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*Chairman of the Executive Committee
for the Direct Purchaser Plaintiffs*

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION**

IN RE OPTICAL DISK DRIVE
ANTITRUST LITIGATION

Case No. 3:10-md-02143 RS

MDL No. 2143

This Document Relates to:

ALL DIRECT PURCHASER ACTIONS

**DIRECT PURCHASER PLAINTIFFS’
NOTICE OF MOTION AND MOTION FOR
ORDER AUTHORIZING DISTRIBUTION
OF REMAINING SETTLEMENT FUNDS
AND CY PRES DISTRIBUTION OF FUTURE
REMAINING FUNDS; MEMORANDUM OF
POINTS AND AUTHORITIES IN SUPPORT
THEREOF**

Date: September 2, 2021
Time: 1:30 p.m.
Judge: Hon. Richard Seeborg
Courtroom: 3

NOTICE OF MOTION AND MOTION

TO ALL PARTIES AND THEIR COUNSEL OF RECORD:

PLEASE TAKE NOTICE that on September 2, 2021, at 1:30 p.m., or as soon thereafter as counsel can be heard, before the Honorable Richard Seeborg, Chief United States District Judge, at the United States Courthouse, 450 Golden Gate Avenue, Courtroom 3, San Francisco, California, Direct Purchaser Plaintiffs (“Plaintiffs”) will move this Court for an Order authorizing distribution of remaining funds from settlement proceeds obtained in the Direct Purchaser Actions.

Plaintiffs request that the Court enter an Order authorizing: 1) additional pro rata payments from the remaining Net Settlement Funds to certain approved claimants; 2) distribution of any future remaining funds to a cy pres beneficiary; and 3) payment to the Settlement Administrator for additional claims administration costs. Entry of this Order will authorize distribution of all remaining settlement funds and, with the exception of Post-Distribution Accounting, terminate all outstanding matters in the Direct Purchaser Actions.

This Motion is based upon this Notice of Motion and Motion, the Memorandum of Points and Authorities in Support Thereof, the Declaration of Rachel Christman re Proposed Residual Distribution of the Net Settlement Funds (“Christman Declaration” or “Christman Decl.”), the Declaration of Diana L. Moss (“Moss Decl.”), the [Proposed] Order Granting Direct Purchaser Plaintiffs’ Motion for an Order Authorizing Distribution of Remaining Settlement Funds and Cy Pres Distribution of Future Remaining Funds, submitted herewith, as well as the complete files and records in this case, and upon such argument at the hearing on this motion and in further pleadings as may be presented to the Court.¹

¹ After Plaintiffs file this Motion, this Notice of Motion and Motion, the Memorandum of Points and Authorities in Support Thereof, the Declaration of Rachel Christman re Proposed Residual Distribution of the Net Settlement Funds, the Declaration of Diana L. Moss, and the [Proposed] Order Granting Direct Purchaser Plaintiffs’ Motion for an Order Authorizing Distribution of Remaining Settlement Funds will be posted on the ODD settlement website (www.ODDDirectPurchaserAntitrustSettlement.com) maintained by the Settlement Administrator.

STATEMENT OF ISSUES TO BE DECIDED

1. Whether to authorize additional pro rata payments from the remaining Net Settlement Funds to the 138 approved claimants who were authorized to be paid more than \$10.00 from the initial distribution.
2. Whether to designate any remaining settlement funds, if any, to a cy pres beneficiary.
3. Whether the Settlement Administrator shall be reimbursed for costs and expenses incurred in the amount of \$106,727.96.
4. Whether to reserve \$11,135.67 from the remaining Net Settlement Funds for estimated administrative costs necessary for the Settlement Administrator to complete its work in this matter.
5. Whether to authorize the use of a portion of the previously authorized reserve to correct a payment to one claimant.

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

The Court previously approved a pro rata distribution of \$47,327,650.10 from the Net Settlement Funds to 25,424 approved claimants. In December 2019, the Settlement Administrator disbursed the settlement checks, and 21,517 approved claimants cashed their checks prior to the void date of the checks. Due to COVID-19, the check expiration date for a limited number of checks was extended several times for re mailing to recipients at different or new addresses. \$45,863.74 of the distributed funds remains uncashed. Direct Purchaser Plaintiffs (“Plaintiffs”) now request that the Court approve distribution of the remaining funds as well as the \$250,000.00 previously authorized reserve among 138 previously approved claimants. Plaintiffs further request that the Court designate the American Antitrust Institute (“AAI”) as a cy pres beneficiary to receive any remaining funds after the final distribution. Small Claimants, whose previous payments were increased to \$10.00, would not receive an additional payment.

In addition, Plaintiffs request authorization to pay additional and future remaining administration costs incurred by the Settlement Administrator, and to use a portion of the

1 previously authorized reserve to correct a payment to one claimant.

2 Plaintiffs therefore request that the Court enter the [Proposed] Order, submitted herewith,
3 which authorizes additional payments to certain class members, a corrected payment to one
4 claimant, and payment of additional and remaining claims administration costs incurred by the
5 Settlement Administrator.

6 **II. STATEMENT OF RELEVANT FACTS**

7 On September 16, 2019, the Court entered its Order Granting Direct Purchaser Plaintiffs'
8 Motion for an Order Authorizing Distribution of Settlement Funds. ECF No. 2906. On December
9 17 and 18, 2020, checks were mailed to the 25,424 approved claimants. ECF No. 2910-1 ¶ 4.
10 Checks over \$1,000,000.00 were sent via FedEx overnight delivery with tracking, as were fifteen
11 other payments at the request of the claimants. *Id.* ¶ 4 & n.1.

12 On January 8, 2020, Plaintiffs filed a Notice of Post-Distribution Accounting in accordance
13 with the United States District Court, Northern District of California's *Procedural Guidance for*
14 *Class Action Settlements* (updated Nov. 1 and Dec. 5, 2018), available at
15 <https://www.cand.uscourts.gov/forms/procedural-guidance-for-class-action-settlements/>
16 ("*Guidance*"). ECF No. 2910. Following the filing, the Settlement Administrator posted the Post-
17 Distribution Accounting on the ODD settlement website
18 (www.ODDDirectPurchaserAntitrustSettlement.com). Declaration of Rachel Christman re
19 Proposed Residual Distribution of the Net Settlement Funds ("Christman Declaration" or
20 "Christman Decl.") ¶ 5.

21 The original void date of the checks was April 15, 2020. ECF No. 2910-1 ¶ 5. The void date
22 of some checks was extended several times for remailing of checks to recipients at different
23 addresses due to COVID-19. Christman Decl. ¶ 7.

24 After mailing the checks, the Settlement Administrator determined that 1,429 checks, worth
25 a total of \$426,674.20, were returned as undeliverable. *Id.* ¶ 6. Of the 1,429 checks returned as
26 undeliverable, the Settlement Administrator was able to obtain new addresses for 1,022 approved
27 claimants and remail their checks. *Id.*

28 One hundred eighty two of the 833 checks over \$10.00 were not cashed before February 15,

1 2020. For these uncashed checks, the Settlement Administrator telephoned and/or emailed the
2 approved claimants to ensure that they had received their payments and to remind them to cash
3 their checks. *Id.* The Settlement Administrator reissued a total of 1,102 checks upon request of
4 Class Members, of which 765 were cashed. *Id.* ¶ 7.

5 As of October 30, 2020—the final extended void date for some checks—\$47,281,786.36 of
6 the \$47,327,650.10 had been distributed to 21,517 approved claimants. *Id.* ¶¶ 7, 8. Furthermore,
7 738 of the 827 checks over \$10.00 were cashed, representing \$47,073,996.36, or 99.46%, of the
8 \$47,327,650.10 initial distribution. *Id.* ¶ 8. The value of the largest uncashed check was \$511.46.
9 *Id.* In addition, 20,779, or 84.48%, of the \$10.00 minimum payment checks to 24,591 approved
10 claimants were cashed. *Id.* Three thousand nine hundred seven checks—including remained
11 checks—with a total value of \$45,863.74 (0.10% of the total amount issued) were not cashed. *Id.*

12 On November 11, 2019, a representative for one approved claimant, Claim ID No.
13 ODDA3-700009744, contacted the Settlement Administrator regarding the amount of its approved
14 payment. *Id.* ¶ 9. Following a review, the Settlement Administrator determined that the payment
15 associated with Claim ID No. ODDA3-700009744 was calculated incorrectly due to a
16 typographical error by the Settlement Administrator during claim processing. *Id.* Specifically, the
17 Settlement Administrator recorded in its database that the claimant belonged to only the HLDS
18 Class Period when it should have been marked as belonging to both the HLDS and non-HLDS
19 Class Periods. *Id.* This claimant's approved payment should have been \$67,769.74 but was
20 approved for \$15,915.96. *Id.* Upon learning of this error, the Settlement Administrator undertook a
21 systematic review to determine whether other similar errors occurred, and none was identified. *Id.*
22 The Settlement Administrator informed the claimant of the error and the claimant agreed to accept
23 a corrective payment in the amount of the under payment in conjunction with any approved
24 residual distribution to Class Members to be approved by the Court. The Settlement Administrator
25 made the \$15,915.96 payment to the claimant for Claim ID No. ODDA3-700009744 and the
26 claimant cashed the check. *Id.*

27 The Settlement Administrator has incurred \$106,727.96 in additional unreimbursed claims
28 administration costs between February 1, 2019, and April 30, 2021. *Id.* ¶ 10. The Settlement

1 Administrator expects to incur no more than \$11,135.67 in further claims administration costs to
2 complete its work on the case. *Id.*

3 **III. ARGUMENT**

4 The Court previously approved the pro rata allocation, *see* ECF No. 2902 at 10, as well as
5 the pro rata distribution, *see* ECF No. 2906 ¶ 8, which resulted in the distribution to approved
6 claimants of \$47,281,786.36 of the \$47,931,511.35 Net Settlement Funds. Christman Decl. ¶ 8.
7 Now before the Court is Plaintiffs' request for an Order authorizing the distribution of remaining
8 Net Settlement Funds to previously approved claimants, as set forth in Exhibit B to the Christman
9 Declaration.

10 Entry of an Order permitting distribution of funds from uncashed checks is appropriate at
11 this time because the void date of the previously issued checks has passed and those checks can no
12 longer be cashed. In addition, the Settlement Administrator completed extensive efforts to ensure
13 that approved claimants received and cashed their checks, including by tracking uncashed checks
14 and remaining undelivered checks where a new address was available. *See* Christman Decl. ¶ 6.

15 Furthermore, Plaintiffs propose to distribute the \$250,000.00 reserve to correct an
16 unexpected issue that arose—a claims processing error—and the remaining balance to the Direct
17 Purchaser Class. Accordingly, Plaintiffs propose paying \$51,853.78 of the reserve to an underpaid
18 claimant (Claim ID No. ODDA3-700009744)² and distributing the remaining \$198,146.22 pro rata
19 to certain approved claimants as described below. Distribution of the remainder of the reserve is
20 appropriate at this time because the Settlement Administrator has accounted for potential tax
21 liability and other issues for which the \$250,000.00 reserve was designated. Christman Decl. ¶ 11.

22 Plaintiffs also request that the Court authorize payment of \$106,727.96 in additional
23 unreimbursed claims administration costs incurred by the Settlement Administrator, as set forth in
24

25 ² As noted above, Claim ID No. ODDA3-700009744 should have been valued at \$67,769.74 but
26 due to a claims processing error was only recommended to receive a payment of \$15,915.96. *Id.*
27 ¶ 9. While the Settlement Administrator was made aware of this error prior to the distribution of
28 the initial distribution payments, the Court's Order Granting Direct Purchaser Plaintiffs' Motion
for an Order Authorizing Distribution of Settlement Funds had already become final. *See* Fed. R.
App. P. 4(a)(1)(A).

1 Exhibit A to the Christman Declaration, as well as future costs to complete claims administration
 2 from the \$117,863.63 of the Net Settlement Funds earmarked for that purpose. ECF No. 2906 ¶ 9.
 3 Plaintiffs propose that the remainder of the \$117,863.63 budget previously authorized by the
 4 Court—\$11,135.67—be withheld for costs to complete all future administration work. *See*
 5 Christman Decl. ¶ 10.

6 The following chart is an accounting of the remaining Net Settlement Funds:

	<u>Authorized by</u> <u>ECF No. 2906</u>	<u>Remaining</u> <u>Funds</u>	<u>To Be Authorized</u>
Distribution to approved claimants	\$47,327,650.10	\$45,863.74 (checks not cashed)	Pro rata distribution
Reserve	\$250,000.00	\$250,000.00	Pro rata distribution of \$198,146.22 and distribution of \$51,853.78 to underpaid claimant
Administration costs (incurred and paid)	\$235,764.80	\$0	-
Administration costs (unpaid and future)	\$117,863.63	\$117,863.63	Payment of \$106,727.96 for costs incurred and \$11,135.67 withheld for future costs
Net Settlement Funds not previously distributed due to rounding (<i>see</i> ECF No. 2902 at 10 n.5)	\$232.82	\$232.82	Pro rata distribution
TOTALS	\$47,931,511.35	\$413,960.19	\$244,242.78 (pro rata distribution) ³ + \$51,853.78 (to underpaid claimant) + \$117,863.63 (final administration costs)

24 Plaintiffs propose that the combined available funds of \$244,242.78 (\$45,863.74 +
 25 \$198,146.22 + \$232.82) be distributed pro rata to the 138 approved claimants who were authorized

27 ³ The sum of the proposed additional payments is \$244,242.76, *see* Christman Decl., Ex. B at 3,
 28 which is \$0.02 less than the amount available to distribute due to rounding. Christman Decl. ¶ 13.
 These funds will be distributed at a later date as authorized by the Court.

1 to be paid more than \$10.00 from the initial distribution, participated in the initial settlement
2 distribution by cashing their checks, and would be entitled to an additional pro rata payment of at
3 least \$10.00 from the remaining Net Settlement Funds.⁴ Small Claimants, i.e., the 24,591 approved
4 claimants whose payments of less than \$10.00 were increased to \$10.00 in order to conserve
5 administration funds and therefore provide a greater net benefit to the Class overall, *see* ECF No.
6 2902 at 12–13, would not receive an additional payment; their payments were larger than if the
7 previous and proposed distributions were allocated on a strict pro rata basis, without adjusting each
8 claim to the \$10.00 minimum payment. *See* Christman Decl. ¶ 12. Making payments only to 138
9 claimants would also minimize the administrative costs that would be drawn from this smaller pool
10 of funds for issuing, mailing, and tracking the checks. *See id.*; *see also* ECF Nos. 2902 at 12–13,
11 2902-1 ¶ 32. This approach is consistent with cases in which courts have set minimum thresholds
12 for payment, such that claimants who would receive payments of less than the threshold amount
13 would not receive any payment at all, and concluded that such plans of distribution are fair,
14 adequate, and reasonable. *See* ECF No. 2902 at 12–13 & n.7.

15 Pro rata redistribution would provide a substantial benefit to the Class Members with the
16 largest number of approved purchases and thus were most injured by the alleged conspiracy. Here,
17 the average (mean) proposed additional payment to the 138 previously approved claimants would
18 be \$1,769.88; the payments would range from \$10.45 to \$33,190.88. Christman Decl. ¶ 13; *see*
19 *also id.*, Ex. B. Redistribution of the current total residual funds of \$244,242.78 is feasible given
20 the small number of recipients and the consequential amounts of the proposed payments. *See, e.g.*,
21 *In re Anthem, Inc. Data Breach Litig.*, 327 F.R.D. 299, 333 (N.D. Cal. 2018) (redistribution reflects
22 “the law’s general preference for cy pres awards to be limited to scenarios where it is not feasible
23 to make further distributions to class members”); *Camberis v. Ocwen Loan Servicing LLC*, No. 14-
24 CV-02970-EMC, 2018 WL 6068999, at *5–6 (N.D. Cal. Nov. 20, 2018) (ordering a second round
25 of distribution to class members where practicable, and deeming a cy pres award appropriate in the
26

27 ⁴ Approved claimants who would otherwise qualify for further distribution but did not cash their
28 first checks have not been recommended for further payment since it is unlikely that they would
cash their second, smaller checks. Christman Decl. ¶ 12.

1 event that unclaimed funds remain after secondary distribution and costs are paid); *Perkins v.*
2 *LinkedIn Corp.*, No. 13-CV-04303-LHK, 2016 WL 613255, at *10, *13 (N.D. Cal. Feb. 16, 2016)
3 (approving redistribution to class members provided it is “economically feasible”; if not, to
4 designated cy pres recipients).

5 Plaintiffs expect, however, that additional future distributions would be impractical once
6 residual payments are made to the 138 previously approved claimants, and specifically that the
7 administration costs of additional future distributions would exceed the monetary benefit to Class
8 Members. Christman Decl. ¶ 12. Plaintiffs therefore request that the Court designate AAI as the cy
9 pres beneficiary of any future remaining funds. *See Malta v. Fed. Home Loan Mortg. Corp.*, No.
10 3:10-cv-01290-BEN-NLS, 2019 WL 1367814, at *1 (S.D. Cal. Mar. 25, 2019) (“A *cy pres*
11 distribution ‘is most useful when individual stakes are small, and the administrative costs of a
12 second round of distributions to class members might exceed the amount that ends up in class
13 members’ pockets.”) (citing *Ira Holtzman, C.P.A. v. Turza*, 728 F.3d 682, 689 (7th Cir. 2013));
14 *see also Beaver v. Tarsadia Hotels*, No. 11-CV-01842-GPC-KSC, 2020 WL 1139662, at *2 (S.D.
15 Cal. Mar. 9, 2020) (concluding “that it would be burdensome and inefficient to require a second
16 distribution of the residual settlement fund and a cy pres award is more appropriate”).

17 In federal class actions, cy pres is a permissible method of distributing unclaimed damages.
18 *See Six (6) Mexican Workers v. Arizona Citrus Growers*, 904 F.2d 1301, 1307 (9th Cir. 1990). “Cy
19 *pres* distributions must account for the nature of the plaintiffs’ lawsuit, the objectives of the
20 underlying statutes, and the interests of the silent class members, including their geographic
21 diversity.” *Nachshin v. AOL, LLC*, 663 F.3d 1034, 1036 (9th Cir. 2011) (citing *Six (6) Mexican*
22 *Workers*, 904 F.2d at 1307–08). “The *cy pres* doctrine allows a court to distribute unclaimed or
23 non-distributable portions of a class action settlement fund to the ‘next best’ class of beneficiaries.”
24 *Nachshin*, 663 F.3d at 1036 (citing *Six (6) Mexican Workers*, 904 F.2d at 1307–08)).

25 Distribution of any future remaining settlement funds to AAI would satisfy the
26 requirements of Ninth Circuit law for cy pres distribution. *See Six (6) Mexican Workers*, 904 F.2d
27 at 1307 (“The district court’s choice among distribution options should be guided by the objectives
28 of the underlying statute and the interests of the silent class members.”). AAI would use the cy pres

award here to further the purpose of promoting competition. AAI is an independent, nonprofit organization devoted to promoting competition that protects consumers, businesses, and society. *See* Declaration of Diana L. Moss (“Moss Decl.”) ¶ 3. It is an appropriate use of cy pres funds to promote research, education, and advocacy activities that indirectly benefit the victims of antitrust violations by improving the administration of the antitrust laws. *Id.* ¶ 9. Accordingly, AAI has been considered a qualified cy pres recipient in a number of antitrust class actions, including *In re Publication Paper Antitrust Litigation* (D. Conn.), *In re Visa Check/Mastermoney Antitrust Litigation* (E.D.N.Y.), *Louisiana Wholesale Drug Co. v. Abbott Labs. (In re Terazosin Hydrochloride Antitrust Litigation)* (S.D. Fla.), Moss Decl. ¶¶ 10, 12 n.7; *Kleen Products LLC v. International Paper*, No. 10-cv-05711 (N.D. Ill. May 29, 2020) (ECF No. 1481), a federal antitrust class action alleging a conspiracy to fix prices of Containerboard Products; and *In re: Urethane Antitrust Litigation*, No. 04-MD-1616-JWL (D. Kan. Mar. 1, 2021) (ECF No 3318). Concerning price-fixing cases, AAI advocates to ensure that Section 1 of the Sherman Act affords adequate cartel deterrence and victim compensation and has conducted extensive work on the damaging effects of cartels and the importance of private antitrust remedies in deterring such conduct. Moss Decl. ¶ 12. AAI will use the funds to support private antitrust enforcement of the antitrust laws generally, including against cartels. *Id.* ¶ 13. Alternatively, if directed by the Court, AAI would segregate the *cy pres* award to fund educational activities and research directed specifically at the role of private enforcement in detecting, preventing, and punishing cartel behavior. *Id.*

IV. CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court enter the [Proposed] Order Granting Direct Purchaser Plaintiffs’ Motion for an Order Authorizing Distribution of Remaining Settlement Funds and Cy Pres Distribution of Future Remaining Funds, submitted herewith.

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1 Dated: July 20, 2021

Respectfully submitted,

2 /s/ R. Alexander Saveri

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