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

Reply Brief of David P. Oetting, Class Representative

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Table of Contents

Table of Authorities

Cases

Rules and Statutes

Other Authorities

Introduction

The district court here unilaterally withheld millions of dollars from a settlement fund that would otherwise have been distributed to a nationwide class of undercompensated class members, and then chose to distribute that money to a local legal-aid society based on a misapplication of Eighth Circuit precedent and a fundamental misunderstanding of corporate law. No appellate court has ever upheld such a blatant abuse of *cy pres*, and this Court should not be the first.

Green Jacobson throws a great deal of mud at the class representative, much of which is simply false, and the rest of which has no bearing on this case. They posit that class members were required to object to *cy pres* before they knew whether there was any *cy pres*, how much money was in the *cy pres* pot, and who the *cy pres* beneficiaries would be, and that the failure to do so gives the district court *carte blanche* to redistribute as much of the class's money as it wants to the attorneys and its preferred local charity without any notice. Moreover, GJ argues that the only living class representative participating in the case (and the only class member given notice of the *cy pres* proposal) has no say in the matter or standing to represent the class's interests, notwithstanding binding Supreme Court precedent to the contrary.

GJ resorts to these untenable procedural arguments because their case on the merits is even weaker: the district court's *cy pres* decision is indefensible as a matter of precedent or public policy. This is readily seen by the National Legal Aid and Defender Association (NLADA) *amicus* brief, which acknowledges the correctness of §3.07 of the American Law Institute's *Principles of the Law of Aggregate Litigation* ("*ALI*

Principles") on the one hand, but is then forced to suggest a level of scrutiny that would eviscerate the standard and be so permissive as to allow a judge to give money to his or her spouse's charity. Rather than address Oetting's actual arguments, the *amici* attack a strawman that Oetting is challenging all *cy pres*, and even IOLTA distributions authorized by statute that Oetting never mentioned. But Oetting simply asks for application of existing Eighth Circuit law, including decisions directly on point, and for this Court to adopt the same *ALI Principles* that every other circuit to consider the question has and that NLADA endorses.

The district court committed multiple legal errors in its *cy pres* order, and reversal is required.

Argument

I. Oetting has standing to challenge both the *cy pres* and fees.

Green Jacobson challenges appellate jurisdiction. GJB1-10.[1] But for three separate and independent reasons,[2] Oetting has standing on appeal.

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[1] Oetting's Opening Brief will be referred to as "OB"; the Green Jacobson Appellee's Brief as "GJB"; the MLTAF Amicus Brief as "MAB"; and the National Legal Aid Amicus Brief as "NAB." The Joint Appendix is still "JA" and Oetting's addendum is still "Addendum."

[2] Though Green Jacobson claims that "Oetting offers two reasons" why standing exists (GJB4), his opening brief identified the same three reasons discussed in more detail here. OB1-2.

A. Oetting has standing to assert his own claims.

GJ argues that Oetting does not have standing because he ***might*** not collect anything on remand if the district court orders a distribution, and the possibility that he will is only "conjectural or hypothetical" and does not give him standing. GJB2-4. This argument is wrong and proves too much. It is true of almost any appeal that the appellant ***might*** not win on remand. But the fact that a remand might result in proceedings that ultimately fail does not preclude an appellant from reversing an order that prevents the appellant from engaging in the proceedings in the first place; that is not what "conjectural or hypothetical" means in the standing inquiry.

For example, in *Richter v. Advance Auto Parts*, 686 F.3d 847 (8th Cir. 2012), the plaintiff successfully appealed a ruling granting a motion to dismiss her Title VII retaliation claims. That the plaintiff might prevail upon the claims in her complaint was only a possibility, but she had the standing to ask the Eighth Circuit to give her that opportunity. Under GJ's analysis, however, she lost standing because her entitlement to recovery was only "conjectural or hypothetical."

Similarly, in *Amchem Prods. v. Windsor*, 521 U.S. 591 (1997), the successful objectors had not yet suffered injury and might never suffer injury, and thus *might* never be adversely affected by the Rule 23(a)(4) violation in that case. Nevertheless, the fact that the settlement adversely affected appellants' rights to *attempt* to recover from defendants gave them standing to successfully challenge the unfair class-action settlement procedures. Under GJ's argument, *Amchem* was wrongly decided: the

Supreme Court should have reversed the Third Circuit for the appellants' lack of standing.

Such results show that GJ's reading of their cited cases and interpretation of "conjectural and hypothetical" are wrong. *Steger v. Franco* held that plaintiffs who never entered a particular building and never demonstrated an intent to visit the building in the future did not have an "injury-in-fact" to bring ADA claims regarding the building's accessibility. 228 F.3d 889 (8th Cir. 2000). *Faibisch v. University of Minnesota* simply held that a plaintiff does not have standing to seek prospective injunctive relief from a former supervisor who would not be supervising her in the future. 304 F.3d 797, 801 (8th Cir. 2002). Neither of these cases holds that the right to engage in legal proceedings that might be unsuccessful is "conjectural or hypothetical."

Upon reversal, Oetting will have the right to petition for a distribution that includes him. Yes, the 2004 order (JA13-16) would preclude a future distribution to Oetting, but that interlocutory order is not binding on the district court: indeed, the BankAmerica class counsel is, consistent with its fiduciary duties to the class, seeking a fourth distribution that would override the 2004 order. JA126-27.[3] Nothing in the

[3] That unopposed motion has Green Jacobson's names on it as local counsel.

This Court should note that the district court has already disregarded the 2004 order in multiple respects. Notwithstanding the 2004 order's command that there be only two distributions and that the second distribution distribute remaining funds, in 2008 the district court ordered only a partial distribution, including a third distribution to the BankAmerica class. *See* OB9 & n.2. The possibility that the district court may account for changed circumstances and disregard the interlocutory 2004 Order again is hardly so remote as to divest Oetting of standing.

2004 order and nothing in the PSLRA, the Federal Rules of Civil Procedure, or Eighth Circuit precedent precludes the district court on remand from issuing a new order permitting distribution to Oetting, and the plaintiffs identify no such bar.[4] That the district court ***might*** not issue that order does not preclude Oetting from asking this Court for a remand that gives him that opportunity. Oetting has standing on behalf of himself.

Oetting disputes Green Jacobson's after-the-fact characterization (GJB3 n.3) of the check-cashing release (JA105), which differs from the settlement-agreement release (Dkt. 450 at 12), but that complex legal question is irrelevant both to Oetting's standing and to this appeal, so Oetting will not trouble the Court with it. Oetting similarly disputes GJ's characterization of the law of Rule 62(a). *Compare* GJB28 (asserting without authority that Rule 62(a) only prohibits action to involuntarily obtain judgment) *with United States v. Twelve Thousand, Three Hundred Ninety Dollars*, 956 F.2d 801, 805 (8th Cir. 1992) (accounting transfer by government violated Rule 62(a) stay). Because LSEM has agreed to be bound by appellate rulings (OB15-16), this Court need not resolve this now-moot academic dispute.

[4] Nor was Oetting required to appeal interlocutory 2004 or 2005 orders, as GJ suggests. GJB21. Those decisions were not final decisions permitting appellate review. 28 U.S.C. §1291. (Indeed, as noted in footnote 3 above, the district court has on multiple occasions disregarded its 2004 order when convenient to do so; nothing in the 2004 order is binding.) GJ asserts that Oetting failed to appeal the 2004 order in this case. This is false: Oetting's notice of appeal expressly included an appeal of "all orders and rulings that merge" into the final decision and order of June 24, 2013. Dkt. 807. The frequently-disregarded interlocutory orders are not "law of the case" because Oetting appealed them when it first became ripe for him to do so.

This appeal is timely, because Oetting was not required to raise the issue of *cy pres* in his 2002 appeal, when it was unripe to do so. *See* Section II.A.1 below.

B. Oetting, as a class representative, has standing to assert the class's claims.

Even if Oetting had somehow permanently waived any rights to ever participate in future distributions, it would be irrelevant to his standing in this appeal, because he is not just any class member, but the class representative of a certified class.

There is a certified class, and Oetting is acting on behalf of the class as the class representative. The *class* has a right to future distributions. Class counsel does not get *carte blanche* to favor its friends without consultation with the class representatives; if there is a dispute between class counsel and the class representative, the dispute is to be resolved by the court acting as a fiduciary for the absent class members. *Cf. Radcliffe v. Experian Info. Solutions*, 715 F.3d 1157 (9th Cir. 2013) (class representatives have independent duties to class separate from class counsel's interests). Oetting stands in the class's shoes,[5] and the class as a whole has been injured by the loss of $2.7 million that belongs to it (plus any sums from collateral litigation now diverted to *cy pres*), regardless of whether Oetting himself gets a share of that money. That injury can be redressed by a reversal of the legally invalid *cy pres* and fee award. The three components of standing are thus met.

[5] *Cf.* Appellee's Addendum 15-16 (Oetting discussing his fiduciary duty to 160,000 class members).

1. Notwithstanding Green Jacobson's admittedly false accusations, Oetting is a legitimate class representative.

Section D of Green Jacobson's Counterstatement of the Case and of the Facts is titled "Oetting became a class representative through misrepresenting his ownership interest in NationsBank." GJB22-23. Green Jacobson goes on to say, without citation, "Oetting asserted in his lead plaintiff application that he owned or controlled 125,000 NationsBank shares" and concludes "Under the PSLRA, but for his exaggeration of his financial interest in the case, Oetting would not have been qualified to be a lead plaintiff and class representative." GJB23.

As Green Jacobson now concedes,[6] every single one of these accusations, and the resulting conclusion (and the reasoning of the conclusion), is 100% false: Oetting did not misrepresent his ownership interest; his lead plaintiff application was entirely accurate; and Green Jacobson moved for Oetting to be class representative (and the district court granted that motion) with full awareness of his shareholdings.

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[6] *See* Green Jacobson Memorandum to the Court (filed October 24, 2013). In that memorandum, GJ explains "Although appellee believed the assertion to be true at the time the brief was filed, appellee's mistaken belief resulted from the incomplete documentary record in its possession. That record has since been supplemented by documents provided by appellant." But the only documents provided by Oetting were documents ***filed by Green Jacobson*** in the district court below. It is possible that GJ, which made a point of including irrelevant 2001 filings in its addendum, chose to make recklessly false accusations without examining 1998 and 1999 filings it had filed that disproved those accusations, and also somehow decided not to take the opportunity to investigate if those filings could be included in its addendum to support its accusations.

On December 14, 1998, Oetting—in district-court filings and declarations signed by GJ attorney Martin Green on December 14, 1998—accurately stated "At the time of the merger, David P. Oetting individually owned 18,725 shares of NationsBank stock…" *Schneider v. Bankamerica Corp.*, No. 98-CV-1912, Dkt. 10 at 6 (E.D. Mo.); *id.* Dkt. 12 at Exh. A. Those same filings acknowledged that other Oetting family members' shareholdings comprised an additional 105,450 shares. *Id.*

On January 8, 1999, Joe D. Jacobson submitted an affidavit that stated "the Oetting family of plaintiffs including Marie Oetting and her two sons, David P. Oetting and James W. Oetting, who collectively owned, in their various capacities, 124,175 shares of NationsBank stock at the time of the merger." *Id.* Dkt. 17. Again, no misrepresentation—and this accurate characterization is entirely consistent with Oetting's *BankAmerica IV* brief's statement that "he and his family owned or controlled approximately 125,000 shares of NationsBank stock." GJB23.

On June 21, 1999, several months ***after*** Green Jacobson filed papers indicating they had full knowledge of the scope and nature of Oetting's shareholdings, Green Jacobson made its motion for class certification and appointment of Oetting as a class representative, which was granted by the district court on July 6, 1999. MDL Dkt. 34, 39.

At no point in the fourteen years since did Green Jacobson move to replace Oetting as a class representative.

Oetting represents the NationsBank class, and Green Jacobson does not dispute that he is the only living class representative participating in the case.

2. A class representative has standing to raise claims on behalf of the class.

Binding Supreme Court precedent holds that a representative of a certified class has standing to raise claims on behalf of the class. *Sosna v. Iowa*, 419 U.S. 393, 402 (1975); *United States Parole Comm'n v. Geraghty,* 445 U.S. 388, 413, 416 n.8 (1980) (Powell, J., dissenting, taking narrower position than majority); OB1-2 (discussing these and other precedents). Green Jacobson cites no authority to the contrary. Rather, it attempts to distinguish this case from the binding precedent. GJ's arguments are not only tendentious, but have been explicitly rejected by the Supreme Court in other binding cases that GJ fails to cite.

Green Jacobson asks this Court to adopt a reading of *Sosna* and *Geraghty* that those cases apply only to the limited circumstances where "only if the claim is one that, by its nature, was likely to expire before the litigation process is complete." GJB5-8. This ignores the language in *Sosna* and *Geraghty* emphasizing the fiduciary nature of class representation. OB1-2. And unfortunately for Green Jacobson, the Supreme Court has repeatedly rejected their interpretation, including just last term.

All nine justices agreed in *Genesis Healthcare Corp. v. Symczyk*. The majority held that "essential to *Sosna* and *Geraghty* was the fact that a putative class acquires an independent legal status once it is certified under Rule 23." 133 S. Ct. 1523, 1525 (2013). Thus, a defendant could not moot a class's claims by mooting the class representative's claims if the class was certified. The four-justice dissent would go farther and hold that a ***putative*** class representative of an ***uncertified*** class has standing to raise claims on behalf of the ***putative*** class: even if the putative class

representative has received all she is entitled to, "satisfying an individual claim does not give a plaintiff like Smith, exercising her right to sue on behalf of other employees, 'all that [she] has . . . requested in the complaint (i.e., relief for the class).'" *Id.* at 1536 (Kagan, J., dissenting) (quoting *Deposit Guaranty Nat. Bank v. Roper*, 445 U. S. 326, 341 (1980) (Rehnquist, J., concurring)). And what is arguably true for the putative class representative (and was true for the putative class representative in *Roper*) is certainly true for the actual class representative of a certified class.

Franks v. Bowman Transp. Co. more explicitly rejected the precise argument Green Jacobson makes here, stating that overreliance on *Sosna*'s account of capable-of-repetition doctrine and mootness was "misplaced." 424 U.S. 747, 754 (1976). "[N]othing in our *Sosna* or *Board of School Comm'rs* opinions holds or even intimates that the fact that the named plaintiff no longer has a personal stake in the outcome of a certified class action renders the class action moot unless there remains an issue 'capable of repetition, yet evading review.'" *Id.* (citing *Board of School Comm'rs v. Jacobs*, 420 U.S. 128 (1975) (holding case moot only because lack of proper class certification)). "To the contrary, *Sosna*, 419 U. S., at 401 n. 10, cited with approval two Courts of Appeals decisions not involving 'evading review' issues which held, in circumstances less compelling than those presented by the instant case, that Title VII claims of unnamed class members are not automatically mooted merely because the named representative is determined to be ineligible for relief for reasons peculiar to his individual claim." *Franks*, 424 U.S. at 754 n.7.

Wiesmueller v. Kosobucki is informative. 513 F.3d 784 (7th Cir. 2008) (Posner, J.). The plaintiff sought to represent a class of out-of-state law students suing over Wisconsin bar admission requirements; the district court dismissed his case. As his appeal was pending, Wiesmueller was admitted to the Wisconsin bar, mooting his individual claim. Appellees asked to dismiss the appeal. The Seventh Circuit refused.

> Since the named plaintiff is the representative of the unnamed class members, the evaporation of his claim no more bars him from continuing in that capacity (provided a class has been certified), [*Sosna*, 419 U.S. at 402], than a lawyer is barred from representing a litigant just because the lawyer himself has no dispute with the defendant.

Id. at 786.

Green Jacobson's reading is thus untenable. Imagine a world where the class representative cannot appeal on behalf of a certified class because her individual claims have been mooted. In this counterfactual world, a class is certified in the class action *Coyote v. Acme Products*, but summary judgment is granted on behalf of the defendant. The class representative appeals the grant of the summary judgment, but before briefing begins, Acme presents Coyote with a check for his full measure of damages. Under GJ's reading of *Sosna* and *Geraghty*, the case is now over: Coyote has lost his standing to appeal, and the unnamed class members are all bound by the district-court ruling with no recourse. That result is nonsense, and so is Green Jacobson's theory. *Id.* at 787 (quoting *Cowen v. Bank United of Texas, FSB*, 70 F.3d 937, 941-42 (7th Cir. 1995)); *Roper*, 445 U.S. 326. If GJ thought that Oetting was an improper class representative, their remedy was to move in the district court to

replace him as class representative sometime between 2004 and 2013, rather than to claim now that the class is a headless zombie with no representative whatsoever and no ability to protect its rights.

Sosna and *Geraghty* give Oetting standing to assert claims on behalf of the class, regardless of whether his individual claims are moot, and the Supreme Court has expressly rejected Green Jacobson's argument to the contrary; indeed, GJ fails to identify any cases adopting its idiosyncratic view of standing.

C. Any class member has standing to object to improper *cy pres* distributions.

Every appellate court to rule on the question has permitted a class member to object to an improper *cy pres* distribution, even if the class member did not and could not directly benefit from the decision. Green Jacobson does not and cannot identify any authority to the contrary.

For example, in *In re Airline Ticket Com'n Antitrust Litigation*, the appellants would not receive a single dollar more when they objected that the district court failed to select the "next best use" for unclaimed funds. 268 F.3d 619 (8th Cir. 2001). There was no question that those appellants had standing to ensure that their indirect benefit from *cy pres* was properly realized. *Nachshin v. AOL, LLC*, 663 F.3d 1034 (9th Cir. 2011), presented a settlement where the appealing objector would receive $0 no matter who the *cy pres* recipient was, because the settlement did not permit class members to make financial claims; again, there was no dispute that the class member had the right to protest the improper recipient, even though it would not affect his $0

recovery. As a class member, Oetting has standing to protest the failure of the *cy pres* to satisfy the "next best" use for the class.[7]

An appellate court has the "independent obligation" to ensure subject-matter jurisdiction exists, even in the absence of a challenge from any party. *Arbaugh v. Y&H Corp.*, 546 U.S. 500 (2006); *accord* GJB1. Thus, *Airline Ticket* and *Nachshin* implicitly found that class members have standing to appeal improper *cy pres* distributions. This is the correct result: a *cy pres* award as part of a class action settlement without the opportunity for a class member to object forces class members to "endorse[] … ideas that [the court] approves." *Knox v. Service Employees Intern. Union, Local 1000*, 132 S. Ct. 2277, 2288 (2012) (union contributions). Class members have standing to protest when class counsel uses class funds as *cy pres* in an objectionable way.

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For these three independent reasons, Oetting has standing, and this Court has jurisdiction.

[7] Two cases suggest in *dicta* that a class member possibly might not have the right to challenge a *cy pres* distribution without first intervening to obtain party status. *In re Baby Products Antitrust Litig.*, 708 F.3d 163, 181 (3d Cir. 2013); *In re Lupron Mktg. and Sales Pract. Litig.*, 677 F.3d 21, 29-30 (1st Cir. 2012). Even if this is correct, it is immaterial here, because Oetting is already a party, and thus had no need to intervene to establish party status.
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II. 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.

While this Circuit and other appeals courts emphasize the importance of limitations on *cy pres*, Green Jacobson and the *amici* propose a lawless regime where district courts may redistribute from a settlement fund at will. This is wrong.

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.

Green Jacobson does not dispute that *ALI Principles* §3.07 is sound public policy or that §3.07 requires a distribution to the class if it is feasible and it would not be a windfall. Indeed, Green Jacobson does not mention §3.07 at all. 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*, 728 F.3d 682, 2013 U.S. App. LEXIS 17811, *16-*17 (7th Cir. 2013). GJ never mentions, much less distinguishes, *Turza*. It has waived any argument that this is not the correct legal standard.

The NLADA amicus incorrectly states that *Turza* was only cited for dicta. NAB14 n.5. Not so: *Turza* reversed a *cy pres* award to a legal-aid society as an inappropriate mismatch given the nature of the class of certified public accountants, held that on remand it would be inappropriate to award *cy pres* when it was feasible to distribute to the class, and held that it was premature to do so in the absence of

information as to the size of the settlement fund. Affirmance here would create a circuit split with *Turza* on all three points.

Hughes v. Kore of Indiana Enterprise, No. 13-8018, -- F.3d --, 2013 WL 4805600 (7th Cir. Sept. 10, 2013), relied upon by NLADA, where a legal-aid society *would* be a plausible next-best match with a class of ATM users, and where distribution of $10,000 to a set of unknown class members would be infeasible, is entirely consistent with §3.07 and Oetting's arguments on this appeal. *Kore* is distinguishable from a case where $2.7 million is being distributed to a legal-aid society instead of to a class of 160,000 identifiable PSLRA shareholder plaintiffs (or 99,200 identifiable claimants) that it would be feasible to pay.

The NLADA amicus is written from the false premise that Oetting and his counsel opposes all *cy pres*. NAB4 n.2. Their so-called "balanced explication" misrepresents Oetting's counsel's long-stated position. OB40-41 (noting that *cy pres* is controversial, but endorsing a "narrow berth" for it consistent with Eighth Circuit precedent). At no point in this appeal has Oetting asked this Court to abolish *cy pres*; Oetting merely asks that *cy pres* be used as a last resort, that class attorneys uphold their fiduciary duty to maximize recovery to the class, that geographic favoritism be avoided, that the "next best" nexus requirement be observed, and the class be given notice of potentially objectionable distributions—*i.e.,* that district courts follow Eighth Circuit precedent, *Turza*, and §3.07.

The analogy of *cy pres* to the trust context is closer than NLADA admits. NAB16-17. In testamentary law, the property of the trust belongs to the settlor; in

class-action law, the settlement fund belongs to the class. Thus, in both cases, "*cy pres* is only a last resort." *See generally Klier v. Elf Atochem of N. Am.*, 658 F.3d 468, 475 n.16 (5th Cir. 2011) (citing authorities). Thus, for *cy pres* to be valid, courts must "attend to the fact that they are allocating the class members' property." *Id.* at 476 n.20.

1. Oetting did not waive an objection to the *cy pres* distribution.

Green Jacobson claims that Oetting waived the right to challenge *cy pres* by not doing so in *BankAmerica IV*. GJB30, 34-36. This assertion is ironic given that GJ devotes ten pages of its brief to bogus arguments against Oetting's standing. As Green Jacobson admits (GJB34), Oetting had no power to challenge the provision unless it was ripe to do so. *See generally Public Water Supply Dist. v. Peculiar*, 345 F.3d 570, 572-73 (8th Cir. 2003). A challenge to the discretionary *cy pres* provision before there was any *cy pres* distribution would have not satisfied the ripeness requirement: there would not necessarily be any *cy pres*; if there was, the district court's discretion might have been exercised unobjectionably. Without this "further factual development," the question of the *cy pres* provision was merely an "abstract disagreement"; any injury to Oetting or the class was not "certainly impending." *Id.* (quotations and citations omitted). Had Oetting appealed the hypothetical problems with the discretionary provision in *BankAmerica IV*, he would have been told he was premature and to come back when there was a concrete dispute.

In re Baby Products Antitrust Liab. Litig. is directly on point. An objector challenged a provision granting the district court discretion to award *cy pres* at a future date without notifying the class who the *cy pres* recipient was going to be. The Third

Circuit refused to reach the issue. There was no requirement to object to the *cy pres* because the time to object to the *cy pres* recipient identity was at a "later date": "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 makes a selection." 708 F.3d 163, 180 (3d Cir. 2013). *Contrast Dennis v. Kellogg*, 697 F.3d 858 (9th Cir. 2012) (ripe to object to *ex ante cy pres* provision requiring donation to inappropriate food charities). Green Jacobson's citation to *Barnes v. Fleetboston Fin. Corp.* is inapposite: that case involved an appellant who entirely failed to raise the question of feasibility of further distributions at the district-court level, and did not consider the question of when the timing of doing so was appropriate. 2006 WL 6916834 at *2 (D. Mass. Aug. 22, 2006).

The claim of waiver is especially disturbing in this case. The main reason the district court had so much money available to it to distribute was because the 2008 distribution order, without any authority from the settlement and without notice to the class, withheld distribution of millions of dollars. OB9; JA19-22; JA44-45; JA24-26. Oetting objected to Green Jacobson contemporaneously, and Green Jacobson assured Oetting multiple times in 2009 that there would be "a second final distribution" if there were millions of dollars left in the settlement fund. OB10; JA79-80. Having made that promise to Oetting, Green Jacobson cannot be heard to complain that the class representative relied upon the representations of class counsel to look out for the best interests of the class. Under Green Jacobson's theory of waiver now, the district court could have withheld not just $3 million of the classes'

money as it did in 2008, but could have chosen to withhold $100 million (or indeed, the entire settlement fund) in 2004 and then distributed those withholdings as *cy pres*, and the failure to object to this hypothetical possibility in 2002 would constitute waiver. After all, GJ now claims, perhaps the NationsBank class was not entitled to anything. This Court should reject Green Jacobson's proposal to permit a district court *carte blanche* to redistribute settlement funds belonging to the class. The only reason there is $2.7 million "unclaimed" is because the district court refused to permit class members to claim it in 2008. Oetting could not have challenged the distribution sooner, because to do so would be unripe: had Green Jacobson fulfilled its fiduciary duties to the class and its promise to Oetting, there would have been the "second final distribution" to the NationsBank class, the law would have been followed, and there would be nothing to appeal. Because of this possibility, it was not ripe for Oetting to appeal until GJ actually breached its fiduciary duty to the class and the district court permitted that breach over Oetting's objection.

There has been no waiver, and this Court may reverse the illegal order entered below.

2. A distribution would not be a windfall.

As Green Jacobson acknowledges, the NationsBank class theory of damage from the failure to disclose the Shaw transactions did not rely solely upon stock price, and thus was not affected by the bounce-back of the Bank of America stock. GJB13-14 n.5. GJ's argument about the bounce-back (GJB11-14) is a plausible reason for accepting the adequacy of a settlement that paid a tiny fraction of the posited

shareholder loss. But it is not grounds for finding that shareholders have been completely compensated for their alleged damages. One test of this might be for the district court to inquire what NationsBank class opt-outs received when they settled their independent litigation. For example, large shareholder Florida State Board of Administrators participated as a BankAmerica class member, but opted out of the NationsBank class, and sued over and settled its claims separately and confidentially. Dkt. 454. Did FSBA settle for less than 49 cents a share or did they settle for, as Oetting would contend on information and belief, a multiple of that amount?

There is another reason to think the class hasn't been fully compensated: $5.8 million meant to go to class members was embezzled from the settlement fund. JA147; OB5. If that embezzlement had never happened, no one would have objected to a distribution to class members of 51 cents/share instead of 49 cents/share; it certainly would have raised eyebrows if the district court had unilaterally withheld $8 million from distribution rather than $2 million.

There was no record showing that anything over 49 cents a share would be a windfall relative to the total damages alleged by the class. As Green Jacobson admits, the record does not include any such evidence, because the parties agreed to destroy it. GJB14 n.5. Green Jacobson certainly did not introduce any evidence supporting the windfall argument they make for the first time at this Court. Indeed, Green Jacobson's argument below was a convoluted and economically fallacious rationalization that new distributions would not compensate for financial losses

suffered by the class, not that the class had been fully compensated for their financial losses. JA51-53; *see* Section II.A.4 below.

Instead, Green Jacobson made the argument that the district court should find that class members "had been fully compensated according to the terms of the settlement agreement." JA51. This is what the district court found when it made the ambiguous *ipse dixit* statement "All class members submitting claims have been satisfied in full." Addendum 4. As Oetting noted, and Green Jacobson does not contest on appeal, this would be the wrong legal standard. OB27-28. Contrary to GJ's claim that *Klier* does not support Oetting, *Klier* holds that a settlement agreement does not determine what full compensation is. *Klier v. Elf Atochem of N. Am., Inc.*, 658 F.3d 468, 480 (5th Cir. 2011).

The district court made no finding relating to windfall; if one buys Green Jacobson's argument that it did, the decision was clearly erroneous given the lack of reasoning in the district court's decision, and the lack of support from Green Jacobson's own briefing and the record below. It was GJ's burden of proof to demonstrate windfall, and their *ipse dixit* on appeal does not establish it.

3. The settlement did not require a violation of §3.07.

Green Jacobson's argument for ignoring the holding of *Klier v. Elf Atochem* is that the settlement agreement "directed the district court to distribute the surplus settlement funds." GJB36-38; GJB30. This is fiction. As Green Jacobson itself quotes (GJB19), the settlement agreement states:

> All settlement funds remaining unclaimed one year after the initial date of the settlement distribution, whether by reason of uncashed checks or otherwise, plus any funds designated for the expenses of administration which are not expended, ***may*** be contributed as a donation to one or more non-sectarian, not-for-profit 501(c)(3) organizations as determined by the Court in its sole discretion.

Dkt. 450 at 30, ¶ 20 (emphasis added). This is precisely the discretionary decision constrained by *Klier*, *Beecher v. Able*,[8] and by *ALI Principles* §3.07, a guideline that goes entirely unmentioned by GJ. "*[O]nly*" at the "point at which the marginal cost of making an additional pro rata distribution to the class members exceeds the amount available for distribution" does "a district court has discretion to order a *cy pres* distribution." *Klier*, 658 F.3d at 475 n.15 (emphasis added). The district court failed to obey this command.

Moreover, Green Jacobson's argument—that *Klier* may be overridden when the parties agree to *cy pres* instead of class compensation (GJB38)—does not apply here. The party here is the class representative: ***Oetting***, not Green Jacobson. Oetting did not agree to this *cy pres* distribution: Green Jacobson and the district court did, without consulting the class representative. Nothing in the language quoted from *Klier* or in

[8] 575 F.2d 1010, 1016 (2d Cir. 1978). GJ tries to distinguish *Beecher* by claiming that the settlement agreement there permitted reallocation to class members (GJB43-45), but the NationsBank settlement also permits such a reallocation. The *cy pres* provision here is discretionary, rather than mandatory. GJ mischaracterizes *Beecher* by arguing "No one contended that members of Class 1 or Class 2 were fully compensated," but as GJ admits (GJB44) the defendant in *Beecher* complained of an "inequitable windfall." While *cy pres* was not an issue in *Beecher*, the underlying principles are the same.

the settlement permits class counsel to override the class representative's preference for a *cy pres* distribution.

4. Further distribution is feasible.

Oetting fully rebutted the district court's fallacious reasoning against distribution in his opening brief. OB29-32. At no point does GJ address any of these rebuttals; instead, GJ reiterates the fallacious reasoning that the district court adopted wholesale. GJB45-53.

Green Jacobson argues that *Powell v. Georgia-Pacific Corp.*, 119 F.3d 703 (8th Cir. 1997) permits *cy pres* here. In *Powell,* it was impossible to locate the injured class members. GJ argues that mutual funds and institutional investors would recover the additional distribution, but the identities of the fund holders have changed since the injury occurred in 1997; thus, distribution to the injured parties is impossible. GJB47-48. The fallacy in GJ's reasoning is that the mutual fundholders are not the class members; rather, the mutual funds are. GJ's argument proves too much: by GJ's reasoning, a court can divert the ***entirety*** of any PSLRA settlement fund to its favorite charity, because there is always churn in the makeup of mutual fundholders between the time of injury and the time of recovery.

Indeed, one can see the absurdity of GJ's argument by imagining its effect on corporate patent litigation. Apple sues Samsung for smartphone patent violations, and wins a $1 billion jury verdict. *Apple, Inc. v. Samsung Elec. Co.*, No. 11-cv-1846 (N.D. Cal.). By GJ's reasoning, Samsung can petition the court to have the $1 billion go to *cy pres* instead of to Apple: after all, the injury to Apple occurred in 2010, but the Apple

shareholders once the judgment is paid some time in 2014 or 2015 will be different than the Apple shareholders in 2010, so compensation of what GJ calls the truly injured parties is impossible.

GJ's argument is based on a fundamental misunderstanding of the law. If the entity Fidelity Contrafund owned shares of NationsBank as part of its holdings during the relevant class period, ***the entity Fidelity Contrafund is the injured class member*** with the cause of action against Bank of America and the right to recover. Individual Fidelity Contrafund fundholders do not get an indirect PSLRA cause of action against Bank of America, and are not the class members to whom distributions may be made. Just as in federal antitrust law, there is no indirect-purchaser cause of action in federal securities law. The fact that the fundholders change over time is entirely irrelevant, just as the churn in shareholder identity is in the *Apple v. Samsung* patent litigation: the injury is and the right of recovery belongs to the legal entity, not to individual shareholders or fundholders.[9] The district court adopted GJ's unprecedented and entirely erroneous rule of law that, to calculate injury, one must pierce the corporate veil and examine the indirect injuries of individual shareholders, and try to funnel recovery back to those historic persons.

No appellate court has ever held that, and for good reason: the corporate form must be respected. "[G]enerally, the corporate veil is never pierced for the benefit of

[9] Similarly, when a corporate defendant must pay damages under the PSLRA or other litigation, its current shareholders bear the loss; in the absence of exceptional circumstances, a successful plaintiff does not get to pursue former shareholders who owned the stock of the corporate defendant at the time of the wrongdoing.

the corporation or its stockholders[.]" *In re Ozark Restaurant Equipment Co.*, 816 F.2d 1222, 1225 (8th Cir. 1987) (quoting 18 Am.Jur.2d *Corporations* §46 (1985)).

Thus *Powell* is inapplicable. The district court's application of *Powell* rested on GJ's and the court's legal error that the class members entitled to further distributions were the indirect fundholders, rather than the funds and institutional investors themselves. There is no dispute that the institutional investors previously paid are readily locatable and that further distributions to them are possible; indeed, as Oetting noted and GJ refuses to confront, the parallel BankAmerica shareholder class counsel is petitioning for a much smaller distribution to the same type of shareholders as Oetting requests here. JA127; JA37-38; OB29.

That GJ attempts to defend the district court's clearly erroneous decision with this utter misunderstanding of corporate law exhibits the unfortunate contempt of its institutional clients that Oetting previously criticized (OB31-32, 38-40). GJ repeats this disdain when it asserts that an individual class member with a claim is distinguishable from an institutional class member with a claim. GJB52 n.17. GJ cites no law for this proposition, nor can it: it has no more right to skim the accounts of its institutional clients than its individual clients, no matter how worthy the recipients of the embezzlement or how odious the client. OB31. The "Montgomery Burns" parable in Oetting's brief is equally applicable if one substitutes "Soylent Corporation" or "Fidelity" for the miser: the client is the legal entity, not the individual shareholder or fundholder beneficiaries of the legal entity, and the attorney does not get to substitute

his preferences for the client's preferences.[10] If Green Jacobson thinks its institutional-investor clients are unmeritorious beneficiaries of its labors, it should find a line of legal work that doesn't tempt GJ to breach its fiduciary duty to clients.

5. The "IOLTA analysis" is consistent with Oetting's arguments.

Green Jacobson and *amicus* Missouri Lawyer Trust Account Foundation (MLTAF) suggest that *cy pres* is analogous to IOLTA distributions. The analogy actually helps prove Oetting's position both in the general application of *cy pres* and in the specific application of this case: the differences between IOLTA and the *cy pres* in this case demonstrate why IOLTA is acceptable and this award of *cy pres* is not.

IOLTA is explicitly authorized by "legislatures or [states'] highest courts." *Brown v. Legal Foundation of Washington*, 538 U.S. 216, 221 & n.2 (2003); *e.g.* Mo. S. Ct. R. 4-1.15(a); Cal. Bus. & Prof. Code Ann. §6211(a). Oetting does not challenge the legality of the handful of state statutes that have established *cy pres* procedures (MAB20 n.8); but there is no such authorization in federal law except in the rare instance of coupon settlements. 28 U.S.C. §1712(e). Indeed, the ***absence*** of a South-Dakota-like federal statute authorizing client funds being paid to the class counsel's and judge's favorite *cy pres* recipients is evidence that the practice is improper. It is

[10] For the same reason, NLADA's argument that *cy pres* funds do good in the hands of legal-aid societies (NAB21-22) or MLTAF's argument that LSEM is a worthy recipient (MAB5) is beside the point, as *Turza* notes. The settlement fund belongs to the class, and courts do not have *carte blanche* to redistribute parties' assets to do the most social good, even when the assets belong to absent class members, even when the absent class members are "wealthy." Addendum 7.

thus ironic that Green Jacobson proposes that Oetting petition Congress for *cy pres* reform (GJB62); it is Green Jacobson who should be petitioning Congress to authorize its breach of fiduciary duty to the class's interests here. In the absence of IOLTA statutes and rules, there would be no IOLTA; Oetting does not go that far with *cy pres*, as he recognizes that it has a limited role in class actions, but in the absence of statutory or FRCP authority to the contrary, *cy pres* should be cabined at least as much as §3.07 suggests.

Moreover, IOLTA is only permissible where client funds "cannot earn net interest for the client"—*i.e.*, it would be infeasible to distribute to the private clients, the same standard Oetting argues for here for *cy pres*. *See generally Brown*, 538 U.S. at 221-25. If, on the other hand, the client is depositing with the attorney an amount that is feasible to be interest-bearing, the client is entitled to that interest. *Id.* at 226 ("Can the client's money be invested so that it will produce a net benefit for the client? If so, the attorney must invest it to earn interest for the client."). Because it was feasible to distribute $2.7 million to the ***class*** (OB29-32; Section II.A.4, above), it was improper to instead siphon it to a *cy pres* recipient unauthorized by a legislature or court rule, especially when to do so contradicted binding judicial precedent on *cy pres*.

6. The district court's diversion of collateral-suit recovery was error.

GJ asserts that the value of the collateral suits is low because the criminal defendants will make only "small, periodic payments." GJB24. GJ neglects to mention that Oetting is not suing the criminal defendants, but is suing GJ and the settlement administrator, whose assets GJ never investigated. OB5; ER64-65. Regardless, the

district court legally erred in ***assuming*** the value of the collateral suits instead of waiting to determine if the value was too low to distribute to the class. GJ never addresses the cases Oetting cited (OB31), and has thus waived any argument the court did not commit reversible error on this point.

B. Even if *cy pres* were appropriate, distribution to a local legal-aid society in a nationwide securities fraud case contradicts Eighth Circuit precedent, §3.07, and sound public policy.

Even if it were permissible to distribute $2.7 million to an entity other than the class, a local legal-aid society is an impermissible recipient when the class is a nationwide securities class. Indeed, GJ's and the district court's repeated emphasis that the class largely consisted of wealthy institutional investors demonstrates that a legal-aid society is a particularly poor "next best" choice. *Turza*, 728 F.3d 682 (legal-aid society "does not directly or indirectly benefit" a class of certified public accountants). GJ makes no attempt to reconcile the district court's decision with the directly-on-point *Airline Ticket Commission I* and *II* precedent it flouts. 268 F.3d 619 (8th Cir. 2001); 307 F.3d 679 (8th Cir. 2002); OB34-41.[11] GJ does not dispute

[11] MLTAF makes a conclusory assertion that the district court opinion follows *Airline Ticket Commission* by simply quoting the district court opinion without once addressing Oetting's critique. *Compare* MAB3-4 *with* OB34-41. That some of the injured shareholders resided in the St. Louis area is insufficient to disregard the nationwide nature of the class; there was no dispute that some of the injured ticket agents in *Airline Ticket Commission* resided in Minnesota.

NLADA simply asserts that *Airline Ticket Commission II* can be disregarded because it was "factually unusual." NAB15 n.6. Oetting rejects the contention that *Airline Ticket Commission II* only applies to cases involving travel agencies; that it is so

Oetting's analysis of why the district court's reasoning of a local geographic nexus permitting local distribution was inconsistent with *Airline Ticket Commission*, entirely abandoning the fallacious argument they made below that the district court adopted. OB34-37. Reversal is required on these multiple grounds alone.

Instead, GJ argues for a different standard of law, without admitting that to do so would contradict *Airline Ticket Commission*. It is notable that GJ relies not on appellate cases, but two district-court cases in claiming that *cy pres* may be "unrelated to the plaintiff's original claims." GJB56. As *Airline Ticket Commission* shows, that simply is not the law in this circuit. To the extent the Second Circuit suggested otherwise in 1984, that is not the current law of that court, further showing the error of the district courts GJ cites. *Masters v. Wilhelmina Model Agency, Inc.,* 473 F.3d 423, 436 (2d Cir. 2007). One court has criticized *Motorsports Merch.*'s random distribution in particular. *SEC v. Bear, Stearns & Co. Inc.*, 626 F. Supp. 2d 402, 414-15 (S.D.N.Y. 2009).

The parties in *Dennis v. Kellogg* attempted the same framing argument that GJ does here to rationalize *cy pres*. GJB56-57. The Ninth Circuit rejected it. 697 F.3d 858, 866-67 (9th Cir. 2011). That LSEM is taking on a single case of state-law securities

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widely cited in rejecting improper *cy pres* on the grounds Oetting requests here shows otherwise. *E.g., Nachshin*, 663 F.3d at 1040 (citing and quoting *In re Airline Ticket Comm'n Antitrust Litig.*, 307 F.3d 679, 683 (8th Cir. 2002)). It is just as improper to award *cy pres* to local legal-aid societies when the class is a class of nationwide shareholders as it is when it is a class of nationwide travel agencies.

Neither *amicus* nor GJ attempts to reconcile the district court opinion with 28 U.S.C. §1714. OB34.

fraud involving a boiler-room operator preying on a single elderly client in the local area (MAB8-9) hardly makes them an appropriate "next best" recipient for a nationwide class of shareholders in a PSLRA case.[12] NLADA's argument that "access to justice" is the relevant frame for "next best" (NAB18) is wrong because it proves too much, "access to justice" would be a true justification of any legal *pro bono* non-profit, and we know from *Airline Ticket Commission*, *Turza*, and *Nachshin* that that is insufficient grounds for a *cy pres* award: the connection is not tight enough with the identity of the class.

GJ denies that LSEM is a "local" charity because it asserts that the *cy pres* will be shared with three other Missouri legal aid societies, making the award statewide. GJB58. But Missouri is one state out of fifty, with less than 2% of the population of the United States: the award is impermissibly local. That the unreported PSLRA

[12] GJ criticizes CCAF as a potential recipient (GJB60-61), a red herring because CCAF is not seeking *cy pres* in this case and has never asked for or accepted *cy pres*. But GJ misstates CCAF's track record. The majority of CCAF's cases do not involve challenges to abusive *cy pres*. CCAF, a 501(c)(3) non-profit, has won tens of millions of dollars for shareholders in PSLRA class actions in its short four-year existence, even though the *cy pres* award in this case dwarfs CCAF's total expenditures in its first four years. *E.g.*, *In re Citigroup Inc. Sec. Litig.*, No. 07-cv-9901 (S.D.N.Y. Aug. 1, 2013) (net settlement fund augmented $26.7 million); *In re Apple Inc. Sec. Litig.*, No. 5:06-cv-5208 (N.D. Cal. May 17, 2011) ($2.5 million). In other words, CCAF's work directly benefits the type of class member in this case, including in the type of lawsuit brought here, and is thus a closer fit. *Turza,* 728 F.3d 682. Moreover, unlike LSEM, CCAF takes no government funding that precludes it by law from participating in class actions. 45 C.F.R. §1617. While Oetting is not seeking appellate review of the decision not to favor CCAF, there should be no doubt that Oetting suggested a superior alternative to LSEM that better met the "next best" standard.

district-court case *In re Motorola Sec. Litig.* awarded *cy pres* to a local legal-aid charity (NAB23-24) merely shows that the court in that case abused its discretion, and that class members could have legitimately objected or appealed that decision to the Seventh Circuit, where it would have been reversed. *Turza,* 728 F.3d 682. There is also a material difference between the $200,000 distribution in *Motorola* and a $2.6 million distribution that may be augmented by millions of dollars in collateral litigation in this case.

It is ironic that Green Jacobson claims that Oetting did not object to the distribution to LSEM (GJB31), because Green Jacobson proposed that distribution without ever consulting Oetting. In any event, Oetting did object: he identified four other potential charities that he would prefer to LSEM, including the Stanford Class Action Securities Clearinghouse. JA98-99. Moreover, Oetting cited the relevant authority, *Airline Ticket Comm'n*, which the district court proceeded to misapply. JA69. *Cf. Yee v. Escondido*, 503 U.S. 519, 534 (1992) ("a party can make any argument in support of [a claim properly presented]; parties are not limited to the precise arguments they made below"); *Koch v. Cox*, 489 F.3d 384, 391 (D.C. Cir. 2007); *Bew v. City of Chicago*, 252 F.3d 891, 895-96 (7th Cir. 2001). This Court is entitled to apply the controlling law—*Airline Ticket Commission*—even if litigants fail to cite the best authority *on appeal*. *In re Aqua Dots Prod. Liab. Litig.*, 654 F.3d 748, 752 (7th Cir. 2011) (Easterbrook, J.) (citing *Elder v. Holloway*, 510 U.S. 510 (1994)). Oetting has thus preserved all challenges to the *cy pres* recipients.

Oetting's opening brief identified numerous alternative recipients that would satisfy this Circuit's precedents for *cy pres* distribution, including the SEC Fair Funds. OB38-39. Neither GJ nor the *amici* dispute that these alternatives would have been a "next best" distribution; the Fair Funds are not mentioned once in any of the three briefs. The district court erred in awarding *cy pres* to a local legal aid society without fulfilling its duty to investigate whether a more suitable recipient was possible.[13]

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

GJ does not dispute that the class received no notice of their request that $2.7 million go to someone other than the class, and that class members did not have "the opportunity to object before [the court] made a selection." *Baby Prods.*, 708 F.3d at 180. 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). GJ does not even dispute that it did not even consult with any of the class representatives before making its *cy pres* proposals.

[13] GJ also defensively complains that CCAF is involved in this case at all because, they assert, "this case did not involve a 'bad class action settlement.'" GJB60 n.21. CCAF has a broader mission of fighting abusive conflicts of interest in class actions where class counsel self-deals at the class's expense, and a class counsel that diverts over $2.7 million of a nationwide class's money to itself and a local charity is precisely the sort of abuse CCAF fights. *E.g., Apple Inc. Sec. Litig.*, *supra* ($2.5 million *cy pres* to charity affiliated with PSLRA class counsel redirected to class after CCAF objection).

Rather, GJ takes the position that a clause in the settlement mentioning the *possibility* of *cy pres* was sufficient notice. GJB19. But nothing in that notice suggested that a court would unilaterally choose to withhold millions of dollars from the settlement fund and then distribute it to a local charity over the objection of the class representative. Moreover, as GJ admits, the notice suggested that a court *would not* distribute "substantial" amounts to *cy pres*, but would rather do a supplemental distribution. GJB20. If this is the notice GJ is relying upon, it is plainly misleading and inadequate.

GJ does not cite, much less distinguish, *Baby Products* or *Katrina Canal Breaches*. The *cy pres* distribution was improperly noticed and must be reversed. If substantial *cy pres* is to be awarded, class members should have the opportunity to object.

IV. The district court's failure to address *ex parte* communications is potentially an independent reason requiring reversal.

As NLADA admits, the "appearance of impropriety" should be avoided in *cy pres* distributions. NAB25; *Nachshin*, 663 F.3d at 1039. Unfortunately, it has not happened in this case. There was an admitted *ex parte* communication lobbying the district court to approve LSEM as a *cy pres* beneficiary in this case without any notice to the class or Oetting; that communication still has not been docketed. Such communications are *per se* impermissible. Code of Conduct for United States Judges, Canon 3(A)(4) ("If a judge receives an unauthorized ex parte communication bearing on the substance of a matter, the judge should promptly notify the parties of the subject matter of the communication and allow the parties an opportunity to respond,

if requested"); *id.,* Commentary on Canon 3A(4) ("The restriction on ex parte communications concerning a proceeding includes communications from lawyers, law teachers, and others who are not participants in the proceeding"); *Rinehart v. Brewer*, 561 F.2d 126, 132 (8th Cir. 1977) (reversing because of prejudice to defendant not being informed of *ex parte* communications until after criminal sentencing).

Unfortunately, the district court, even as this reply brief is due, has ***still*** refused to indicate the scope of the *ex parte* lobbying campaign: was it one communication that Oetting happened to learn of by accident or a hundred? We do not know, though Oetting made a timely motion under Fed. R. App. Proc. 10 to correct the record. Over two months later, as briefing closes in this case, the district court has failed to even rule upon it.

This has metastasized into potential reversible error. *Edgar v. KL*, 93 F.3d 256 (7th Cir. 1996), is directly on point. There, as here, the district court engaged in *ex parte* communications, but "declined to state on the record" what those communications were. *Id.* at 258. The Seventh Circuit issued *mandamus* and reassigned the case to another judge: the absence of cooperation prevented the appellate court from determining whether the *ex parte* communications touched the merits and was a "disqualifying event." *Id.* Here, we already know that at least one *ex parte* communication Oetting had no opportunity to respond to touches the merits; we do not know the scope because neither LSEM nor the district court are talking. While NLADA sneers that Oetting is taking a "low road" because he seeks discovery into the communications, *Edgar* plainly states that such discovery is mandatory, and neither

NLADA nor GJ cites any authority that Oetting is not entitled to a complete record of the *ex parte* communications nor any authority that such communications are not *per se* improper.[14]

The district court's *cy pres* order flouted Eighth Circuit law and the *ALI Principles*, and is reversible for multiple reasons on that ground.

But the *ex parte* problem creates independent grounds requiring Eighth Circuit intervention. As NLADA admits, the recusal standard is "whether a reasonable person ***with knowledge of all the facts*** would conclude that the judge's impartiality might reasonably be questioned." 28 U.S.C. §455(a) (emphasis added). Nobody in this case knows all the facts, because the district court has refused to place them in the record, or even to give a ruling that could be reviewed. *Baby Products* requires *cy pres* proposals be "publicly available," 708 F.3d at 180, and the *ex parte* communications violate that standard. Neither GJ nor NLADA mention Canon 3(A)(4), the *Baby Products* "publicly available" standard, *Rinehart*, or *Edgar v. KL*, much less attempt to reconcile the district court's actions with this law. This Court should order disclosure

[14] True, *Nachshin* rejected the argument that a district court judge must recuse when awarding *cy pres* to a charity where her spouse sits on the board. 663 F.3d at 1041. Why NLADA thinks raising such a conflict of interest is beyond the pale is unclear, but in any event, *Nachshin* is distinguishable because there was no issue of *ex parte* communications in that case. It is worth noting that *Nachshin*'s decision conflicts with the Supreme Court case relied upon by the appellant in that case. *Liljeberg v. Health Servs. Acquisition Corp.*, 486 U.S. 847 (1988) (requiring recusal of judge who sat on board of non-profit *non-party* who might be affected by outcome of case, even when judge did not know of conflict). *Nachshin* neither mentioned nor distinguished *Liljeberg*, but because the appellant prevailed, he did not pursue the issue further.

of all *ex parte* communications, and then request supplemental briefing to determine the parties' position on the import of those disclosures.

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

Green Jacobson admits that there was no new notice of their new fee request. Their argument for compliance with Rule 23(h) is that the class received notice in 2002 that Green Jacobson would request $83.3 million. GJB65. Because Green Jacobson received only $58.8 million in the Court's order after some class members admittedly objected, GJ claims they were entitled to make new requests for up to another $24.5 million without notice to the class. GJB66. GJ cites absolutely no authority for this absurd proposition. For one thing, it contradicts the language of the notice, which said "Counsel for each of the Classes intend to apply to the Court for ***an*** award of attorneys' fees" (Appellee's Addendum 1 (emphasis added)): "***an*** award" means one award, not "multiple seriatim requests until $X is received." *Cf. United States v. St. Michael's Credit Union*, 880 F.2d 579, 596 (1st Cir. 1989) (reporting obligations of financial institution). There was no notice that there would be multiple requests or multiple awards.

If nothing else, the original $58.8 million fee ruling *was* a final order (unlike the interlocutory rulings GJ keeps citing as law of the case) that GJ did not appeal from. GJ thus lost any right to seek another $24.5 million (or even the $0.1 million it did seek) on grounds that contradicted the earlier ruling (OB44-46) without following appropriate Rule 23(h) procedures.

GJ relies upon *Powell* for its right to a supplemental fee request, but *Powell* predates Rule 23(h), and cannot be authoritative on the Rule's interpretation.

VI. The abandonment finding must be reversed.

Green Jacobson does not dispute that the district court's finding that the class was not "abandoned" was based on the premise that it was proper to make a *cy pres* award instead of a distribution to the class (OB46-48); the word "abandon" is absent from their brief. If this Court reverses and orders additional distribution to the class, it should also vacate the finding that Green Jacobson did not abandon the class, since that conclusion was based on a false premise.

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: October 28, 2013

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Certificate of Service

The filing attorney certifies that on October 28, 2013, the foregoing was filed electronically with the Clerk of the Court to be served by operation of the Court's electronic filing system. I have caused a copy to be served by first-class mail on the following attorneys not registered with the ECF system:

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