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**IN THE  
SUPREME COURT OF MISSOURI**

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**No. SC84213**

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**IN RE ANCILLARY ADVERSARY PROCEEDING QUESTIONS:  
STATE TREASURER, NANCY FARMER,**

**Appellant,**

**v.**

**SHARON MORGAN, RECEIVER,  
DEBORAH CHESHIRE, CIRCUIT CLERK AND THE COUNTY OF COLE,**

**Respondents.**

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**AMICUS CURIAE BRIEF<sup>1</sup>**

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**PATRICK MCLARNEY  
Missouri Bar No. 20244**

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Missouri Bar No. 28920**

**ATTORNEYS FOR MISSOURI BAR**

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<sup>1</sup> Pursuant to Rule 84.05(f) of the Rules of The Missouri Supreme Court, all parties to this appeal have consented to The Missouri Bar's filing of this brief. Amicus has prepared a statement of consent that its counsel has signed, which has been submitted concurrently with this brief.

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## INTRODUCTION

On December 18, 2001, Circuit Judge Thomas J. Brown III issued an order and judgment in consolidated Case No. CV194-24CC, which is presently before this Court on appeal, determining that:

IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED that  
Legal Services of Eastern Missouri, Inc., Legal Aid of Western Missouri,  
Inc., Mid-Missouri Legal Services and Legal Services of Southern  
Missouri are designated as non-exclusive *cy pres* beneficiaries of the  
residuary funds in this case.

This December 18, 2001 Order of Judge Brown was issued after Judge Ward B. Stuckey's Order and Judgment of November 27, 2001, from which Appellant State Treasurer Nancy Farmer has appealed, but before Appellant Farmer's appeal had been filed. Judge Brown recognized the likelihood of appeal by Appellant Farmer and stayed his Order of *cy pres* distribution of the residual funds until the appellate process was complete and Judge Stuckey's Order was thereby final.

Judge Brown's Order of *cy pres* distribution of residual funds to Legal Aid of Western Missouri, Legal Services of Eastern Missouri, Legal Services of Southern Missouri and Mid-Missouri Legal Services (collectively "Legal Aid Organizations") is not directly before this Court. The spirit of Judge Brown's *cy pres* distribution is, however, before the Court in this appeal, as is the ability of any judge to make a *cy pres* distribution of residual class funds which can no longer feasibly be distributed to members of the class.

The Missouri Bar submits this brief on two limited issues:

(1) The doctrine of *cy pres* distribution should be endorsed for class funds such as those before the Court in this appeal.

(2) Organizations such as the Legal Aid Organizations are proper *cy pres* recipients of such residual class funds.

It is the Missouri Bar's belief that if Appellant Farmer's arguments are accepted by this Court, then *cy pres* distribution of class funds will effectively be prohibited in Missouri. The Missouri Bar asks this Court to reject such a finding and instead adopt, under appropriate circumstances, judicial *cy pres* distribution of residual class funds.

## **ARGUMENT**

### **I.**

#### **Adoption of Appellant Farmer's Arguments Would Effectively Prohibit *Cy Pres* Distribution of Residual Class Funds in Missouri.**

Appellant Farmer's basic arguments are:

- (1) The class fund in this case (the AFund®) is intangible property held by the Circuit Court of Cole County to be claimed piecemeal by any member of a class of potential recipients. Appellant's Brief at Argument II.
- (2) If after five years any part of the Fund is unclaimed, it becomes abandoned property pursuant to the Uniform Distribution of Unclaimed Property Act. *Id.*
- (3) Any part of the Fund which is deemed Aabandoned property® must be reported and turned over to the State Treasurer. *Id.*

To this point, Appellant Farmer's arguments, whatever their merit, seek to determine the control of the money in a class fund after the fund has existed for five years. Once such money in a class fund is turned over to the State Treasurer, that money would either be claimed by the members of the class or be deposited in the State's general fund. Appellant's Brief at Argument I. No judicial application of *cy pres* could occur.

Additional arguments of Appellant Farmer, however, would prohibit any *cy pres* distribution of money in a class fund at any time. Appellant Farmer argues that once such a class fund is created, the trial judge loses all ability to issue additional orders as to who can or cannot receive money from the fund. Appellant's Brief at Argument VIII. Appellant Farmer further argues that once money in such a fund has been deemed abandoned, that money and any interest that has been earned on that money at any time must be reported and turned over to the State Treasurer. Appellant's Brief at Arguments II and III. Finally, as demonstrated in *Nancy Farmer v. Byron L. Kinder et al.*, SC84328; Cole County Case No. 01CV324800, Appellant Farmer's position is that if such money and interest are not reported and turned over to the State Treasurer, then any judge failing to do so will be personally liable for the total amount of the funds and interest involved.

If such arguments are accepted by this Court, then no judge creating or implementing a class fund, such as the Fund before this Court, will be able to apply the *cy pres* doctrine to these funds. Such a judge would be forced to maintain such a class fund for five years, and then turn the residual fund over to the State Treasurer. If the judge distributed any of the money in such a fund by *cy pres* prior to the expiration of the five-year period, then that judge would need to declare the money undistributable to the original class members and designate new recipients, which Appellant Farmer argues would be

improper. Appellant's Brief at Argument VIII. Such a judge would then risk a ruling that after five years the fund money distributed by *cy pres* would be found to be abandoned property. Appellant's Brief at Argument II. Such a judge would then be at risk by Appellant Farmer's argument to personally repay all of the money distributed by *cy pres*.

## II.

### **The Trial Court Has the Discretion to Equitably Disburse Money Remaining in Class Litigation Funds and Is Uniquely Situated to Do So.**

The goal in the creation of any class fund is to do justice. The trial court must weigh all evidence before it and determine by what remedy justice can be best served. Because of its intimate involvement with the evidence in the underlying action, and in the creation of the remedy, the trial court is uniquely situated to determine if the created remedy is working properly, and to entertain alternative remedies.

As often noted, it is common for funds created as a result of class action litigation to have money remaining in the funds after payment of all reasonably identifiable claims. *See, e.g., In Re Motor Sports Merchandise Antitrust Litigation*, 160 F. Supp. 2d 1392, 1393 (N.D. Ga. 2001), and *Jones v. National Distillers*, 56 F. Supp. 2d 355, 356 (S.D.N.Y. 1999). Consequently, it is implicit in the creation of any such fund that some money may remain which must be disbursed by the Court. The trial court retains jurisdiction over such a fund until the trial court has determined how all remaining money in the fund is to be completely disbursed. *Jones*, 56 F. Supp. 2d at 356-357 (20 years after creation of fund, the court still has jurisdiction to distribute remaining money in fund); *Powell v. Georgia-Pacific Corp.*, 843 F. Supp. 491, 495 (W.D. Ark. 1994) citing *Beecher v. Able*, 575 F.2d 1010, 1016 (2d Cir.

1978) and *In Re Agent Orange Product Liability Litigation*, 611 F. Supp. 1396, 1402 (E.D.N.Y. 1985). See also *Van Gemert v. The Boeing Co.*, 739 F.2d 730 (2d Cir. 1984). It is the trial court's responsibility to determine when it is no longer feasible to attempt to disburse money to identifiable members of a class, and the time when all remaining money in the fund should be disbursed by other means. *Jones*, 56 F. Supp. 2d at 356-357, citing 2 Herbert B. Newberg and Alba Conte *Newberg on Class Actions*, § 10.5, at 10-38 (3d ed. 1992). See also *Van Gemert*, *supra*.

Because remaining money in class litigation funds is a frequent occurrence, a substantial body of law has developed as to how courts should disburse such money. *In Re Motor Sports Merchandise Antitrust Litigation*, 160 F. Supp. 2d at 1393. Although a variety of recipients for such disbursements have been chosen by courts, the common thread in these decisions is that, absent specific language in the judgment or settlement causing creation of the fund as to how remaining money in the fund is to be ultimately disbursed, the trial court has broad discretion to equitably disburse such remaining money. *Van Gemert*, 739 F.2d at 737; *In Re Motor Sports Merchandise Antitrust Litigation*, 160 F. Supp. 2d at 1393-1394; *Jones*, 56 F. Supp. 2d at 357; *Powell*, 843 F. Supp. at 495.

If money remains in a class litigation fund after all reasonably identifiable recipients have been found, then the court must employ equitable principles to determine what is the best use for such money to accomplish the original goals of the award. [E]quitable remedies are a special blend of what is necessary, what is fair, and what is workable.® *Van Gemert*, 739 F.2d at 737, citing *Lemon v. Kurtzman*, 411 U.S. 192, 200 (1973). The trial court is the forum most familiar with the underlying litigation creating class litigation funds and with the reasons for the award of money in that litigation. In those

situations where there is money remaining in a class litigation fund, the trial court should be given broad discretion in determining how such money should be disbursed. *Id.* As the court in *Van Gemert* stated:

The critical determining factor here, however, is that trial courts are given broad discretionary powers in shaping equitable decrees. A[E]quitable remedies are a special blend of what is necessary, what is fair, and what is workable. *Lemon v. Kurtzman*, 411 U.S. 192, 200 (1973) (footnotes omitted). Appellate review is narrow. *Id.* We believe that this principle should apply to equitable decrees involving the distribution of any unclaimed class action fund. *Id.*

### III.

#### **The Equitable Powers of the Court Warrant the Application of Cy Pres Principles to the Distribution of Residual Class Funds.**

The *cy pres* doctrine originated as a method of fairly distributing testamentary charitable gifts that otherwise would fail. This equitable doctrine allows bequeathed monies to be applied to a next-best use in situations where the gift's original purpose fails. Natalie A. Dejarlais, Note, *The Consumer Trust Fund: A Cy Pres Solution to Undistributed Funds in Consumer Class Actions*, 38 Hastings L.J. 729 at 730. This remedy, however, has not been limited to traditional trust funds. Rather, the *cy pres* doctrine has been extended to situations in which funds remain after distribution in class actions or other types of representative litigation. See *Newberg on Class Actions*, § 10.17. In such situations, state and federal courts have exercised broad discretion in determining how to put the undistributed portion of the fund to its next best use. See, e.g., *Jones*, 56 F. Supp. 2d at 359.

Although no reported Missouri state court decision has expressly addressed the distribution of unclaimed litigation funds under the *cy pres* doctrine, such a distribution would be consistent with well-established Missouri law. Missouri courts have long-recognized the common law doctrine of *cy pres*. See *Comfort v. Higgins*, 576 S.W.2d 331, 336-37 (Mo. banc 1978); *Ramsey v. City of Brookfield*, 361 Mo. 857, 237 S.W.2d 143, 145-146 (1951); *Pilgrim Evangelical Lutheran Church v. Lutheran Church Missouri Synod Foundation*, 661 S.W.2d 833, 840 (Mo. Ct. App. 1983).

Moreover, under Missouri law, *cy pres* distributions of residual class litigation funds are consistent with common law principles of equity. The trial court in this case has created a vehicle for payment to claimants which is essentially a trust fund, the remaining beneficiaries of which cannot be found. See, e.g., *Ramsey*, 237 S.W.2d at 145 (No particular words are required to create an express trust not even the words trust or trustee need be used); *Yeager v. Johns*, 484 S.W.2d 211, 213 (Mo. 1972) (No particular words are required to create an express trust; equity need only to ascertain the intention of the creator of the purported trust). Missouri law clearly empowers courts to apply the doctrines of equity to trusts other than testamentary charitable gifts. *Whan v. Whan*, 542 S.W.2d 7, 11 (Mo. Ct. App. 1976) (Court determined contract created an express trust and entered equitable orders regarding the express trust). As the Court in *Whan* stated:

It has long been the law in this state that courts of equity have inherent jurisdiction over express trusts [citations omitted], and they may take all needful steps to prevent failure of trusts [citations omitted].

*Id.* Consequently, Missouri courts should be allowed, through their traditional powers to do equity, to apply *cy pres* principles to distribution of residual class litigation funds.

#### IV.

#### **Public Policy Goals of Disgorgement and Deterrence Warrant the Application of *Cy Pres* Remedies to the Distribution of Settlement or Litigation Funds.**

In addition to the equitable powers of the court inherent in trusts, public policy concerns warrant the application of *cy pres* principles to the distribution of settlement or litigation funds. *Cy pres* distribution mechanisms serve three goals of fundamental importance to the issue of settlement or litigation fund distribution. Dejarlais, *supra*, at 740. First, the defendant is disgorged of all illegally obtained profits because the entire amount recovered can be distributed, leaving nothing to revert to the defendant. *Id.* Second, such mechanisms provide compensation to the maximum number of class members by the nature of its *Anext-best@ use* application. *Id.* Therefore, even if some class members cannot be located, remaining funds can be distributed in a manner beneficial to absentee class members. Finally, courts will be more likely to certify consumer class actions since the distribution of recovered funds becomes a more manageable task. *Id.*

Beyond serving as a useful tool for framing the distribution of settlement or litigation funds, *cy pres* principles and recovery methods should also be utilized in the distribution of unclaimed settlement or litigation funds. Because class members in some appreciable numbers will die, move during the pendency of a case, or otherwise cannot be located at the time of distribution, an undistributed residue of the settlement or litigation fund will almost always exist. Numerous courts, therefore, have employed the *cy pres* doctrine to distribute unclaimed settlement or litigation funds to charitable, educational and legal organizations, i.e., its *Anext-best@ use*. *Superior Beverage Co. v. Owens Illinois*, 827 F. Supp. 477

(N.D. Ill. 1993) (over \$2 million of unclaimed funds distributed to various organizations including Public Interest Law Initiative, University of Chicago Mandel Legal Aid Clinic, Legal Aid Bureau of United Charities, Chicago Volunteer Legal Services, and National Association for Public Interest Law); *In Re Motor Sport Merchandise Antitrust Litigation*, 160 F. Supp. 2d 1392 (distribution of over \$2 million in unclaimed settlement funds to charities providing health care, child assistance programs, a lawyer's philanthropic foundation and two legal aid services, the Atlanta Legal Aid Society and Georgia Legal Services Program); *Jones*, 56 F. Supp. 2d 355 (distribution of unclaimed funds to Legal Aid Society Civil Division); *Powell v. Georgia-Pacific Corp.*, 119 F.3d 703 (8<sup>th</sup> Cir. 1997) (court used residual proceeds from a class action to fund scholarship programs); *In Re Folding Carton Antitrust Litigation*, 557 F. Supp. 1091 (N.D. Ill. 1983), *aff'd in part, rev'd in part*, 744 F.2d 1252 (7<sup>th</sup> Cir. 1984) (court of appeals suggested that funds be distributed to federal judicial center; however, trial court on remand elected to use funds to finance fellowship program to give young lawyers opportunity to work at public interest organizations and provide legal services to the poor); *Drennan v. Van Ru Credit Corp.*, 1997 U.S. Dist. LEXIS 7776 (N.D. Ill. 1997) (distribution of unclaimed funds to Mid-Minnesota Legal Assistance Foundation) (Appendix A-2); *In Re Three Mile Island Litigation*, 557 F. Supp. 96 (M.D. Pa. 1982) (payment made to newly formed foundation to study biological effects of radiation exposures from nuclear plant accident); *West Virginia v. Chas. Pfizer & Co.*, 314 F. Supp. 710 (S.D.N.Y. 1970) (unclaimed settlement funds distributed to states for public health purposes); *Ohio Public Interest Campaign v. Fisher Foods*, 546 F. Supp. 1 (N.D. Ohio 1982) (unused food certificates to be given to organizations that feed the needy); *Liebman v. J.W. Petersen Coal & Oil*

Co., 63 F.R.D. 684 (N.D. Ill. 1974) (unclaimed funds given to Legal Assistance Foundation and Lawyers' Committee for Civil Rights Under Law).

State and federal courts, therefore, have employed *cy pres* remedies to ensure that public policy goals of disgorgement of illegally obtained profits and deterrence of unlawful conduct are realized.

Missouri has similar aspirations. As such, Missouri state courts should have the discretion to employ *cy pres* remedies to the distribution of settlement or litigation funds.<sup>2</sup>

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<sup>2</sup> Although the instant case presents an issue of first impression for Missouri state courts, at least two Missouri federal courts have awarded residual funds from class actions to legal services offices. See *Brockman v. Overland Park Automotive Co.*, Case No. 97-0462 (W.D. Mo. Oct. 4, 2001) (Appendix A-5) (residual proceeds distributed between Legal Aid and the National Consumer Law Center). *Grantham v. J.L. Mason Group*, Case No. 80-359 (E.D. Mo. Sept. 30, 1993) (Appendix A-7) (portion of unclaimed settlement funds distributed to Legal Services of Eastern Missouri).

## V.

### **In Consumer Rights Actions, Cy Pres Distributions to Consumer Advocacy groups, Legal Services Programs or Government Programs Likely to Benefit Class Members Are Proper Equitable Remedies.**

In consumer actions, the distribution of the damages awarded to all class members can be impractical or impossible. Some class members may have suffered small monetary losses, some may be difficult to identify, some may be hard to locate, some may choose not to make a claim while others simply will not cash their settlement or damage checks. In these common situations, the creative use of *cy pres* remedies can satisfy the "next-best" use requirement by distributing residue funds for the aggregate prospective benefit of all class members.

Across the United States, *cy pres* awards have frequently been used to fund advocacy work on behalf of a wide range of consumers. Consumer protection litigation advocacy and litigation are critical to the safeguarding of consumer rights. Many consumers would be unable to fund this essential litigation without assistance from one of the many not-for-profit consumer protection groups. Therefore, courts have used *cy pres* remedies to distribute unclaimed settlement or litigation funds to consumer advocacy groups, legal services programs or government programs likely to benefit class members. Patricia Sturdevant, using the *Cy Pres* Doctrine to Fund Consumer Advocacy, 33-Nov Trial 80 (1997), citing *Superior Beverage Co., supra*, (unclaimed funds in antitrust case distributed to a number of legal services programs); *In Re Motor Sport Merchandise Antitrust Litigation, supra*, (unclaimed consumer funds distributed to two legal aid services programs); *State v. Levi Strauss & Co.*, 715 P.2d 564 (Cal. 1986) (court approved *cy pres* distribution of funds that could not be distributed to consumers

who had been overcharged); *Starr v. Fleet Fin., Inc.*, No. 9210-2314-06 (Ga., Cobb County Super. Ct. Oct. 30, 1995) (distribution of residue funds to establish Consumer Law Center of the South and to provide funding for the Atlanta Legal Aid Society, among other groups); *McClendon v. Security Pacific National Bank*, No. 613772-5 (Cal., Alameda County Super. Ct. June 28, 1996) (\$855,000 residue distributed to several consumer advocacy groups); *Patterson v. ITT Consumer Financial Corp.*, No. 936818 (Cal., San Francisco County Super. Ct. Sept. 19, 1996) (distribution of \$1.1 million of unclaimed funds to 10 legal services providers and consumer advocacy groups).

Courts and commentators attempting to determine how best to equitably distribute money remaining in class settlement or litigation funds have considered three other options besides *cy pres* distribution: 1) *pro rata* distribution to class members; 2) reversion to defendant; and 3) escheat funds to a government body. *In Re Motor Sports Merchandise Antitrust Litigation*, 160 F. Supp. 2d at 1393-1394 citing *Powell v. Georgia Pacific Corp.*, 843 F. Supp. 491, 495 (W.D. Ark. 1994); *Newberg on Class Actions* ' ' 10.13 to 10.25. These remedies, however, are not appropriate in consumer rights actions.

First, *pro rata* distribution to identifiable class members results in their over-compensation. Although such an approach succeeds in disgorging illegally obtained profits and deterring unlawful practices, its compensatory effect is equitable only when almost all class members come forward to share the recovery. Kerry Barnett, Note, *Equitable Trusts: An Effective Remedy in Consumer Class Actions*, 96 Yale L.J. 1591, 1600 (1987). In consumer actions, however, a large number of absentees are always to be expected. The more absentee parties there are, the more inequitable this method becomes.

Second, reversion to the defendant runs counter to the public policy goals of disgorgement and deterrence. Distributing residual funds to defendants would reward them for their unlawful and unfair practices.

Third, escheat to the government is an equitable remedy of last resort. . . where a more precise remedy cannot be found. *Levi Strauss & Co.*, 715 P.2d at 572-573. The problem with such a remedy is that any direct benefit to injured class members may be trivial since there is a lack of control over governmental use of these funds. *See Democratic Central Comm. v. Washington Metro Area Transit Comm'n*, 84 F.3d 451, 456 (D.C. Cir. 1996) (because escheat approach provides the least focused compensation to the injured class, it is used only when a more precise method cannot be found). Therefore, such a distribution would not bear a sufficiently close relationship to the intended use of the funds, i.e. to compensate consumers and advance consumer rights. Accordingly, *cy pres* distribution is the appropriate equitable remedy in consumer based actions.

In the instant case, a litigation fund was created to distribute monies to individual telephone customers who were overcharged by Southwestern Bell. Over \$63 million was refunded to customers but monies still remained that were due individual telephone customers who could not be located. Appellant's Statement of Facts. Therefore, the trial court should have the equitable power to make *cy pres* distributions of the residue to organizations that engage in consumer protection litigation. The Missouri Bar respectfully submits that the Legal Aid Organizations are such organizations.

## VI.

**Legal Aid of Western Missouri, Legal Services of Eastern Missouri, Legal Services of Southern Missouri and Mid-Missouri Legal Services Are Appropriate Recipients of Cy**

## ***Pres Remedies Distributing Residue Funds From Class Action and Other Representative Litigation.***

The Legal Aid Organizations are nonprofit organizations that provide free civil legal assistance to low-income clients. The Legal Aid Organizations provide legal services free of charge for more than 800,000 Missouri residents through a combination of federal, state, and local government funding. Unfortunately, funding for such Legal Aid Organizations faces an uncertain future.

The Legal Aid Organizations handle cases assisting low-income clients with various legal needs ranging from evictions and homelessness to consumer problems. In addition, the Legal Aid Organizations: 1) provide community education presentations, 2) prepare handbooks, pamphlets, and brochures on legal issues, and 3) operate a number of special projects, including the Children's Legal Alliance, Medicaid Managed Care Advocacy, Immigration Law and the AIDS projects.

The Legal Aid Organizations address important consumer and public utility issues and continue to be advocates on behalf of low-income households regarding utility policies and procedures. Unfortunately, these Legal Aid Organizations must turn down numerous other consumer/utility cases due to a lack of funding.

Additional funding would allow these Legal Aid Organizations to not only maintain their present level of consumer protection litigation and advocacy but also to take on those cases they otherwise would be forced to turn down. The Legal Aid Organizations clearly advance and protect consumer rights through litigation and advocacy. As discussed above, numerous courts have employed *cy pres* remedies to distribute unclaimed consumer settlement or litigation funds to such legal aid organizations. *See, e.g., Superior Beverage Co. v. Owens Illinois, supra*, and accompanying cases. Accordingly, The

Missouri Bar respectfully submits that the Legal Aid Organizations would be excellent candidates for a *cy pres* distribution of a portion of the Fund in question.

### **CONCLUSION**

For the reasons set forth above, The Missouri Bar respectfully requests that this Court uphold the application of the *cy pres* doctrine to disbursement of residual class funds such as those before the Court.

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**CERTIFICATE OF SERVICE AND  
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## **APPENDIX**