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Michigan Supreme Court Clerk
P.O. Box 30052
Lansing, MI 48909
ADMcomment@courts.mi.gov

Re: ADM File # 2018-02
Proposed Amendment to MCR 3.501
Disbursement of Residual Class Action Settlement Funds
Comment from Pitt McGehee Palmer & Rivers, PC ("PMPR")

Dear Clerk:

The Law Firm of PMPR supports the adoption proposed amendment to MCR 3.501.

Rule 3.501 Class Actions Proposal

(A)-(C) [Unchanged.]

(D) Judgment.

(1)-(5) [Unchanged.]

(6) Any order entering a judgment or approving a proposed settlement of a class action certified under this rule that establishes a process for identifying and compensating members of the class shall provide for the disbursement of any residual funds. In matters where the claims process has been exhausted and residual funds remain, not less than fifty percent (50%) of the residual funds shall be disbursed to the Michigan State Bar Foundation to support activities and programs that promote access to the civil justice system for low income residents of Michigan. Notwithstanding this requirement, the court may order the disbursement of all residual funds to a foundation or for any other purpose that has a direct or indirect relationship to the underlying litigation or otherwise promotes the interests of the members of the certified class.

(E)-(I) [Unchanged.]

Description of PMPR

PMPR was established in 1992 as a law firm of trial attorneys specializing in plaintiffs' civil rights and personal injury matters. In the ensuing 27 years, the Firm has distinguished itself as a regional and national leader in complex civil rights litigation pursuing collective and class actions on behalf of employees, prisoners and consumers. Members of the Firm have served as class counsel on many state and federal class actions. Members of the Firm are currently involved in leadership positions in Flint Water Crisis putative class actions, a certified class action against the Michigan Department of Corrections on behalf of 500 or more juvenile prisoners who have been sexually assaulted by adult prisoners and corrections staff and the putative class action pending against the state for harm it caused to tens of thousands of Michigan's citizens who were falsely accused of unemployment benefit fraud.

Michael Pitt, the author of this letter, is immediate Past President of the Public Justice Foundation, a national public interest law firm, which has been a direct beneficiary of hundreds of thousands of dollars of *cy pres* awards each year.

Discussion of Reasons for the Support of the Proposed Amendment to MCR 3.501

State and federal courts have been granting *cy pres* awards to non-profit organizations in increasing frequency. Martin Redish, Peter Julian, & Samantha Zyontz, *Cy Pres Relief and the Pathologies of the Modern Class Action: A Normative and Empirical Analysis*, 62 Fla. L. Rev. 617, 653-656 (2010), see also Natalie Rodriguez, *Era of Mammoth Cases Tests Remedy Of Last Resort*, Law360 (May 2, 2017) ("A Lexis Advance search for '*cy pres*' or 'fluid recovery' ... yielded ... decisions in 266 cases since 2000, the majority of which arose in the last decade."). And there has been an increase in the proportion of funds going to *cy pres*. As the Redish study found, "*cy pres* awards generally make up a non-trivial portion of total compensatory damages awarded, and in some cases comprise the entire compensatory award." Redish at 658-59.

The Firm is cognizant of the criticism of utilizing *cy pres* awards as part of a class action remedy, including the argument that *cy pres* awards are impermissible under Rule 23 because they do not compensate class members; they are used as a means to enhance attorneys' fees for the plaintiffs' lawyers; they create an environment whereby judges can abuse their authority by enriching nonprofits with which they have personal ties at the expense of the allegedly injured class members; and they permit plaintiffs' lawyers and defendants to collude to ensure that the plaintiffs' lawyers get paid, while permitting the defendants to limit their liability by not paying the purportedly injured class members and most recently the argument that *cy pres* awards implicate First Amendment concerns because the court forces class members to support groups with whose views class members

may disagree. *Janus v. Am. Fed'n of State, County, & Mun. Employees Council 31*, 138 S. Ct. 2448 (2018).¹

However, the Firm believes that many of the concerns regarding *cy pres* awards have been addressed in the proposed amendment. Underlying the proposed amendment to MCR 3.501 is the presumption that residual class action settlement funds shall be disbursed to non-profit organizations in accordance with the proposed court rule only after all class claims have been “exhausted.” The Firm fully supports the presumption that residual funds should be disbursed after claim exhaustion to non-profit organizations as opposed to reverting to the defendant or as an escheat to the state.

Once *cy pres* becomes an issue in a class action settlement, counsel for the parties and the court must determine which charitable entities are appropriate recipients of a *cy pres* distribution. The American Law Institute (“ALI”) Principles state that recipients should be those “whose interests reasonably approximate those being pursued by the class,” and if no such recipients exist, “a court may approve a recipient that does not reasonably approximate the interests” of the class. Principles of The Law of Aggregate Litigation, ALI, § 3.07(c). These ALI legal principles have been widely accepted by state and federal courts.

Many states have adopted statutes or court rules which either authorize or limit *cy pres* awards to organizations “whose interests reasonably approximate those being pursued by the class.”² Six states require state courts to allocate either 25% or 50% of *cy pres* awards

¹ Dana Nessel, Michigan’s Attorney General, joined 14 other state Attorney Generals in filing an Amicus Brief in *Perryman v Romeo*, United States Supreme Court docket number 18-1074 (cert. denied June 24, 2019) supporting the petitioner’s request that the court grant the writ of certiorari. In that Brief, Attorney General Nessel, along with her co-amici, argued that there are important, foundational *cy pres* settlement questions that could use the Court’s guidance, “including when, if ever, such relief should be considered; how to assess its fairness as a general matter; whether new entities may be established as part of such relief; if not, how existing entities should be selected; what the respective roles of the judge and parties are in shaping a *cy pres* remedy; how closely the goals of any enlisted organization must correspond to the interests of the class; and so on” quoting *Marek v. Lane*, 134 S. Ct. 8, 9 (2013) (Roberts, C.J., respecting the denial of certiorari)

² State-by-State analysis compiled in Wilber H. Boies; Latonia Haney Keith, *Class Action Settlement Residue and Cy Pres Awards: Emerging Problems and Practical Solutions*, 21 Va. J. Soc. Pol’y & L. 267, 291 (2014): CAL. CIV. PROC. CODE § 384 (2002) (permitting payment of residual class action funds to nonprofit organizations that provide civil legal services to low-income individuals); HAW. R. CIV. P. 23(f) (granting a court discretion to approve distribution of residual class action funds, specifically to nonprofit organizations that provide legal assistance to indigent individuals); 735 ILL. COMP. STAT. 5/2-807 (2008) (requiring distribution of at least fifty percent of residual class action funds to organizations that improve access to justice for low-income Illinois residents); IND. R. TRIAL P. 23(F)(2) (requiring distribution of at least twenty-five percent of residual class action funds to the

to organizations providing legal *services* to low income and disadvantaged persons and underserved populations or to bar organization Foundations. (Illinois 50%, Indiana 25%, Kentucky 25%, Pennsylvania 50%, South Dakota 50% and Washington 25%).

PMPR strongly endorses class action litigation which has become an important device for resolving a wide range of disputes between individual plaintiffs and corporate and governmental defendants. PMPR takes the position that, when possible, monies recovered in class actions should go directly to the class members themselves. Although some critics of *cy pres* awards would argue that there should be a categorical ban on diverting class compensation to third parties no matter how closely related, the Firm does not prescribe to that view. Rather, it is the view of PMPR that *cy pres* awards should be permissive subject to reasonable restrictions by the courts to prevent abuse. The proposed amendment to MCR 3.501 is consistent with this view.

The problems caused by unrestricted and abusive selection of organizations to receive *cy pres* awards is fairly addressed by the proposed court rule amendment. Organizations serving low income and disadvantaged members of the community are very

Indiana Bar Foundation to support the activities and programs of the Indiana Pro Bono Commission and its *pro bono* districts); KY. R. CIV. P. 23.05(6) (requiring distribution of at least twenty-five percent of residual funds to the Kentucky IOLTA Fund Board of Trustees to support activities and programs that promote access to civil justice for low-income Kentucky residents); MASS. R. CIV. P. 23(e) (permitting distribution of residual class action funds to nonprofit organizations that provide legal services to low income individuals consistent with the objectives of the underlying causes of action on which relief was based); N.M. DIST. CT. R. CIV. P. 1-023(G)(2) (permitting payment of residual class action funds to nonprofit organizations that provide civil legal services to low income individuals); N.C. GEN. STAT. § 1-267.10 (2005) (requiring equal distribution of residual class action funds between the Indigent Person's Attorney Fund and the North Carolina State Bar for the provision of civil services for indigents); PA. R. CIV. P. 1716 (directing distribution of at least fifty percent of residual class action funds to the Pennsylvania IOLTA Board to support activities and programs which promote the delivery of civil legal assistance, permitting distribution of the balance to an entity that promotes either the substantive or procedural interests of the class members); S.D. CODIFIED LAWS § 16-2-57 (2008) (requiring at least fifty percent of residual funds be distributed to the Commission on Equal Access to Our Courts); TENN.CODE ANN. § 16-3-821 (2009) (creating the Tennessee Voluntary Fund for Indigent Civil Representation and authorizing the fund to receive contributions of unpaid residuals from settlements or awards in class action litigation in both federal and state courts); WASH. SUPER. CT. CIV. R. 23(f)(2) (requiring distribution of at least twenty-five percent of residual class action funds to the Legal Foundation of Washington to support activities and programs that promote access to the civil justice system for low income residents).

much like the class action device itself in that organizations and the procedural device exist to promote broad access to justice goals.

This connection between legal aid organizations and the class action remedy creates the singular category of *cy pres* recipients which will almost always approximate the interests of class members. The proposed amendment rationally connects the access to justice interests of almost all class members and the missions of the legal aid groups supported by the State Bar of Michigan Foundation.

PMPR supports the last sentence of the Proposed Amendment because it authorizes payment of 100% of *cy pres* award to an organization that directly “promotes the interests of the members of the certified class” and which might not be of the same ilk as organizations supported by the State Bar of Michigan Foundation. Thus, in a consumer class action that creates a residual fund arising out deceptive sales of canine medication, the court could authorize 100% of a *cy pres* award to organizations devoted to protecting the well-being and health of dogs. This language will give the court the flexibility to tailor-make the *cy pres* award in a manner which promotes the interests of the members of the certified class.

For all these reasons, PMPR strongly support adoption of the amendment to MCR 3.501.

Very truly yours,

PITT MCGEHEE PALMER & RIVERS

A handwritten signature in blue ink that reads "Michael L. Pitt". The signature is written in a cursive style with a large, stylized "P" at the end.

Michael L. Pitt

MLP/rb