No. 13-2620

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

In re BankAmerica Corporation Securities Litigation,

David P. Oetting, Class Representative,
Plaintiff-Appellant,

v.

Green Jacobson, P.C.,
Appellee.

On Appeal from the United States District Court
for the Eastern District Of Missouri, St. Louis

Opening Brief of David P. Oetting, Class Representative

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Summary of the Case

This appeal stems from the administration of a settlement of securities litigation on behalf of the "NationsBank Classes," nationwide classes of shareholders and securities purchasers, over the merger of NationsBank Corporation and old BankAmerica in a stock-for-stock transaction. Class counsel and appellee Green Jacobson, P.C., successfully petitioned the district court to distribute the remainder of the settlement fund, totaling $2.7 million, plus millions more that might be recovered for the settlement fund in collateral litigation, to a local St. Louis charity, Legal Services of Eastern Missouri, Inc. ("LSEM"). Class representative and appellant David Oetting protests that a distribution to *cy pres* instead of the class—and to a local charity that has nothing to do with securities litigation in a case involving a nationwide class suing under the securities laws—violates the law and Green Jacobson's fiduciary duty to their clients. Mr. Oetting also challenges on appeal an award for attorneys' fees given to Green Jacobson as procedurally and substantively improper.

Mr. Oetting requests twenty minutes of oral argument for each side. Mr. Oetting is represented by experienced appellate counsel and oral argument would significantly aid the merits panel's decisional process.

Corporate Disclosure Statement

Appellant and class representative David P. Oetting is an individual.

The challenged district court order effectively awards at least $2.6 million to Legal Services of Eastern Missouri, a private, non-profit 501(c)(3) organization.

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Jurisdictional Statement

The district court had jurisdiction of a Private Securities Litigation Reform Act case pursuant to 15 U.S.C. § 78aa and 28 U.S.C. § 1331.

This Court has appellate jurisdiction under 28 U.S.C. § 1291. On June 24, 2013, the district court ordered distribution of the remainder of the NationsBank class settlement fund to be paid to a local charity, awarded attorneys' fees, and terminated the case. Addendum 1-12.[1] Plaintiff and class representative David Oetting filed his notice of appeal on July 19, 2013. Dkt. 807. Because the June 24 order was a final order, Oetting's notice of appeal is timely under Fed. R. App. Proc. 4(a)(1)(A). *Miller v. Alamo*, 975 F.2d 547, 550 (8th Cir. 1992); *Solis v. Current Dev. Corp.*, 557 F.3d 772, 776 (7th Cir. 2009).

As a court-appointed class representative with fiduciary duties to the class, Oetting has appellate standing to raise issues on behalf of the class, not just himself. Oetting did not cash his distribution checks because the cover letter (without any authority from the settlement or the court) stated that endorsing the check would act to waive his claims against class counsel. JA100-01, JA105-07. Class counsel has suggested in other litigation that because there is a 2004 court order limiting future distributions to those who cashed their checks in the initial distribution, Oetting has no Article III standing to protest the allocation of settlement funds, because he

[1] "JAxyz" refers to page xyz of the Joint Appendix. "Dkt." refers to docket entries in Case No. 4:99-md-01264-CEJ (E.D. Mo.) below. As 8th Cir. R. 28A(g) requires, the order under appeal, Dkt. 802, is attached as an Addendum to this brief.

hypothetically would not benefit from a new distribution to the class. Whether or not this would be true if Oetting were a non-party objector (after all, no law precludes the district court from reopening the claims process for eligible class members who did not cash checks in the first distribution, so redressability is not entirely foreclosed), it is simply irrelevant in the case of a court-appointed class representative who is standing in the shoes of the class. *Sosna v. Iowa*, 419 U.S. 393, 402 (1975) (mootness of claims of individual representative does not divest him or her of standing to appeal claims on behalf of class); *Martens v. Thomann*, 273 F.3d 159, 173 n.10 (2d Cir. 2001) (Sotomayor, J.); *cf. Sondel v. Northwest Airlines, Inc.*, 56 F.3d 934, 938-39 (8th Cir. 1995). *See generally United States Parole Comm'n v. Geraghty,* 445 U.S. 388, 413, 416 n.8 (1980) (Powell, J., dissenting) (dissenting from holding that putative class representative has standing to appeal denial of class certification once his individual claim becomes moot, but distinguishing that case from situation where a class has already been certified). *Cf. also* JA27 (identifying Oetting as a noticed party in the district court proceedings). Moreover, all class members, not just class representatives, have standing to object to the identity of *cy pres* recipients regardless of their stake in the settlement fund. *E.g., Nachshin v. AOL, LLC*, 663 F.3d 1034 (9th Cir. 2011) (reversing *cy pres* distribution on appeal even though appellant was ineligible to make financial claim in settlement).

Statement of the Issues

1. Did the district court err as a matter of law when it ordered *cy pres* distribution of millions of dollars of the class's money, including moneys yet to be

recovered in pending third-party litigation, where (a) class members had not yet been fully compensated for their alleged damages; (b) the beneficiary was a local St. Louis charity yet the class was nationwide in scope; and (c) the beneficiary had no relationship to the underlying securities litigation? *In re Airline Ticket Comm'n Antitrust Litig.*, 268 F.3d 619 (8th Cir. 2001); *Klier v. Elf Atochem, Inc.*, 658 F.3d 468 (5th Cir. 2011); *Nachshin v. AOL, LLC*, 663 F.3d 1034 (9th Cir. 2011); *Ira Holtzman, C.P.A. & Assoc. v. Turza*, Nos. 11-3188 & 11-3746, -- F.3d --, 2013 U.S. App. LEXIS 17811 (7th Cir. Aug. 26, 2013) (Easterbrook, J.) ("*Turza*").

2. In the alternative, did the district court err as a matter of law in awarding over $2 million in *cy pres* without giving class members notice of and opportunity to object to the proposed beneficiaries? *In re Katrina Canal Breaches Litig.*, 628 F.3d 185 (5th Cir 2010).

3. Did the district court err as a matter of law in awarding a second round of attorneys' fees to class counsel without providing the class with required Rule 23(h) notice? *In re Mercury Interactive Corp. Sec. Lit.*, 618 F.3d 988 (9th Cir. 2010).

4. Did the district court err in awarding a second round of attorneys' fees when class counsel had already been handsomely compensated by the original fee award and class counsel breached its fiduciary duty to the class by placing the interests of a third-party charity ahead of the interests of their clients? *In re BankAmerica Corp. Sec. Litig.*, 228 F. Supp. 2d 1061 (E.D. Mo. 2002); *New Hampshire v. Maine*, 532 U.S. 742 (2001); *Rodriguez v. Disner*, 688 F.3d 645 (9th Cir. 2012); *Radcliffe v. Experian Information Solutions, Inc.*, 715 F.3d 1157 (9th Cir. 2013).

Statement of the Case

This appeal stems from the administration of a settlement of securities litigation on behalf of the "NationsBank Classes" over the merger of NationsBank Corporation and old BankAmerica in a stock-for-stock transaction. *In re BankAmerica Corp. Sec. Litig.*, 210 F.R.D. 694 (E.D. Mo. 2002) ("*BankAmerica I*"); *In re BankAmerica Corp. Sec. Litig.*, 227 F. Supp. 2d 1103 (E.D. Mo. 2002) ("*BankAmerica II*"), *aff'd* 350 F.3d 747 (8th Cir. 2003) ("*BankAmerica IV*"). Class counsel and appellee Green Jacobson successfully petitioned the district court to distribute $2.6 million of the settlement fund to Legal Services of Eastern Missouri, Inc. ("LSEM"), a local St. Louis charity. Class representative and appellant David Oetting protests that a distribution to *cy pres* instead of the class—and to a local charity that has nothing to do with securities litigation in a case involving a nationwide class suing under the securities laws—violates the law and Green Jacobson's fiduciary duty to the class..

The district court appointed appellant David Oetting one of four class representatives for the two nationwide classes of NationsBank shareholders; as of 2013, he is the only living NationsBank Class class representative still participating in the case. *BankAmerica I*, 210 F.R.D. at 697-98; JA158; *cf. also* JA27 (identifying Oetting as a noticed party in the district court proceedings). Green Jacobson's predecessor firm was appointed class counsel for the NationsBank shareholders. *BankAmerica I*, 210 F.R.D. at 698.

Under a settlement eventually approved by the district court, defendants established a $333.2 million settlement fund for the NationsBank Classes. *BankAmerica I*, 210 F.R.D. at 699. The district court awarded 18% of the net

settlement fund, or about $59 million, to class counsel as attorneys' fees. *In re BankAmerica Corp. Sec. Litig.*, 228 F. Supp. 2d 1061 (E.D. Mo. 2002) ("*BankAmerica III*"). A related settlement provided a lesser sum to BankAmerica shareholder classes led by different class counsel. *BankAmerica I*, 210 F.R.D. at 699.

During the distribution of settlement funds, the NationsBank class fell victim to two separate fraudulent schemes. JA147. One of these schemes was conducted by Christian Penta, an employee of the claims administrator, Heffler, Radetich & Saitta, LLP ("Heffler"). The fraud resulted in a loss to the class of over five million dollars. *Id.* Class counsel filed a supplemental complaint against Heffler over the loss. Dkt. 723. The district court struck the complaint under Fed. R. Civ. P. 15, after concluding that the claims should be brought as a separate suit. Dkt. 753. When class counsel declined to pursue the suit further, Oetting decided to pursue litigation separately on behalf of the NationsBank class, and brought suit against Heffler in the district court on February 8, 2011. The case was transferred to the Eastern District of Pennsylvania and is now docketed as *Oetting v. Heffler, Radetich & Saitta, LLP*, No. 2:11-cv-4757-JD (E.D. Pa.). That case is currently stayed pending the outcome of an insurance coverage action, which will determine the extent to which Heffler's insurance policy will cover the losses from the Penta's fraud. *CAMICO Mut. Ins. Co. v. Heffler, Radetich & Saitta, LLP*, No. 2:11-cv-4753-JCJ (E.D. Pa.). JA147-48. On June 15, 2013, Oetting brought an action on behalf of the NationsBank class against Green Jacobson and its partners alleging, *inter alia*, negligent hiring of Heffler; this case is docketed as *Oetting v. Green Jacobson, P.C.*, No. 4:13-cv-1148 (E.D. Mo.). JA165-86.

After two distributions and some recovery from Penta, over $2.7 million remained in the settlement fund for the NationsBank class, with several million dollars more potentially available in the pending actions by Oetting against Heffler and Green Jacobson. JA120. Green Jacobson moved to distribute that sum—and any other future recoveries received by the settlement fund—to three *cy pres* recipients and for a second distribution of attorneys' fees for themselves. JA40-60. Oetting, on behalf of the class, objected. JA61-76. Over Oetting's objection, the district court granted Green Jacobson's motion for *cy pres* distribution (holding that the only *cy pres* recipient should be LSEM) and attorneys' fees. Addendum 1-12. This timely appeal followed. Dkt. 807.

One collateral matter is still pending in the district court, and possibly two collateral motions will be brought in this Court. As part of the campaign to grant the motion for *cy pres*, an unknown number of third parties sent *ex parte* communications to the district court lobbying for LSEM's receipt of the settlement fund, but none of these communications were served upon the parties or docketed below. JA158-63. The district court has yet to rule on a motion to correct the record under Fed. R. App. Proc. 10(e) or otherwise act to disclose *ex parte* communications it received. Dkt. 805, 813, 815. In the continued absence of action by the district court (or a refusal by the district court to correct the record), Oetting will make a motion in this Court to command such disclosure.

In addition, Oetting has offered to stipulate to a joint motion to permit LSEM to intervene in the Eighth Circuit proceedings as an appellee, but LSEM has refused

to take that action yet. Dkt. 817. But LSEM has also refused to state that it will *not* move to intervene, and claims that it reserves the right to move to intervene in the Eighth Circuit. Oetting would not oppose such a motion if it does not disrupt the briefing schedule, but would object if LSEM sleeps on its rights and then seeks to stall the proceedings with an untimely motion to intervene that would delay the resolution of this case. Green Jacobson has stated on the record that it would oppose intervention by LSEM. Dkt. 816.

Statement of the Facts

A. The *BankAmerica* settlement.

This appeal stems from the administration of a settlement of securities litigation on behalf of the "NationsBank Classes" over the merger of NationsBank Corporation and old BankAmerica in a stock-for-stock transaction to create the Bank of America Corporation. *See generally BankAmerica I; BankAmerica II*.

The two companies agreed to a stock-for-stock transaction in April 1998 with a ratio based on the closing price of the stocks on April 9, 1998, and the merger closed on September 30, 1998. *BankAmerica I*, 210 F.R.D. at 696. The successor corporation then disclosed on October 14, 1998 that a 1997 transaction between BankAmerica and D.E. Shaw & Co. had gone sour, requiring a substantial write-off. *Id.* at 696-97. The Bank of America stock dropped over ten percent, $5.87 a share. *Id.* at 696. Shareholders filed numerous lawsuits over the stock drop in federal and state courts the very next day, alleging, *inter alia*, that BankAmerica and NationsBank had failed to

adequately disclose the risks of the Shaw transaction to BankAmerica and NationsBank shareholders. *Id.* at 697.

The Judicial Panel on Multidistrict Litigation, at the time chaired by Senior Judge Nangle of the Eastern District of Missouri, transferred numerous pending federal class actions relating to the BankAmerica-NationsBank merger to Senior Judge Nangle's court in 1999. Dkt. 1; *BankAmerica I*, 210 F.R.D. at 697; JA191-95.

In July 1999, the district court certified four subclasses and appointed appellant David Oetting one of four class representatives for the two nationwide classes of NationsBank shareholders and securities purchasers; as of 2013, he is the only living NationsBank Class class representative still participating in the case. *BankAmerica I*, 210 F.R.D. at 697-98; JA158; *cf. also* JA27 (identifying Oetting as a noticed party in the district court proceedings). The court appointed Green Jacobson's predecessor firm class counsel for the NationsBank shareholders and securities purchasers. *BankAmerica I*, 210 F.R.D. at 698.

The securities litigation settled. Under the settlement, defendants established a $333.2 million settlement fund for the NationsBank Classes. *Id.* at 699. A related settlement provided a lesser sum to BankAmerica shareholder classes led by different class counsel. *Id.* This amount was "only a percentage of the damages that [plaintiffs] sought," at most $0.22/share compensation for a $5.87/share stock drop. *Id.* at 701, 708. (Because not every eligible class member made claims, the actual payout in the first distribution was approximately 49 cents a share. JA105.)

The district court awarded 18% of the net settlement fund, or about $59 million, to class counsel as attorneys' fees, and another $3.7 million in expenses. *BankAmerica III*, 228 F. Supp. 2d 1061. This amount was approximately three times Green Jacobson's lodestar. *Id.* at 1066.

B. Distributions of settlement funds.

The district court ordered a distribution of settlement funds on June 14, 2004. JA13-16. That order contemplated that there would be a "second" distribution of remaining funds, and that anything remaining after the second distribution would go to *cy pres*. JA15.

However, when it came time to order another distribution of funds in 2008, the district court ordered only a partial distribution of funds: $4.75 million of approximately $6.942 million remaining in the NationsBank classes' settlement fund, and $1.75 million of approximately $3.0 million remaining in the BankAmerica classes' settlement fund. JA19-22; JA44-45; JA24-26.[2] No one at the time or since suggested that it was infeasible to distribute $1.75 million to the large nationwide BankAmerica classes, and the BankAmerica classes did in fact receive $1.71 million of the $1.75 million distribution. JA120-21. The district court did not state any reason for leaving millions of dollars in the settlement fund undistributed in 2009. JA19-22.

[2] Notwithstanding the 2004 order stating there would only be two distributions, the BankAmerica classes had already received a second distribution of $10 million from the settlement fund; the 2008 order actually established a third distribution for those classes, perhaps recognizing that it would be inappropriate to distribute $3.0 million of *cy pres*. JA25.

In August 2008, that second distribution was stayed until April 2009 as the Penta fraud was investigated. JA23, JA28.

Throughout this period, Oetting expressed concern to Green Jacobson that the entire settlement fund was not being distributed to the class. JA79-80. Green Jacobson attorneys represented to Oetting that, "if we have $3 million or $9 million in the kitty, we would ask the court to do a second final distribution." *Id.*

C. Collateral litigation by Oetting on behalf of the NationsBank classes.

Oetting is currently prosecuting two lawsuits on behalf of the NationsBank settlement classes.

During the distribution of settlement funds, the NationsBank class fell victim to two separate fraudulent schemes. JA147. One of these schemes was conducted by Christian Penta, an employee of the claims administrator, Heffler, Radetich & Saitta, LLP (Heffler), in conjunction with outside third parties that filed fictional claims that Penta would approve. The fraud resulted in a loss to the class of over $5.87 million dollars, of which less than $300,000 has been recovered. *Id.*; JA124-25. Class counsel filed a supplemental complaint against Heffler over the loss. Dkt. 723. The district court struck the complaint under Fed. R. Civ. P. 15, after concluding that the claims should be brought as a separate suit. Dkt. 753. When class counsel declined to pursue the suit further, Oetting decided to pursue litigation separately on behalf of the NationsBank class, and brought suit against Heffler in the district court on February 8, 2011. The district court transferred the case to the Eastern District of Pennsylvania and it is now docketed as *Oetting v. Heffler, Radetich & Saitta, LLP*, No. 2:11-cv-4757-

JD (E.D. Pa.). That case is currently stayed pending the outcome of an insurance coverage action, which will determine the extent to which Heffler's insurance policy will cover the losses from the Penta's fraud; Heffler claims it does not have sufficient assets of its own to cover any losses beyond the contested insurance policy. *CAMICO Mut. Ins. Co. v. Heffler, Radetich & Saitta, LLP*, No. 2:11-cv-4753-JCJ (E.D. Pa.). JA147-48. On June 15, 2013, Oetting brought an action on behalf of the NationsBank class against Green Jacobson and its partners alleging, *inter alia*, negligent hiring of Heffler; this case is docketed as *Oetting v. Green Jacobson, P.C.*, No. 4:13-cv-1148 (E.D. Mo.). JA165-86.

Millions of dollars may or may not be recovered for the NationsBank classes in these actions in the future. JA120; JA67-68.

D. Class counsel Green Jacobson requests *cy pres* distribution and attorneys' fees, and class representative Oetting opposes the motion.

Because the district court in 2009 ordered only a partial second distribution to NationsBank class members (and only a partial third distribution to BankAmerica class members), as of November 30, 2012, $2,734,136.69 remained in the NationsBank fund (including a little under $300 thousand of restitution from Penta and his conspirators) and $1,376,188.20 in the BankAmerica fund. JA119-21.

In 2012, Green Jacobson moved to distribute these funds as *cy pres* to three charitable organizations that operate in the eastern Missouri region: 50% to Legal Services of Eastern Missouri, 30% to Matthews Dickey Boys' & Girls' Club, and 20% to The Backstoppers. JA40-60. Green Jacobson also requested that the district court

order that any funds recovered "on behalf of the NationsBank Class in any action arising out of the Penta affair" also be distributed to *cy pres* recipients rather than the class. JA47. Green Jacobson requested another $98,114.34 in fees. JA46. There was no notice to the class of these motions.

Oetting opposed the motion. JA61-76; JA96-103. Oetting argued that a *cy pres* distribution of what would be between $2 and $8 million was inappropriate when it was feasible to distribute money to uncompensated class members and no shareholder had been totally compensated for his/her loss. JA71; JA101. Oetting also argued that the proposed *cy pres* recipients were inappropriate given that they were neither of national scope nor related to securities litigation. JA69-71; JA98-99.[3]

Meanwhile, unknown to Oetting at the time, there was a campaign of unknown scope to lobby the district court with *ex parte* communications supporting a *cy pres* award to LSEM. JA158-63. These communications with the district court were neither served upon Oetting nor formally filed on the docket. *Id.* As of the filing of this brief, the district court has not yet ruled on Oetting's Fed. R. App. Proc. 10(e) motion to correct the record. Dkt. 813, 815, 805.

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[3] As part of this argument against the proposed *cy pres* recipients, Oetting suggested the non-profit Center for Class Action Fairness as a potential alternative recipient. JA98. Oetting did this without the knowledge of or consultation with the Center, who was not yet Oetting's appellate counsel, and who would not accept a *cy pres* award in such circumstances. JA187. The Center's position is that it would be legally erroneous to award *cy pres* to the Center when distribution to the class was feasible. Oetting is not appealing the district court's decision not to distribute *cy pres* to the Center, and will not seek such a *cy pres* distribution on remand.

Oetting further objected to the request for attorneys' fees. Oetting argued that Green Jacobson had already been overpaid because the fee award was based on the *net* settlement fund distributed to the class, and a presumption that over $8 million to be distributed to the class was actually distributed, rather than lost to *cy pres* and fraud by a settlement administrator employee and others, and complained that Green Jacobson had breached its fiduciary duties to the class by failing to pursue actions against Heffler and by seeking *cy pres* instead of a full distribution to the NationsBank classes. JA71-73.

While Green Jacobson's motion was pending, lead counsel for the BankAmerica classes, in a filing with Green Jacobson's attorneys in the signature block, have moved for a fourth distribution to the BankAmerica classes of approximately $1 to $1.3 million, with *cy pres* distribution only if there are funds remaining after that distribution. JA126-27. The district court has not yet ruled on that unopposed motion.

E. The district court orders *cy pres* distribution and approves additional attorneys' fees.

Without any hearing, the district court ordered *cy pres* distribution to LSEM. It held that "All class members submitting claims have been satisfied in full." Addendum 4. It reasoned

> Oetting's objection ignores several important factors, including the difficulties of beginning a third distribution more than a decade after the settlement and eight years after the initial distributions, and the contemplation by the parties and the court of an eventual *cy pres* distribution of surplus. A third distribution

> simply would not inure to the benefit of those actually harmed; institutional investors would be the primary recipients of the distribution, and beneficial ownership of the shares has shifted over time. In addition, Oetting's objection rests upon his misguided belief that the surplus amounts to $12 million. Oetting's estimate is based on a faulty premise that, *first*, assumes total recovery of funds involved in the Penta fraud and, *second*, contemplates that lead counsel will disgorge a portion of the legal fees awarded in 2002, as a penalty for "abandoning" their clients. In reality, the NationsBank surplus is approximately $2.7 million dollars, and this sum may be properly distributed according to the doctrine of *cy pres*.

Addendum 5.

The district court acknowledged that the "Eighth Circuit requires courts to tailor the distribution to match both the purpose and the geographic scope of the original litigation." Addendum 5-7. It nevertheless held LSEM an appropriate *cy pres* recipient because "the multi-district litigation was transferred to this district because much of the harm suffered by the class was felt by individuals in the St. Louis region. Therefore, a *cy pres* distribution to a regional organization is proper." Addendum 7. The district court further adopted Green Jacobson's argument that "the great majority of the financial interest in the settlement was held by the largest shareholders of the former NationsBank. These shareholders are some of the largest investment entities in the United States. *There are no charities that benefit the interests of these very wealthy entities*." Addendum 7-8 (emphasis in original). "A distribution of surplus settlement funds to a legal aid organization is especially fitting in a securities fraud class action, because the *cy pres* distribution will assist future victims of fraud." Addendum 8.

The district court proceeded to extend its order not just to the $2.7 million currently in the settlement fund, but also to "all funds acquired in future litigation or otherwise from Heffler" regardless of the size of that recovery. Addendum 9, 12. The district court suggested that the value of Oetting's suits against third parties on behalf of the class was low (Addendum 5), but there was no record evidence to support this contention—indeed, the only record evidence was Green Jacobson's own time records showing that class counsel had devoted next to no time investigating or pursuing the matter against Heffler. JA64-67.

The district court further granted Green Jacobson's motion for attorneys' fees; it rejected Oetting's argument that class counsel abandoned the class or was double-dipping. Addendum 11. It terminated the case with respect to the NationsBank classes.[4]

F. Post-decision developments.

The district court's June 24 order was a final order for monetary payment, subject to the automatic fourteen-day stay of Fed. R. Civ. Proc. 62(a).[5] While the automatic stay was in effect, after Oetting notified Green Jacobson that he would

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[4] The same day, the district court also denied (1) Heffler's motion to intervene (Addendum 2-4) and (2) Oetting's motion for $25,000 in expenses to pursue litigation against third parties on behalf of the class. JA147-48. Neither of those decisions is being challenged on appeal.

[5] *Iowa Beef Processors, Inc. v. Bagley*, 601 F.2d 949, 955 (8th Cir. 1979); *Cleveland Hair Clinic v. Puig*, 104 F.3d 123, 125 (7th Cir. 1997); 11 Wright & Miller, *Federal Practice & Procedure* § 2901 n.3 (2d ed.).

appeal and that no money should be distributed, but before Oetting had an opportunity to move for *supersedeas*, Green Jacobson distributed $2.6 million from the NationsBank settlement fund to LSEM and $98,114.34 to itself. JA156-57.

Rather than subject LSEM to collateral litigation to unwind the transaction, Oetting arranged an agreement in lieu of formal *supersedeas* whereby LSEM agreed to maintain the status quo: LSEM would not spend the contested money while appeals were pending, and it agreed to return the money to the NationsBank settlement fund upon a reversal of the district court's *cy pres* order. Dkt. 817. *Cf.* Mo. S. Ct. R. 4-1.15(e). Oetting offered to stipulate to a joint motion to permit LSEM to intervene in the Eighth Circuit proceedings as an appellee, but LSEM has failed to do so. Dkt. 817. LSEM has since communicated that it reserves the right to intervene at a later date if it wishes. Green Jacobson has stated that it would oppose LSEM intervention. Dkt. 816.

Oetting timely appealed the district court's June 24, 2013 order on July 19, 2013. Dkt. 807.

Summary of Argument

The potential of *cy pres* to create conflicts of interest and ethical dilemmas for the judiciary have garnered increasing attention in recent years; many "courts have expressed skepticism about using the residue of class actions to make contributions to judges' favorite charities." *Ira Holtzman, C.P.A. & Assoc. v. Turza*, Nos. 11-3188 & 11-3746, -- F.3d --, 2013 U.S. App. LEXIS 17811, *16-*17 (7th Cir. Aug. 26, 2013) (Easterbrook, J.). *See generally* Martin H. Redish, Peter Julian & Samantha Zyontz, *Cy*

Pres Relief and the Pathologies of the Modern Class Action: A Normative and Empirical Analysis, 62 FLA. L. REV. 617 (2010); Adam Liptak, *When Lawyers Cut Their Clients Out of the Deal*, N.Y. TIMES (Aug. 13, 2013); Nathan Koppel, *Proposed Facebook Settlement Comes Under Fire*, WALL ST. J. (Mar. 2, 2010); Adam Liptak, *Doling Out Other People's Money*, N.Y. TIMES (Nov. 26, 2007); Sam Yospe, *Cy Pres Distributions in Class Action Settlements*, 2009 COLUMBIA BUS. L. REV. 1014; Amanda Bronstad, *Cy pres awards under scrutiny*, NAT'L L. J. (Aug. 11, 2008).

The Eighth Circuit has been in the forefront in discouraging abusive unfettered *cy pres*. *In re Airline Ticket Comm'n Antitrust Litig.*, 268 F.3d 619 (8th Cir. 2001) ("*Airline Ticket Comm'n I*"). Unfortunately, the district court's application of this precedent to award *cy pres* from a nationwide securities class to a local legal aid society in the court's backyard left much to be desired. While the district court paid lip-service to Eighth Circuit standards, its application of law to facts was reversible error.

Most importantly, *cy pres* was premature given that it was entirely feasible to distribute the over $2 million to class members who had already made claims but had not yet been fully compensated for their alleged losses. *Klier v. Elf Atochem, Inc.*, 658 F.3d 468 (5th Cir. 2011); *Turza*, 2013 U.S. App. LEXIS at *16-*17; American Law Institute, *Principles of the Law of Aggregate Litigation* § 3.07 (2010). We know this because the district court previously successfully ordered a third distribution of $1.7 million to the BankAmerica classes in the same case; a request for a fourth $1 million distribution to those classes is pending. JA20-21 (ordering distribution of $1.75M); JA120-21 (documenting successful distribution of over $1.7M of $1.75M amount);

JA126-27. The district court's finding that the class had already been fully compensated by the first two distributions was clearly erroneous: the district court previously recognized that the full $333.2 million settlement fund awarded "only a percentage of the damages that [plaintiffs] sought" (*BankAmerica I*, 210 F.R.D. at 701), and if the full settlement fund did not fully compensate the class by paying less than a dime on the dollar in claimed damages, neither did distributions of only part of that fund.

The district court's supplemental award of attorneys' fees to class counsel without notice to the class, on top of what was a generous 18% award of a net settlement fund that turned out to be over $8 million smaller than promised, was both procedural and substantive error requiring reversal.

Preliminary Statement

Attorneys with the non-profit public-interest law-firm Center for Class Action Fairness are representing Oetting *pro bono* on appeal. The Center's mission is to litigate on behalf of class members against unfair class-action procedures and settlements, and it has won millions of dollars for class members. *See, e.g.,* Brian Zabcik, *Conscientious Objector*, LITIGATION 11 (Spring 2013), *available at* http://is.gd/alm_frank2013 (redirect); Ashby Jones, *A Litigator Fights Class-Action Suits*, Wall St. J. (Oct. 31, 2011); *In re Classmates.com Consol. Litig.*, No. 09-cv-0045-RAJ, 2012 U.S. Dist. LEXIS 83480, at *29 (W.D. Wash. Jun. 15, 2012) (praising CCAF's work on behalf of the class). Center attorneys have consistently called for the *cy pres* doctrine to be cabined to limited circumstances. *E.g.,* Adam Liptak, *When Lawyers Cut*

Their Clients Out of the Deal, N.Y. Times (Aug. 13, 2013); *Examination of Litigation Abuse: Hearing Before the Subcommittee on the Constitution and Civil Justice of the House Comm. On the Judiciary*, 113th Cong. (Mar. 13, 2013) (written testimony of Theodore H. Frank); Theodore H. Frank, *Cy Pres Settlements*, CLASS ACTION WATCH 1 (March 2008), available at http://is.gd/dyR5L (redirect). The Center has never asked to be nor has ever been designated as a *cy pres* beneficiary, and does not seek that status in this case. JA187.

Argument

I. The district court's *cy pres* distribution order illegally favored local institutions with no connection to the subject matter of the litigation over further distribution to the class.

Standard of Review: The Eighth Circuit "generally review[s] a district court's *cy pres* distribution for an abuse of discretion." *In re Airline Ticket Comm'n Antitrust Litig.*, 307 F.3d 679, 682 (8th Cir. 2002) ("*Airline Ticket Comm'n II*"). But mixed questions of law and fact are reviewed *de novo*. *Plunk v. Hobbs*, 719 F.3d 977, 980-981 (8th Cir. 2013); *Donaldson Co. v. Burroughs Diesel, Inc.*, 581 F.3d 726, 731 (8th Cir. 2009). And a district court that "fails to follow applicable law" abuses its discretion. *Martin v. Ark. Blue Cross & Blue Shield*, 299 F.3d 966, 969 (8th Cir. 2002) (*en banc*). The district court's factual finding that "All class members submitting claims have been satisfied in full" is reviewed for clear error. *Plunk*, 719 F.3d at 980-81. "Findings of fact are clearly erroneous if they are unsupported by substantial evidence, or if the reviewing court is left with the conviction that a mistake has been made." *Id.* at 981.

The legal construct of *cy pres* (from the French "*cy pres comme possible*"—"as near as possible") has its origins in trust law as a vehicle to realize the intent of a settlor whose trust cannot be implemented according to its literal terms. *Airline Ticket Comm'n I*, 268 F.3d at 625; *Nachshin v. AOL, LLC*, 663 F.3d 1034, 1038 (9th Cir. 2011). The classic example of *cy pres* was a 19th-century case where a court repurposed a trust that had been created to abolish slavery in the United States to instead provide charity to poor African-Americans. *Jackson v. Phillips*, 96 Mass. 539 (1867). Courts do not have *carte blanche* to modify trusts under *cy pres* doctrine; they must do so in a "manner consistent with the settlor's charitable purposes." Uniform Trust Code § 413(a).

In 1972, a student comment in the University of Chicago Law Review suggested the use of *cy pres* in the context of class actions with large classes and unclaimed remainders of funds to avoid "unjust enrichment" through reversion to a defendant found to have violated the class's rights. Stewart R. Shepherd, Comment, *Damage Distribution in Class Actions: The Cy Pres Remedy*, 39 U. CHI. L. REV. 448 (1972). The California Supreme Court had previously adopted a "fluid recovery" mechanism in class action settlements in 1967, to distribute proceeds to a "next best" class of consumers who might differ from, but likely overlapped with, the class of consumers who had alleged injury but could not feasibly engage in a claims process. *Daar v. Yellow Cab*, 433 P.2d 732 (Cal. 1967). *But see Eisen v. Carlisle & Jacquelin*, 479 F.2d 1005, 1017 (2d Cir. 1973), *vacated on other grounds*, 417 U.S. 156 (1974) (holding that "fluid recovery" was not permitted by Fed. R. Civ. P. 23, and that if it were, it would be an unconstitutional violation of due process).

Imported to the class action context, *cy pres* is a "misnomer—though one common in the legal literature." *Turza*, 2013 U.S. App. LEXIS 17811 at *14 (*citing Mirfasihi v. Fleet Mortgage Corp.*, 356 F.3d 781, 784 (7th Cir. 2004) (Posner, J.)). Nevertheless, *cy pres* has quite recently become an increasingly popular method of distributing settlement funds to non-class third parties in lieu of class members. Redish, 62 FLA. L. REV. at 661; Frank, *supra*. Still, non-compensatory *cy pres* distributions, disfavored among both courts and commentators alike, remain an inferior avenue of last resort. *See, e.g., Turza,* 2013 U.S. App. LEXIS 17811 at *16-*17; *Nachshin*, 663 F.3d at 1038 ("[A] growing number of scholars and courts have observed, the cy pres doctrine…poses many nascent dangers to the fairness of the distribution process") (citing authorities); *In re Baby Prods. Antitrust Litig.*, 708 F.3d 163, 173 (3d Cir. 2013) ("Cy pres distributions imperfectly serve that purpose by substituting for that direct compensation an indirect benefit that is at best attenuated and at worse illusory"); *Mirfasihi*, 356 F.3d at 784 ("There is no indirect benefit to the class from the defendant's giving the money to someone else."); American Law Institute, *Principles of the Law of Aggregate Litigation* ("*ALI Principles*") § 3.07 cmt b (2010) (rejecting position that "cy pres remedy is preferable to further distributions to class members"). *See generally* Redish, 62 FLA. L. REV. at 628; Theodore H. Frank, *Cy Pres Settlements*, CLASS ACTION WATCH 1 (March 2008).

When *cy pres* distributions are unmoored from class recovery or *ex ante* legislative or judicial standards,

> the selection process may answer to the whims and self interests of the parties, their counsel, or the court. Moreover, the specter of judges and outside entities dealing in the distribution and solicitation of settlement money may create the appearance of impropriety.

Nachshin, 663 F.3d at 1039 (citing authorities). For example, a defendant could steer distributions to a favored charity with which it already does business, or use the *cy pres* distribution to achieve business ends. *See Dennis v. Kellogg Co.*, 697 F.3d 858, 867-68 (9th Cir. 2012) (ruminating on these issues). In one infamous example, Microsoft sought to donate numerous licenses for Windows software to schools as part of an antitrust class action settlement, essentially using the *cy pres* as a marketing tool that would have frozen out its competitors. *In re Microsoft Corp. Antitrust Litig.*, 185 F. Supp. 2d 519 (D. Md. 2002).

Conversely, if the *cy pres* distribution is related to plaintiffs' counsel, it would result in class counsel being double-compensated: the attorney indirectly benefits both from the *cy pres* distribution, and then makes a claim for attorneys' fees based upon the size of the *cy pres*. *See* Frank, *supra*; *cf. also* Redish, 62 FLA. L. REV. at 661 (*cy pres* awards "can also increase the likelihood and absolute amount of attorneys' fees awarded without directly, or even indirectly, benefitting the plaintiff"). Permitting class counsel to collect attorneys' fees based on unmoored *cy pres* awards "threatens to undermine the due process interests of absent class members by disincentivizing the class attorneys in their efforts to assure [classwide] compensation of victims of the defendant's unlawful behavior." Redish, 62 FLA. L. REV. at 666.

When the charitable distribution is related to the judge, or left entirely to the judge's discretion, the ethical problems and conflicts of interest multiply. Class action settlements require judicial approval: one can readily envision a scenario where a judge looks more favorably upon a settlement that provides money for a judge's preferred charity than one that does not. A judge that knows that a larger settlement fund will eventually result in a larger *cy pres* distribution at the end of the case for his favorite charity might be inclined to slant rulings to encourage such a larger settlement. Even if a judge divorces himself from such considerations, the parties may still believe that it would increase the chances of settlement approval or a fee request to throw some money to a charity associated with a judge.

Moreover, charities that know that a judge has discretionary funds to distribute can—and do—lobby judges to choose them, blurring the appropriate role of the judiciary. The "specter of judges and outside entities dealing in the distribution and solicitation of settlement money may create the appearance of impropriety." *Nachshin*, 663 F.3d at 1039 (citing authorities); Adam Liptak, *Doling Out Other People's Money*, N.Y. TIMES (Nov. 26, 2007) ("allowing judges to choose how to spend other people's money 'is not a true judicial function and can lead to abuses'" (quoting former federal judge David F. Levi)); *see also id.* (quoting Judge Levi as saying "judges felt that there was something unseemly about this system" where "groups would solicit [judges] for consideration as recipients of *cy pres* awards"); *Turza,* 2013 U.S. App. LEXIS 17811 at *16-*17 (citing cases). This ethical morass is more than hypothetical in this case, where there was an *ex parte* lobbying campaign of as yet-undisclosed scope. JA158-63.

As tempting as it is to permit judges to play Santa Claus with settlement money, Congress has not given courts this authority, and the judiciary should not seize this ethically and constitutionally problematic power for themselves.

On September 21, 2012, class counsel moved the court to disperse the multi-million-dollar remainder of the settlement fund—and the potential millions that might be recovered for the class in litigation relating to the Penta fraud—to third party institutions under the *cy pres* doctrine. JA40-60. Over Oetting's opposition (JA61-76; JA96-103), the district court approved *cy pres* distributions of 100% of the remaining and any later-accrued funds to LSEM. Addendum 4-9, 11-12.

Three defects make this application of *cy pres* insupportable: *first,* there is an impermissible geographic discontinuity between the composition of the class (nationwide) and the locus of the *cy pres* recipient (Eastern Missouri); *second*, there is zero connection between the *cy pres* recipients and the subject matter of the lawsuit or the composition of the class; and *third*, and most importantly, *cy pres* is improper when it is feasible to make further distributions to class members, at least when such distributions do not result in a legal windfall overcompensating class members beyond their claimed damages.

The Eighth Circuit has been in the forefront in discouraging abusive unfettered *cy pres*. *Airline Ticket Comm'n I*, 268 F.3d 619 (8th Cir. 2001). Unfortunately, the district court's application of this precedent to award *cy pres* from a nationwide securities class to a local legal aid society in the court's backyard left much to be desired. Moreover, *cy pres* was premature given that it was entirely feasible to distribute the over-$2 million

to class members who had already made claims but had not yet been fully compensated for their alleged losses. While the district court paid lip-service to Eighth Circuit standards, its application of law to facts was reversible error; its finding that the class had already been fully compensated by the first two distributions was clearly erroneous and contrary to the law of the case.

A. *Cy pres* is inappropriate when it is feasible to distribute remaining settlement funds to still undercompensated class members, and the district court erred in holding otherwise.

The district court's distribution was error, because it was entirely feasible for the $2.7 million (at minimum) settlement-fund remainder to be given to undercompensated class members *pro rata*.

Class counsel induced the court to violate the American Law Institute's "last resort" rule:

> "If the settlement involves individual distributions to class members and funds remain after distributions (because some class members could not be identified or chose not to participate), the settlement should presumptively provide for further distributions to participating class members unless the amounts involved are too small to make individual distributions economically viable or other specific reasons exist that would make such further distributions impossible or unfair." *ALI Principles* § 3.07(b).[6]

[6] Numerous courts have endorsed §3.07 to a greater or lesser degree. *Ira Holtzman, C.P.A. & Assoc. v. Turza*, Nos. 11-3188 & 11-3746, -- F.3d --, 2013 U.S. App. LEXIS 17811, *17 (7th Cir. Aug. 26, 2013) (Easterbrook, J.); *Klier*, 658 F.3d at 474-75 & nn.14-16; *Nachshin*, 663 F.3d at 1039 n.2; *In re Lupron Mkt'g and Sales Practices Litig.*, 677 F.3d 21, 32-33 (1st Cir. 2012); *Masters*, 473 F.3d at 436 (draft); *Baby Prods.*, 708 F.3d at 173 (agreeing in part).

A *cy pres* "option arises only if it is not possible to put those funds to their very best use: benefitting the class members directly." *Klier v. Elf Atochem N. Am., Inc.*, 658 F.3d 468, 475 (5th Cir. 2011). Unless "individual stakes are small, and the administrative costs of a second round of distributions to class members might exceed the amount than ends up in class members' pockets," there should be an "additional round of distribution" because left-over money "should be used for the class's benefit to the extent that is feasible." *Ira Holtzman, C.P.A. & Assoc. v. Turza*, Nos. 11-3188 & 11-3746, -- F.3d --, 2013 U.S. App. LEXIS 17811, *16-*17 (7th Cir. Aug. 26, 2013) (Easterbrook, J.) (reversing order of *cy pres* distribution where claimants had not been fully compensated with full measure of statutory damages). This rule follows from the precept that "[t]he settlement-fund proceeds, generated by the value of the class members' claims, belong solely to the class members." *Id.* at 474; *accord ALI Principles* § 3.07 cmt. (b).

This Circuit should follow §3.07 and the decided national trend of those Circuits which have rejected the use of *cy pres* where distribution to the class is economically feasible. *See, e.g.*, *Klier*; *Masters,* 473 F.3d at 436 (disparaging *cy pres* distribution where neither side contended that "it would be onerous or impossible to locate class members or [that] each class member's recovery would be so small as to make an individual distribution economically impracticable"); *Mirfasihi*, 356 F.3d 781, 784 (7th Cir. 2004) (rejecting proposed *cy pres* distribution where potential damages were sufficient to make individual payments feasible); *Molski v. Gleich*, 318 F.3d 937, 955 (9th Cir. 2003), *overruled on other grounds by Dukes v. Wal-Mart Stores, Inc.*, 603 F.3d

571 (9th Cir. 2010) (rejecting *cy pres* as an inadequate substitute for individual damages when "there is no evidence that proof of individual claims would be burdensome or that distribution of damages would be costly."). The conflicts of interest that *cy pres* awards can create are easily eliminated by restricting such awards to those narrow circumstances in which pecuniary relief to the class is infeasible. Feasible compensation to class members legally trumps *cy pres* payments that do not directly benefit the class.

But the district court accepted various justifications for a *cy pres* outcome: that "[a]ll class members submitting claims have been satisfied in full"; that "identification of members for additional distribution would be difficult and costly, considering the time that has passed since the initial distribution"; and that "[t]he beneficial ownership of Bank of America shares changes constantly, so further distribution to the holders of stock would not benefit the individuals who actually suffered harm." Addendum 4. These justifications are neither availing nor factually correct.

Legal windfall or full compensation may constitute a reason to authorize a *cy pres* remedy. *See Klier*, 658 F.3d at 475. But such concepts have no application here where another distribution to class members would only make class members slightly less undercompensated. Bank of America shareholders lost $5.87 a share, but were scheduled to receive at most 22 cents a share from the settlement fund. *BankAmerica I*, 201 F.R.D. at 701, 708. (Because not every eligible class member made claims, the actual payout in the first distribution was approximately 49 cents a share. JA105.)

Windfall compensation should be determined by comparing the relief obtained to the full measure of legal damages sought in the complaint, not to the amount paid in the first and second distributions, which the district court previously correctly acknowledged was just a "fraction" of the damages claimed. "The fact that the members of Subclass A have received payment authorized by the settlement agreement does not mean that they have been fully compensated." *Klier*, 658 F.3d at 480; *accord Beecher v. Able*, 575 F.2d 1010, 1016 (2d Cir. 1978) (no windfall or unjust enrichment to redistribute to class members when alleged damages are greater than the sum after redistribution); *compare BankAmerica I*, 210 F.R.D. at 701 *with* JA105. While it is true that there might have been various legal barriers to class members obtaining the full $5.87/share from the stock drop over the course of litigation (*BankAmerica I*, 210 F.R.D. at 708-09), it is also true that the alleged damages were substantially more than $0.49/share.

Further, in light of *BankAmerica I's* conclusion that the initial settlement amount was "only a percentage of the damages that [plaintiffs] sought," the law of the case doctrine precludes the current finding that "all class members submitted claims have been satisfied in full." *See First Union Nat'l Bank v. Pictet Overseas Trust Corp.*, 477 F.3d 616, 620 (8th Cir. 2007) (explaining that the "intent of the doctrine is to prevent the relitigation of settled issues in a case, thus protecting the settled expectations of parties, ensuring uniformity of decisions, and promoting judicial efficiency" (internal quotation omitted)).

The court's second concern—that "identification of members for additional distribution would be difficult and costly, considering the time that has passed since the initial distribution"— is unwarranted on the facts of this case. In fact, the record plainly belies any such infeasibility: since the initial distribution in 2004, there have been two supplementary distributions to the BankAmerica classes: a $10 million "Second Distribution" plus another distribution in 2009 for only $1.7 million. JA37-38. And BankAmerica class counsel has requested a fourth distribution for just over $1 million. JA127. (That request includes Green Jacobson in the signature block as liaison counsel. JA134.) This case is distinguishable from *Powell v. Georgia-Pacific Corp.* where the settlement administrator who conducted the earlier distributions "is no longer responsible for locating class members and distributing the funds." 119 F.3d 703, 707 (8th Cir. 1997). Here, Heffler has been the administrator since day one, for the initial distribution as well as every subsequent one, continuity that allows for easy identification and location of class members.

The third rationale the court used to justify *cy pres* was that "[t]he beneficial ownership of Bank of America shares changes constantly, so further distribution to the holders of stock would not benefit the individuals who actually suffered harm." Addendum 4. But this is a *non sequitur*. Oetting seeks a distribution to the *class*—the shareholders who were injured by the alleged securities fraud in 1998. No one suggests paying current beneficial owners or a random subset of shareholders in the successor corporation's stock. Indeed, Oetting is not even proposing anything other than a new round of distribution to those who have already filed claims, so administrative costs

will consist entirely of sending out new checks. Payment can be issued to those individuals: actual class members. A 2009 distribution of $1.75 million to the BankAmerica classes resulted in only $44,293.28 of checks unpaid—a 98% success rate in paying claimants. JA37. The concurrent distribution to the NationsBank classes of $4.75 million had a 94% success rate in paying claimants. *Id.* There is no basis in the record to find that a 2012 or 2013 (or 2014) distribution of $2.6 million wouldn't have similar success—and even greater success if those who did not cash their checks in 2009 and do not apply for their *pro rata* share in the new distribution are not issued new checks.

There is no dispute that "under the settlement agreement, defendant acknowledged that any surplus would not be returned to it." Addendum 4-5. But no one argues that the funds should revert to the defendant; the only question now is how the leftover funds should be allocated: to class members who have not yet been fully compensated or to third parties.

By adopting the presumption in favor of class distributions, espoused by *ALI Principles* § 3.07, this Court can help to cabin unfettered use of *cy pres* and again make class members the foremost beneficiaries of class settlements. The alternative would create a circuit split with the Fifth and Seventh Circuits.[7]

[7] "Although [the Eighth Circuit is] not bound by another circuit's decision, we adhere to the policy that a sister circuit's reasoned decision deserves great weight and precedential value. As an appellate court, we strive to maintain uniformity in the law among the circuits, wherever reasoned analysis will allow, thus avoiding unnecessary burdens on the Supreme Court docket." *Aldens, Inc. v. Miller*, 610 F.2d 538, 541 (8th Cir. 1979).

At a minimum, it was inappropriate for the district court to command that future recoveries necessarily go to *cy pres*. Addendum 12. Perhaps it is the case that the collateral litigation over the Penta fraud will not recover a sum that can be feasibly distributed to the class. But that is a decision that should wait until that sum is quantified. *Cf. Baby Prods.*, 708 F.3d at 174-75 (vacating approval of a *cy pres* settlement where the district court did not wait and apprise itself of how much money would be disbursed via *cy pres*); *Turza*, 2013 U.S. App. LEXIS 17811 (vacating *cy pres* award where it was unclear how large remainder would be and whether it would be feasible to distribute that remainder to undercompensated class members). If Green Jacobson no longer wants to be responsible for overseeing settlement administration, it has been quite clear for years that the sole class representative still active in the case would be happy to agree to have new counsel replace them.

The court and Green Jacobson seemed to have concern that if the remainder of the settlement fund were the distributed to the class, the "primary recipients" would be "very wealthy" investors. Addendum 7. But if Green Jacobson represented a single billionaire miser instead of a class, there would be no question that they would not have the authority to redistribute their client's assets to a deserving charity without the client's permission—even if the client was an especially odious Montgomery Burns-type who would only spend the money on particularly distasteful bacchanalia. And the judicial oath of office explicitly requires "do[ing] equal right to the poor and to the rich." 28 U.S.C. §453. The result should be no different in the class-action

context—especially where, as here, class counsel did not even have the fig leaf of support of a class representative.

Green Jacobson may claim noble intent in wishing that settlement funds go to Legal Services of Eastern Missouri, but Green Jacobson should fulfill their good intentions with their own money, rather than that of their clients. If institutional investors are the "primary recipients" of further settlement distributions, it is because they are the primary victims of the fraud that was sued upon. If Green Jacobson finds being paid treble-lodestar to represent "institutional investors" distasteful work, one can think of any number of legal aid societies that would be happy to put their considerable skills to use elsewhere.

B. "Next best" *cy pres* for a nationwide class should have a nationwide scope.

Even if this Court were to choose to create a circuit split with the Fifth and Seventh Circuits, and permit *cy pres* distribution when it was feasible to supplement distributions to undercompensated class members, the district court's beneficiary selection contravened Eighth Circuit law and sound public policy, and must be reversed.

A first dispositive deficiency of the *cy pres* award is its failure to account for the nationwide scope of the class. Eighth Circuit precedent is directly on point. *Airline Ticket Comm'n I* involved a nationwide class of travel agencies alleging antitrust violations; as here, the Judicial Panel on Multi-District Litigation consolidated the cases in a single forum. 268 F.3d at 621. After distributing settlement proceeds to class

members, a $600,000 residual balance was left in the fund. *Id.* At that point class counsel proposed a *cy pres* dispensation of those funds to three Minnesota law schools and several Minnesota charities, and the district court approved it. *Id.* at 622. This Court reversed and remanded, with instructions "to make a distribution or distributions more closely related to the origin of this nation-wide class action concerning caps on commissions paid to travel agencies." *Airline Ticket Comm'n I,* 268 F.3d at 626. The district court had "failed to consider the full geographic scope of the case." *In re Airline Ticket Comm'n Antitrust Litig.*, 307 F.3d 679, 683 (8th Cir. 2002) ("*Airline Ticket Comm'n II*").

Other circuits agree about the need to match geographic scope of the class with geographic scope of the *cy pres* beneficiaries. In *Nachshin v. AOL, LLC*, the Ninth Circuit followed this Circuit by requiring geographic congruence between the class and the *cy pres* beneficiary. 663 F.3d at 1040 (citing *Airline Ticket Comm'n I*, 268 F.3d at 625-26). *Nachshin* reversed settlement approval where *two thirds* of the donations were made to local institutions—a substantially better attempt to match geographic scope than this case, where the sole beneficiary was in the district court's backyard. *Id. Accord Houck v. Folding Carton Admin. Comm.*, 881 F.2d 494, 502 (7th Cir. 1989) (invalidating settlement agreement, in a national antitrust class action, that made a *cy pres* distribution to local law schools, and directing the district court to "consider to some degree a broader nationwide use of its cy pres discretion").

The *cy pres* distribution at bar suffers from the same ailment. The two NationsBank classes are diffuse and nationwide in scope. The original lawsuits

originated in "several United States District Courts" and California state court, and involved the merger of a North Carolina corporation and a Delaware corporation traded on the New York stock exchange. *BankAmerica I*, 210 F.R.D. at 696-97. In federal court alone, plaintiffs filed over a dozen complaints in the Southern District of New York, Eastern District of New York, Northern District of California, Western District of North Carolina, and Southern District of Illinois. JA191-92. It was happenstance that the head of the Judicial Panel on Multidistrict Litigation assigned the case to his own court in the Eastern District of Missouri. Meanwhile, LSEM "provides free civil legal assistance to elderly and low-income people in 21 counties in Eastern Missouri."[8] LSEM is undoubtedly a "worthy organization"—but that is insufficient to sustain improper *cy pres*. *Turza*, 2013 U.S. App. LEXIS 17811 at *16 (vacating *cy pres* distribution to "worthy" legal aid foundation).

A local charity simply is not the "next best" approximation of a benefit to a nationwide class. *Airline Ticket I, Nachshin,* and *Houck* forcefully repudiate that position. By preventing unjustifiable localizations of benefit, geographic restrictions on *cy pres* work in conjunction with the Class Action Fairness Act of 2005. *See* 28 U.S.C. § 1714 (proscribing favoritism toward segments of the class based on geographic proximity to the court).

Nonetheless, while purporting to follow *Airline Ticket Comm'n I*, the district court concluded that because "much of the harm suffered by the class was felt by individuals in the St. Louis region," "a *cy pres* distribution to a regional organization is

[8] *See* "What We Do," http://www.lsem.org/WhatWeDo_2.aspx.

proper." Addendum 7. This is wrong: harm in "the St. Louis region" is *necessary* before awarding purely localized *cy pres*, but hardly *sufficient* when the relevant harm at issue in the litigation is that of the shareholders and purchasers of NationsBank at the time of their merger.[9]

Class counsel based their argument on the premise that many NationsBank shareholders were "shareholders of the former Boatmen's Bank," a St. Louis-based bank purchased by NationsBank. JA54-55. But there is no showing that Boatmen's shareholders were overwhelmingly St. Louis residents. Nor would one expect that to be true: Boatmen's Bancshares, Inc., was a massive bank holding company openly traded on NASDAQ when NationsBank acquired it in 1996. Moreover, Boatmen's itself acquired banks from all over the Midwest in stock transactions—such as the Kansas- and Oklahoma-based Fourth Financial Corporation, which Boatmen's acquired in 1995. *Boatmen's to Buy Fourth Financial in $1.2 Billion Stock Deal*, N.Y. TIMES (Aug. 26, 1995). Even if Boatmen's, after all these transactions, was overwhelmingly

[9] Indeed, given the district court's simultaneous claim in the same paragraph that distribution to the class would largely benefit "the largest investment entities in the United States" (Addendum 7) it is highly unlikely that the St. Louis region could even be said to have suffered harm disproportionate to the rest of the country, much less relative to the nation's financial centers where institutional investors are most likely to be found. The specific geographic locations of recipients is currently under seal, but no one below contended that St. Louis-area class members comprised so much as ten percent of the class, much less an overwhelming majority. That class counsel did not provide these statistics below when they were in their possession merits an adverse inference. *See In re Dry Max Pampers Litig.*, No. 11-416, -- F.3d --, 2013 WL 395706, at *4 (6th Cir. Aug. 2, 2013).

held by shareholders in St. Louis, why should Boatmen's shareholders get priority over other shareholders of other banks purchased by NationsBank in stock transactions, such as Jacksonville-based Barnett Bank, which was purchased by NationsBank for billions of dollars more than it paid for Boatmen's—much less priority over the original NationsBank shareholders themselves?[10]

The harm alleged in this case was not localized to eastern Missouri; it occurred throughout the entire country, at every place where class members reside. No court should countenance disproportionate concentrations of *cy pres* proceeds to organizations within a single community when the class is nationwide. Such organizations exist to serve primarily (and sometimes solely) their local constituencies. Such localized distributions are especially problematic when there is a "home-court" advantage favoring the neighbors and community of the court (and local counsel) that happens to be adjudicating the nationwide dispute, something Congress has expressly condemned. 28 U.S.C. § 1714. The district court's reasoning simply is not reconcilable with *Airline Ticket Comm'n I*, *Nachshin*, or *Houck*.

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[10] Saul Hansell, *Biggest Southeast Bank Buying Florida Giant for $15.5 Billion*, N.Y. TIMES (Aug. 30, 1997) (NationsBank purchased Barnett for $15.5 billion vs. Boatmen's for $9.5 billion). By comparison, the BankAmerica merger involved $62 billion of NationsBank stock. Mitchell Martin, *Nations Bank Drives $62 Billion Merger: A New BankAmerica: Biggest of U.S. Banks*, N.Y. TIMES (Apr. 14, 1998). St. Louis-based Boatmen's shareholders' $9.5 billion of holdings was necessarily a small minority of the shareholders affected by the much larger NationsBank transaction at issue in this case—even in the improbable event that every single one of Boatmen's nationally-traded stock's shareholders was in the St. Louis area and hadn't sold his or her or its NationsBank stock in the interim.

This is not just good law, but sound public policy to avoid the sorts of abuses endemic to *cy pres*. *E.g.*, Redish, *supra*; Sam Yospe, *Cy Pres Distributions in Class Action Settlements*, 2009 Columbia Bus. L. Rev. 1014, 1030-31; *Examination of Litigation Abuse: Hearing Before the Subcommittee on the Constitution and Civil Justice of the House Comm. On the Judiciary*, 113th Cong. (Mar. 13, 2013) (written testimony of John H. Beisner and Theodore H. Frank).

The court below gave short shrift to the geographic diffuseness of the class. If a district court can evade the restrictions of *Airline Ticket Comm'n I* simply by noting that part of a nationwide class resides in the district court's backyard, the exception would swallow the Eighth Circuit's rule and make it meaningless. The award was legal error, and must be reversed.

C. "Next best" requires a nexus between the class's identity, interests, the lawsuit's objectives, and the *cy pres* beneficiary.

On remand after this Court reversed the *cy pres* distribution in *Airline Ticket Comm'n I* and remanded for consideration of charities with a wider geographic scope, the *Airline Ticket* district court elected to distribute the funds to National Association for Public Interest Law ("NAPIL"). Once again, this Court reversed on appeal, because the award lacked the requisite "tailoring" "to the nature of the underlying lawsuit." *Airline Ticket Comm'n II*, 307 F.3d at 683. As a legal principle, "unclaimed funds should be distributed for a purpose as near as possible to the legitimate objectives underlying the lawsuit, the interests of class members, and the interests of those similarly situated." *Id.* at 682.

Other circuits are in accord. *See e.g., Dennis*, 697 F.3d at 866 (reversing where *cy pres* beneficiary had "little or nothing to do with the purposes of the underlying lawsuit or the class of plaintiffs involved"); *Baby Prods.*, 708 F.3d at 169 (under certain circumstances "courts have permitted the parties to distribute to a nonparty (or nonparties) the excess settlement funds for their next best use—a charitable purpose reasonably approximating the interests pursued by the class."); *Klier*, 658 F.3d at 476 ("the court's discretion remains tethered to the interest of the class, the entity that generated the funds."); *Masters,* 473 F.3d at 436 ("the purpose of *Cy Pres* distribution is to put the unclaimed fund to its *next best* compensation use." (emphasis in original)).

Just as NAPIL could not "claim any relation to the substantive issues" in *Airline Ticket Comm'n II*, LSEM cannot claim any relation to the substantive issue in this case: securities fraud. The district court itself realized this noting that "the tie to the intent of the fund is thin, but not as thin as it would be if the donation served an entirely unconnected cause." Addendum 8. But it is self-evident that the nexus is no thicker in this case than that in the *Airline Ticket Comm'n II* (*i.e.* that between NAPIL and antitrust issues). Nothing in the record (or on the LSEM website) suggests that LSEM had ever aided in the prosecution of a securities claim of any stripe.

Class counsel's and the district court's assertion that straying this far afield was justified because there "are no charities that benefit the interests of" shareholders (Addendum 7) beggars belief. There are any number of non-profit recipients that directly or tangentially work on behalf of shareholder interests in securities litigation. For example, law professors and organizations housed at, *inter alia*, the University of

Chicago, Stanford University, University of California at Los Angeles, Northwestern University, Vanderbilt University, and Cardozo Law School are performing important research on securities litigation and corporate governance.[11] If nothing else, money could readily go to the Securities and Exchange Commission "Fair Funds for Investors," established by the Sarbanes-Oxley Act, to pay future victims of securities fraud. 15 U.S.C. §7246(b) (authorizing SEC to accept "accept, hold, administer, and utilize gifts, bequests and devises of property" for Fair Funds established by 15 U.S.C. §7246(a)); *cf. generally Official Cmte. of Unsecured Creditors of Worldcom, Inc. v. SEC*, 467 F.3d 73 (2d Cir. 2006) (Sotomayor, J.) (discussing discretion of SEC to distribute civil penalties under 15 U.S.C. §7246(a)). "Shareholders in the United States injured by securities fraud" are surely a closer fit to the class than "residents of Eastern Missouri," even if a fraction of the *cy pres* pays for LSEM lawsuits for "fraud." But the district court believed a more exacting search was unnecessary because "the great majority of the financial interest in the settlement was held by the largest shareholders of the former NationsBank…some of the largest investment entities in the United States [and] [t]here are no charities that benefit the interest of these very wealthy entities." Addendum 7.

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[11] The Center for Class Action Fairness is not seeking *cy pres* in this case because of its direct involvement in the appeal, but it is a non-profit public-interest law-firm that has won tens of millions of dollars for shareholders in securities litigation. *E.g.*, Daniel Fisher, *Judge Cuts Fees In Citigroup Settlement, Citing "Waste And Inefficiency"*, Forbes.com (Aug. 1, 2013) ($26.7 million additional for Citigroup shareholders). Oetting is not appealing the district court's decision not to distribute *cy pres* to the Center, and will not seek such a *cy pres* distribution on remand.

This is incorrect on multiple levels. *First*, while "Fidelity" or "Vanguard" mutual funds or state pension funds may be a multi-billion dollar investment entities with a potentially large recovery from the settlement fund, those assets are held in the accounts of millions of individual small investors and retirement funds or in trust for millions of pension beneficiaries. *Second,* all investors, be they individuals or entities, have a natural interest in protecting investors from securities fraud generally. There may be disputes over the best means of protecting the investor, whether that is by private action or SEC agency enforcement or some other method, but the class definitively shares the general common interest in combating actual securities fraud.

"[C]y pres remedies often stray far from the 'next best use' for undistributed funds and turn courts in a grant giving institution doling out funds to hospitals, legal services organizations, law schools, and other charities." *SEC v. Bear, Stearns & Co.*, 626 F. Supp. 2d 402, 414 (S.D.N.Y. 2009). The class here did not receive the "next-best" solution to which it is entitled if a distribution must be made to *cy pres* rather than directly to the class.

The bare legitimacy of *cy pres* in the class action context is controvertible with good reason. *See Klier*, 658 F.3d at 480-82 (Jones J., concurring); *In re Pet Foods Prod. Liab. Litig.*, 629 F.3d 333, 358 (3d Cir. 2010) (Weis, J., concurring and dissenting); Redish, *supra*; *In re Thornburg Mortg., Inc. Secs. Litig.*, 885 F. Supp. 2d 1097, 1105-12 (D.N.M. 2012) (collecting sources); George Krueger & Judd Serotta, *Our Class-Action System is Unconstitutional*, WALL ST. J. (Aug. 6, 2008). *Cy pres* has been given a narrow

berth in the Eighth Circuit; for the foregoing reasons, circuit law requires that this particular application be rejected.

II. The class had inadequate notice of the *cy pres* distribution.

Standard of Review: Questions of law are reviewed *de novo*. *Plunk*, 719 F.3d at 980-81.

Even if, somehow, this Court is willing to condone the *cy pres* distribution below, it must be reversed because of the lack of notice given to the class that over $2 million in settlement funds would be going to a local St. Louis charity. There was no notice to the class that millions of dollars of undistributed money would not be going to the class; the initial distributions did not even mention the *possibility* of *cy pres*. JA105. Notice principles require the class to be informed that *cy pres* distributions will be used in lieu of direct payments. *See In re Katrina Canal Breaches Litig.*, 628 F.3d 185, 198 (5th Cir 2010). *Baby Products* also suggests that notice is required even if the determination to use *cy pres* comes after the time of settlement: "We are confident the Court will ensure the parties make their proposals publicly available and will allow class members the opportunity to object before it made a selection." *Baby Prods.*, 708 F.3d at 180. After all, "class members are not indifferent" whether money is used to pay them or to provide *cy pres*. *Id.* at 178. But because no notice went to the class regarding the size of the *cy pres* or the identity of the proposed recipients, only the class representative had an opportunity to object. Notice may not be required when the *cy pres* distribution is *de minimis* and when the cost of notice would exceed the

remainder to be distributed, but, given the size of the distribution here, and the relatively few class members who would be entitled to notice (99,200 who received previous distributions (Dkt. 616-4)), it was improper to spend money on behalf of the class without giving class members an opportunity to contest the distribution to a purely local charity or argue for further distributions to the class.

Oetting did not raise this purely legal argument below, though he did complain that class counsel had chosen the *cy pres* recipients without consultation with the class. JA98. Ordinarily, this Court will not consider an argument raised for the first time on appeal, but the Eighth Circuit will address an argument if the issue is "encompassed in the party's more general argument and no new evidence is presented on appeal." *PCTV Gold, Inc. v. SpeedNet, LLC.*, 508 F.3d 1137, 1144 n.5 (8th Cir. 2007). *See also Sexton v. Martin,* 210 F.3d 905, 914 n.8 (8th Cir. 2000); *Stockmen's Livestock Market, Inc. v. Norwest Bank of Sioux City, N.A.,* 135 F.3d 1236, 1243 n.4 (8th Cir. 1998). Moreover, the Eighth Circuit retains discretion to decide questions "where the proper resolution is beyond any doubt or when the argument involves a purely legal issue in which no additional evidence or argument would affect the outcome of the case." *Tarsney v. O'Keefe*, 225 F.3d 929, 939 (8th Cir. 2000) (internal quotation and ellipsis omitted).

III. The failure of class counsel's fee request to comply with Rule 23(h) is reversible error.

Standard of Review: Questions of law are reviewed *de novo*. *Plunk*, 719 F.3d at 980-81.

Class counsel were paid over $62 million in fees and expenses from the original settlement fund, essentially three times their lodestar. *BankAmerica III, supra*. But they made a second motion for compensation from the settlement fund without having won the class any new money—and, indeed, after having failed to distribute to the class over $8 million of the original net settlement fund that their original fee award was based on.

The class received no notice of class counsel's supplemental fee request. This is, simply put, a violation of Fed. R. Civ. Proc. 23(h), which requires notice of a motion for class counsel attorneys' fees to be "directed to class members in a reasonable manner." This Court need not decide what level of notice is required to meet the "reasonable manner" standard, because whatever that level is, class counsel here did not meet it: the class received no notice whatsoever.

Thus, class members were "deprived of an adequate opportunity to object to the motion" and the required "full and fair opportunity" to evaluate the request. *In re Mercury Interactive Corp. Sec. Lit.*, 618 F.3d 988, 993 (9th Cir. 2010). The breach of Rule 23(h) unfairly shielded class counsel's fee request from scrutiny. As in *Mercury Interactive*, this by itself is legal error requiring reversal. As in Section II above, this is a purely legal argument that can be reached at the appellate level for the first time. *Accord Mercury Interactive*, 618 F.3d at 993 ("We exercise our discretion to reach the question [about] Federal Rule of Civil Procedure 23(h) … because it is a pure question of law.").

IV. The district court's fee award unfairly double-compensates already-handsomely-compensated class counsel.

Standard of Review: The Eighth Circuit reviews "factual findings for clear error and questions of law or mixed questions of law and fact de novo." *Plunk*, 719 F.3d at 980-81.

A. Class counsel is judicially estopped from seeking a lodestar supplement to their percentage-of-the-fund award.

Class counsel successfully argued that their fees should not be based upon their lodestar of about $20 million, but upon a "percentage of the recovery," collecting 18% of the net settlement fund for themselves, about three times their lodestar. *BankAmerica III*, 228 F. Supp. 2d at 1063 (requesting 25% of net settlement fund); *id.* at 1066 (awarding 18% of net settlement fund).

Class counsel, however, was not satisfied with this amount and asked the district court to augment their fees. JA40-60.

If class counsel had asked the district court to base a new fee award on the amount it had won for the class, however, the necessary finding would be that class counsel had already been overpaid. Class counsel received $58,831,424.38 plus interest in the 2002 order. But between the Penta fraud and the millions for which class counsel failed to request distribution in 2008, the class received over $8.3 million *less* than the initial percentage fee award contemplated.[12] As a result, class counsel was overpaid by over $1.8 million. (Indeed, the lackadaisical efforts class counsel has made

[12] $5.879M (Penta fraud) + $2.734M surplus - $0.295M Penta restitution = $8.318M. JA120.

on behalf of the class since receiving the award demonstrates why class counsel should only be paid when the class is paid: with their treble-lodestar fee already in their pockets, class counsel was indifferent to whether the settlement administrator was competent or corrupt and whether the settlement fund actually made its way into the class's hands. *E.g., Baby Prods.*, 708 F.3d at 179 (recommending delaying "a final assessment of the fee award to withhold all or a substantial part of the fee until the distribution process is complete" (quoting FEDERAL JUDICIAL CENTER, MANUAL FOR COMPLEX LITIGATION § 21.71 (4th ed. 2008))).)[13]

Class counsel thus based their secondary fee request on lodestar, and received another $98,114. This amount is small, but it is unconscionable double-dipping. It is unfair for class counsel to request to be compensated on the size of the fund and, then, having acted in such a way to shrink that fund by millions of dollars, request new compensation on the basis of lodestar. Class counsel cannot shift horses midstream in identifying a theory of Rule 23(h) awards.

This basic principle of fairness is known as judicial estoppel. *New Hampshire v. Maine*, 532 U.S. 742 (2001). Judicial estoppel protects "the integrity of the judicial process by prohibiting parties from deliberately changing positions according to the exigencies of the moment." *Id.* at 749-50. Having won a victory of over $58 million

[13] If nothing else, there is a fundamental unfairness that 100% of the loss caused by the Penta fraud is borne by the class, which otherwise receives only 82% percent of the gains of the net settlement fund. Class counsel might be better incentivized to seek recovery of losses caused by Heffler negligence if they were sharing in the losses.

under one theory of the case, class counsel is estopped from claiming that they are entitled to compensation under any basis other than "percentage of fund." Class counsel did not appeal the fee award of *BankAmerica III*. They are not entitled to more than 18% of the net settlement fund—and have already been awarded $1.8 million more than 18% of the net settlement fund. Class counsel has already received tens of millions of dollars more than their lodestar, and was compensated in advance for future settlement administration.

The district court relied upon *Powell v. Georgia-Pacific Corp.*, 119 F.3d 703 (8th Cir. 1997) for the second distribution of fees, but that case is inapposite. *Powell* involved a settlement that explicitly named class counsel as trustee for a supplemental settlement fund, with substantial adjudicative responsibilities. *Id.* at 704. Class counsel then sought fees for the administration of that fund, which the Eighth Circuit held appropriate. *Powell* did not involve a case where class counsel had already been awarded tens of millions of dollars in excess of their lodestar (and $1.8 million in excess of the formula originally ordered by the district court). There was no question of overpayment or judicial estoppel in *Powell*. Having requested and received compensation based on the percentage of the fund, rather than on their hourly rates, class counsel is not allowed to charge the class a second time for their hours.

B. The district court's finding that class counsel did not abandon the class is based on the false premise that *cy pres* was necessary, and must be vacated.

Oetting argued that class counsel abandoned the class by seeking *cy pres* instead of class recovery and failing to pursue recovery against Heffler and its insurer. Class

counsel did not just advocate for *cy pres*, but affirmatively denigrated the class as undeserving "wealthy entities" not entitled to full compensation or to have their "next best" interests considered—a legally irrelevant smear that the district court adopted as its own. JA 55; Addendum 7.

"Class members are not indifferent to whether funds are distributed to them or to *cy pres* recipients, and class counsel should not be either." *Baby Prods.*, 708 F.3d at 178. If it was apathy toward class members or—worse yet—preference for non-class third-parties that drove the decision to prioritize *cy pres* distributions, that casts doubt on the Rule 23(g)(4) adequacy of class counsel representation. *See Broussard v. Meineke Disc. Muffler Shops*, 155 F.3d 331, 338 (4th Cir. 1998) ("The premise of a class action is that litigation by representative parties adjudicates the rights of all class members, so basic due process requires that named plaintiffs possess undivided loyalties to absent class members."); *cf. also Mandujano v. Basic Vegetable Prods., Inc.*, 541 F.2d 832, 834-35 (9th Cir. 1976) (stating that "a proposed class ... is not a legal entity," and that the "class attorney continues to have responsibilities to each individual member of the class."); *Turza*, 2013 U.S. App. LEXIS 17811, at *13 ("[I]t is the persons who [were injured] not "the class" as a whole, who are entitled to damages…A class certified under Rule 23(b)(3) is not a juridical entity.").

The district court held the *cy pres* request proper, adopting class counsel's arguments against class recovery. Because of this, it rejected Oetting's arguments that class counsel should be required to disgorge moneys for abandoning the class. But as demonstrated above in Section I, the *cy pres* request was inappropriate on multiple

levels. The remainder of the settlement should have been distributed to the class, rather than as a contribution to a local charity that served as advertising for class counsel. *See* Green Jacobson, P.C. website, *Check for $2.6 million delivered to Legal Services of Eastern Missouri*, http://www.stlouislaw.com/2013/07/check-for-2-6-million-delivered-to-legal-services-of-eastern-missouri/ (July 2, 2013) (accessed Sep. 1, 2013).

The district court's false premise led to a false conclusion, and the decision should be vacated for a new determination on the question of to what extent class counsel should be penalized for working against the interests of the class. *E.g., In re Thomasson's Estate*, 144 S.W.2d 79, 83 (Mo. 1940); *Rodriguez v. Disner*, 688 F.3d 645 (9th Cir. 2012); *Radcliffe v. Experian Information Solutions, Inc.*, 715 F.3d 1157 (9th Cir. 2013) (after holding that district court erred in not finding a Rule 23(a)(4) conflict of interest, "we reverse the awards because the district court abused its discretion by not considering 'whether class counsel has properly discharged its duty of loyalty to absent class members' in its award of attorneys' fees and costs" (quoting *Rodriguez*)).

Conclusion

The district court award of *cy pres* violated the law of this and other circuits, contravened sound public policy, and must be vacated and reversed with instructions to distribute the remainder of the settlement fund to the class. The distribution of any future recoveries relating to the Penta fraud can be decided once the parties know whether the recovery is closer to $12 million, as Oetting hopes, or zero, as the district court implicitly predicted.

The supplemental attorney-fee award contravened Rule 23(h) procedures and was based on a false premise that class counsel's advocating for *cy pres* instead of class recovery did not breach class counsel's duty of loyalty to the unnamed class members. That award, too, should be vacated and reversed.

Dated: September 3, 2013

Respectfully submitted,

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Certificate of Service

The filing attorney certifies that on September 3, 2013, the foregoing was filed electronically with the Clerk of the Court to be served by operation of the Court's electronic filing system.

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