As the Seventh Circuit put it in *Redman v. Radioshack Corp.*, the fact that 99.99% of class members did not object or opt out "hardly shows 'acceptance' of the proposed settlement: rather it shows oversight, indifference, rejection, or transaction costs." 768 F.3d 622, 628 (7th Cir. 2014). For Plaintiffs to suggest that the absence of objectors constitutes some sort of "get out of jail free" card ignores both the law *and* economics underlying the Settlement.

III. Much of Plaintiffs' brief is spent arguing against straw men.

Plaintiffs spend inordinate parts of their brief rebutting arguments that HLLI never makes. Plaintiffs write that "class counsels' attorneys' fee award is not increased by *cy pres* distribution, as *HLLI seems to suggest*." Pls' Opp. to Am. Amicus Br., ECF No.

154-3 at PageID 4550 (emphasis added). They assert "*HLLI also claims* that the attorneys' fee award being tied to the *cy pres* distribution … risks 'preferential treatment' for class counsel … a *baseless allegation* with no support." *Id.* at PageID 4551 (emphasis added). And they also submit that "HLLI [] *attacks the Court* by claiming that '[t]he impartiality of judges is impinged by *cy pres*, too, as it tempts judges to play benefactor with money meant for the class and creates 'a potential appearance of impropriety.'" *Id.* at PageID 4552 (emphasis added) (alterations in original) (citation omitted). Wrong on all three counts.[1]

Clearly Plaintiffs did not read HLLI's original brief closely enough. For the entirety of the section to which Plaintiffs purportedly respond to HLLI's "accusations," "suggestions," and "attacks," *id.* at PageID 4550-52, HLLI makes *zero* claims about *this* case. Am. Br. of *Amicus Curiae*, ECF No. 152-1 at PageID 4396-99. Until it pivots to

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[1] These are not the only examples demonstrating why this Court cannot rely on Plaintiffs' counsel in this fundamentally "ex parte proceeding," because their advocacy leaves the Court "vulnerable to being misled." *Ark. Teacher Ret. Sys. v. State St. Corp.*, 25 F.4th 55, 65 (1st Cir. 2022). They also make up and then misattribute an attack on this Court to HLLI. In full:

> Hamilton's *stated interest in this proposed settlement is to "advise [the c]ourt" because its "perspective will help the Court satisfy its independent obligation to ensure that the Settlement serves the interests of the class."* See Proposed Amicus Brief at 3 and 5. *In other words, the Hamilton law firm believes it knows better than this Court* whether the settlement before it is "fair, adequate, and reasonable," which the Court already must examine independently. Williams v. Vukovich, 720 F.2d 909, 921 (6th Cir. 1983). *But Hamilton's ipse dixit statement that they know better than this Court* does not confer HLLI with any interest in this proposed settlement.

Pls' Opp. to Am. Mot., ECF No. 154 at PageID 4516 (emphasis added). HLLI never made an "ipse dixit statement that they know better than this Court"—not even close. *Id.* That attack is grounded in counsel's (inaccurate) paraphrasing of HLLI's original statement.

discussing PIRG's inclusion in the Settlement, HLLI offers *general* substantive critiques mainly from scholars against *cy pres* that this Court might value given the dearth of Sixth Circuit caselaw on this issue. This is consistent with the pertinent section header, which previewed "[*c*]*y pres* is not appropriate relief for federal class action lawsuits," *not* "*cy pres* is not appropriate relief for this case." *Id.* at PageID 4396.

Of course HLLI's general arguments against *cy pres* "are in no way tied to any argument about this case or this settlement." Pls' Opp. to Am. Amicus Br., ECF No. 154-3 at PageID 4551. That was not the point of this pertinent argument section in HLLI's brief—it was to provide relevant legal context against the use of *cy pres* in class settlements that this Court may want to consider in ruling on *this* Settlement, given the lack of binding caselaw regulating its approval analysis.

IV. PIRG is not an appropriate *cy pres* beneficiary, and its inclusion in the Settlement is a First Amendment violation.

A. PIRG is a left-wing political actor and an inadequate substitute for the class.

Plaintiffs complain "Hamilton gives away its true agenda by referring to PIRG's left-wing activism … If Hamilton was actually trying to protect the broad sanctity of free speech on behalf of the class, then the reference to left wing would be wholly unnecessary." Pls' Opp. to Am. Mot., ECF No. 154 at PageID 4514 (internal quotes omitted). Not so: Because some courts permit *cy pres* distributions of residual funds to non-profits with political causes so long as they adequately substitute for the plaintiffs, the specific politics of a potential beneficiary is highly relevant to any *cy pres* settlement.

See Bucklo and Meites, 41 NO. 3 LITIG. at 21. In some circuits—if Plaintiffs had actually structured the Settlement to deliver relief primarily to the class—the residual funds in this Settlement could revert to a consumer protection watchdog, particularly one addressing fraud and product labeling. But this hypothetical consumer protection watchdog is still a *political* actor, since it would likely advocate for specific policies, lobby legislators, and engage in litigation.

What makes PIRG so inappropriate as a *cy pres* beneficiary in this Settlement—amongst other things—is that its advocacy is not just political, but *partisan*. *See* Am. Br. of *Amicus Curiae*, ECF No. 152-1 at PageID 4401-04. If Plaintiffs had put the same effort into researching PIRG as they did into researching HLLI, they could have realized this before including the organization as a beneficiary. *Compare* Pls' Opp. to Am. Mot., ECF No. 154 at PageID 4513-15, *with* Settlement, ECF No. 143-2 at PageID 4109 (mentioning PIRG only once as "a charitable organization which has as its purpose the advancement of consumer protections and rights"). Partisan political activity makes PIRG wholly inappropriate as "a substitute for the injured plaintiffs," who are simply ripped-off customers—not partisan actors. Bucklo and Meites, 41 NO. 3 LITIG. at 21. While the Plaintiffs and PIRG may claim "the problems we work on aren't progressive or conservative," its advocacy and preferred solutions—as HLLI's amicus brief makes clear—certainly are left-leaning. *See* Pls' Opp. to Am. Amicus Br., ECF No. 154-3 at PageID 4556 (citation omitted). Regardless, the problem is not the

direction of PIRG's political leanings—a *cy pres* award to a right-wing group would be no more proper. The problem is that PIRG is a partisan organization at all.

And yes, PIRG does some consumer protection activity. *Id.* at PageID 4558. But as Plaintiffs concede, PIRG's other missions to which it devotes significant time—health, global warming, and democracy—do not "directly assist in protecting consumers from deceptive trade practices." *Id.* at PageID 4556. So separate from its partisanship, PIRG's elaborate mission set also disqualifies it as an appropriate stand-in for the class members in this case. Bucklo and Meites, 41 NO. 3 LITIG. at 21.

B. *Jones v. Monsanto Co.* and *Hyland v. Navient Corp.* do not save the Settlement's *cy pres* distribution from violating the First Amendment.

Plaintiffs' counsel relies on *Jones v. Monsanto Co.*, 38 F.4th 693 (8th Cir. 2022), and *Hyland v. Navient Corp.*, 48 F.4th 110 (2d Cir. 2022), to assert that "even if" PIRG was a "political activist group," "there still is no violation of any class members' First Amendment rights." Pls' Opp. to Am. Amicus Br., ECF No. 154-3 at PageID 4558-60. But neither of these cases permit this Settlement under the First Amendment.

First, while *Jones* rejected a First Amendment argument to a *cy pres* Settlement, its analysis was limited to a *cy pres* that only involved "residual" funds. 38 F.4th at 699. And *Jones* reiterated the holding in *BankAmerica* that "unclaimed funds may only be distributed *cy pres* where existing class-member claimants have been fully compensated and further distribution to remaining class members is not feasible." *Id.* at 698-99 (citing *In re BankAmerica Corp. Sec. Litig.*, 775 F.3d 1060, 1064 (8th Cir. 2015). In contrast, the

Settlement here will deliver a majority of the promised relief—not some small "residual" amount—to PIRG. *Id.* at 699; *supra* II; Am. Br. of *Amicus Curiae*, ECF No. 152-1 at PageID 4393-95. Further, the Settlement does not "fully compensate" the class members, as even after the secondary distribution relief is capped at 50% of what each member paid for the sheets—even with proof of purchase. *Jones*, 38 F.4th at 698-99; Settlement, ECF No. 143-2 at PageID 4109. And remaining distribution to class members is feasible—such as by increasing the award to class members without proof of purchase, for example. *Jones*, 38 F.4th at 698-99.

Hyland does Plaintiffs no better. For one, the *cy pres* award affirmed in that case was not "a damages award" that "belonged to class members as damages (indeed, the class members expressly reserved their individual right to later sue Navient for money damages)[.]" 48 F.4th at 122. But here, the Settlement *is* a damages award, and class members *do* disclaim their rights to any other damages arising from this case if it is approved. Settlement, ECF No. 143-2 at PageID 4105, 4117. Thus, the Settlement dollars here "belong[] to [the] class." *Hyland*, 48 F.4th at 122; *In re Wells Fargo Sec. Litig.*, 991 F. Supp. 1193, 1197 (N.D. Cal. 1998). Further, the class members in *Hyland* received a personal and tangible benefit from the *cy pres* distribution: "The cy pres award funds Public Service Promise and thereby assists all class members in navigating [the Public Service Loan Forgiveness program] and determining whether they have a viable individual monetary claim against Navient." *Hyland*, 48 F.4th at 122. That is not the case

here. PIRG not only fails to offer the Plaintiffs a personal and tangible benefit as in *Hyland*, but also—in the case of those who disagree with its politics—advocate for causes completely contrary to class member interests. *Supra* IV.A; Am. Br. of *Amicus Curiae*, ECF No. 152-1 at PageID 4401-04. Certainly, PIRG is not "a substitute for the injured plaintiffs" in the way Public Service Promise was for the class in *Hyland*. Bucklo and Meites, 41 NO. 3 LITIG. at 21.

Further, *Hyland*'s constitutional analysis of *cy pres* under the First Amendment is flawed. The *Hyland* court remarked the "settlement agreement does not involve state action[.]" 48 F.4th at 122. In so holding, it cited language that a "class-action settlement, like an agreement resolving any other legal claim, is essentially a private contract negotiated between the parties," and "[m]ere approval of or acquiescence in the initiatives of a private party is not sufficient to constitute state action." *Id.* (alterations in original) (cleaned up). But the analogy to traditional settlements is wrong: "Put simply, the parties may not accomplish through class settlement what they otherwise would be unable to accomplish through class litigation." *W. Morgan-East Lawrence Water and Sewer Auth. v. 3M Co.*, 737 Fed. Appx. 457, 469 (11th Cir. 2018) (per curiam); *Williams v. Reckitt Benckiser LLC*, 65 F.4th 1243, 1257 (11th Cir. 2023) (plaintiffs with past harms lack standing to earn injunctive relief). "This is a class action, and class representatives are not free to enter into a settlement without judicial approval." *U.S. Trust Co. of N.Y. v. Executive Life Ins. Co.*, 791 F.2d 10, 13 (2d Cir. 1986); *see also Dry Max*,

724 F.3d at 718. And because the federal courts play such a hands-on role in the class settlement process, their decision in approving a settlement constitutes state action. *See Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 845-46 (1999) (noting approval of the class settlement implicated both the Seventh Amendment and due process, and thus is state action). Accordingly, *Hyland*'s First Amendment holding is erroneous and should be dismissed by this Court.

CONCLUSION

HLLI respectfully asks the Court to reject the Settlement for these additional and foregoing reasons.

Respectfully submitted,

s/ Joseph P. Ashbrook
Joseph P. Ashbrook (0091279)
ASHBROOK BYRNE KRESGE LLC
PO Box 8248
Cincinnati, Ohio 45249
Tel: (513) 582-7424
Fax: (513) 216-9882
jpashbrook@ashbrookbk.com

HAMILTON LINCOLN LAW INSTITUTE
Max A. Schreiber
(*pro hac vice*)
5868 E. 71st Street, Suite E-709
Indianapolis, IN 46220
(703) 203-3848
max.schreiber@hlli.org

PROOF OF SERVICE

I hereby certify that on October 10, 2023, I electronically filed the foregoing with the Clerk of the United States District Court for the Southern District of Ohio using the CM/ECF system, which will provide notification of such filing to all who are ECF-registered filers.

s/Joseph P. Ashbrook
Joseph P. Ashbrook