

**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

**SUPPLEMENTAL BRIEF OF THE HAMILTON LINCOLN LAW INSTITUTE
ADDRESSING PIRG'S SELECTION AS THE *CY PRES* BENEFICIARY IN THE
SETTLEMENT**

This Court invited Hamilton Lincoln Law Institute (“HLLI”) to brief whether the Public Interest Research Group (“PIRG”) meets the standard for selection as a *cy pres* recipient in the Settlement as laid out in *In re BankAmerica Corporation Securities Litigation*, 775 F.3d 1060 (8th Cir. 2015). For the following reasons, it is clear PIRG fails the *BankAmerica* criteria and that the Settlement should be rejected.

First, when a court permits a *cy pres* remedy, the funds must be distributed “for a purpose *as near as possible* to the legitimate objectives underlying the lawsuit, the interests of class members, and the interests of those similarly situated.” *BankAmerica*, 775 F.3d at 1067 (emphasis added). This is a high bar: *BankAmerica* was a securities fraud class action case which incorporated even more fraud when the claims administrator’s employee stole from the class’s second distribution. 2013 U.S. Dist. LEXIS 88133, *6-7 (E.D. Mo. June 24, 2013). The class members were primarily wealthy individuals and institutions in the St. Louis area, and because of their vast wealth the parties believed the class lacked an obvious charitable representative for *cy pres*. *Id.* at *16-18. Accordingly, the parties proposed, and the district court accepted, donating some of the residual class money to the Legal Services of Eastern Missouri (“LSEM”)—which practiced *some* anti-fraud work—“to vindicate the rights of victims of fraud and deter future fraudulent schemes.” *Id.* at *17-18. But the Eighth Circuit rejected the parties’ LSEM proposal, primarily because LSEM did not “sufficiently approximate[] the interests of the class” simply by “serv[ing] victims of fraud.” *BankAmerica*, 775 F.3d at 1067.

The selection of PIRG in the Settlement here suffers from the same fatal defect—an inadequate nexus between the *cy pres* recipient and the class—as did the selection of the class in *BankAmerica*. The Parties selected PIRG because it engages in the “advancement of consumer protections and rights,” Settlement, ECF No. 143-2 at PageID 4109, just as the parties in *BankAmerica* improperly selected LSEM as a *cy pres* recipient “because it serves victims of fraud,” 775 F.3d at 1067. But as HLLI has already pointed out, saying PIRG focuses on consumer rights is like saying Cincinnati’s culinary scene is limited to chili—in reality, the organization advocates across an array of issues not relevant to the class, including waste/recycling, democracy, global warming, health, clean water & air, energy, toxics, and transportation. *Our Work*, PIRG (accessed Nov. 10, 2023), <https://pirg.org/our-work/>. This widespread mission set disassociates PIRG from “uses consistent with the nature of the underlying action,” since the recipient must be “relate[d] directly to the [] injury alleged in this lawsuit”—specifically and narrowly, consumer fraud. *BankAmerica*, 775 F.3d at 1067 (cleaned up) (second alternation in original). Even if Plaintiffs’ contention that PIRG “made certain ... that any money [from *cy pres*] will be solely dedicated to addressing [consumer protection issues]” was enforceable and 100% accurate, Final Approval Hr’g, Oct. 20, 2023, Tr. of Proceedings (hereinafter “Transcript”), ECF No. 45 at PageID 625, this argument completely ignores a basic and fundamental economic premise: “Money is fungible,” *Ransom v. FLA Card Servs., N.A.*, 562 U.S. 61, 79 (2011), so any funds from the Settlement will free up dollars—and lend class support—to *all* of PIRG’s political initiatives.

PIRG’s partisan advocacy on these issues further divorces it from the interests of the class, which presumably has a range of political opinions given Macy’s nationwide presence and substantial customer base. *See* Am. Br. of *Amicus Curiae* HLLI in Opp’n to the Class Settlement (hereinafter “HLLI Amicus Br.”), ECF No. 158 at PageID 4601-02 (discussing PIRG’s politics); Reply of HLLI to Pls.’ Resp. (hereinafter “HLLI Reply Br.”), ECF No. 157 at PageID 4583-85 (same). In its own words, PIRG campaigns for America “to go fossil fuel free” and “encourage[s] more [public] transit, biking and walking.” *Global Warming*, PIRG (accessed Nov. 10, 2023), <https://pirg.org/our-work/global-warming/>. The organization actively promotes “end[ing] the subsidies that fuel the climate crisis” and wants to make voting “as close to automatic as [PIRG] can get it.” *Energy*, PIRG (accessed Nov. 10, 2023), <https://pirg.org/our-work/energy/>; *Democracy & government*, PIRG (accessed Nov. 10, 2023), <https://pirg.org/our-work/democracy-government/>. While PIRG would have to engage in some political activity to conduct consumer fraud advocacy in line with *BankAmerica*, these positions are irrelevant to this case and inappropriately engage the entire class on one side of charged partisan issues.

And PIRG doesn’t engage these issues alone—it uses its own bankroll to finance other political organizations, putting it squarely within “the darker side of nonprofits” where “charities and social welfare groups” act as “political slush funds.” *See* Robert Meier, *The Darker Side of Nonprofits: When Charities and Social Welfare Groups Become Political Slush Funds*, 147 U. PA. L. REV. 971 (1999). PIRG’s Form 990s reveal substantial political

bias far outside the “legitimate objectives underlying the lawsuit [and] the interests of class members.” *BankAmerica*, 775 F.3d at 1067.

For example, in 2016 PIRG granted \$40,000 to the People’s Action Institute, whose mission is to “advance a long-term agenda for racial, economic and gender justice.” PIRG, *Form 990* Schedule I (2016), <https://tinyurl.com/yv7rmhvu>; *The Antidote to Authoritarianism*, People’s Action (accessed Nov. 10, 2023), <https://peoplesaction.org/institute/>. This organization fights for socialized medicine, for “climate justice,” and against “the growing threat of authoritarianism in rural communities,” People’s Action Institute, *2022 Annual Report* 5, 7, 10 (accessed Nov. 10, 2023), <https://tinyurl.com/45399tx2>, and its sister organization and affiliates also “made tens of thousands of phone calls and knocked on doors” to help elect progressives like Brandon Johnson as mayor of Chicago. *Join Our Organizing Revival!*, People’s Action (accessed Nov. 10, 2023), <https://peoplesaction.org>. PIRG has donated a million dollars to Environment America, which “envision[s] a greener America” and supports radical environmentalist priorities, like banning plastic. PIRG, *Form 990* Schedule I (2017), <https://tinyurl.com/2kes2h9t>; *About*, Environment America (accessed Nov. 10, 2023), <https://environmentamerica.org/about/>; *Banning Single-Use Plastics*, Environment America (accessed Nov. 10, 2023), <https://tinyurl.com/42d4mr4m>. And Hillary Clinton’s “Onward Together” organization—which seeks to “advance[] progressive values”—received \$60,000 from PIRG’s Education Fund in 2020 as well. *Our Mission*, Onward Together (accessed Nov. 10, 2013), <https://www.onwardtogether.org/mission/>; PIRG Education Fund, *Form*

990 Schedule I (2020), <https://tinyurl.com/wpbn3p6k>. PIRG's recent Form 990s are especially damning given the relative dearth of money committed to specialized consumer protection organizations. Together, these funding activities—in addition to PIRG's independent advocacy—put the organization squarely outside the class's interests and makes PIRG an inappropriate *cy pres* beneficiary. *See BankAmerica*, 775 F.3d at 1067.

Second, the Parties' input and the lack of objectors to PIRG's inclusion in the Settlement does not favor *cy pres* in the Sixth Circuit. *Contra BankAmerica*, 775 F.3d at 1066 (noting the “district court should ... allow class members to object or suggest alternative recipients” and solicit input from the parties on *cy pres*). While the Parties tried to equate the lack of objections to PIRG's selection with approval, Transcript, ECF No. 45 at PageID 627, it is “*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). Such is the case with this Settlement: Class members who did not keep their proof of purchase receipts for years are entitled to \$2.50 total, and for the rare few “who do[] this sort of thing,” *In re Dry Max Pampers Litig.*, 724 F.3d 713, 718 (6th Cir. 2013), they get \$7.50 per purchase. *See* Settlement, ECF No. 143-2 at PageID 4108. This is hardly the type of money that motivates detailed attention to the Settlement's intricacies—especially intricacies regarding money that does *not* return to individual class members. *See id.*

Accordingly, this Court should not impute affirmation or even neutrality to PIRG from the lack of objections, even if the *BankAmerica* court would have considered it. *Cf.*

775 F.3d at 1066-67. Instead, this Court must independently and “carefully scrutinize” the *cy pres* proposal. *Dry Max*, 724 F.3d at 718. Upon inspection, it is clear that the Settlement does not efficiently or effectively deliver relief to the class; instead, it selects a *cy pres* beneficiary that does not “relate[] directly to the [] injury alleged in this lawsuit,” *BankAmerica*, 775 F.3d at 1067 (cleaned up) (second alteration in original), and it violates the First Amendment rights of the class members. HLLI Amicus Br., ECF No. 158 at PageID 4600-04; HLLI Reply Br., ECF No. 157 at PageID 4583-88.

Third, PIRG’s selection is flawed because the Settlement does not meet the prefatory “rigorous standards” for *cy pres* as laid out in *BankAmerica*. 775 F.3d at 1067. Implicit in *BankAmerica*—which rejected a \$2.4 million dollar *cy pres* award that came after the \$490 million dollar settlement’s second distribution—is the same central tenet numerous other circuits already endorse: *Cy pres* only applies to *residual* class funds. *BankAmerica*, 775 F.3d at 1064; *In re Baby Products Antitrust Litig.*, 708 F.3d 163, 174 (3d Cir. 2013); *Pearson v. NBTY, Inc.*, 772 F.3d 778, 784 (7th Cir. 2014). But as HLLI has already explained, the Settlement is structured to award the bulk of class relief—not residual funds—to PIRG. *See* HLLI Amicus Br., ECF No. 158 at PageID 4593-95; HLLI Reply Br., ECF No. 157 at PageID 4579-81. Further, the class members are not limited by liquidated damages, so there is no “windfall” issue from increasing their individual awards rather than gifting class funds via *cy pres*. *BankAmerica*, 775 F.3d at 1064-65. It is “feasible” to deliver better relief to class members, too, since the Parties can simply increase the awards with the first distribution still active. *Id.* at 1064, 1066.

Finally, the two cases discussed at the Fairness Hearing—*Gascho v. Global Fitness Holdings, LLC*, 822 F.3d 269 (6th Cir. 2016) and *Moulton v. United States Steel Corporation*, 581 F.3d 344 (6th Cir. 2009)—do not support the *cy pres* proposal before this Court. Neither case discusses any rule for when *cy pres* is appropriate, nor do they analyze its application. In fact, class counsel in *Gascho* “did not see fit to include a *cy pres* beneficiary” in their settlement at all, 822 F.3d at 296 n.3 (Clay, J., dissenting), and the relevant analysis compared how courts award fees for unclaimed funds that reverted to the defendants (as happened in *Gascho*) versus settlements with *cy pres*. *Id.* at 283-85.

While *Moulton* at least involved a third-party settlement beneficiary, it similarly fails to analyze that award’s application and the words “*cy pres*” are conspicuously absent from the decision. The award’s appropriateness was not an issue raised on appeal, so the *Moulton* court could not address the issue *sua sponte*. And the beneficiaries in *Moulton* were two public school departments, 581 F.3d at 351, which makes the remedy more akin to escheat to the State than *cy pres* to a private third-party organization. At the fairness hearing the Court asked directly about escheat, which is a better remedy for the Settlement’s unclaimed funds because it eliminates PIRG’s failure to “sufficiently approximate[] the interests of the class” and the First Amendment concerns from PIRG’s political advocacy. *BankAmerica*, 775 F.3d at 1067. In fact, the best remedy for this Settlement’s post-distribution funds—given that the Parties “remarkabl[y]” have access to “1.5 million verified purchasers” from Macy’s—is unclaimed escheat to the State. Transcript, ECF No. 45 at PageID 580. This is where “the [S]tate [] acts as an intermediary” for known class members until they make a claim for their share of the

Settlement. Ethan D. Millar and John L. Coalson, Jr., *The Pot of Gold at the End of the Class Action Lawsuit: Can States Claim it as Unclaimed Property?*, 70 U. PITT. L. REV. 511, 516 (2011). Unclaimed escheat would maximize relief to the class and avoid the aforementioned and prior-briefed issues with PIRG's selection.

Ultimately, the burden is on the Parties to demonstrate that *cy pres* is warranted and PIRG is an appropriate recipient for this Settlement. *See 1988 Tr. for Allen Children Dated 8/8/88 v. Banner Life Ins. Co.*, 28 F.4th 513, 520-21 (4th Cir. 2022) (“[T]he parties seeking approval of a class settlement also bear the burden of demonstrating fairness, reasonableness, and adequacy.”); *Allred v. ReconTrust Co.*, 787 F. App'x. 994, 996 (10th Cir. 2019) (“A *cy pres* remedy contained in a class-action settlement must also be reviewed through that lens.”); *see also Lane v. Facebook, Inc.*, 696 F.3d 811, 819-20 (9th Cir. 2012). But as the fairness hearing made clear, the Parties did not make a compelling case—or even a clear one—for why they selected PIRG to receive unclaimed funds. *See, e.g.*, Transcript, ECF No. 45 at PageID 629 (“We did all kinds of different things, and we couldn't come up with those kinds of groups.”). And they did not satisfy their burden to show that “alternatives [were] thoroughly explored before concluding that a totally unrelated charity” like PIRG was selected. *BankAmerica*, 775 F.3d at 1067. Therefore, PIRG's selection does not comply with *BankAmerica*. For these reasons and those laid out in HLLI's Amicus Brief and its Reply, this Court should reject the Settlement.

Respectfully submitted,

s/ Joseph P. Ashbrook

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PROOF OF SERVICE

I hereby certify that on November 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