UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

IN RE COMPACT DISC MINIMUM ADVERTISED PRICE ANTITRUST LITIGATION	]]]	**MDL DOCKET NO. 1361** (This Document Applies To All Actions Except *Trowbridge, et al. v. Sony Music Entertainment Inc., et al.,* Docket No. 2:01-CV-125-P-H)

ORDER TO SHOW CAUSE

INTRODUCTION

Almost three years ago, I approved a settlement agreement in this multidistrict antitrust class action, and entered final judgment. In re Compact Disc Minimum Advertised Price Litig., MDL No. 00-1361, 2003 WL 21685581 (D. Me. July 18, 2003) (actually dated July 9, 2003). That settlement included payments of $13.86 each to millions of individual claimants, millions of free music CDs distributed to non-profit groups chosen by the plaintiff states, and injunctive relief. Now, the class representatives and the State Attorneys General have submitted a Final Report and Recommendation ("Final Report") (Docket Item 384) for the distribution of excess funds and leftover CDs. As it turns out, substantial amounts of both remain. I conclude that a hearing is necessary. First, however, I **DIRECT** the parties to inform the Court by April 21, 2006, who should receive notice of the hearing and of the proposed distributions.

FACTUAL BACKGROUND

According to the plaintiffs' report, over $5.5 million including interest remains to be distributed.[1] Final Report at 2. Given the number of claimants—over 3.48 million—there is obviously a practical difficulty in distributing the remaining amount in individual checks. Mailing and other costs would reduce each check to a meaningless amount. Almost 93,000 CDs (proportionally, a small number given a total distribution of over 5.6. million CDs) also remain. Id. at 16. CDs originally allocated, but then either refused or returned by the recipient or unshipped due to duplication concerns, make up the lion's share of that figure.[2]

SUMMARY OF THE PROPOSAL

The class representatives and State Attorneys General make a number of

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[1] Of $48,243,361.32 sent out in checks to individuals, $4,234,430.76 in individual $13.86 distribution checks were not cashed, and $985,924.56 in individual checks were returned undeliverable (over 310,000 checks not cashed and over 72,000 checks returned). Final Report at 2. In the end, the funds remaining amount to $5,553,984.94. See id., Ex. B ("Steingard Aff.") at 7.

[2] Approximately 24,397 CDs originally allotted to New York were not shipped to their intended recipients at the State's request, due to those recipients' concerns that they would receive more duplicates of certain titles than could be accommodated in their collections. Final Report at 15-16. The same occurred for approximately 19,500 titles allotted to Florida. Id. The Administrator also holds in storage 46,119 CDs comprised of CDs that some recipients refused or returned to the Administrator, and excess CDs sent by the defendants. Id. (The plaintiffs did not provide a breakdown of this number by state, nor provide an exact number of excess CDs given by the defendants.) Finally, the Administrator also holds an additional 1,971 CDs labeled "explicit" or "Parental Advisory" that have not been claimed by recipients. (These CDs were intended to be replacements for CDs inadvertently shipped to States without such labels, but not all recipients who received the unlabeled CDs chose to apply for a replacement.) Id. at 15. In addition to what the Administrator still holds, approximately 1,000 CDs are collectively held by the State Attorneys General of Arkansas, Delaware, Idaho, Illinois, Indiana, Nevada, North Dakota, Utah, Washington, West Virginia, and the Northern Mariana Islands, because their intended recipients returned the CDs to them for various reasons. Id. at 17.

proposals for distributing the remaining funds.[3] There are three general categories. First, they propose that $3,728,404.52 go to the individual States pro rata, for the States to distribute according to "Supplemental Cy Pres Distribution Plans" filed with the recent Report. Final Report at 11-12. Most States propose giving the money to their public library system, school system, or arts council for music-related purposes (although some propose other recipients). See, e.g., id., Ex. E., New Hampshire Plan (public libraries); Arkansas Plan (Arkansas Arts Council); Texas Plan (in part to the Texas Music Office, to help promote Texas's music industry). Second, they propose that $1,003,297.68 be held in reserve for the 72,388 claimants whose checks were returned undeliverable. Final Report at 18. The Administrator would then undertake to trace addresses and re-mail checks, at an administrative cost of an additional $75,000. Id. They estimate the success rate for this process at 25%-50%, and therefore anywhere from $501,648.84 to $752,473.26 of those funds would *still* remain. The class representatives and State Attorneys General propose giving this remaining

[3] Some proposals for distributing excess funds were filed by private lawyers because the respective State Attorney General was not involved in the litigation; nevertheless, several of these private lawyers consulted with their respective State Attorney General in order to propose recipients. See Final Report, Ex. E., New Hampshire Plan; District of Columbia Plan. Several consulted only with Kohn, Swift & Graf, P.C., Lead Counsel for the Plaintiff Settlement Class. See id., Louisiana Plan; Minnesota Plan; Missouri Plan; New Jersey Plan (two Lead Counsel lawyers are listed at the end of the document; however, neither signed the Plan). One, however, does not report consulting with either in choosing their recipients. See id., South Dakota Plan.

amount to three nonprofit or public entities in varying percentages.[4] Id. at 18-20. Third, and finally, the plaintiffs propose that $747,282.74 be awarded as additional expenses, in varying amounts to the Administrator and the private plaintiffs' lawyers. Specifically, they propose that $733,000 (not including the additional $75,000 should I approve re-mailing undelivered checks) go towards compensating the Administrator partially[5] for additional expenses incurred since I last approved payment of expenses, id. at 9, $8,000 for accounting charges, Steingard Aff. ¶ 19, and $6,282.74 to the private plaintiffs' lawyers for additional expenses (but not attorney fees), Final Report at 11.

As for the remaining CDs, the class representatives and State Attorneys General propose distributing them in the following ways: first, 48,090 CDs to the USO (this number is the sum of those CDs refused or returned to the Administrator, excess CDs sent by the defendants, and the unclaimed "explicit" CDs, see supra n. 2); second, to new recipients chosen by the respective State

[4] The three entities they propose are: the National Endowment for the Arts (NEA), "a public agency, established by Congress[, which] provides funding to support the arts[,]" the United Service Organization (USO), "a 501(c) corporation [which] provide[s] 'morale, welfare and recreation-type services' [including concerts] to men and women in military service[,]" and Tipitina's Foundation, a "501(c)(3) organization located in New Orleans . . . that, in the wake of Hurricane Katrina, has been focusing its efforts on restoration of the national treasure that is the musicians and the performance of music in New Orleans." Final Report at 19-20.

[5] The additional expenses claimed are: shipping costs for the CDs ($325,000), printing costs for the checks ($361,000), bank fees ($195,000), project management fees ($150,000), storage charges for the CDs ($90,000), handling costs associated with re-shipping CDs that had been refused ($43,000), and miscellaneous expenses ($16,000). Final Report at 7-9. These total $1,180,000, but the plaintiffs propose reimbursing the Administrator for only $733,000 of that total. Id.

Attorneys General (some recipients are music-related, and some are not[6]) in the States of New York (24,397 CDs), Florida (19,500 CDs), and those States where the Attorney General holds returned CDs (a total of 1,000 CDs). Final Report at 16-18.

ANALYSIS

Compliance with the Settlement Agreement

In order to determine whether this proposed final distribution of the excess settlement assets is proper, I first must determine whether the Settlement Agreement contains any provisions that control such a distribution.[7] The plaintiffs have not extensively analyzed the terms of the Agreement in their legal memorandum. What follows, therefore, is subject to revision after the hearing.

The Settlement Agreement provides that "[a]ny funds remaining in the Settlement Fund after the payment of the costs and fees . . . and after all direct payments to [claimants] under the Distribution Plan, shall be distributed *cy pres* under the terms of the Cy Pres Distribution Plan." Settlement Agreement ¶ 4.9.2. The Agreement defines the term "Cy Pres Distribution Plan" as:

> [T]he state-specific plan or method of allocation of that portion of

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[6] For example, Florida proposes to give all 19,500 of its CDs to the Florida National Guard. Final Report at 18.

[7] As I have previously recognized, "[t]here are actually four settlement agreements [comprising Docket Items 183-86]. They are uniform in most respects . . . and I shall treat them collectively as one settlement agreement . . . ." In re Compact Disc Minimum Advertised Price Antitrust Litig., 216 F.R.D. 197, 206 n.14 (D. Me. 2003). Accordingly, my citations hereinafter shall be to the "Settlement Agreement."

> the Settlement Fund (after payment of attorneys' fees, costs and expenses) and the [CDs] designated in the Distribution Plan for *cy pres* distribution. The Cy Pres Distribution Plan will be submitted . . . with the motion for final approval of the settlement . . . .

Id. ¶ 1.2. It goes on to state that:

> To the extent the Distribution Plan or this Settlement Agreement provides that the Settlement Fund and/or [CDs] will be distributed *cy pres*, the Plaintiffs will prepare and submit with their motion for final approval of the Settlement Agreement a state-specific Cy Pres Distribution Plan which shall set out a state-specific plan or method of allocation for the distribution of such portion of the Settlement Fund and/or [CDs].

Id. ¶ 4.9.4. And further:

> Distribution under the Cy Pres Distribution Plan shall be to not-for-profit corporations and/or charitable organizations and/or governmental or public entities, with express conditions ensuring that the funds or [CDs] be used to further music-related purposes or programs reasonably targeted to benefit a substantial number of the [class members].

Id. The Settlement Agreement does not have a similar provision governing treatment of leftover CDs, but states generally that "[t]he Distribution Plan shall provide that the [CDs] will be distributed *cy pres* in accordance with the provisions of [¶ 4.9.4,] and the Cy Pres Distribution Plan." Id. ¶ 4.9.3.2.

Thus, the Settlement Agreement I approved after hearing provides that, in the event excess funds remain after "payment of costs and fees" and after "all

direct payments" to claimants under the Distribution Plan's[8] formula, those excess funds are to be distributed according to the Cy Pres Distribution Plan filed with the Motion for Final Approval. It does not provide how excess CDs are to be distributed. The only document to control distribution of the CDs, whether original or excess, is the Cy Pres Distribution Plan. Therefore, I must consult the Cy Pres Distribution Plan for both excess funds and CDs.

In fact, there is no overall, single document entitled "Cy Pres Distribution Plan." Instead, Exhibit F[9] to the Motion for Final Approval is a collection of 56 numbered, state-specific plans from 56 different States, Commonwealths and Territories. See Mot. for Final Approval of Settlement ("Final Approval Mot."), Ex. F (Docket Item 241). The Final Approval Memorandum recognizes that what is

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[8] The "Distribution Plan" is defined as "the plan or method of allocation of the Settlement Fund (after payment of attorneys' fees, costs and expenses) and the [CDs]. [It] will be submitted . . . with the Preliminary Approval Motion . . . ." Id. ¶ 1.4. That document, filed as Appendix F to the Motion for Preliminary Approval, states that all valid claimants "shall be paid a uniform refund amount," calculated by dividing "the funds remaining in the Settlement Fund after payment of the costs and fees . . . by the number of claims filed." Mot. for Preliminary Approval of Settlement, App. F at 2 (Docket Item 189). As for any excess funds, it adds nothing to the Settlement Agreement; it merely reiterates that "[a]ny funds remaining . . . after the payment of the costs and fees . . . and after all direct payments to compact disc purchasers, shall be subject to *cy pres* distribution in accordance with the *Cy Pres* Distribution Plan." Id. at 1. Of the CDs, it also reiterates the terms of the Settlement Agreement, that they "are to be distributed . . . pursuant to the Cy Pres Distribution Plan (to be submitted with the Motion for Final Approval)," to the same types of organizations and for the same purposes as the Settlement Agreement provided. Id. at 2.

[9] Early in their Final Approval Memorandum the plaintiffs state that "[a]ttached hereto as Exhibit B are the *cy pres* distribution plans . . . for each of the Plaintiff states, commonwealths and territories . . ." Mem. in Support of Mot. for Final Approval ("Final Approval Mem.") at 8 (Docket Item 241). This appears to a typographical error. Exhibit B is the Affidavit of Steven M. Steingard. See Final Approval Mot., Ex. B. Later, the plaintiffs refer to Exhibit F as the Cy Pres Distribution Plan. See Final Approval Mem. at 56, 62.

termed the "Cy Pres Distribution Plan" is actually the aggregate of the State's individual plans. See Final Approval Mem. at 8 (characterizing Exhibit F as "the *cy pres* distribution plans for the distribution of the music CDs . . ."); id. at 56 (characterizing Exhibit F as "Cy Pres Distribution Plan); id. at 62 (characterizing Exhibit F as "[e]ach States' Proposed Plan of Distribution . . ."). None of the 56 plans, however, has a plan for the distribution of excess funds. Only a few deal with distribution of excess CDs. See, e.g., Final Approval Mot., Ex. F, Hawaii Plan at 2 (unwanted or excess CDs will be sold and profits used to purchase additional CDs).

The Final Approval Memorandum suggests that this was not an inadvertent omission, at least so far as excess funds are concerned:

> Plaintiffs anticipate there will be money remaining in the Settlement Fund as a result of undistributed accrued interest as well as uncashed consumer claims checks. Plaintiffs will [apprise] the Court of the amount remaining and *present a proposal regarding its distribution when the total amount of the residual is known.*

Final Approval Mem. at 7 (emphasis added). This assertion is echoed in a later letter from the New York Attorney General's Office, responding to questions I had posed regarding certain unrelated matters:

> Because the amount of cash remaining after [payments to claimants and deduction of fees and costs] will be relatively small, Plaintiffs do not anticipate a pro rata distribution among the states and territories. Instead, at the end of this process (after the [CD] *cy pres* distribution has been completed and the time to cash the refund checks has expired), we expect to

> propose one or more music-related national charitable organizations to receive the cash residue and seek the Court's approval of such recipient(s).

Letter from Linda J. Gargiulo, Assistant Attorney General, Office of New York State Attorney General, to Court (June 27, 2003) ("Gargiulo Letter") (Docket Item 274).

Approval of the Settlement Agreement and Cy Pres Distribution Plan, therefore, proceeded on the premise that virtually all cash was being distributed in the initial check mailings. Unfortunately, the predicted "relatively small" leftover amount has become a significant sum.

As a result, I conclude that a hearing is necessary on whether the current proposals for use of the excess funds and leftover CDs are consistent with the Settlement Agreement, or a proper modification of that court-approved document, including its Cy Pres Distribution Plan. I also need to know whether any of the parties or their lawyers have relationships with the charitable or governmental organizations they have proposed as beneficiaries, such that their choices might have been influenced. See In re Compact Disc Minimum Advertised Price Antitrust Litig., 370 F. Supp.2d 320, 323 (D. Me. 2005) (ordering parties in music club portion of this case to certify that the proposed organizations have "no ties to the parties or the lawyers").

Amounts Proposed for Additional Costs and Expenses

With regard to payment of costs and expenses, on the other hand, the Settlement Agreement expressly provides that "[a]ll costs of administering the Settlement Fund, including but not limited to notice, administering and distributing the [money and CDs], and taxes and other expenses, . . . shall be paid out of the Settlement Fund . . . ." Settlement Agreement ¶ 3.6. This includes the "costs . . . and administrative expenses incurred in the Litigation, including . . . [those] related to implementation of this settlement," and also includes "payment of attorneys' . . . expenses and costs." Id. ¶ 4.1, 4.3.

I have already awarded settlement administration costs of almost $5.68 million, see Final Judgment & Order ¶ 8.1.[10] Before I award further expenses to the Administrator, a hearing is in order.

Separately, I awarded the plaintiffs' lawyers (State Attorneys General and

[10] Although the Settlement Agreement initially provided for the court to award administrative expenses of up to $8.5 million, in their Motion for Final Approval the lawyers estimated administrative expenses to be around $5.12 million. Final Approval Mem. at 66-67. Therefore, at the Final Fairness Hearing I queried the lawyers about the difference, due to my concerns that the "unspent funds would be an excessive amount to distribute under the cy pres program . . . ." In re Compact Disc Minimum Advertised Price Antitrust Litig., 216 F.R.D. at 213. In response, the lawyers assured me "that if the actual distribution checks . . . [were] delayed for a few weeks, they [would] have a better understanding of the expense needs and [would] be able to increase the individual checks going to class members so as to reduce any potential leftover cy pres cash amounts to a minimum." Id. Thereafter, the lawyers provided a final figure of around $5.68 million, see First Steingard Aff. ¶¶ 9, 11 (Docket Item 275), which I subsequently approved in the Final Judgment & Order of July 9, 2003, and individual checks were accordingly higher. Thus, no one expected leftover funds in the amount of $5.5 million. Final Fairness Hr'g Tr. at 86, May 22, 2003.

private lawyers) more than $14.3 million to cover *both* attorney fees *and* costs. At that time I stated:

> Suffice it to say here that if the plaintiffs press their request for a total fee and disbursement amount that exceeds [this figure], they will have to provide more support for their disbursements than they have to date. To justify taking more from the class, I will have to be satisfied with the hotel accommodations they selected, the air fares they obtained, the meals they charged . . . , the photocopying they have charged . . . , etc.

In re Compact Disc Minimum Advertised Price Antitrust Litig., 216 F.R.D. at 217-18. I see no reason to alter that ruling. Therefore the lawyers' request for additional amounts (albeit small sums) is **DENIED.**

What Kind of Notice is Required?

As required by Rule 23, the Settlement Agreement was the subject of extensive notice to the class, and a hearing at which objectors appeared and voiced their concerns. If the current proposals amount to a modification of the Settlement Agreement I am concerned with what notice should be given. Should some form of truncated notice go to the entire class? to the objectors only, or at all? to a government agency such as the Federal Trade Commission (FTC) that might appear as amicus? Federal Rule of Civil Procedure 23(d)(2) provides:

> [T]he court may make appropriate orders . . . requiring, for the protection of the members of the class or otherwise for the fair conduct of the action, that notice be given in such manner as the court may direct to some or all of the members of any step in the action, . . . or of the opportunity of members to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or otherwise to come into the action.

Fed. R. Civ. P. 23(d)(2) (2005).[11]

CONCLUSION

I hereby **ORDER** that the parties file legal memoranda by April 21, 2006, addressing what notice should be given and to whom. They are also free to address anything else I have said in this Order. The plaintiffs' lawyers shall also disclose any relationships they have with the proposed beneficiaries. Then I will proceed to the stage of scheduling a hearing.

SO ORDERED.

DATED THIS 31ST DAY OF MARCH, 2006

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

[11] As an example, the Advisory Committee Notes refer "to poll[ing] members on a proposed modification of a consent decree," citing Sam Fox Publishing Co. v. United States, 366 U.S. 683 (1961). Rule 23(d)(2) Advisory Committee Notes (1966 Rule Amendment); see also L.J. v. Massinga, 778 F. Supp. 253, 255 (D. Md. 1991) (giving notice of modification of consent decree to class members and their caretakers, foster parents, and parents); Benjamin v. Malcolm, No. 75 Civ. 3073, 1995 WL 378529, *2 (S.D.N.Y. June 26, 1995) (requiring notice be given to class members of modification of consent decree). Of course, the Settlement Agreement here is *not* a consent decree, and may be distinguishable. I point out the Advisory Committee Note and citation only to urge the parties to address it.

U.S. DISTRICT COURT
DISTRICT OF MAINE (PORTLAND)
CIVIL DOCKET FOR CASE #: 2:00-MD-1361-DBH

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