In Re Petrobras Securities Litigation Settlement Failed Notification and Cy Pres Doctrine Application

David Andrew Taylor
Partner
Almeida Advogados

Introduction

According to Class Counsel Pomerantz LLP, January 3, 2018[1] marked a "significant victory for investors" of the semi-public Brazilian corporation Petróleo Brasileiro S.A. ("Petrobras") as the day of the historic[2] USD 2.95 billion settlement ("Settlement") to the three-year securities class action *In re Petrobras Securities Litigation 14-cv-9662* ("*In re Petrobras Securities Litigation*") before Judge Jed S. Rakoff, United States District Judge for the Southern District of New York. The class action was brought on behalf of investors holding common and preferred Petrobras American Depository Shares ("ADSs") traded on the New York Stock Exchange ("NYSE") and/or certain Petrobras debt securities, which price fell drastically as the Brazilian Federal Police Operation Car Wash investigation exposed the multi-billion dollar money-laundering and corruption scheme within Petrobras the reality of which, via false and misleading public statements, Petrobras did not disclose to investors.

Large numbers of street name holders of Petrobras securities covered by the terms of the class action were not notified of the Settlement, never received a Proof of Claim form to fill out to stake their claim, and thus were excluded. Furthermore, the Settlement stipulates cy pres relief "contribution" of the non-distributed or unclaimed Net Settlement Fund amount "to an appropriate

[1] *See* Petrobras, Press Release, January 3, 2018, *Petrobras Signs Agreement in Principle to Settle Class Action in the U.S.*, http://www.petrobras.com.br/en/news/petrobras-signs-agreement-in-principle-to-settle-class-action-in-the-u-s.htm.

[2] "[T]he largest securities class action settlement in a decade, [it] is [also] the largest settlement ever in a securities class action involving a foreign issuer, the fifth-largest securities class action settlement ever achieved in the United States, the largest securities class action settlement achieved by a foreign Lead Plaintiff, and the largest securities class action settlement in history not involving a restatement of financial reports." Pomerantz LLP Firm Biography, *Securities Litigation, Significant Landmarks In Securities-related Litigations*, Case 1:14-cv-09662 (JSR), Document 789-25, filed April 23, 2018, at p. 2, available at https://www.conjur.com.br/dl/peticao-class-action-petrobras-risco.pdf.

non-profit organization selected by Class Counsel, with approval by the Court, in which Class Counsel shall not have any financial interest or other affiliation," which contribution in actuality provides no benefit to class members whatsoever.

This is tantamount to adding injury to injury to injury for these investors. In words commonly attributed to Aristotle, "[w]ith the truth, all given facts harmonize; but with what is false, the truth soon hits a wrong note." Petrobras investors worldwide suffered loss in shareholder value, in many cases considerable shareholder value, from fraudulent concealment, bribe facilitation and fraudulent accounting practices, and should be recompensed. To hit the right note, the claims distribution notice and processing to the securities class action should actually work properly for investor class members as should the class action settlement award work for them fully and directly.

The Facts Giving Rise to In Re Petrobras Securities Litigation

The facts giving rise to *In re Petrobras Securities Litigation* are best summarized primarily in the court documents to the litigation itself. As stated in the court documents, Petrobras is a Brazil-headquartered Brazilian government majority-owned multinational oil and gas company whose common and preferred shares are listed on the B3 (formerly BM&FBOVESPA) São Paulo, Brazil Stock Exchange and sponsors ADSs (representing common and preferred American Depositary Receipt (ADR) equity) that are listed on the NYSE.[3] Petrobras also makes Note debt securities offerings.[4] Before and during the time period of January 22, 2010 through March 19, 2015 (the

[3] *Opinion*, Case 1:14-cv-09662 (JSR), Document 194, filed July 30, 2015, at p. 4. *See also* Petrobras, *Investor Relations, Shares* ("Petrobras shares are negotiated mainly on the São Paulo Stock Exchange where the common stock is symbolized by PETR 3 and the preferred by PETR 4[….] Since July 2nd, 2007 each [Preferred Share] ADR represents two preferred shares and is traded in NYSE under the symbol of PBRA [and] each [Common Stock] ADR is represented by two ordinary Petrobras shares and negotiated at the NYSE under the PBR acronym."), http://www.investidorpetrobras.com.br/en/shares-and-dividends/shares. For sake of informational knowledge, ADRs must be obtained through depository U.S. banks. These banks, such as JPMorgan Chase, BNY Mellon and Citibank, have reserves of the local (foreign) equities which they can then convert into ADRs, packaging the foreign shares at an equivalent U.S. Dollar value into ADSs. ADRs can also cover bond issuances or other interest bearing notes in addition to normal commercial shares. *See also infra* text p. 14.

[4] Petrobras issues Global Note debt securities in the international capital markets as a means of long-term financing its operations. These debt securities can be underwritten by U.S. and foreign bank syndicates authorized to sell them in the U.S. but are not traded on any U.S. exchange rather in over-the counter transactions internationally. To ensure compliance with *Morrison v. National Australia Bank Ltd.*, 561 U.S. 247 (2010), which holds that Section 10(b) of the Exchange Act does not "provide a cause of action for foreign plaintiffs suing foreign [ ] defendants for misconduct in connection with securities traded on foreign exchanges," the District Court included such noteholders demonstrating

"Class Period"), Petrobras expanded its petroleum production capacity through construction and oil refinery purchase, which expansion[5] was coordinated between certain corrupt Petrobras executives[6] and a cartel of large-scale project contractors and suppliers[7] at grossly-inflated bidding prices,[8] established to pay bribes and kickbacks to the corrupt Petrobras executives and government officials.[9] This corruption scheme was known by Petrobras' upper management, including the then head of Petrobras' energy and gas division as well as then CEO and President

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acquisition of their notes "directly in, pursuant and/or traceable" to a May 15, 2013 and a March 11, 2014 public offering registered in the U.S. or issued by the two Petrobras international financing companies Petrobras International Finance Company and/or Petrobras Global Finance B.V. on the NYSE. *Opinion and Order*, Case 1:14-cv-09662 (JSR), Document 428, filed February 2, 2016 at p. 48. Interesting to note is the argument made in an appellate court amici curiae brief filed by the State Board of Administration of Florida relative to class certification in this matter is that as all Petrobras notes are housed at the Depository Trust Company, which electronic system handing note title transfer transactions is located in the New York area, all trades in them should be considered domestic. *See Brief of Amici Curiae State Board of Administration of Florida Acting on Behalf of the Florida Retirement System Trust Fund and Other Funds, Professor Egon Guttman and Professor James Angel in Support of Plaintiffs-Appellees Urging Affirmance,* Case 16-1914, Document 222, filed September 1, 2016.

[5] Cited examples are the 2006 acquisition of a refinery in Pasadena, Texas, and contracts relating to the Abreu e Lima refinery in Pernambuco, Brazil as well as one of the refineries of the Complexo Petroquímico do Rio de Janeiro – Comperj project. *Opinion*, *supra* note 3 at p. 7.

[6] In particular, these corrupt Petrobras executives were its Chief Downstream Officer and Director of Supply, its Chief Services Officer, its Director of the International Division and an executive in its Engineering and Services Division at the time. *Id.* at p. 5.

[7] As everyone knows, Odebrecht was "the top member of the cartel" and Andrade Gutierrez was "another top Cartel company." *Consolidated Fourth Amended Class Action Complaint*, Case 1:14-cv-09662-JSR, Document 342, filed November 30, 2015, at pp. 56-57. What is little known generally is that there were at least 14 other major contractors to the cartel, *see Id.* at pp. 171, some of the company names of which are peppered throughout the pleading in the description on their participation.

[8] The Pasadena, Texas refinery was acquired in 2006 for a total of USD 1.18 billion. One year earlier, the same refinery had been purchased by a Belgian oil company for but USD 42.5 million. The cost of the Abreu e Lima refinery ballooned from USD 4 billion to over USD 18 billion due to contract padding. Likewise, the aforementioned Comperj project refinery went 60% over budget. *Id.* at p. 7.

[9] *Opinion*, *supra* note 3 at pp. 6-7:

> "[T]he Corrupt Executives would apprise the cartel members of the estimated cost that Petrobras assigned to a project. The cartel members [] would agree among themselves which company would win the contract and adjust their bids to conform to Petrobras´ parameter allowing for a 15-20% profit above that figure. On top of that profit, they would build into the winning bid ´three percent political adjustment,' which would be used to pay kickbacks to the Corrupt Executives and their political party patrons [….] Under Petrobras´ system of political patronage, each of the company's seven divisions, known as Directorates, was allocated to one of the political parties forming the majority coalition: the Partido Progressista ('PP'), the Partido do Movimento Democrático Brasileiro ('PMDB') and the Partido dos Trabalhadores ('PT'). Because the Brazilian government was Petrobras' majority shareholder, the political parties had the power to appoint the directors of the divisions under their control, as well as to nominate all members of Petrobras' Board of Directors, including its President. In return for the parties' sponsorship of their careers, individual executives were expected to provide kickbacks to the parties by diverting company funds from works and contracts under their control."

of the company, which was complicit in concealing this knowledge.[10] The corruption scheme was discovered by the Brazilian Federal Police extensive and in-depth Operation Car Wash money-laundering investigation and as its details gradually unfolded[11] the value of Petrobras' securities declined, the price of its common ADS falling by 80.92% and its preferred ADS by 78.01% over the course of the Class Period.[12]

On December 8, 2014, together with the U.S. law firm Wolf Popper LLP, the minority shareholder rights-advocate Brazilian corporate law firm Almeida Advogados, which had been accompanying the then Petrobras bribery and corruption scheme media disclosure closely and had been carefully preparing for litigation in light of the drastic shareholder value decline and Petrobras' related false and misleading statements, filed the first putative securities class action[13] against Petrobras – *Kaltman v. Petroleo Brasileiro S.A. - Petrobras* – in the United States District Court Southern District Court of New York.[14] Four other putative securities class actions were

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[10] *Id.* at p. 8 (A Petrobras manager that had "repeatedly reported problems with bidding and contracts to her superiors [including the then Petrobras CEO] for five years [was] transferred to Singapore and ultimately fired in retaliation." USD 58 million in unperformed "communication services" was discovered by internal investigation but the employee responsible for the embezzlement was keep on the payroll for years afterwards. A Rio de Janeiro PT politician had "[taken] his concerns" about the Pasadena refinery purchase bribery and corruption to the then Petrobras president.).

[11] The details also uncovered and revealed the acceptance by Petrobras executives of USD 139 million from SBM Offshore relative to oil rig supply bidding. *See Consolidated Fourth Amended Class Action Complaint*, *supra* note 7 at p. 32.

[12] *Opinion, supra* note 3 at p. 8. *See also Consolidated Fourth Amended Class Action Complaint, supra* note 7 at p. 5:

> At its height in 2009, Petrobras' market capitalization was approximately USD 310 billion, making it the worlds' fifth-largest company […. F]ollowing the disclosure of [the] rampant fraud and corruption at the Company, which led to the arrest of high-level Petrobras executives and prompted investigations by Brazilian and U.S. authorities, the Company's worth declined to USD 39 billion [(by early 2015)].

And *see Id.* at pp. 129-164, "Additional Allegations Related to the Scheme," which describes chronologically how with the media news reporting on the scheme during the Class Period the market value Petrobras' securities, including its ADSs and debt securities, gradually fell.

[13] A proposed (putative) class action is first filed in which a plaintiff represents itself and others similarly situated until such time as the federal or state court concludes that the requirements for a class action are satisfied in accordance with Rule 23 of the U.S. Federal Rules of Civil Procedure.

[14] *Kaltman v. Petroleo Brasileiro S.A. - Petrobras,* Case 1:14-cv-09662 (JSR), Document 1, filed December 8, 2014. For very readable background on this initial fling, *see* Roberto Katz, Folha de São Paulo, Piauí Magazine, *The Oil is Theirs: The story of the multi-billion-dollar lawsuit against Petrobras in the United States, 118 Edition, July 2016,* https://piaui.folha.uol.com.br/materia/the-oil-is-theirs/ and André de Almeida, A maior ação do mundo: A história da Class Action contra a Petrobras ("The Largest Action in the World: The Story of the Class Action Against Petrobras"), São Paulo, Editora SES, 2018 (the book is not available in the English language at present).

subsequently filed before the court on behalf of likewise investors, which actions, asserting substantially similar claims, were consolidated together with the *Kaltman* action by court Order on February 17, 2015 under the caption *In re: Petrobras Securities Litigation*.[15] On March 4, 2015, after considering the motions of four candidates,[16] the Court appointed the Universities Superannuation Scheme, Ltd[17] as the putative securities class action's Lead Plaintiff and approved its choice of Lead Counsel, Pomerantz LLP. On February 2, 2016, in accordance with the U.S. Private Securities Litigation Reform Act[18] the Court granted the putative securities class action's Lead Plaintiff's motion to appoint four plaintiffs – itself, the North Carolina Department of State Treasurer, Employees' Retirement System of the State of Hawaii, and Union Asset Management Holding AG – as class representatives for a "Securities Act Class" and itself as the class representative for an "Exchange Act Class" and Pomerantz LLP as "Class Counsel" for both Classes – and certified the classes on the basis of the plaintiffs' having satisfied the requirements of Rule 23(b)(3) of the U.S. Federal Rules of Civil Procedure.[19]

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[15] *Ngo v. Petroleo Brasileiro*, 14-cv9760 (filed December 10, 2014); *Messing v. Petroleo Brasileiro*, 14-cv-9847 (filed December 12, 2014); *City of Providence v. Petroleo Brasileiro et al.*, 14-cv-10117 (filed December 24, 2014) and *Kennedy v. Petroleo Brasileiro*, 15-cv-93 (filed January 7, 2015). *See Order,* Case 1:14-cv-09662 (JSR), Document 99, filed March 4, 2015, at p. 1. *See also Opinion, supra* note 3 at p. 2.

[16] The Court had received nine motions for Lead Plaintiff appointment; five movants subsequently withdrew their motions. *Opinion, supra* note 15 at p. 1.

[17] "Universities Superannuation Scheme (USS) was established in 1975 as the principal pension scheme for universities and other higher education and research institutions in the UK. [It] is one of the largest pension schemes in the UK, with total fund assets of approximately £50 billion." https://www.linkedin.com/company/universities-superannuation-scheme/

[18] 15 U.S. Code § 78u–4 - Private Securities Litigation.

[19] To quote the Rule verbatim:

> Rule 23. Class Actions (a) Prerequisites. One or more members of a class may sue or be sued as representative parties on behalf of all members only if: (1) the class is so numerous that joinder of all members is impracticable; (2) there are questions of law or fact common to the class; (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and (4) the representative parties will fairly and adequately protect the interests of the class. (b) Types of Class Actions. A class action may be maintained if Rule 23(a) is satisfied and if: (3) the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy. The matters pertinent to these findings include: (A) the class members' interests in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already begun by or against class members; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and (D) the likely difficulties in managing a class action.
> (Underlined for content emphasis.).

The Exchange Act Class certification allowed for class action pursuit of claims under the U.S. Securities Exchange Act of 1934[20] and the Securities Act Class allowed for the same under the U.S. Securities Act of 1933.[21] The Exchange Act claims asserted under the class action were for violation of Section 10(b)[22] of the Exchange Act and Rule 10b-5,[23] anti-fraud provisions

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[20] The Exchange Act Class is defined as follows:

> As to claims under Sections 10 (b) and 20 (a) of the Securities Exchange Act of 1934, all purchasers who, between January 22, 2010 and July 28, 2015, inclusive (the "Class Period") purchased or otherwise acquired the securities of Petroleo Brasileiro S.A. ("Petrobras"), including debt securities issued by Petrobras International Finance Company S. A. ("PifCo") and/ or Petrobras Global Finance B. V. ("PGF") on the New York Stock Exchange (the "NYSE") or pursuant to other domestic transactions, and were damaged thereby. Excluded from the Class are Defendants, current or former officers and directors of Petrobras, members of their immediate families and their legal representatives, heirs, successors or assigns, and any entity in which Defendants have or had a controlling interest. *Opinion and Order*, *supra* note 4 at p. 48.

[21] The Securities Act Class is defined as follows:

> As to claims under Sections 11 and 15 of the Securities Act of 1933, all purchasers who purchased or otherwise acquired debt securities issued by Petroleo Brasileiro S.A. ("Petrobras"), Petrobras International Finance Company S.A. ("PifCo"), and/or Petrobras Global Finance B.V. ("PGF"), in domestic transactions, directly in, pursuant and/or traceable to a May 15, 2013 public offering registered in the United States and/or a March 11, 2014 public offering registered in the United States before Petrobras made generally available to its security holders an earnings statement covering a period of at least twelve months beginning after the effective date of the offerings, and were damaged thereby. As to claims under Sections 12 (a) (2) of the Securities Act of 1933, all purchasers who purchased or otherwise acquired debt securities issued by Petroleo Brasileiro S.A. ("Petrobras"), Petrobras International Finance Company S. A. ("PifCo"), and/ or Petrobras Global Finance B. V. ("PGF"), in domestic transactions, directly in a May 15, 2013 public offering registered in the United States and/ or a March 11, 2014 public offering registered in the United States before Petrobras made generally available to its security holders an earnings statement covering a period of at least twelve months beginning after the effective date of the offerings, and were damaged thereby. Excluded from the Class are Defendants, current or former officers and directors of Petrobras, members of their immediate families and their legal representatives, heirs, successors or assigns, and any entity in which Defendants have or had a controlling interest. Id. at pp. 48-49.

[22] Section 10(b) of the Exchange Act, codified at 15 U.S. Code § 78j - Manipulative and Deceptive Devices:

> It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange—
> […]
> (b)
> To use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, or any securities-based swap agreement [1] any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the [Securities and Exchange] Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

[23] U.S. Securities and Exchange Commission (SEC) Rule 10b-5, codified at 17 C.F.R. 240.10b-5: Rule 10b-5: Employment of Manipulative and Deceptive Devices:

> It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails or of any facility of any national securities exchange,
> (a) To employ any device, scheme, or artifice to defraud,

prohibiting the use of any "device, scheme, or artifice to defraud" and imposing liability "necessary or appropriate in the public interest or for the protection of investors" for misstatement or omission of a material fact" as well as Section 20(a) of the Exchange Act, which holds individual "control persons joint and severally liable."[24]

Firstly, Petrobras knowingly overpaid construction project costs in exchange for kickbacks and political party official bribes "for years" and "grossly understated the amount of payments incorrectly capitalized." *Inter alia*, during the Class Period Petrobras' financial statements purposely and materially inflated "reported property, plant and equipment […] necessitating a massive write-down" and qualified bribe repayments "as depreciation over the unit-of production basis or straight line method, resulting in materially lower current expenses and materially higher net income."[25]

Secondly, *inter alia*, during the Class Period Petrobras consistently assured its investors that its operations were conducted with full adherence to ethical principles. For example, the May 27, 2010 Petrobras press release on the first quarter Year 2010 operations results stated:

> We are going through a period of crucial importance regarding our shareholders[….] We are fully committed to implementing a fair and transparent operation, respecting our minority shareholders' rights and following the best practices of corporate governance.[26]

(b) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or
(c) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security.

[24] Codified at 15 U.S. Code § 78t - Liability of Controlling Persons and Persons Who Aid and Abet Violations.

[25] *See Consolidated Fourth Amended Class Action Complaint*, *supra* note 7 at pp. 58-71.

[26] *Id*. at p. 91. *See also* Petrobras, Press Release, *Petrobras Announces First Quarter of 2010 Results,* Rio de Janeiro, May 27, 2010, https://www.investidorpetrobras.com.br/enu/6489/1Q10FinancialReportUSGAAP.pdf.

Similar assurances were made throughout the Class Period.[27] The Year 2011 Annual Report 20-F filing with the SEC iterated that Petrobras "guide[s its] business and [its] relations with third parties by ethical principles."[28] Under the Ethics Code of the Petrobras System that had pre-existed, and had existed throughout, the Class Period Petrobras undertook to:

> conduct its business with transparency and integrity, creating credibility with its shareholders [and] investors, register its reports and statements in a correct, consistent, accurate and complete way[,] refuse any corrupt and bribery practices, keeping formal procedures for control and consequences of any transgressions [and] refuse support and contributions to political parties or political campaigns of candidates for elective offices.[29]

As respects Petrobras' assurance of commitment to "register its reports and statements in a correct, accurate and complete way" its Year 2010 Annual Report 20-F SEC filing, for example, stated that "Company's management assessed the effectiveness of each [Petrobras] Company's internal control over financial reporting as of [the end of the fiscal year and] has concluded that as of [the end of the fiscal year] each [Petrobras] Company's internal control over financial reporting is effective."[30] For example relative to Petrobras´ assured maintenance of procedures for preventing and containing fraud and corruption, its Facts and Data blog website posting

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[27] *See Consolidated Fourth Amended Class Action Complaint*, *supra* note 7 at p. 83.

[28] *Id*. *See also* Petrobras, SEC 20-F Year 2011 Annual Report, https://www.investidorpetrobras.com.br/enu/8568/AnnualReport20Fen.pdf, at p. 175.

[29] *See Consolidated Fourth Amended Class Action Complaint*, *supra* note 7 at p. 85. *See also Ethics Code Petrobras System: Ethics Code – That's Just How We Are* ("Version approved by the Board of Petrobras on 11/09/2006, Minutes DE 4.613, Sheet No 1109; and by the Board of Directors on 11/29/2006, Minutes CA 1.281, Sheet No 35"), https://docplayer.net/21300746-Ethics-code-petrobras-system.html.

[30] *See Consolidated Fourth Amended Class Action Complaint*, *supra* note 7 at p. 95. *See also* Petrobras, SEC 20-F Year 2010 Annual Report, https://www.investidorpetrobras.com.br/enu/8573/FORM_20F_2010_PETROBRAS_INGLES_25MAI11.pdf. In connection with Petrobras' SEC Form 6-K financial statement filing for the period ending March 31, 2012, for example, co-defendant PricewaterhouseCoopers, rendering "specified technical accounting audit services" to Petrobras for Years 2012-2014, issued its Report of Independent Registered Public Accounting firm and, as respects Petrobras' internal control over final reporting, seconded Petrobras' statement of its financial condition and operations results, formally opining as follows: "Based on our review, we are not aware of any material modifications that should be made to the accompanying condensed consolidated interim financial information for it to be in conformity International Financial Reporting Standards as issued by the International Accounting Standards Board." *Consolidated Fourth Amended Class Action* Complaint, *supra* note 7 at pp. 18, 100.

entitled "We Have Strict Legal Procedures in Place as Respects Payments, Including in the Case of the Pasadena Purchase," the Company represented that:

> The payments made for any reason and in any country follow strict and clear procedures and relevant legislation. Additionally, the Company has a structured Internal Audit group, which has unrestricted access to any unit of the Petrobras System to verify the compliance of procedures and transactions made.[31]

On similar factual basis regarding the bribery and corruption scheme, the Securities Act claims which were asserted under the class action on behalf of Petrobras noteholders stated violation of Sections 11, 12(a)(2), and 15 of the Securities Act[32] for material false registration statement and other document representation relative to a May 2013 and a March 2014 Petrobras notes offering. On August 29, 2012, Petrobras and Petrobras Global Finance B.V. ("PGF") filed a SEC Form 3ASR registration statement "for the offer and sale of an indeterminate amount of securities at indeterminate offering prices, including debt securities."[33] On May 15, 2013, PGF filed a SEC Form 424(b)(2) prospectus supplement to the registration statement for the offer and sale of USD 9.5 billion in notes.[34] On March 10, 2014, PGF filed a SEC Form 424(b)(2) prospectus supplement to the registration statement for the offer and sale of USD 8.1 billion in notes.[35] The

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[31] *See Consolidated Fourth Amended Class Action Complaint; supra* note 7 at p. 121. *See also* Petrobras, Blog, *Temos rígidos procedimentos legais para pagamentos, inclusive na compra de Pasadena* ("We Have Strict Legal Procedures in Place as Respects Payments, Including in the Case of the Pasadena Purchase"), May 23, 2014, http://www.petrobras.com.br/fatos-e-dados/temos-rigidos-procedimentos-legais-para-pagamentos-inclusive-na-compra-de-pasadena.htm (in Portuguese).

[32] Codified at 15 U.S.C. §§ 77k, 77l(a)(2), 77o. Section 11 of the Securities Act of 1933 provides private remedy for purchasers of securities issued under a registration statement filed with SEC if the registration statement "contained an untrue statement of material fact or omitted to state a material fact required to be stated therein or necessary to make the statement therein not misleading." Under Section 12(a)(2), an offer or sale of a security through a prospectus or an oral communication containing a material misstatement or omission creates liability, provided that the purchaser did not know about the misstatement or omission at the time of the purchase. Under Section 15, "control persons" are jointly and severally liable for Sections 11 and 12 violations.

[33] *See Consolidated Fourth Amended Class Action Complaint, supra* note 7 at p. 175.

[34] USD 1.25 billion 2.000% Global Notes due 2016, USD 2 billion 3.000% Global Notes due 2019, USD 3.5 billion 4.375% Global Notes due 2023, USD 1.75 billion 5.625% Global Notes due 2043, USD 1 billion Floating Rate Global Notes due 2016 and USD 1.5 billion Floating Rate Global Notes due 2019. *Id.* at pp. 175-6. *See also Prospectus Supplement (To Prospectus Dated August 29, 2012) Registration Statements Nos. 333-183618 and 333-183618-01*, https://www.sec.gov/Archives/edgar/data/1119639/000129281413001177/pbra20130513_424b2.htm.

[35] USD 1.6 billion 3.250% Global Notes due 2017, USD 1.5 billion 4.875% Global Notes due 2020, USD 2.5 billion 6.250% Global Notes due 2024, USD 1 billion 7.250% Global Notes due 2044, USD 1.4 billion Floating Rate Global

Securities Act claims to the class action stated that these offering documents which incorporated by reference the SEC filings by Petrobras during the Class Period, contained numerous false and misleading statements about Petrobras' asset value and income[36] as well as incorporated by reference Petrobras' Code of Ethics and incorporated representations to the effect that it had effective internal control over financial reporting.[37]

The In Re Petrobras Securities Litigation Settlement

As stated in the February 1, 2018 Stipulation of Settlement and Release agreed to and signed between Class Counsel Pomerantz LLP and Petrobras defendants' counsel from December 2015 through August 2016, five in-person mediation sessions were held between Class Counsel and the Petrobras defendants towards achieving settlement, which mediation sessions were also accompanied by extensive arm's length discussion and negotiation via written exchange and teleconferencing.[38] On December 31, 2018 the plaintiffs, Petrobras and PGF entered into a memorandum of understanding outlining the terms of their agreement to settle.[39] On January 3, 2018, Petrobras made press release public announcement that it had signed an agreement in principal to settle the class action.[40]

In accordance with the February 1, 2018 Stipulation of Settlement and Release, without admitting liability and maintaining that it was itself a victim of the bribery and corruption scheme, Petrobras agreed to pay a settlement amount based on damages caused to its ADRs' holders as a result of the "conduct alleged in the Action."[41] Likewise not admitting liability and maintaining that it too was a victim of the bribery and corruption scheme, PGF agreed to pay a settlement amount

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Notes due 2017 and USD 500 million Floating Rate Global Notes due 2020. *See Consolidated Fourth Amended Class Action Complaint, supra* note 7 at pp. 176-7. *See also Prospectus Supplement supra* note 34.

[36] *See Consolidated Fourth Amended Class Action Complaint, supra* note 25 and accompanying text.

[37] *Opinion*, *supra* note 3 at p. 13. *See also supra* notes 26-31 and accompanying text.

[38] *Stipulation of Settlement and Release*, Case 1:14-cv-09662-JSR Document 767-1, filed February 1, 2018 at p. 10.

[39] *Id.*

[40] Petrobras, Press Release, *supra* note 1.

[41] *Stipulation of Settlement and Release*, *supra* note 38 at pp. 11-12.

based on damages caused to Petrobras debt securities purchasers as a result of the "conduct alleged in the Action."[42]

The Settlement amount was USD 2.95 billion, to be paid in three instalments, the last being within six months of the District Court's final approval of the Settlement or by January 15, 2019, whichever came later,[43] in exchange for full and final release of any and all settled claims.[44] Notice would be first-class mailed to such Settlement Class Members as are identified through reasonable efforts.[45]

As per the Amended Stipulation and Agreement of Settlement of the same date of February 1, 2018, "best efforts" distribution of the escrow account-held Net Settlement Fund would be made by check and redistribution of any balance remaining would be made until no longer considered cost effective, after which any unclaimed balance would be contributed "to an appropriate non-profit organization selected by Class Counsel, with approval by the Court, in which Class Counsel shall not have any financial interest or other affiliation."[46] Attorney's fees and expenses would be awarded before the distribution of the Net Settlement Fund to the Settlement Class Members.[47]

On March 1, 2018, the District Court preliminarily approved the settlement so that it could be presented to the class members.[48] Following a June 4, 2018 settlement hearing, on June 22,

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[42] *Id.* The Amended Stipulation and Agreement of Settlement of the same date of February 11, 2018 established the terms relative to PwC Brazil and its affiliates. "[W]ithout any admission or concession of "any liability or wrongdoing or lack of merit in the defenses asserted," PwC Brazil agreed to fully and finally settle the Class Action for USD 50 million in exchange for full and final release of all settled claims against it. *See Amended Stipulation and Agreement of Settlement*, Case 1:14-cv-09662-JSR, Document 767-10, filed February 1, 2018, at pp. 6, 19-24.

[43] *Stipulation of Settlement and Release, supra* note 38 at p. 28.

[44] *Id.* at p. 33.

[45] *Id.* at p. 41.

[46] Amended Stipulation and Agreement, *supra* note 42 at pp. 32-33. The language of the Stipulation of Settlement and Release had originally affirmed that the unclaimed balance would be contributed to "an organization organized under Brazilian law, selected by the Petrobras Defendants and approved by Class Counsel, whose mission is to fight corruption and improve corporate governance in Brazil." *Stipulation of Settlement and Release, supra* note 38 at p. 46.

[47] *Stipulation of Settlement and Release, supra* note 38 at p. 47.

[48] *Order*, Case 1:14-cv-09662-JSR, Document 770, filed March 1, 2018, at p. 2.

2018 the District court granted the class plaintiffs' motion for final approval,[49] approving plaintiffs' application for attorney's fees, awarding USD 186.5 million, USD 170,880,000 of which was to Class Counsel,[50] closing the case but the Court retaining jurisdiction over "any further disputes arising in connection with the implementation of the Settlement or the payment of fees and costs."[51] The Opinion of the District Court was Ordered, Judged and Decreed by the District Court's court clerk on June 27, 2018[52] and the District Courts' Order and Final Judgment was entered on July 2, 2018.[53]

Failed Notification

To have filed a claim and recover from the Net Settlement Fund, Settlement Class Members must have duly submitted the Proof of Claim and Release form ("Proof of Claim form") that accompanied the Notice Packet ("Notification"), mailing it to the court-appointed Settlement, Claims and Notice Administrator Garden City Group (GCG) ("Claims Administrator") postmarked no later than June 9, 2018 or submitting it online at www.petrobrassecuritieslitigation.com no later than June 9, 2018.[54]

To the average-level street name investor this form could appear a little intimidating, and certainly onerous. It requires registration details of the ADS (share) numbers, dates, financial value, transaction details, etc., which the investor would probably need to get from the broker. The

[49] *Opinion and Order*, Case 1:14-cv-09662-JSR, Document 834, filed June 25, 2018, at p. 6.

[50] *Id.* at p. 37 ("[R]oughly two-thirds of what was sought.").

[51] *Id.* at p. 42.

[52] *Judgment*, Case 1:14-cv-09662-JSR, Document 835, filed June 27, 2018.

[53] *Order and Final Judgment*, Case 1:14-cv-09662-JSR, Document 838, filed July 2, 2018.

[54] www.petrobrassecuritieslitigation.com. As per the Court's July 12, 2019 Order Regarding Late Claims, all late claims received through but not after January 31, 2019 were subsequently accepted by the Court for processing by the Claims Administrator. *http://www.petrobrassecuritieslitigation.com/docs/Order%20re%20Late%20Claims.pdf*. For a sample of the Proof of Claim form *see* the Declaration of the Claims Administrator Garden City Group (GCG). *Declaration of Niki L. Mendoza Regarding Class Notice and Exclusion Requests Received to Date*, Case 14-cv-09662 (JSR), Document 789-2, filed April 23, 2018, at p. 52, available at http://www.petrobrassecuritieslitigation.com/docs/JAL%20Declaration%20-%20Ex.%202.pdf. GCG was acquired by Epiq, a legal services global leader, which among other things provides class action administration services, in June 2018.

investor then needs to manually transcribe this supporting information into the Proof of Claim form and then has to return the form to the Claims Administrator by mail or electronically via a designated website. A more sophisticated investor would expect his broker to submit the required information, because this is why he pays the Brokerage Services Fee.[55]

The information required is certainly needed by the Claims Administrator who has to receive and verify valid claims for the Settlement distribution to proceed, and adequate and satisfactory notification for settlement proceeds claim purposes is an essential and detailed task that is authorized by the Court and which work is remunerated as approved by the Court in the Settlement terms. "The settlement administrator earns its fees not by simply writing checks, but also by its extensive efforts to assure that all reasonable efforts have been taken to give potential claimants notice of the settlement and how those investors can submit their claims so as to be eligible to participate in a settlement."[56]

The legal standard for individual notice (by mail or e-mail[57]) is "reasonable effort" and the main question is therefore what defines "reasonable."[58] It is indeed unfortunate that there are no

[55] For example *see Pershing Advisor Solutions LLC, Terms and Conditions of Your Cash and Margin Accounts*, https://www.pershing.com/_global-assets/pdf/disclosures/pas-terms-and-conditions.pdf, which "Account Communications" definition "means account statements, trade confirmations and/or other notices, disclosures and other information related to Your Account including, without limitation, prospectuses, quarterly, semi-annual or annual shareholder reports, proxy statements, and legal and regulatory notices and documents." The "Roles" clause to the same agreement identifies that as a broker dealer Pershing Advisor Solutions conducts transactions as instructed by its beneficial owner clients and the beneficial owner's investment advisor(s).
Such record owner common practice is recognized in the language of the Instructions for Filling Out the Proof of Claim section of Part II General Instructions of The Petrobras Settlement Proof of Claim and Release Form, which states that "stockbrokers" with "discretionary authority to trade stock in another person's accounts" have the "authority to complete and sign a Proof of Claim" if "expressly authorized to act on behalf of the owner." *Declaration of Niki L. Mendoza*, *supra* note 54 at p. 55.

[56] James D. Cox & Randall S. Thomas, Leaving Money on the Table: Do Institutional Investors Fail to File Claims in Securities Class Actions, 80 Wash. U. L. Q. 855, 867 (2002).

[57] For example of class action court notice plan approval of e-mail as a form of individual notice, *see In re Pool Prods. Distribution Mkt. Antitrust Litig.*, 310 F.R.D. 300, 318 (E.D. La. 2015), *In re HP Inkjet Printer Litig.*, No. 5:05-cv-3580, 2011 WL 115863, at *3 (N.D. Cal. Mar. 29, 2011), rev'd on other grounds, 716 F.3d 1173 (9th Cir. 2013), *Bauer-Ramazani v. Teachers Ins. & Annuity Ass'n of Am.-Coll. Ret. & Equities Fund*, 290 F.R.D. 452, 464 (D. Vt. 2013), *Hanlon v. Palace Entm't Holdings, LLC*, No. 11-987, 2012 WL 27461, at *6 (W.D. Pa. Jan. 3, 2012), *Kelly v. Phiten USA, Inc.*, 277 F.R.D. 564, 569-70 (S.D. Iowa 2011) and *Hall v. AT&T Mobility LLC*, No. 07-5325, 2010 WL 4053547, at *4-6 (D.N.J. Oct. 13, 2010).

[58] The language of Fed R. Civ. P. 23 (c)(2) states that "individual notice should be given to all members who can be identified through reasonable effort." The Committee Notes on Rules – 2003 Amendment adds that: "Reasonable settlement notice may require individual notice in the manner required by Rule 23(c)(2)(B) for certification notice to a Rule 23(b)(3) class. Individual notice is appropriate, for example, if class members are required to take action—such

factors in the procedural rules attempting to quantify what is meant by "reasonable" and "as is true in traditional non-class litigation" actual receipt of notice is not actually expected or required[59] – incredible as this might seem.

In *In re Petrobras Securities Litigation*, the Court determined that notice be mailed, by first-class mail, postage pre-paid, to Settlement Class Members identified through reasonable efforts."[60] In its Declaration to the Court to report on the implementation of the settlement notice program proposed by plaintiffs and agreed to by defendants on February 1, 2018 and pursuant to the March 1, 2018 Preliminary Approval Order of the Court, the Claims Administrator GCG stated that its Notice Plan was implemented to "provide and exceed the best notice practicable under the circumstances to class members in numerous countries who speak numerous different languages" and presented the extent and scope of the work that was involved.[61]

The concept of reasonable efforts in the notification process has undoubtedly worked quite well on average in the majority of U.S. legal situations. This is certainly helped by having reliable and working mailing[62] and communication systems, and knowledgeable people involved with a

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as filing claims—to participate in the judgment, or if the court orders a settlement opt-out opportunity under Rule 23(e)(3)."

[59] *See* Debra Lyn Bassett, Class Action Silence, 94. B.U. L. Rev. 1781, 1794 (2014), citing *Silber v. Mabon*, 18 F.3d 1449, 1454 (9th Cir. 1994) (finding notice effective even though the brokerage firm delayed mailing the notice until after the opt-out deadline had expired).

[60] *See Stipulation of Settlement and Release, supra* note 38 at p. 41.

[61] *See Declaration of Niki L. Mendoza, supra* note 54 at p. 5.

[62] *See* Alexander W. Aiken, Class Action Notice in the Digital Age, 165 U. Pa. L. Rev. 967, 977 (2017), speaking of mailing in the U.S. context:

> Standard mail is perhaps the most important means by which courts and parties have traditionally disseminated notice, and its popularity continues today. Typically, a party to the litigation or a class action notice expert sends individual notice by first-class mail to the last known addresses of class members. To maximize the effectiveness of the notice program, addresses on the class list are checked against the United States Postal Service's National Change of Address Database (NCOA Database). Parties use the database, developed based on change of address form submissions, in an attempt to find class members' most recent addresses for notice purposes. If the postal service returns a notice as undeliverable, the party or expert will then try to find a new address for the class member and send notice there. (Citations omitted.).

rational understanding of the process and also understanding of the local situation overall,[63] so that the methodology used and the verification process for the Notification can be effective and optimized.

A "Long-Form Notice and Claim Form" ("Long Form Notice"),[64] a Request for Exclusion form and the Proof of Claim form were combined into the Notification that was mailed to potential class members.[65] As explained in the Declaration of the Claims Administrator to the Court,[66] the contact information for this mailing was obtained basically from three sources:

a) From the returns of an original Notice of Pendency mailing;[67]

b) From contact information provided by Petrobras' counsel;[68] and

c) From contact information provided by brokers, nominees and others and based on a proprietary GCG list of largest and most common U.S. and international brokers and nominees.[69]

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[63] *See* Timothy G. Cameron, Lauren R. Kennedy, Daniel R. Cellucci and Alex Weiss, The Law Reviews, The Class Action Law Review – Edition 2, United States, https://thelawreviews.co.uk/edition/the-class-actions-law-review-edition-2/1169598/united-states:

> Class actions are a long-standing part of the American legal landscape, at both the state and federal level. Class actions are routinely used to prosecute a wide variety of substantive claims, including consumer fraud, labour and employment, products liability, antitrust and securities claims. Class actions are explicitly permitted in both the US federal and state systems. (Citations omitted.).

[64] The Long Form Notice is described on page 5 of the *Declaration of Niki L. Mendoza*, *supra* note 54.

[65] A copy of the Notification is presented as Exhibit 1 to the Declaration. *See Id.* at p. 17.

[66] *Id.*

[67] *See Notice of Pendency of Class Action*, Case 1:14-cv-09662-JSR, Document 589, filed May 9, 2018. This first class-mailed correspondence, in accordance with Fed. R. Civ. P. 23(c)(2)(B)(v), provided notice of class certification and provided eligible settlement class members other than the named or lead plaintiffs with the opportunity to opt out, stating: "If you choose to remain a member […] you do not need to do anything [....] You will automatically be included […]" *Id.* at p. 2.

[68] *See Declaration of Niki L. Mendoza*, *supra* note 54 at p. 6 ("Petrobras' counsel circulated lists containing […] additional unique names and addresses.").

[69] *Id.* at pp. 6-7.

From the Notice of Pendency mailing (a) there were 645,693 class members identified.[70] From Petrobras' counsel (b) there were an additional 2401, for a combined total of 648,094 class members.[71]

In paragraph 12 of the Declaration it is stated that "as in most class actions of this nature, the large majority of potential class members are expected to be beneficial purchasers whose securities are held in 'street name' – i.e., the securities are purchased by brokerage firms, banks, institutions and other third-party nominees in the name of the nominee, on behalf of the beneficial purchasers."[72] The proprietary GCG database with names and addresses of the largest and most common U.S. banks and brokerage firms, including national and regional offices, and updated from time to time, yielded 1791 mailing records.[73]

With each Notice Packet mailed to these brokers and nominees a broker letter was included that directed those who purchased the Petrobras securities (for beneficial interest of a person or entity other than themselves) to:

> 1) Send the Notice Packet to the class members directly, by mail, after receiving copies from GCG, by mail, to send out; or,
>
> 2) Provide to GCG the names and addresses of the class members for GCG to mail the Notice Packets directly to them.[74]

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[70] *Id.* at p. 6.

[71] *Id.*

[72] *Id.*

[73] *Id.* at pp. 6-7.

[74] *Id.* at p. 7. See also *Notice of Pendency*, *supra* note 67 at p. 3, which "Special Notice to Securities Brokers and Other Nominees" Section contains similar language:

> [Y]ou must, WITHIN TEN (10) DAYS OF YOUR RECEIPT OF THIS NOTICE, either (a) request from the Notice Administrator sufficient copies of the Notice to forward to all such beneficial owners and within seven (7) calendar days of receipt of those Notices forward them to all such beneficial owners; or (b) provide a list of the names and the last known addresses of each person or entity for whom or which you purchased such securities during the relevant period to the Notice Administrator. If you select option (a) above, you must send a statement to the Notice Administrator confirming that the mailing was made and you must retain your mailing records for use in connection with any further notices that may be provided in this Action. If you select option (b), the Notice Administrator will send a copy of the Notice to the beneficial owners. All written communications concerning the foregoing should be

Through April 13, 2018 there were 221,322 Notice Packets mailed under 1) and 146,325 under 2) for a total of 367,647 under this Notification source c) namely, brokers, nominees and others.[75] It was stated that this source c) – "as in most cases of this nature" – would represent the large majority of potential class members. However, from the data presented it is evident that this is clearly not the case. The number of class members from the brokers, nominees and others (367,647) is only slightly more than half (57%) of the number (648,094) obtained from just the original Notice of Pendency mailing and the Petrobras contact information. This strongly suggests that something is seriously wrong here. There are many "missing" investors.

The problem may possibly relate to the methodology used in the Notification process and the need for internal checks to verify this process. The presented data relate to the Notification response from brokers world-wide, and therefore indicate something to be wrong generally.[76] In the case of Brazilian investors the discrepancy might be much larger since Petrobras is a major Brazilian company with a lot of prestige and very popular with Brazilian investors.

ADRs are U.S. securities, subject to U.S. commerce laws. They are used by many large Brazilian companies to gain a global presence and to raise investment capital by being able to trade on the U.S. stock exchanges. These are not market instruments that can be purchased by Brazilian investors from any local Brazilian broker or bank. They have to be acquired through U.S. depository banks and U.S. registered brokers, and since they are subject to U.S. law they require U.S. registration, and the brokers assume this responsibility, as well as for related tax determinations, dividend payment and transaction reporting to the client, perhaps as part of an investment portfolio. So, in the case of the Brazilian investor, the ADR registration and dates and

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addressed to the Notice Administrator at: Petrobras Securities Litigation, Notice Administrator, c/o GCG, P.O. Box 10280, Dublin OH 43017-5780. You are entitled to reimbursement for your reasonable expenses actually incurred in complying with the foregoing, including reimbursement of reasonable postage expenses and the reasonable costs of obtaining the names and addresses of beneficial owners, provided you timely submit an invoice to the Notice Administrator. Those reasonable expenses and costs will be paid upon request and submission of appropriate supporting documentation. All requests for reimbursement should be sent to the Notice Administrator.

[75] *See Declaration of Niki L. Mendoza, supra* note 54 at p. 7.

[76] "In addition," GCG maintains an International Nominee Database, which proprietary database contains "the names and addresses of the largest and most common European and Asian banks, brokerage firms, and nominees." *Id.*

performance details are held by the U.S. registered broker, and therefore this is where all the required investor information resides.

There are undoubtedly large numbers of Brazilian street name holders of Petrobras ADRs that have not been notified of the Settlement and have never received a Proof of Claim form. There are likely many with very significant holdings. It is quite impossible that these investor clients with such large holdings could have been overlooked by their brokers if there had been a proper understanding of the situation and an active participation of the brokers in the Notification process.

The breakdown in the Notification chain seems to be at the brokers' stage c). These brokers of course would be the brokers of the Brazil offices of the U.S. brokerage firms, and this has direct relevance in terms of possible effects of local conditions on the basic situation that many Settlement Class Members did not receive "actual notice," including those with large financial interests.

The History of Cy Pres

"Cy pres" is derivative of "cy pres comme possible," which expression in French signifies "as close or near as possible."[77] The origins to the doctrine can be traced back to a passage in the Digest compendium of juristic writings on Roman law of Roman emperor Justinian I referencing that a charitable gift given relative to games that were subsequently rendered illegal would be applied to "a legal use" so as to best keep the "deceased's memory alive."[78] In fourteenth century England the church would customarily designate property left without any specified designation for use "pro solute animae" ("for the good of the testator's soul")[79] and in the Reformation (of the sixteenth century) charities were controlled by church-connected chancellors "seeking out the closest feasible alternative" when "a specified charitable gift [was] rendered impossible or

[77] Martin H. Redish et al., Cy Pres Relief and the Pathologies of the Modern Class Action: A Normative and Empirical Analysis, 62 Fla. L. Rev. 617, 624 (2010).

[78] *Id.*

[79] *Id*. quoting Hamish Gray, The History and Development in England of the Cy-Pres Principle in Charities, 33 B.U. L. Rev. 30, 32 (1953).

impracticable because of exigent circumstances"[80] to ensure "the perpetuation of the testator's memory."[81] Judicial cy pres developed in England to "designate the trust's corpus to a charity or worthy project that most closely approximated the testator's intent behind the original gift" when the directive "behind a filed charitable trust […] could not, for whatever reason, be implemented."[82]

It is key to the cy pres doctrine that the operative condition is "intent." That is, as close or near as possible to the original purpose of the designation.

The earliest judicial use of cy pres relief in the U.S. class action context was in the 1974 Southern District of New York *Miller v. Steinbach* decision, which determined the proposed class settlement to the shareholder suit concerning alleged unfair merger terms and violation of securities laws to be "fair and reasonable" in "applying a variant of the cy pres doctrine at common law" (to pay the settlement fund to the trustee of the shareholding company's retirement plan) in "view of the very modest size of the settlement fund and the vast number of shares among which it would have to be divided."[83]

It is interesting to note that from the very beginning with this very first case there is already the problem. The plaintiffs brought a putative class action on behalf of the shareholders of the Baldwin-Lima Hamilton Corporation (BLH) that claimed that merger terms with Armour Corporation were unfair and violated federal securities laws. The district court proposed a settlement that should be applied as a cy pres award to the BLH retirement plan. The problem of course is that not all BLH shareholders are necessarily employees of BLH and members of its retirement plan and, therefore, such class members are being excluded from the settlement. This is the basic problem in applying cy pres as if dealing with awards to charities. Basically the *Miller* court did not, or could not, apply the concept of "intent" in the cy pres doctrine and, in this case, the intent is simply the intent of the class action, which was to seek redress for all the shareholder

[80] *Id.* at p. 625.

[81] *Id.* at p. 626 citing Gray at p. 32.

[82] *Id.* at p. 627 citing Comment, A Revaluation of Cy Pres, 49 Yale L.J. 304-305, 309 (1939).

[83] *Id.* at p. 635 citing *Miller v. Steinbach*, No. 66 Civ. 356, 1974 WL 350, at *2 (S.D.N.Y. Jan. 3, 1974).

class members in the action. The actual *Miller* court explanation was that "while neither counsel nor the Court had discovered precedent for the proposal" it had not "been made aware of any precedent that would prohibit it" and "no alternative was realistically possible."[84] Therefore the Court declared the settlement "fair and reasonable." [85]

As will be further described in this article, this problem with cy pres in class actions still persists. Its current form is used in the federal courts in class actions and "involv[es] the donation of a portion of the settlement or award to charitable uses which are in some loose manner connected to the substance of the case."[86] When the distribution of settlement funds is not amenable to individual claims or meaningful pro rata distribution it is redirected to nonprofit organizations whose work is determined to indirectly benefit class members. [87]

Cy Pres Under Scrutiny

Cy pres settlement has come under increasing scrutiny over the years, culminating most recently in the March 20, 2019 *Frank v. Gaos* per curiam (summary whole court) decision, which case was brought before the U.S. Supreme Court by the Center of Class Action Fairness of the Competitive Enterprise Institute.[88] It is based on the situation resulting from the following case.

In *In re Google Referrer Header Privacy Litigation*,[89] plaintiffs brought a class action with the claim that Google Search, the free Internet search engine, encroached upon user privacy by disclosing their search terms to third-party website owners, violating the Stored Communications Act, 18 U.S.C. § 2701, et seq., which prohibits an entity from "knowingly divulg[ing] to any person

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[84] *Id.* at p. 635.

[85] *Id.*

[86] *Id.* at p. 634.

[87] Black's Law Dictionary 470 (10th ed. 2014).

[88] *Frank v. Gaos*, 586 U. S. ____ (2019), https://www.supremecourt.gov/opinions/18pdf/17-961_j42k.pdf.

[89] *In re Google Referrer Header Privacy Litigation*, Case: 15-15858, 08/22/2017, ID: 10552938, Dkt Entry: 57-1, https://hlli.org/wp-content/uploads/2019/03/Aug-22-2017.OPINION-of-the-U.S.-Court-of-Appeals-for-the-Ninth-Circuit.pdf, a consolidated class action brought by three Google Search users: Paloma Gaos, Anthony Italiano and Gabriel Priyev. Google Search processes more than 3.5 billion user-generated search requests daily. Google Search Statistics, https://www.internetlivestats.com/google-search-statistics/.

or entity the contents of a communication while in electronic storage by that service"[90] and creates a private right of action allowing any "person aggrieved by any violation" of the statute to "recover from" the entity that "engaged in th[e] violation such relief as may be appropriate."[91] Following mediation, the parties negotiated a USD 8.5 million class-wide settlement in which Google agreed to providing information on its website as to the said disclosure and would distribute USD 3.2 million to class counsel in attorney's fees and administrative costs and to the class representatives in "incentive payment" and USD 5.3 million to six cy pres recipients – AARP Inc., the Berkman Center for Internet and Society at Harvard University, Carnegie Mellon University, the Illinois Institute of Technology Chicago-Kent College of Law Center for Information Society and Policy, the Stanford Center for Internet and Society, and the World Privacy Forum – that would "devote the funds to promote public awareness and education, and/or to support research, development and initiatives, related to promoting privacy on the Internet," in exchange for the release of the claims of approximately 129 million Google Search users within the class period of October 25, 2006 to April 25, 2014, the date the class was given notice of the settlement.[92]

Five class members, of the 129 million web user unnamed class being represented in the case, including Theodore H. Frank, Director of Litigation of the Competitive Enterprise Institute, objected and appealed following final approval of the settlement on March 31, 2015, which appeal review was predicated on "benchmark[ing] whether the district court discharged its obligation to assure that the settlement is "fair, adequate and free from collusion"[93] as the objectors took issue with the choice of cy pres recipients (Google had donated in the past to at least some of the recipients, three of them had previously received Google settlement funds and three of them were based at the alma maters of class counsel).[94] The U.S. Court of Appeals for the Ninth Circuit concluded however that the district court did not abuse its discretion.[95]

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[90] Stored Communications Act, 18 U.S.C. § § 2702(a)(2).

[91] *Id.* at § 2707(a).

[92] *In re Google supra,* note 89 at p. 6.

[93] *Id.* at p. 10.

[94] *Id.* at p. 13.

[95] *Id.* at p. 4.

In this Google settlement of USD 8.5 million, where attorney's fees and administrative costs totalled USD 3.2 million and there was a USD 5.3 million cy pres award to chosen independent recipients promoting internet privacy, the 129 million actual valid claimants in the action were awarded absolutely nothing. However, the average claimant award would only have been a few cents when distributing USD 5.3 million to 129 million claimants, and this is the reality of the situation.

Under the cy pres doctrine the "intent" would be the intent of the class action of which it is part, and this is to provide compensation and redress to all the class members in the action and who are the ones with legal standing. On this basis independently chosen unrelated external recipients of the cy pres award are not privy to the class action and are without legal standing.

There is then the point of view that settlement should be applied down to the very last cent and that cy pres is relevant only to the extent it provides for other possible channels of compensatory remedy. There should then be no voluntary agreements with other parties to do other things.

There is another point of view that it is perfectly acceptable that settlements in class actions can be used to provide a related social benefit. This is especially relevant in the situation with 129 million claimants, where the individual monetary award becomes meaningless.

The Google case is impressive because the true claimants in the class action were awarded absolutely nothing, and it directly led to Supreme Court involvement (*Frank v Gaos*). The Supreme Court granted certiorari "to review whether such cy pres settlements satisfy the Fed. R. Civ. P. 23(e)(2) requirement that class settlements be 'fair, reasonable, and adequate.'"[96] In its March 20, 2019 per curiam opinion on *Frank v. Gaos*, however, the Supreme Court determined that the threshold question regarding standing prevented it from ruling on the merits. During the pendency of the Ninth Circuit appeal, the Supreme Court had decided on *Spokeo v. Robbins*, 136 S. Ct. 1540 (2016), which decision held that a plaintiff must identify sufficiently valid injury-in-fact (actual real harm) and not merely federal statute violation to establish standing. Thus, the Supreme Court vacated and remanded *Frank v. Gaos* for the lower courts to

[96] *Frank v. Gaos*, *supra* note 88 at p. 1.

consider the standing question anew, applying the standard now articulated in the *Spokeo* decision.[97]

Of relevant interest regarding the *Frank v. Gaos* decision is the U.S. Supreme Court Justice Clarence Thomas dissent. In his dissent, Justice Thomas stated that in his view the merits should be reached and the decision of Supreme Court reversed, questioning whether the class action is in fact the "superior" method for "fairly and efficiently adjudicating the controversy" when "the interests of the class are not adequately represented" via cy pres settlement.[98] One can readily concur with the opinion that class action involving cy pres is not necessarily the best nor perhaps the most appropriate legal vehicle to resolve disputes of this type.

On June 24, 2019, the U.S. Supreme Court denied – for the procedural reason of the automatic stay that went into effect upon the bankruptcy filing of respondent Provide Commerce, Inc. – the petition for certiorari of *Perryman v. Romero*, 906 F.3d 747 (9th Cir. 2018), pet. for cert. docketed, (Feb. 15, 2019) (No. 18-1074), which case matter involved the relaying of private payment information to the marketing and advertising company Encore Marketing International upon an "Accept" click by class member consumers on e-commerce company Provide Commerce Inc. website's pop up of a "Thank you" gift. Upon receipt of the relayed information, Encore Marketing enrolled class members in a rewards program, charging their credit/debit cards an activation fee and then a monthly fee. Under the settlement terms of the class action, a "non-reversionary cash fund" would issue refunds and an additional purchase credit and after attorney's fees (USD 8.7 million) and administrative costs (USD 3.5 million) are paid "any remaining funds [would be]

[97] *Id.* at p. 6.

[98] His position echoes that of U.S. Supreme Court Chief Justice Roberts in *Marek v. Lane*, 571 U.S. ___ (2013), which decision denied the petition of certiorari for review of the 9th U.S. Circuit Court of Appeal's denial of cy pres settlement challenge. *See Marek v. Lane, 571 U.S. ___ (2013),* https://h2o.law.harvard.edu/cases/4170. In *Marek*, the district court approved a USD 9.5 million class action settlement relative to the so-called Beacon program part of Facebook's advertisement system (that automatically reported user "personally identifiable" information to Facebook). The class action was brought against Facebook and companies that used the program alleging violation of federal and state privacy laws. As per the settlement, USD 6.5 million of the USD 9.5 million award "entailed the establishment of a new charitable foundation that would help fund organizations dedicated to educating the public about privacy," a foundation in which a Facebook representative would be one of its three board members. *Id.* In his statement added to the Supreme Court's decision, Chief Justice Roberts noted that although agreeing with the Court's decision to deny the petition for certiorari, "what the respective roles of the judge and parties are in shaping a cy pres remedy [and] how closely the goals of any enlisted organization must correspond to the interests of the class" amongst other "fundamental concerns" should be addressed by the Court as "[t]his Court has not previously addressed any of these issues." *Id.*

distributed as a cy pres award to San Diego State University, the University of California at San Diego, and the University of San Diego School of Law 'for a chair, professorship, fellowship, lectureship, seminar series or similar funding, gift, or donation program . . . regarding internet privacy or internet data security.'" Although it vacated the USD 8.7 million attorney's fee award, the appellate court panel upheld the district court's approval of the use of cy pres as a non-abuse of discretion, which decision was under class action member objector challenge.[99] As things now stand, in the two main cases before the U.S. Supreme Court on the question of cy pres in class actions no decision has been rendered.

The *Perryman* case has a direct similarity to the previously mentioned Google class action situation. The class members were only awarded USD 250,000 in settlement, with USD 8.7 million going to attorney's fees (later vacated on appeal) and with a USD 3.2 million cy pres award to local third party San Diego universities on the basis of providing programs related to internet privacy or internet data security. One obvious criticism is that in this case the "intent" element of the cy pres doctrine relating to redressing the injury to the class action members has been diverted to award independent third party university funding.

These two cases illustrate some of the present legal activity surrounding the problems with inclusion of cy pres in class actions. The *Frank v Gaos* case, although not resolved by the Supreme Court, has nevertheless resulted in substantive legal opinion on the matter.

[99] *Brian Perryman, Petitioner v. Josue Romero, et al.*, Case Number 18-1074, Docketed Feb. 15, 2019, https://www.supremecourt.gov/Search.aspx?FileName=/docket/docketfiles/html/public/18-1074.html, *Hunt v. Perryman (In re Easysaver Rewards Litig.*), 906 F.3d 747 (9th Cir. 2018), https://casetext.com/case/hunt-v-perryman-in-re-easysaver-rewards-litig-1.

In its *Frank v. Gaos* Brief for the United States as Amicus Curiae[100] Supporting Neither Party,[101] the Solicitor General of the United States[102] first expressed that the U.S. government has a substantial interest in the resolution of the question of whether "a class action settlement that distributes settlement funds to non-parties on a cy pres theory" should be approved as "fair, reasonable, and adequate," noting that it had participated in multiple cases before the U.S. Supreme Court involving class-action rules and practices[103] and highlighting that it had issued a memorandum (in 2017) directing the Department of Justice that it, *inter alia*, may not enter into cy pres settlements.[104] It then enumerated "many of the principles underlying that decision [as] relevant to the question presented in [*Frank v. Gaos*]," the three main principles of which are summarized below and are important principles regarding the inappropriateness of cy pres award in class actions (underlined for content emphasis):

- "Cy pres relief provides no direct compensation to members of the plaintiff class [,] a significant ´red flag´ [as] the plaintiffs' injuries are the basis for the lawsuit. Class

[100] Cornell Law School, Legal Information Institute, *Amicus Curiae*, https://www.law.cornell.edu/wex/amicus_curiae. ("Frequently, a person or group who is not a party to an action, but has a strong interest in the matter, will petition the court for permission to submit a brief in the action with the intent of influencing the court's decision. Such briefs are called `amicus briefs.`").

[101] United States, *Brief for the United States as Amici Curiae Supporting Neither Party, In re Petrobras Securities Litigation,* July 2018, https://www.supremecourt.gov/DocketPDF/17/17-961/54428/20180716192524453_17-961%20nsacUnitedStates.pdf.

[102] Cornell Law School, Legal Information Institute, *28 U.S. Code § 1715. Notifications to Appropriate Federal and State Officials*, https://www.law.cornell.edu/uscode/text/28/1715. ("Under 28 U.S.C. 1715, Notifications to appropriate Federal and State officials, class-action defendants seeking court approval of settlements must notify the Attorney General or other designated federal official of the settlement terms.). Under the Class Action Fairness Act of 2005, "notice of class action settlements [must] be sent to appropriate state and federal officials […] so that they may voice concerns if they believe that the class action settlement is not in the best interest of their citizens." S. REP. 109-14, 2005 U.S.C.C.A.N. at p. 5, https://www.congress.gov/109/crpt/srpt14/CRPT-109srpt14.pdf. "[N]otifying appropriate state and federal officials ... will provide a check against inequitable settlements. Notice will also deter collusion between class counsel and defendants to craft settlements that do not benefit the injured parties." *Id.* at p. 35.

[103] *See note 101, supra,* at p. 2 citing *Tyson Foods, Inc. v. Bouaphakeo*, 136 S. Ct. 1036 (2016), *Campbell-Ewald Co. v. Gomez*, 136 S. Ct. 663 (2016) and *Amgen Inc. v. Connecticut Ret. Plans & Trust Funds*, 568 U.S. 455 (2013) as examples.

[104] Office of the Attorney General, "*Memorandum for all Component Heads and United States Attorneys, Prohibition on Settlement Payments to Third Parties*," June 5, 2017, https://www.justice.gov/opa/press-release/file/971826/download. (Effective immediately, Department attorneys may not enter into any agreement on behalf of the United States in settlement of federal claims or charges, including agreements settling civil litigation, accepting plea agreements, or deferring or declining prosecution in a criminal matter, that directs or provides for a payment or loan to any non-governmental person or entity that is not a party to the dispute [….] This policy applies to civil and criminal cases litigated under the direction of the Attorney General and includes civil settlement agreements, cy pres agreements or provisions, plea agreements, non-prosecution agreements….").

members are 'presumptively' entitled to a share of the 'funds generated through the aggregate prosecution of [their] claims,' which are typically released by the settlement."[105] "The private causes of action aggregated in [the] class action — as in many others — were created by Congress to allow plaintiffs to recover […] damages for their injuries."[106] Cy pres distributions are permissible only if they redress plaintiffs' injuries and only if there is no non-arbitrary way to distribute settlement funds to allegedly injured class members."[107]

- "Cy pres settlements exacerbate ´the perennial risk of collusion' between the parties at the expense of absent class members."[108] By "allowing the parties or the court to select the recipients of charitable contributions, cy pres relief opens the door to apparent favoritism toward entities with which the parties or the court have prior affiliations, such as an alma mater or favorite local charity."[109]

- "Applying the cy pres doctrine to class-action settlements […] has no basis in history or equity practice."[110] Such a settlement "often arises when the parties agree to cy pres relief, which ´permits a court to distribute unclaimed or non-distributable portions of a class action settlement fund to the "next best" class of beneficiaries for the indirect benefit of the class.'"[111] Cy pres "evolved in trust law from the absence of specific direction."[112] "It is inherently dubious to apply a doctrine associated with the voluntary distribution of a gift to the entirely unrelated context of a class action

[105] *See Brief for the United States*, note 101 *supra* at p. 18 citing, *inter alia*, ALI Principles § 3.07 cmt. b, at p. 218, and *Klier v. Elf Atochem N. Am., Inc.*, 658 F.3d 468, 474 (5th Cir. 2011) (Jones, J., concurring).

[106] *Id.* at p. 20 quoting *In re Baby Prods. Antitrust Litig.*, 708 F.3d 163, 173 (3d Cir. 2013).

[107] *Id.* at pp. 10 and 11.

[108] *Id.* at p. 19 citing Rhonda Wasserman, Cy Pres in Class Action Settlements, 88 S. Cal. L. Rev. 97 (2014) at p. 123.

[109] *Id.* at p. 20 citing Wasserman at pp. 124-125 and nn. 116-120 (citing examples); *See Frank v. Gaos* note 88 *supra* at p. 30 (discussing appearance of potential self-dealing by counsel in the case).

[110] *Id.* at p. 17.

[111] *Id.* at p. 5 quoting *Frank v. Gaos,* note 88 *supra* at p. 7 and citing William B. Rubenstein, Newberg on Class Actions (5th ed. 2014) at pp. 238-242.

[112] *Id.* at p. 17 quoting Rubenstein *supra* note 111 at p. 238.

settlement."[113] Although "cy pres remedies ´are a growing feature of class-action settlements´ […] such settlements are irreconcilable with the logic of cy pres as historically understood. Because the need for cy pres arose only when a donor's intent was frustrated, there was no such thing as a voluntary cy pres agreement or award."[114]

Petrobras Cy Pres Award Analogy in the Brazil Context

One of the three limited exceptions to the aforementioned Office of the Attorney General DOJ memorandum, which prohibits Department attorneys from entering into any agreement on behalf of the United States in settlement of federal claims or charges, including agreements settling civil litigation, accepting plea agreements, or deferring or declining prosecution in a criminal matters,[115] is that said prohibition does not apply to "restitution to a victim […] that […] directly remedies the harm that is sought to be addressed, including […] harm […] from official corruption."[116] On September 26, 2018, the DOJ entered into a three-year non-prosecution agreement (NPA) with Petrobras,[117] bringing to a close the DOJ and SEC public investigations against Petrobras that had preceded the filing of *In re Petrobras Securities Litigation*.[118] According to the NPA, from the total criminal penalty of USD 853.2 million Petrobras would pay USD 85.320 million to the DOJ and the SEC each and to "complete" its "payment obligations to the United States" would pay the remaining USD 682.560 million (80%) to "the Brazilian

[113] *Id.* quoting Klier *supra* note 105 at p. 480 and citing *Mirfasihi v. Fleet Mortg. Corp.*, 356 F.3d 781, 784 (7th Cir. 2004) (explaining that a cy pres class-action settlement is "badly misnamed").

[114] *Id.*

[115] *See Memorandum supra* note 104.

[116] *Id.*

[117] Stanford Law School, Foreign Corrupt Practices Act Clearinghouse, Case Information, In Re Petróleo Brasileiro S.A. - Petrobras, Documents, United States Department of Justice, Criminal Division, Fraud Section and the United States Attorney's Office for the Eastern District of Virginia, *Non-Prosecution Agreement* (Sept. 26, 2018), http://fcpa.stanford.edu/fcpac/documents/5000/003744.pdf.

[118] See Reuters, *Update 2 - Brazil's Petrobras says received U.S. SEC subpoena for documents* (Nov. 24, 2014), https://www.reuters.com/article/us-brazil-petrobras-sec/brazils-petrobras-says-received-sec-subpoena-for-documents-idUSKCN0J826G20141124.

authorities."[119]

On the following day, September 27, 2018, the SEC settled its enforcement action against Petrobras. The settlement covered Petrobras' violations of the FCPA's internal controls and books-and-records provisions, as well as violations related to misstatements in its SEC filings.[120] Subsequent to the DOJ and SEC settlements, on January 23, 2019 Brazil's Federal Prosecution Service (MPF) Car Wash Task Force entered into an agreement with Petrobras to define how "the remaining amount to the Brazilian authorities" would be applied.[121] Said agreement determined that half of the funds will be allocated to social and educational programs to promote citizenship and integrity in Brazil's public sector.[122] The agreement also stated that the other half of the funds will be used to compensate B3 Petrobras investors with legal suits or arbitration against Petrobras in course up to October 8, 2017.[123]

On March 15, 2019, Brazilian Supreme Court Justice Minister Alexandre de Moraes granted the injunction brought by the office of the Prosecutor General of the Republic (PGR) to suspend the agreement between Petrobras and the Car Wash Task Force prosecutors, determining that the

[119] *See* note 117 *supra* at p. 6.

[120] Petrobras agreed to pay USD 933,473,797 – USD 711,000,000 in disgorgement plus USD 222,473,797 in prejudgment interest – reduced by any payment made to the *In re Petrobras Securities Litigation* class action Settlement Fund. The cease and desist also stipulated the same terms of the DOJ Agreement as to Petrobras, also agreeing to pay a monetary penalty of USD 853,200,000, ten percent of which will be paid pursuant to the non-prosecution agreement Petrobras entered into with the DOJ. Petrobras will receive credit for up to USD 682,560,000 "of any payment made in agreement with the Brazilian authorities as described in the non-prosecution agreement with the Department of Justice." Securities and Exchange Commission, In the Matter of In Re Petróleo Brasileiro S.A. – Petrobras, *Order Instituting Cease-and-Desist Proceedings Pursuant to Section 8a of The Securities Act of 1933 and Section 21c of the Securities Exchange Act of 1934, Making Findings, and Imposing a Cease-and-Desist Orde*r, Administrative Proceeding File No. 3-18843, (Sept. 27, 2018), https://www.sec.gov/litigation/admin/2018/33-10561.pdf, at p. 9.

[121] Ministério Público Federal, Procuradoria da República no Paraná, Força Tarefa, *Acordo de Assunção de Compromissos, Firmado entre Ministério Público Federal e a Petróleo Brasileiro S.A. - Petrobras, Relacionado ao Non-Prosecution Agreement entre Petrobras e DoJ e à Cease-and-Desist Order da SEC* (Jan. 23, 2019), available at http://www.mpf.mp.br/pr/sala-de-imprensa/docs/acordo-fundo-petrobras/view.

[122] According to the agreement, 50% (fifty percent) will be directed to societal investment in projects, initiatives and institutional development of entities and groups of accredited entities, with educative ends or not, that reinforce the combat of the Brazilian Society against corruption. *Id.* at p. 5.

[123] The other 50% (fifty percent) is designated to the satisfaction of possible judgments or settlements with shareholders that invested on the Brazilian stock market (B3) and had legal suits or arbitration against Petrobras in course up to October 8, 2017. *Id.* at p. 6.

amounts judicially deposited by Petrobras via the DOJ and SEC settlements should be blocked and remain in judicial deposit until such time as the Brazilian Supreme Court definitively decides on the matter of their exact destination.[124] Despite the ratification of its agreement by the 13th Federal Court of the State of Paraná, the Brazilian Supreme Court Justice concurred with the PGR that the Task Force had overstepped its bounds in assuming administrative and financial obligations without constitutional right to do so.[125]

On September 17, 2019, Brazilian Supreme Court Justice Minister Alexandre de Moraes ratified a September 9, 2019 agreement between the PGR, the President of the House of Representatives, and the Attorney General of the Union.[126] Under this new agreement, the amounts deposited by Petrobras are destined for "education" (BRL 1,601,941,554.97) [127] and "the combat of forest fires." (BRL 1.06 billion).[128]

Class Action in Brazil

In Brazil the large class action settlement in the U.S. courts against Petrobras, one of the industrial giants of Brazil, was big news in the press and on television and was discussed extensively. However, class actions in Brazil are very rare and not well understood (often being considered an "American thing") and the legal situation with them is rather tenuous. There are legal undercurrents in Brazil surrounding class action litigation and the Petrobras case has been a prime exhibit as it involves a huge Brazilian company, was initiated through actions in Brazil

[124] *See* Supremo Tribunal Federal, *Liminar Defer*ida, available at https://portal.stf.jus.br/processos/detalhe.asp?incidente=5650140.

[125] Constitutional separation of powers violation under Article 2 and Article 60 § 4, III of the Constitution of the Federative Republic of Brazil. *Arguição de Descumprimento de Preceito Fundamental (ADPF)* No. 958. The Governing Board of the House of Representatives had also made similar argumentation to the Brazilian Supreme Court via *Reclamação* (RCL) No. 33.667.

[126] A Procuradora-Geral da República, o Presidente da Câmara dos Deputados, o Advogado-Geral da União, e, na Qualidade de Intervenientes, o Presidente Do Senado Federal e o Procurador-Geral da Fazenda Nacional, STF - ADPF 568 e RCL 33.667 - Requerimento Conjunto para Destinação dos Valores, *Acordo Sobre a Destinação dos Valores* (Sept. 17, 2019), https://www.conjur.com.br/dl/alexandre-homologa-acordo-destinar.pdf.

[127] Infant education initiatives, entrepreneur, innovation and science, science education and applied technologies initiatives. *Id.* at p. 2.

[128] The prevention, oversight and combat of deforestation, forest fires and crimes against the environment within Brazil's Legal Amazon region. *Id.* at pp. 2-3.

and brings out fundamental legal questions of shareholder rights and equal justice in Brazilian law that still have to be resolved.[129]

Brazilian companies are now introducing forced arbitration clauses into their bylaws so they can directly circumvent any possible class action litigation. Petrobras has done this in Brazil through a shareholder referendum the validity of which, on technical grounds, was upheld in Brazilian court.[130] Consequently, as it stands, Petrobras cannot be subject to shareholder class action in Brazil. This of course relates to Petrobras shares bought on the Brazilian exchange (B3), subject to Brazilian securities law. Brazilian investors that have been financially harmed, cheated and lied to by a proven corrupt and criminal management in Petrobras, a hitherto totally respected major Brazilian company, have essentially no legal class action recourse in Brazil. It is the Brazilian investors in Petrobras that invested in the Petrobras ADR instruments, subject to U.S. law, that were able to join class action litigation against Petrobras in the U.S. legal system. It is sadly ironic that the Brazilian investors with ADRs were able to obtain settlement against Petrobras in the U.S. courts but other (perhaps equal value) Brazilian investors without ADRs are denied access to any redress in Brazil. This has opened up the question of shareholder rights and equal justice in Brazil as an ongoing issue, with proposals and efforts to better define and change the laws relating to class action.

The Petrobras Class Action Cy Pres Award

To quote from the *In re Petrobras Securities Litigation* Amended Stipulation and Agreement of Settlement:

> The Settlement Administrator will use its best efforts to administer and distribute[131] the entirety of the Net Settlement Fund to the extent that it is equitably and

[129] U.S. Chamber Institute for Legal Reform, *Class Action Evolution: Improving the Litigation Climate in Brazil* (Aug. 2014), https://www.instituteforlegalreform.com/research/class-action-evolution-improving-the-litigation-climate-in-brazil. This article clearly describes the intricacy of class action law in Brazil and illustrates why, in practical situations relating to shareholder rights, class action in Brazil essentially does not exist. *Id.* at p. 24 ("Experience from abroad offers a number of examples that would help improve Brazilian legislation in two main areas: the need to establish the predominance and superiority of collective issues, and the need to initially verify whether a class action is admissible.").

[130] *See Associação dos Investidores Minoritários – Aidmin v. Petróleo Brasileiro S/A – Petrobras, Public Civil Action (Abusive Practices) Proceeding nº 1106499-89.2017.8.26.0100*, 6th Central Civil Court, Court of Justice of São Paulo (Decided Jul. 04, 2018, Judge Lúcia Caninéo Campanhã presiding).

[131] "On August 30, 2019 the judgment of the United States District Court for the Southern District of New York was affirmed, which approved the Proposed Settlement and determined objections to the Plan of Allocation to be without

> economically feasible […] until the Claims Administrator, in consultation with Class Counsel, has determined that further distributions would not be cost effective. Once such determination has been made, then such unclaimed balance shall be contributed by the Escrow Agent to an appropriate non-profit organization selected by Class Counsel, with approval by the Court, in which Class Counsel shall not have any financial interest or other affiliation.[132]

'Although laudable in theory,"[133] the *In re Petrobras Securities Litigation* court`s unclaimed balance award provides relief only "imperfectly, […] substituting for direct compensation an indirect benefit that is at best attenuated and at worse illusory."[134]

Conclusion

In the *In re Petrobras Securities Litigation* settlement there are some disturbing elements that are perhaps not fully appreciated. As described, there appears to have been a serious failure in the Notification process as a result of which it is quite conceivable that many thousands of valid shareholder claimants (relating specifically to Brazil and outside the USA) were not even notified of the proceedings, were not included in the class action, and therefore were denied legal redress.

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merit. *See Univs. Superannuation Scheme Ltd. Emps. Ret. Sys. v. Bueno (In re Petrobras Sec. Litig.)*, 18-2120 (L) (2d Cir. Aug. 30, 2019). On September 24, 2019, the District Court`s Order Granting Authorization to Distribute the Net Settlement Fund was granted, approving the proposed distribution plan stated in the September 20, 2019 Claim Administrator's Declaration of the Claims Administrator in Support of Class Representatives' Motion for Approval of Distribution Plan. *See Order Granting Authorization to Distribute the Net Settlement* Fund, Case 1:14-cv-09662-JSR, Document 975, filed September 24, 2019, and *Claim Administrator's Declaration of the Claims Administrator in Support of Class Representatives' Motion for Approval of Distribution Plan*, Case 1:14-cv-09662-JSR, Document 970, filed September 20, 2019. According to the Claim Administrator Epiq's Declaration, "[a]s of September 11, 2019, Epiq has completed the processing of 264,587 Proofs of Claim that were received in connection with the Settlements through January 31, 2019, and has determined that 62,182 are acceptable in whole or in part." *Id*. at p. 24. "The provisionally accepted Claims represent a total of $8,635,548,734.71 in Recognized Claims calculated in accordance with the Court-approved Plan of Allocation." *Id*. at p. 25. In general summary, "[p]ursuant to the Court-approved Plan of Allocation, Epiq will calculate each Authorized Claimant's pro rata share of the Net Settlement Funds based on the amount of the Authorized Claimant's Recognized Claim in comparison to the total Recognized Claims of all Authorized Claimants" *Id*. "After Epiq has made reasonable diligent efforts to have Authorized Claimants cash their Initial Distribution and Final Distribution checks, Epiq will conduct a supplemental distribution of the Net Settlement Fund." *Id.* at p. 28. Additional distributions may occur "until no funds remain in the Net Settlement Funds [sic]." *Id*. at p. 29.

[132] *See Amended Stipulation and Agreement of Settlement*; *supra* note 42 at pp. 32-33.

[133] Wasserman, *supra* note 108 at p. 97.

[134] *Baby Prods. 708 F.3d, supra* note 106 at p. *173*.

Also as described, there has been a considerable cy pres type award (USD 682.56 million) in the Petrobras NPA settlement with the US DOJ and SEC resulting from which there has been a somewhat farcical failure in applying the basic cy pres doctrine. The “intent” of cy pres award has been subverted to finance Brazilian infant education and combat forest fires.

The Petrobras Class Action cy pres award portends no better. Overall there are, therefore, aspects of this historic Petrobras settlement that may not warrant unreserved, enthusiastic, celebration.