

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

IN RE COMPACT DISC MINIMUM]
ADVERTISED PRICE]
ANTITRUST LITIGATION]
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MDL Docket No. 1361

(This Document Applies To *Trowbridge,*
et al. v. Sony Music Entertainment, Inc.,
et al., Docket No. 2:00-MD-1361-P-H)

**ORDER ON *CY PRES* PROVISION
OF SETTLEMENT AGREEMENT**

This portion of the multidistrict CD antitrust litigation deals with a class whose members purchased their CDs through music clubs. I previously approved a settlement of this portion of the case but, in light of the modest benefit music club members received, I substantially reduced the request for attorney fees. As a result, my Order of March 29, 2005, declared that approximately \$265,500 remained.¹ I also determined that in light of the size of the class (8.1 million members), administrative costs in cutting and mailing checks made it impracticable to distribute these funds to class members.

Section 8.2 of the Amended Stipulation of Settlement provides that if any funds remain after ruling on the fee and expense application, “after hearing from all parties, the Court may order that . . . the funds be contributed to one or more music-related charities, including but not limited to charities that the

¹ These funds are in the Plaintiffs’ Notice/Fee/Incentive Fund, which was established in the initial Settlement Agreement. Interest has been earned in the amount of \$24,965.32 through March 31, 2005, and taxes on that interest have been paid in the amount of \$6,493. The lawyers’ request for interest earned on fees awarded and expenses is **DENIED**; the request for \$400 in the anticipated cost of the 2005 tax return is **GRANTED**. In light of the April 27, 2005, submission by the lawyers (Docket Item 357, docketed April 28, 2005), the total remaining for distribution, subject to further interest, is approximately \$271,000.

parties shall identify for the Court's consideration within thirty (30) days of the Court's order." Rather than permit these funds to revert to the defendants (the other option under the Settlement Agreement), I ordered identification of proposed charitable recipients by April 28, 2005.

In response, the parties proposed three charities:

- (1) Jazz at Lincoln Center (www.jazzatlincolncenter.org);
- (2) Music for Youth (www.musicforyouth.org); and
- (3) National Guild of Community Schools of the Arts (www.nationalguild.org).

The parties have certified that these organizations have no ties to the parties² or the lawyers and that each, respectively, is a tax-exempt organization.

In addition, an objector (who later withdrew his objection), William Weinstein, Esq., of New York City, has proposed a fourth recipient, namely:

- (4) Radio Station WKCR-FM, Columbia University Radio in New York (www.wkcr.org).

Mr. Weinstein has provided evidence of its tax-exempt status and certifies that he has no ties to it, but I have no information whether it has any ties to the parties or the lawyers for the parties.

Detailed information about each of the proposed recipients can be obtained at their respective websites, listed above.

² In an abundance of caution, they have described the following relationships: some of the defendants are listed on Music for Youth's website as corporate contributors, several lawyers in the firms representing the parties have served on the boards of organizations that have made contributions to the proposed charities, and an executive from defendant Atlantic Records and an executive from defendant Warner Music Group each serve as directors of Jazz at Lincoln Center.

In brief summary, they pursue the following objectives that may be considered related to this case involving the distribution of music CDs: Jazz at Lincoln Center aims to further the development of jazz music via performance, education and broadcast events for audiences of all ages. Jazz at Lincoln Center's activities include transcribing jazz masterpieces from recordings to written form, creating and encouraging the dissemination of recordings of its events, and sponsoring a radio program, "Jazz from Lincoln Center." Music for Youth supports "innovative programs that make quality music education available to young people," and creates scholarship opportunities for young musicians. The National Guild of Community Schools of the Arts provides "leadership, advocacy, and service" to community schools of the arts, which serve more than 380,000 students in forty-five states with programs in music, visual arts and crafts, dance, theater and drama, literary arts, and media arts. WKCR is a non-commercial, non-profit radio station with a focus on jazz music. As described by Ben Young, the Director of Broadcasting and Operations, in his letter regarding the distribution of funds in this case, the station's "mission entails preserving at their optimum - on often 'obsolete' formats - the recorded sound of the works and words of the artists themselves, and disseminating these as FM radio and digital audio around the nation and the world."

Because a judge presiding over the settlement of a class action has an independent responsibility to review the fairness of any settlement and not merely accept the parties' proposals or agreements, see Fed. R. Civ. P. 23(e)(1)(C), I have examined the cases and commentary on this type of

proposal. When a court cannot distribute money to class members practically, some cases and commentary approve (sometimes reluctantly) what is called a *cy pres* remedy (borrowing the trust law term for alterations a court makes to the terms of a charitable trust when the trust can otherwise no longer be carried out). That is the device that Section 8.2 of this Settlement Agreement provides.

The cases and commentary also identify a number of factors to consider in approving any such *cy pres* distribution: e.g., the degree to which the *cy pres* proposal will benefit class members; the degree to which it will promote the purposes of the underlying cause of action that has been settled; the minimization of administrative costs; ensuring that funds disbursed to a private body are used for purposes benefiting the class; holding the recipient accountable; the amount of spillover to non-class-members; and avoidance of having the funds merely replace other monies. See, e.g., California v. Levi Strauss & Co., 41 Cal. 3d 460 (1986).³

³ See In re Agent Orange Prod. Liab. Litig., 818 F.2d 179 (2d Cir. 1987) (project must have a benefit to class members; must be consistent with the nature of the underlying lawsuit; must be consistent with the judicial function; should be designated in detail; should include a plan for supervision). I have considered the following cases where a *cy pres* award was approved: Powell v. Georgia-Pacific Corp., 119 F.3d 703 (8th Cir. 1997) (affirming the use of unclaimed funds for scholarship funds for black high school students in the geographic area around the factory at which the alleged racial discrimination occurred, noting the likelihood that the “scholarships [would] benefit the class members’ younger relatives”) and Nelson v. Greater Gadsen Hous. Auth., 802 F.2d 405 (11th Cir. 1986) (approving an order that unclaimed funds be used to increase the energy efficiency of the apartment units in a case involving a dispute over tenants’ utility allowances). I have also considered the following cases where a *cy pres* award was vacated by the appellate court: In re Folding Carton Antitrust Litig., 557 F. Supp. 1091 (N.D. Ill. 1983), 744 F.2d 1252 (7th Cir. 1984), 881 F.2d 494, 502 (7th Cir. 1989), and 934 F.2d 323 (7th Cir. 1991); In re Airline Ticket Comm’n Antitrust Litig., 268 F.3d 619 (8th Cir. 2001) (concluding that the distribution of unclaimed funds to Minnesota law schools and charities, which were unrelated to the subject matter of the litigation, was an abuse of discretion); Wilson v. Southwest Airlines, Inc., 880 F.2d 807 (concluding that the defendant and class counsel had equitable claims to the residual fund and that award of the funds to a
(continued next page)

I attempt to apply those factors here. By their purchase of music CDs, music club members have demonstrated that they want to listen to music on their own terms. But I cannot determine the type of music; the offerings are wide-ranging. Likewise, the membership of the class is not restricted to any geographic area, but is nationwide. Given the dramatic pace of technological changes in music listening since this lawsuit was filed (digital music exchange, etc.), I cannot confidently determine even what medium music club members may now prefer to use. I have already determined that these remaining funds cannot practically be distributed to the music club members. How, then, to benefit them as nearly as possible? That is a substantial challenge.

I can say that, by definition, music club members are vitally interested in the availability of recorded music and in the performance of music and of musicians. Thus, the proposed recipients here are not necessarily wide of the mark. It is also apparent that a spillover benefit to non-class-members will be

charity chosen by the district court judge was an abuse of discretion); Six Mexican Workers v. Arizona Citrus Growers, 904 F.2d 1301 (9th Cir. 1990) (holding that the distribution of all unclaimed funds to the “Inter-American Foundation” for distribution in Mexico was an abuse of discretion where the charity did not have a substantial record of service, the funds were not limited to specific projects, there was no procedure to ensure proper use of the funds, and the money benefited a group “far too remote from the plaintiff class”); and In re Agent Orange Prod. Liab. Litig., 818 F.2d 179. Finally, I have considered the following cases where a *cy pres* award was made without specific appellate approval or disapproval: In re Motorsports Merch. Antitrust Litig., 160 F. Supp.2d 1392 (N.D. Ga. 2001) (ordering distribution of unclaimed funds to various charitable organizations); Superior Beverage Co. v. Owens-Illinois, Inc., 827 F. Supp. 477 (N.D. Ill. 1993) (distributing varying amounts of money to each of fifteen applicants); Fears v. Wilhemina Model Agency, No. 02-Civ.4911, 2005 WL 1041134 (S.D.N.Y. May 5, 2005) (ordering distribution to charities providing services to “the uninsured and women” in a case involving antitrust claims by models against New York modeling agencies); Jones v. Nat’l Distillers, 56 F. Supp.2d 355 (S.D.N.Y. 1999) (donating excess funds from a twenty-year-old suit to a legal aid society, noting that there was no obvious cause associated with the class and that “[t]he tie to the intent of the fund is thin, but not as thin as it would be if the donation served an entirely unconnected cause such as a dance performance or a zoo”). I have also reviewed Stewart R. Shepherd, Damage Distribution in Class Actions: The Cy Pres Remedy, 39 U. Chi. L. Rev. 448 (1971-72) and In re Holocaust Victim Assets Litig., 302 F. Supp. 2d 89 (E.D.N.Y. 2004).

unavoidable given the inability to distribute the funds directly to class members. I can also say that the purposes of antitrust deterrence are furthered by not allowing reversion of these funds to the defendants.

But in light of the factors I have described, I do need more detailed proposals. Accordingly, I **DIRECT** the parties (and the objector if he chooses) to invite the respective organizations to present:

(1) A brief proposal how the organization will use the funds in a way that is related to the interests of music club members, including specification of what portion will go to administrative costs;

(2) how that proposal, if funded, will result in additional benefit to those interests, and not just replace other monies;

(3) a commitment to implement the proposal if awarded the funds;

(4) a description of how and when the organization will report on use of the funds; and

(5) a commitment to report to the Court.

I understand that the nature of the proposals may depend upon the proportion of the funds that I award to a particular recipient. Any organization is free, therefore, to craft its proposal to reflect different levels of any award I might make.

The submissions, if any, shall be filed by July 22, 2005.

SO ORDERED.

DATED THIS 10TH DAY OF JUNE, 2005

/s/D. Brock Hornby
D. BROCK HORNBY
UNITED STATES DISTRICT JUDGE

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