UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

Appeal No. 13-2620

David P. Oetting, Class Representative,

Plaintiff-Appellant,

— vs. —

Green Jacobson, P.C.,

Appellee.

Appellee's Brief

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CORPORATE DISCLOSURE STATEMENT

Green Jacobson, P.C., is a Missouri professional corporation whose shareholders are all individuals licensed to practice law in Missouri.

SUMMARY OF THE CASE

This appeal presents three primary issues:

(1) Did the district court abuse its discretion in finding that the distribution of surplus settlement funds to class members was impracticable and that, therefore, those surplus funds should be distributed under the *cy pres* doctrine?

(2) Did the district court abuse its discretion in concluding that Legal Services of Eastern Missouri was a suitable *cy pres* recipient?

(3) Did the district court clearly err in finding that the administration of the settlement presented complexities unforeseeable in 2002, when attorneys' fees were awarded, and did it abuse its discretion in awarding additional legal fees for eight years of post-settlement legal services?

Green Jacobson suggests that 30 minutes of oral argument per side is advisable in light of anticipated requests for argument time by counsel representing organizations expected to file as *amicus curiae* on issue two.

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LACK OF JURISDICTION

"Every federal appellate court has the special obligation to satisfy itself … of its own jurisdiction." *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 231 (1990). "[S]tanding is perhaps the most important of the jurisdictional doctrines." *Id.* (internal quotations and brackets omitted).

As Oetting admits in his Jurisdictional Statement, there is an issue whether he has standing to bring this appeal. *Brief* at 1.[1] Oetting does not have standing because the district court's order did not cause him injury. "Ordinarily, a party to a lawsuit has no standing to appeal an order unless he can show some basis for arguing that the challenged action causes him a cognizable injury, *i.e.*, that he is 'aggrieved' by the order." *In re Hecker*, 496 B.R. 541, 550 (B.A.P. 8th Cir. 2013) (citation omitted). "If a plaintiff has not suffered an injury, there is no standing and the court is without jurisdiction to consider the action." *Int'l Ass'n of Fire Fighters, Local 2665 v. City of Clayton*, 320 F.3d 849, 850 (8th Cir. 2003), quoting *Tarsney v. O'Keefe*, 225 F.3d 929, 934 (8th Cir.2000).

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[1] Appellant Oetting's opening brief is cited "*Brief*." The joint appendix is cited "J.A." Appellee's addendum is cited "Addn." Papers filed in the district court are cited by docket number, "Doc. [#]", if one was assigned, or by description and date, if a docket number was not assigned.

Here, the record shows that Oetting was not injured by the order he appeals. Oetting would have been injured by the order if he would be entitled to receive money in a third distribution, if the district court had ordered one rather than a *cy pres* award and attorneys' fees. But Oetting would not have received any money. A 2004 order of the district court bars him from participating in further distributions. That order, which directed the initial distribution of settlement funds to the class members, states:

> Plaintiff's counsel shall then … distribute any funds remaining in the Net Settlement Fund by reason of returned or unpaid checks or otherwise, to Authorized Claimants *who have cashed their checks*, provided that they would receive no less than $10.00 on such second distribution…

J.A. 15 (*Order of June 14, 2004* at 3 (emphasis added)).[2]

Oetting did not appeal this 2004 order when it was entered — and he has not appealed the order now, in his current appeal. That order is

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[2] *See also discussion infra* at 19-21, 35-36, which establishes that: the Settlement Agreement provided for *cy pres* in the discretion of the district court one year after initial distribution; the Notice to the class disclosed this provision; Oetting did not object to the *cy pres* provision; the Settlement Agreement was approved by the district court; that approval was affirmed by this court; and at least two subsequent, unappealed orders repeated that the undistributed balance of the Settlement Fund would be awarded *cy pres* in the district court's discretion.

therefore binding on Oetting under the law-of-the-case doctrine. "The doctrine applies to appellate decisions, as well as to final decisions by the district court that have not been appealed." *First Union Nat. Bank v. Pictet Overseas Trust Corp., Ltd.*, 477 F.3d 616, 620 (8th Cir. 2007) (citations omitted). "[T]he doctrine of law of the case mandates that parties are bound by prior, unappealed orders of the court." *In re Harper*, 194 B.R. 388, 394 (Bankr. D.S.C. 1996); *In re Henricksen*, 291 B.R. 833, 835 (B.A.P. 8th Cir. 2003).

We know Oetting did not cash his settlement checks because he told us so in a filing in the district court:

> Green Jacobson omits the fact that Oetting has never taken a dime from the Settlement fund in this case, although he was entitled to receive more than $22,000.

J.A. 100, ¶ 2. Oetting explained that he did not sign or deposit his settlement checks because he objected to release language accompanying the checks. J.A. 100-01, 105-07, 109.[3] As a result of his refusal to cash his

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[3] The release language stated: "The endorsement or deposit of this check is an acknowledgment that the payee has released all persons from all claims in connection with the litigation." J.A. 105-07. This release was consistent with the terms of the settlement agreement, which provided for all class members to release the defendants and related persons,

checks, Oetting did not receive a distribution as part of the second distribution to the NationsBank Class. *See id.* (showing no 2009 checks).

Oetting has no standing to appeal because, under the order of June 14, 2004, which was never appealed, even if Oetting were successful in overturning the *cy pres* order, he would not receive one cent as a result. For him, this appeal seeks an advisory opinion. Federal courts do not issue advisory opinions. Oetting's appeal should be dismissed for lack of standing.

Oetting offers two reasons why he should be permitted to pursue this appeal even though he has no stake in the outcome. First, he hypothesizes that the district court could decide to reopen the claims process for class members who failed to cash their checks in the first distribution. *Brief* at 2. "An injury-in-fact is a harm that is 'concrete and particularized' and

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the "Released Persons," as defined on page 12 of the Stipulation and Agreement of Compromise and Settlement ("Settlement Agreement)." Doc. 450. This was approved by the district court. *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*").

Oetting never sought relief from the district court with respect to the release language in the Settlement Agreement.

'actual or imminent, not conjectural or hypothetical.'" *Steger v. Franco, Inc.*, 228 F.3d 889, 892 (8th Cir. 2000); *Faibisch v. Univ. of Minnesota*, 304 F.3d 797, 801 (8th Cir. 2002), citing *City of Los Angeles v. Lyons*, 461 U.S. 95, 101–02 (1983). Oetting's suggestion that the district court would set aside an order entered over a dozen years ago to give him a do-over is wholly conjectural and hypothetical. It cannot support standing.

Second, Oetting contends that he is a fiduciary, with obligations to the class, and thus has standing in a representative capacity even if his individual claim is moot. *Brief* at 2. The cases Oetting string cites do not support his contention that Oetting *qua* fiduciary has standing notwithstanding his personal lack of a stake in the outcome of the appeal.

Sosna v. Iowa, 419 U.S. 393 (1975), was brought as a class action on behalf of Iowa residents who wanted to file for divorce but were blocked by a state law requiring a year of residence as a condition of filing. *Id.* at 397. While the case was pending, the class representative satisfied the one-year requirement and so no longer had a personal claim. The Supreme Court held that, notwithstanding the mooting of the class representative's personal claim, the case as a whole could continue, holding that a certified

class action does not necessarily lose Article III standing if the class representative's claim is mooted following class certification. *Id.* at 402.

The Supreme Court held, however, that a case can continue under these circumstances *only if* the claim is one that, by its nature, was likely to expire before the litigation process was completed:

> [T]he same exigency that justifies this doctrine serves to identify its limits. In cases in which the alleged harm would not dissipate during the normal time required for resolution of the controversy, the general principles of Art. III jurisdiction require that the plaintiff's personal stake in the litigation continue throughout the entirety of the litigation.

Id. at 401-02 (analogizing to cases in which claims are "capable of repetition, yet evading review").

Here, there is nothing in the nature of Oetting's securities fraud claims against defendants or his objection to the district court's *cy pres* order that would cause his personal stake (if any) to dissipate while the controversy was being resolved. This is not a case of "capable of repetition, yet evading review." There is no exigency here to justify relaxing the requirement for Article III standing that Oetting have a personal stake in the outcome of the appeal to be able to pursue it.

The second case in Oetting's string cite is *Martens v. Thomann*, 273 F.3d 159, 173 n.10 (2d Cir. 2001). Although footnote 10 of the decision includes language supportive of Oetting's position, the footnote is entirely *dicta*, as the court itself acknowledges in the first line of the footnote ("Although given our disposition we need not decide the issue…," *id.* at 172 n.10), before making the statement upon which Oetting relies: "class representatives *may* continue to represent a class even if their individual claims become moot." *Id.* at 173 n.10 (emphasis added).

Two things should be noted about *Martens*'s *dicta* statement. First, it states that representation *may* continue notwithstanding mootness. It does not state it will. Second, *Martens* cites two cases as authority as to when this might happen. The first is *Sosna*, discussed above, which only authorizes such continuing representation in the exigent circumstance where "the alleged harm would … dissipate during the normal time required for resolution of the controversy…" 419 U.S. at 401-02. The second case cited by *Martens* is *United States Parole Comm'n v. Geraghty*, 445 U.S. 388, 404 (1980).

Geraghty, like in *Sosna*, involved exigent circumstances. The plaintiff filed suit challenging the government's parole-release guidelines. The district court denied class certification. While plaintiff's appeal of the class certification denial was pending, he was released from prison, thus mooting his individual claim. 445 U.S. at 390. Noting that, "[s]ome claims are so inherently transitory that the trial court will not have even enough time to rule on a motion for class certification before the proposed representative's individual interest expires," *id*. at 399 (citing *Gerstein v. Pugh*, 420 U.S. 103, 110, n. 11 (1975) (pretrial detention)), the Supreme Court held that a plaintiff whose personal claims have been mooted by a change in circumstances may continue to represent the putative class *solely* for the purpose of appealing denial of class certification:

> Our holding is limited to the appeal of the denial of the class certification motion. A named plaintiff whose claim expires may not continue to press the appeal on the merits until a class has been properly certified. If, on appeal, it is determined that class certification properly was denied, the claim on the merits must be dismissed as moot.

Id. at 404 (citation omitted).

Nothing in *Geraghty* allows Oetting to pursue this appeal. There is no exigent circumstance here. There has been no change in circumstances. Oetting's claim was not inherently transitory. He is not appealing denial of class certification. The *Geraghty* exception to the standing requirement that an appellant have a personal stake in the outcome of an appeal simply does not apply here.

The last two cases Oetting cites in support of his contention that he has standing to bring this appeal are entirely inapposite. Neither case involves any issue about whether a plaintiff whose individual claims are moot nevertheless has standing to bring an appeal.

Sondel v. Northwest Airlines, Inc., 56 F.3d 934 (8th Cir. 1995), held that because class representatives are fiduciaries of the class, an adverse judgment entered against plaintiffs on claims brought by them as individuals in one action was *res judicata* as to the class they represented on the same claims in another action. *Id.* at 937-939.

Nachshin v. AOL, LLC, 663 F.3d 1034 (9th Cir. 2011), was an appeal by class members from a district court's approval of a class action settlement over their objections. The Ninth Circuit held that the *cy pres* recipi-

ents selected by the district court were improper. While that decision may be relevant to the merits of Oetting's appeal, it is not relevant to whether Oetting has standing to bring this appeal in the first place.

Finally, Oetting cites the district court's order adding Oetting to those receiving notice as a reason to believe he has standing. *Brief* at 4 (citing J.A. 27). But this order is irrelevant to the standing issue. Oetting's direct receipt of notice of court filings adds nothing to any interest he might have in the issues on appeal. A party has no standing to appeal if he is not aggrieved by a court's action. *Supra* at 1-2.

For all these reasons, this court should hold that Oetting lacks the personal stake in the outcome of this appeal to satisfy Article III standing requirements, and that there are no facts or circumstances present sufficient to justify relaxing those requirements.

This appeal should be dismissed for lack of appellate jurisdiction.

COUNTERSTATEMENT OF THE CASE AND OF THE FACTS

Oetting's statement of the case and statement of facts include many assertions which share the qualities of being both inaccurate and irrelevant. The inaccuracies may be understandable. The court file in this case is staggeringly large and includes filings going back to 1998.

To spare the court unnecessary additional reading, appellee will only correct those erroneous assertions relevant to some issue on appeal and will leave the rest alone. Appellee will also add material facts overlooked by Oetting but important to resolution of this appeal.

A. Stock drop and bounce.

Oetting repeatedly mentions the severe price drop that Bank of America Corporation ("BAC") stock suffered following BAC's October 14, 1998 disclosure that Old BankAmerica had suffered a significant loss as a result of its relationship with the hedge fund D.E. Shaw & Co. *See, e.g., Brief* at 7 ("transaction … gone sour").

Oetting then uses this $5.87 per share stock drop throughout his brief as establishing both the fact and the amount of the NationsBank Class's loss, contending that this supports his claim that the settlement

distributions did not fully compensate the class for its loss. *See, e.g., Brief* at 27 ("Bank of America shareholders lost $5.87 a share, but were scheduled to receive at most 22 cents a share from the settlement fund").[4]

Oetting's discussion of the stock drop is so incomplete as to be misleading. Yes, BAC stock did drop $5.87 a share following the October 14, 1998 news release, but even plaintiffs' experts agreed that the drop did not result solely or even chiefly from the D.E. Shaw news. While the $372 million charge announced relating to Shaw was large, the Shaw loss was just one piece — and far from the largest — of the negative news released that morning in BAC's October 14 press release. Also disclosed were:

> (i) a $500 million addition to its allowance for credit losses; (ii) reduced net interest margin; (iii) a decline in net interest income of $182 million; and (iv) a decline in non-interest income of $1.2 billion (which included a $250 million write down in a mortgage servicing portfolio and losses in the company's own trading activities).

Addn. 21; *see also* Addn. 10.

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[4] Oetting's 22 cent figure is an error. Members of the NationsBank Class were to receive 34 cents per share if all shareholders participated in the settlement. Addn. 1.

BAC's stock did not stay down following this news. On October 13, the day before the announcement, BAC closed at $53.93 per share. On October 14, the stock dropped precipitously, closing at $48.06. By October 20 — less than a week after the plummet — the stock closed at $56.06, well above the price it was at before the announcement of the Shaw losses. Addn. 10, 21. *And the stock price stayed up.* "The average trading price for the 90 trading-day period fol1owing the October 14 announcement was $61.35…" Addn. 10-11. This was higher than the price before the October 14 disclosures and "higher than the price immediately prior to the merger." Addn. 21.[5]

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[5] The rapid and complete bounce-back of BAC's stock price within days of the Shaw disclosure, which disclosure was at the core of plaintiffs' claims, was one of the key facts that drove settlement of the class action. *Cf. BankAmerica II*, 227 F. Supp. 2d at 1105, where the district court noted that the classes' federal claims are subject to the PSLRA bounce-back provision, while the BankAmerica Purchaser Class's California-law claims are not.

To finesse the absolute defense provided by the PSLRA's bounce-back provision, the NationsBank Class's theory was that timely disclosure of the Shaw relationship by Old BankAmerica to the Nations-Bank Board of Directors would have resulted in a renegotiation of the exchange ratio in the stock-for-stock merger between NationsBank and Old BankAmerica, thereby giving the NationsBank shareholders a larger ownership interest in the merged bank — and lasting damages notwith-standing the bounce back.

Thus, from a factual and evidentiary standpoint, it is difficult to state that the NationsBank Class suffered *any* loss, let alone the $5.87 per share loss that Oetting posits.[6]

This theory, although strongly supported by plaintiffs' excellent expert witnesses, was a novel one, was not supported by any published research in the field, and had been developed specifically for the case. Plaintiffs' experts were the subject of extensive *Daubert* motions; those motions were pending at the time of the settlement. The risk that the testimony of plaintiffs' damages experts would be excluded at trial was another key fact driving settlement.

The risks posed by the bounce-back and the possibility of the experts' testimony being excluded were disclosed to the members of the NationsBank Class in the Notice sent to them. Addn. 5, 6 (¶¶ VII, IX).

Pursuant to the terms of a protective order entered by the district court, plaintiffs' expert reports (along with many other sealed filings and discovery depositions and documents) were destroyed by the parties once the final judgment approving the settlement was affirmed by this court, *In re BankAmerica Corp. Sec. Litig.*, 350 F.3d 747, 750 (8th Cir. 2003) ("*BankAmerica IV*"). Thus, the documents cannot be provided as part of the record here.

[6] It was Oetting's extreme view on damages that caused the district court to reject his valuation of the NationsBank Class's claims as "bordering on fantasy." *BankAmerica IV*, 350 F.3d at 750 (quoting district court). Oetting's extremism continues today with his views of the potential for recovery from the claims administrator.

B. Class Counsel added millions to the funds distributed to the NationsBank Class without taking a fee.

The St. Louis brokerage firm Edward Jones & Company ("Jones") held in its street name approximately 5 million shares of NationsBank stock for some 9,000 customers. Jones, through its negligence, failed to either provide notice to its customers of the settlement or provide name and address information about the customers to the claims administrator. As a result, Jones' street-name customers failed to make claims against the settlement within the time period set by the district court. Doc. 670; Doc. 677; Doc. 777-1 at 3-4, ¶ B.

When this failure was discovered, Jones sought court permission to allow its customers to file late claims, noting that there were sufficient undistributed funds in the NationsBank Class's settlement fund to cover its customers' claims. Green Jacobson opposed Jones' motion and the district court rejected it. Docs. 670, 677.[7] Green Jacobson then negotiated

[7] While there were sufficient funds to cover the Jones customers' claims standing alone, there were other substantial late claims already under submission to the district court, and Jones' customers had not yet filed claims — indeed, Jones at the time had not even informed its customers of the BankAmerica settlement or Jones' negligence. Doc. 670 at 2; Doc. 677 at 3.

a settlement with Jones — strongly encouraged by the district court — under which Jones paid its customers out of its own funds the amounts they would have received under the settlement.[8] By December 2008, Jones had paid a total of $2,323,821.02 to members of the NationsBank Class. Doc. 707 at 1, 4; Doc. 712 at 3. This settlement with Jones "effectively added to the total settlement funds available to [NationsBank] class members." Doc. 777-1 at 4, ¶ B.[9]

Green Jacobson received no fee out of the funds provided by Jones to its street-name customers, although this was new money for the class. The time Green Jacobson spent in dealing with the Jones situation, however, and in providing tax advice to class members who received payment out of Jones' funds rather than out of the NationsBank settlement fund, was

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[8] In its order denying Jones' motion to reconsider its application to allow its customers to file late claims, the district court excoriated Jones for its negligence and its failure to inform its customers of its negligence, which the district court suggested was a breach of fiduciary duty. The district court suggested that Jones assure payment to its customers "out of its own pocketbook." Doc. 677 at 2-3 & n.3.

[9] In 2009, while the second distribution was approved but stayed, Jones sought an equitable lien on the undistributed surplus for the over $2.3 million it had paid its customers. Docs. 706, 707. That effort was rejected by the district court. Doc. 712.

included in Green Jacobson's fee application that resulted in the recent $98,114.34 fee award.

C. The Class had adequate notice to permit the additional attorneys' fees and the *cy pres* award.

In his brief, Oetting repeatedly asserts that the district court's award of additional attorneys' fees to Green Jacobson and its decision to make a *cy pres* award out of the undistributed surplus settlement were procedurally defective because the class had not been given notice of either action. The record shows that Oetting is wrong.

With regard to attorneys' fees, the Notice of Proposed Class Settlement ("Notice," Addn. 1-8) sent to the class members advised them that:

> The total attorneys' fees which will be sought will not exceed twenty-five percent (25%) of the recovery. The maximum total attorneys' fees to be sought to be paid by the NationsBank Classes will be $83.3 million…

Addn. 1.

There were almost no objections to the fee requests; the few objections that mentioned attorneys' fees were from persons opposed to class actions on principle. No objections were filed by any institutional investor. Doc. 493 (overview of objections); *BankAmerica I*, 210 F.R.D. at 704 & n.6

(describing objections). *Oetting himself did not object to class counsels' attorneys' fee request.* [Doc. 466]. Indeed, at the hearing on attorneys' fees held May 31, 2002, Oetting, speaking on behalf of himself and (purportedly) two other objectors, stated:

> We don't object to the fee request. We don't object to the expense request. We felt the NationsBank lead counsel did a good job with the case for three and a half years.

Addn. 16.

Thus, the NationsBank Class and Oetting were given notice that class counsel could receive attorneys' fees of up to $83.3 million — equal to 25% of the gross recovery — and had no objection to that possibility. The district court, however, only awarded class counsel attorneys' fees equal to 18% of the *net* recovery after all costs and expenses. *In re BankAmerica Corp. Sec. Litig.*, 228 F. Supp.2d 1061, 1064 & n.4 (E.D. Mo. 2002) ("*BankAmerica III*").

The district court calculated the fee for the NationsBank Class's counsel to be approximately $58.8 million. *Id.* at 1066. *Thus, the fee awarded by the district court was approximately* ***$24.5 million less*** *than the amount to which the class, and Oetting, had no objection.*

The additional $98,114.34 award by the district court to Green Jacobson is substantially less that this $24.5 million difference. *Thus, the total fees awarded by the district court to class counsel for the NationsBank Class, including the $98,114.34 on appeal, is* ***still $24.4 million less*** *than the potential attorneys' fees of which Oetting was given notice.*

With respect to the *cy pres* award, Oetting's assertion that the class failed to get notice also cannot be sustained under the record. The Settlement Agreement stated:

> 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

Doc. 450 at 30, ¶ 20.

The Notice to the class informing them about the proposed settlement stated:

> 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 Section 501(c)(3) organizations as determined by the Court in its sole discretion. If the unclaimed amounts are substantial, a second distribution may be made, on terms which cannot presently be determined, subject to the approval of the Court.

Addn. 7, § X.C.

No one — including Oetting — objected to the settlement provision providing for a *cy pres* distribution of unclaimed settlement funds. Oetting's brief in his appeal from the district court's approval of the settlement never mentions the *cy pres* provisions. *See* Appellants' Brief, *In re BankAmerica Corp. Sec. Litig.*, Appeal No. 02-3780 EMSL (filed January 14, 2003).

Notice that there would be a *cy pres* distribution was repeated from time to time in the district court's orders concerning distribution and claims administration. *See, e.g.*:

- *BankAmerica III*, 228 F. Supp.2d at 1070.[10]
- J.A. 15 (June 14, 2004 order).[11]
- Doc. 647 at 3 (February 4, 2005 order).[12]

While Oetting appealed the final judgment entered as part of *BankAmerica III*, he did not appeal the *cy pres* portion of that final judgment. Oetting did not appeal the June 14, 2004 or the February 4, 2005 orders when entered, and he does not appeal them now in his current appeal, although he is aware of at least the 2004 order, having discussed it in his brief, *Brief* at 9, and included it in the joint appendix, J.A. 13-16.

Consequently, these orders are the law of the case.

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[10] "As set forth in the settlement agreement and notice of settlement, all settlement funds remaining unclaimed one year after the initial date of settlement distribution … may be contributed as a donation to one or more non-sectarian, not-for-profit Section 501(c)(3) organizations as determined by the Court in its sole discretion."

[11] "If, after five months following said second distribution, any funds shall remain in the Net Settlement Fund, then such balance shall be contributed to non-sectarian, not-for-profit, 501(c)(3) organization(s) as determined by the Court in its sole discretion."

[12] "If after November 18, 2005 any funds shall remain in the Net Settlement Fund, then such balance shall be contributed to non-sectarian, not-for-profit, 501(c)(3) organization(s) as determined by the Court in its sole discretion."

D. Oetting became a class representative through misrepresenting his ownership interest in NationsBank.

Throughout his brief, Oetting describes himself as "the only living NationsBank Class class representative still participating in the case." *See, e.g., Brief* at 4. And that is true. But Oetting does not disclose that his application to be a lead plaintiff was tainted with a material exaggeration of his ownership interest in NationsBank stock.

As this court discussed in its prior opinion affirming the district court's approval of the settlement, Congress enacted the Private Securities Litigation Reform Act of 1995 (the "PSLRA") to protect class members' interests against lawyer-driven litigation by requiring a district court to appoint as lead plaintiff or lead plaintiffs the "most adequate plaintiff," and adopting the rebutable presumption that the most adequate plaintiff was the "person or group of persons that … has the largest financial interest in the relief sought by the class." The lead plaintiff or plaintiffs select class counsel. *BankAmerica IV*, 350 F.3d 747, 751 (8th Cir. 2003), citing 15 U.S.C. § 78u–4(a)(3)(B)(iii)(I)(bb).

Oetting was one of several people appointed as a lead plaintiff of the NationsBank Holder Class. (There was also a NationsBank Purchaser

Class; Oetting has never been a lead plaintiff or class representative of that class.) This court noted that the lead plaintiff group, "owned, collectively, less than one tenth of one percent of the outstanding shares in NationsBank. Institutional investors owned more than forty percent of NationsBank, but no institutional investor came forward to serve as a lead plaintiff." *BankAmerica IV*, 350 F.3d at 749.

Oetting asserted in his lead plaintiff application that he owned or controlled 125,000 NationsBank shares. In his brief filed in *BankAmerica IV*, Oetting stated "he and his family owned or controlled approximately 125,000 shares of NationsBank stock." Ultimately, however, Oetting stipulated he personally owned **only 18,724 shares**. Addn. 24-25 (summarizing history); *see also* J.A. 105 ($10,177.72 settlement check payable to Oetting indicates ownership of about 20,770 shares at approximately 49 cents per share).

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. Oetting might still be "participating in the case," but it would be in his true role, that of an objector.

E. The record supported the district court's conclusion that the value of Oetting's collateral suits was low.

Oetting contends that the district court had "no record evidence" to support its conclusion that "the value of Oetting's suits against third parties on behalf of the class was low." *Brief* at 15, citing his addendum at 5 (same as J.A. 139). Oetting is mistaken — or perhaps he does not consider filings by Green Jacobson lawyers to be record evidence.

In a sworn affidavit, Green Jacobson shareholder Martin Green stated, with respect to the fraud perpetrated by the claims administrator's former employee, Christian Penta, that "neither the claims administrator's net worth nor its insurance are sufficient to provide for more than a negligible recovery of the total amount stolen through this fraud." Doc. 777-1 at, ¶ F.[13] *See also* Doc. 784 (describing Pennsylvania litigations); J.A. 124-25 (attorney for claims administrator describes amounts recovered as of January 2013 from the Penta gang; attorney only anticipates "continuing small, periodic payments into the restitution fund from the criminal defendants," of which 17.01% will belong to the NationsBank Class).

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[13] Oetting failed to include Green's affidavit in the joint appendix, although it was filed as an attachment to the motion reproduced at J.A. 40-48.

F. Oetting did not object to Legal Services as a *cy pres* recipient, and his claim of a lobbying "campaign" to obtain a *cy pres* award for Legal Services has no factual basis.

The *cy pres* motion and brief filed by Green Jacobson suggested three possible recipients of *cy pres* awards out of the surplus settlement fund. The suggested recipients were: Legal Services of Eastern Missouri ("LSEM"); Mathews Dickey Boys' & Girls' Club; and The Backstoppers, Inc. J.A. 47, 55-57.

Oetting objected to an award of *cy pres* distributions generally, and also objected specifically to Mathews Dickey and The Backstoppers as *cy pres* recipients. But Oetting asserted no objection to LSEM as a recipient of a *cy pres* award should the district court decide that *cy pres* distributions were proper here. J.A. 69-70. The relevant portion of Oetting's opposition stated in its entirety:

> The *cy pres* doctrine is appropriate to use when there are unclaimed funds to distribute and the value of the funds does not justify, administratively, the awarding of additional damages to the plaintiffs on a *pro rata* basis. However, the choice of charitable beneficiary should not be chosen arbitrarily. In choosing the recipient of a *cy pres* distribution, the court should take into consideration the underlying purpose of the lawsuit, and the indirect

> prospective benefit of the class. Here the lawsuit involved securities and disclosures, and the class members were shareholders of a bank. *There is no connection to the Mathew Dickey Boys Club of St. Louis, or the Backstoppers*, although those organizations may do good works in and around the St. Louis metropolitan area.

J.A. 69-70 (citations omitted; emphasis added).

Although Green Jacobson had recommended LSEM for the largest share of the *cy pres* pie — 50% — Oetting never asserted in either his original opposition (J.A. 61-76) or in his surreply (J.A. 98-103) that a *cy pres* award to LSEM was improper.

The fact that Oetting objected to Mathew Dickey and The Backstoppers but not LSEM would lead a reasonable person to believe that Oetting did not have an objection to LSEM as a *cy pres* recipient. And thus it came to pass that the district court heeded Oetting's objection as to the proposed recipients and entered its order denying *cy pres* awards to Mathew Dickey and The Backstoppers, the two organization to which Oetting objected, and instead awarded the entire surplus in *cy pres* to LSEM, the one organization to which Oetting did not object. J.A. 139, 142-43.

Thus, if the selection of LSEM as a *cy pres* recipient was error — and it was not — it was an error Oetting invited through his own filings.

After the *cy pres* award was made to LSEM, Oetting asserted new objections, contending, without evidence, that there was "a campaign of unknown scope to lobby the district court with *ex parte* communications supporting a *cy pres* award to LSEM." *Brief* at 12.

Oetting knows better. He knows that there was no "campaign." He just likes to use the term for the excitement and doubts it generates.

This issue of an alleged *ex parte* campaign in favor of LSEM has been briefed in connection with Oetting's Rule 10(e) motion in this court. This motion was taken with the case, and needs no further discussion here.

G. Oetting's contention that Green Jacobson violated an "automatic stay" in complying with the district court's order has no basis in law.[14]

Oetting contends that Green Jacobson's compliance with the district court's June 24, 2013 order violated an "automatic fourteen-day stay" imposed by F.R.Civ.P. Rule 62(a), on "final order[s] for monetary pay-

[14] Although this would appear to raise a legal issue and not a factual one, the issue was only asserted in Oetting's statement of facts, and is therefore addressed in Green Jacobson's counterstatement.

ment." Oetting complains that Green Jacobson's compliance with the Order came "after Oetting notified Green Jacobson that he would appeal and that no money should be distributed…" *Brief* at 15-16.[15]

Oetting's contention has a problem with its major premise: Rule 62(a) does not impose a 14-day stay on final orders for monetary payment. What Rule 62(a) provides is that one cannot use judicial process to *enforce* a judgment within 14 days after that judgment is entered:

> [N]o execution may issue on a judgment, nor may proceedings be taken to enforce it, until 14 days have passed after its entry….

Nothing in Rule 62(a) prohibits *voluntary* compliance with an order for payment. The authorities cited by Oetting (*Brief* at 15 n.5) do not hold to the contrary.

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[15] Oetting's reference to his "notice" to Green Jacobson does not cite to any part of the record. The letter to which he refers is not in the record. This may be intentional, given the ridiculous threat contained in this June 26, 2013 letter, which states: "Any attempt at paying these monies out at this time will be considered a further breach of your duty to the class."

Obeying a court order is not a breach of duty. As officers of the court, the lawyers at Green Jacobson are obliged to obey the court's orders. Green Jacobson lawyers' duty do not include ignoring orders and sitting on them, as Oetting demanded of them.

H. Oetting makes other, minor errors in his facts.

Although it may seem like quibbling, Green Jacobson believes it is appropriate to correct two additional minor errors made by Oetting that might tend to cast an inaccurate light:

First, Judge Nangle's home court was not in the Eastern District of Missouri at the time the lawsuits below were filed. *Brief* at 8. Judge Nangle was transferred by the Chief Justice to the Southern District of Georgia in 1990, when Judge Nangle took senior status. When the MDL assigned this case to St. Louis, Judge Nangle's home court was in Savannah, Georgia, and he commuted to St. Louis for hearings.

Second, the lodestar amount cited by Oetting in connection with his discussion of the attorneys' fees awarded by the district court in connection with the settlement was not "Green Jacobson's lodestar." *Brief* at 9. It was the combined lodestar amount of the approximately 20 law firms that performed legal services for the NationsBank Class during the course of this complex class action. The attorneys' fee paid to counsel for the NationsBank Class did not all, or even mostly, go to Green Jacobson, as Oetting implies. It was allocated among the 20 law firms.

SUMMARY OF THE ARGUMENT

The district court did not err in awarding $2.6 million in surplus funds to LSEM, a non-sectarian, not-for-profit 501(c)(3) organization, or in awarding $98,114.34 in attorneys' fees to Green Jacobson, because:

1. The Settlement Agreement, which is binding on the district court and the parties, directed the district court to distribute the surplus settlement funds, in its sole discretion, to one or more non-sectarian, not-for-profit 501(c)(3) organizations.

2. At the time of the fairness hearing, neither Oetting nor any other class member objected to the provision of the Settlement Agreement directing the district court to distribute surplus settlement funds to one or more non-sectarian, not-for-profit 501(c)(3) organizations, although all were given proper notice of the provision. The provision was also never mentioned in Oetting's appeal from the district court's approval of the settlement. Oetting waived his right to object to such a distribution. The district court's ability to make the distribution is the law of the case.

3. The district court did not clearly err in finding that it would be impracticable to make a third distribution of funds to benefit those who

were injured by the misconduct that was resolved by the settlement. The district court therefore did not abuse its discretion in not ordering a third distribution from the NationsBank settlement fund.

4. Oetting did not object to Legal Services of Eastern Missouri as a recipient of surplus settlement funds, although Oetting did object to two other potential recipients proposed by Green Jacobson. The district court did not grant any funds to the two potential recipients to whom Oetting objected. Oetting therefore was not aggrieved by the award to LSEM. If the district court's selection of LSEM as a recipient was an error, it was an error invited by Oetting.

5. LSEM is an appropriate recipient of surplus settlement funds here. Class actions are procedural devices to enable access to justice for persons whose claims are too small to economically justify individual legal representation. Similarly, legal services agencies like LSEM promote access to justice for persons whose claims are too small to economically justify representation by private-sector lawyers. Both this case and many of the cases LSEM handles involve overpayments for a purchase caused by a failure to disclose material information.

6. *Cy pres* awards are analytically identical to IOLTA funds: both involve money that is the property of identifiable persons, but in both cases the total expense of getting the money to the owners outweighs the value to the owners, or delivery is otherwise impracticable. Under IOLTA programs, funds collected go largely to legal services agencies like LSEM.

7. The district court did not err in granting Green Jacobson additional attorneys' fees in the sum of $98,114.34 for its services administering the class action settlement after 2004. The amount and the complexity of the additional legal work was not foreseeable in 2002 when the district court made its initial award of attorneys' fees, and the legal work was properly compensable at current hourly rates.

8. The class members received proper notice of potential attorneys' fees when they received the Notice in 2002. Even with the additional $98,114.34 fee to Green Jacobson, the total fees paid to NationsBank class counsel is still $24.4 million less than the amount stated in the Notice. Oetting supported the much higher fee requested in 2002 and therefore waived any objection to the present, marginal increase in fees, as the total fees are still far below the fees he had supported previously.

ARGUMENT

I. The district court did not clearly err in finding that a third distribution of surplus settlement funds to class members was impracticable and that, therefore, those surplus funds should be distributed under the *cy pres* doctrine.

The district court's factual finding that the distribution of surplus settlement funds to class members was impracticable is reviewed for clear error. "Under the clearly erroneous standard, we will overturn a factual finding only if it is not supported by substantial evidence in the record, if it is based on an erroneous view of the law, or if we are left with the definite and firm conviction that an error was made." *Kingman v. Dillard's, Inc.*, 721 F.3d 613, 616 (8th Cir. 2013).

Powell v. Georgia-Pacific Corp., 119 F.3d 703, 706 (8th Cir. 1997), is on point as to the standard of review. In *Powell* this court affirmed a *cy pres* distribution applying the clearly erroneous standard, holding that "[t]he [district] court found that it would be extremely difficult to distribute the funds *pro rata*, and we cannot say that this factual finding is clearly erroneous."

A. The district court's ability to, in its sole discretion, grant a cy pres award is the law of the case, and Oetting waived his right to object to such an award.

"Where a party could have raised an issue in a prior appeal but did not, a court later hearing the same case need not consider the matter." *United States v. Kress*, 58 F.3d 370, 373 (8th Cir. 1995); *Professional Fire-fighters Ass'n of Omaha, Local 385 v. Zalewski*, 678 F.3d 640, 649 (8th Cir. 2012). And, if the issues were ripe and "should have been raised" in the earlier appeal, they are waived and will not be considered by this court. *Kress*, 58 F.3d at 374. "[U]nder the law-of-the-case doctrine … a decision in a prior appeal is followed in later proceedings unless a party introduces substantially different evidence, or the prior decision is clearly erroneous and works a manifest injustice." *United States v. Callaway*, 972 F.2d 904, 905 (8th Cir. 1992).

Here, Oetting waived his objection to the *cy pres* award by not raising it before or during his first appeal. As a result, the district court's power to distribute the surplus settlement funds to a charity it selected was established as the law of the case. Oetting's appeal of the *cy pres* award should therefore be rejected without further consideration.

The Settlement Agreement between the NationsBank Class and the defendants was unambiguous:

> All settlement funds remaining unclaimed one year after the initial date of the settlement distribution … 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.

Doc. 450 at 30, ¶ 20.

The Notice provided to the members of the NationsBank Class told them the district court had the discretion to order a *cy pres* distribution if there were unclaimed funds after a year. The Notice used precisely the same language as the Settlement Agreement. Addn. 7, § X.C.

No one objected to the *cy pres* provision of the settlement. **Oetting objected to the settlement, but he did not object to the *cy pres* provision of the Settlement Agreement.** Moreover, Oetting conceded at oral argument in his initial appeal that the settlement was fair and adequate. *BankAmerica IV*, 350 F.3d at 751. If the *cy pres* provision was improper, then the settlement could not have been fair and reasonable. *Accord Dennis v. Kellogg Co.*, 697 F.3d 858, 867 (9th Cir. 2012) (improper *cy pres* provision causes class action settlement to not be fair and reason-

able). Oetting "did not raise this issue [of *cy pres*] in [his] objection papers; therefore, the issue has been waived." *Barnes v. Fleetboston Fin. Corp.*, 2006 WL 6916834 at *2 (D. Mass. Aug. 22, 2006) (argument on appeal that "a court must first make a threshold finding that it is impracticable to distribute settlement funds to the class members before a *cy pres* distribution may be made" waived because not raised in objection) (unreported).

Because Oetting and the rest of the NationsBank Class did not object to the *cy pres* provision of the Settlement Agreement during the settlement approval process or during Oetting's appeal from settlement approval, the argument is waived and the judgment below should be affirmed on this simple procedural ground.

B. The district court was required under the Settlement Agreement to make a cy pres award as it determined in its sole discretion.

Although not relied on by the district court as a basis for its order, this court can nonetheless affirm the *cy pres* order based on the general law of contracts. "This court can affirm on any basis supported in the record." *Spirtas Co. v. Nautilus Ins. Co.*, 715 F.3d 667, 670-71 (8th Cir. 2013).

As noted previously, the Settlement Agreement provided:

> All settlement funds remaining unclaimed one year after the initial date of the settlement distribution … 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…

Doc. 450 at 30, ¶ 20.

Under the law as stated by one of the cases most strongly relied upon by Oetting, *Klier v. Elf Atochem North American, Inc.*, 658 F.3d 468 (5th Cir. 2011), the district court was authorized to direct the surplus funds to any non-sectarian, not-for-profit 501(c)(3) organization it chose, in its sole discretion, because the district court was required to follow the terms of the Settlement Agreement as written. *Klier* held:

> Because a district court's authority to administer a class-action settlement derives from Rule 23, the court cannot modify the bargained-for terms of the settlement agreement. That is, while the settlement agreement must gain the approval of the district judge, *once approved its terms must be followed by the court and the parties alike*. The district judge must abide the provisions of the settlement agreement, reading it to effectuate the goals of the litigation. This is not a free exercise of *cy pres*, but a determination of how the settlement agreement's many provisions define the class's property interests and allocate those interests once

> created. *The terms of the settlement agreement are always to be given controlling effect.*

Klier, 658 F.3d at 475-76 (emphasis added).

Under *Klier*, the *cy pres* doctrine and its many requirements need not be considered if the settlement agreement itself provides for a distribution of the surplus to charity, as it does in here. "*Cy pres* comes on stage only to rescue the objectives of the settlement when the agreement fails to do so." *Id.* at 476 (contrasting *Klier* with "case where the settlement agreement itself provides that residual funds shall be distributed via *cy pres*").

Since the district court below simply followed the parties' written agreement, as it was required to do in this class action settlement, the judgment should be affirmed on this simple contractual ground.

C. The district court did not clearly err in finding that the NationsBank Class had been fully compensated by the prior distributions and therefore no longer had an equitable interest in the undistributed surplus.

The district court found that, "All class members submitting claims have been satisfied in full." J.A. 138.

Oetting takes it as a given that this finding is error. Oetting cites the $5.87 stock drop following the October 14, 1998 press release to argue that

his proposed third distribution to the NationsBank Class "would only make class members slightly less undercompensated." *Brief* at 27.

Oetting bases his assertion that the settlement was undercompensating on the damages alleged in the complaint rather than on any facts in the record. *Id.* at 28.

Oetting goes so far as to state that the undercompensating nature of the initial distribution is the law of the case, based upon the district court's statement "that the initial settlement amount was 'only a percentage of the damages that [plaintiffs] sought." Oetting attributes this statement to the district court without specific citation to the record. *Id.*, citing generally to *BankAmerica I*.

Oetting's arguments are wrong.

First, the notion that NationsBank Class members have been undercompensated is not the law of the case. *BankAmerica I* was discussing the proposal to pay members of the NationsBank Class 34 cents per share. Addn. 1. Ultimately, members of the class received 49 cents per share in the first distribution, J.A. 105, and some received an additional payment in the second distribution.

While the district court may have stated that 34 cents was not full compensation, it never said whether 49 cents was or was not full compensation. Indeed, *BankAmerica I* never made any finding as to the amount by which any shareholder was damaged.

34 cents is 69% of 49 cents. Thus, 34 cents is "only a percentage" of 49 cents. So it is perfectly conceivable, and fully consistent with *BankAmerica I*, for the NationsBank Class members to have been undercompensated at 34 cents and fully compensated at 49 cents. The district court made no finding about the 49-cent question, and its finding on the 34-cent question is simply not law-of-the-case as to the latter. Oetting errs in contending it is.

Oetting also errs in comparing the amount distributed with amounts alleged in the complaint rather than amounts established by evidence. The parties engaged in a lot of discovery after the complaint was filed. This included more than 75 depositions and review of more than 1.5 million documents. The parties entered into thousands of stipulations of fact. *BankAmerica I*, 210 F.R.D. at 702. Oetting fails to point to any evidence to support his claim of undercompensation. He merely states that it is so.

The cases Oetting cites on the concept of undercompensation of class members do not assist him. *Klier* — the same case that holds that the district court and the parties are bound by the terms of an approved settlement agreement — is too factually dissimilar to the present case to give any guidance on the issue of undercompensation.

Klier involved toxic emissions, including arsenic, from an industrial plant. The court certified three subclasses. Subclass A consisted of persons who suffered adverse health affects from their exposure to the toxins. Subclass B consisted of persons who had been exposed to the toxins but had not yet suffered an adverse health affect. Subclass C consisted of property owners in the affected area. *Klier*, 658 F.3d at 472.

The Subclass A persons received relatively small cash payments for their serious, unliquidated injuries. The district court described the Subclass A compensation as "far from full." For example, Klier, the appellant, had "endured cancer, nerve damage, and a heart transplant and received $6,500 for his trouble." *Id.* at 478.

The Subclass B persons were to receive medical monitoring, but their participation rate was low and many of those who did participate initially

dropped out. As a result, there was $830,000 left from funds earmarked for medical monitoring that was not spent. *Id.* at 472-73. The parties agreed that a distribution of these funds among the many members of Subclass B was not economically feasible. *Id.* at 473.

Klier moved that the surplus Subclass B funds be reallocated to members of Subclass A. He noted that it would be economically feasible to divide the funds *pro rata* among the members of the subclass, and that it would be equitable since the members of Subclass A had suffered serious physical ailments for which they had not been fully compensated. The district court never directly addressed Klier's motion and instead donated the funds to four local charities. *Id.* at 473.

The court of appeals reversed, noting that the settlement agreement did not include a provision for a charitable distribution of any residual funds but, instead, provided for *pro rata* distributions among the members of the subclass of any funds undistributed to that subclass and also directed that the district court could makes changes to the distribution as necessary for the benefit of the settlement class members. *Id.* at 476-77.

Klier does not support Oetting's position here for two reasons. First, the district court in *Klier* held that the Subclass A members had been undercompensated, while the district court here held to the contrary that, "All class members submitting claims have been satisfied in full." J.A. 138. Second, the settlement agreement in *Klier* did not authorize a charitable gift but instead directed that all of the funds go to the benefit of the class members, while the Settlement Agreement here provided exactly the opposite, authorizing donations to charity at the district court's sole discretion after a year from the date when the initial distribution was completed.

The second case Oetting cites in support of his undercompensation argument is *Beecher v. Able*, 575 F.2d 1010, 1016 (2d Cir. 1978). *Brief* at 28. *Beecher* was a securities case. Actually, it was a whole group of cases, some class actions, some individual actions, that were consolidated. The district court certified three classes and held a trial for Class 3 on one set of claims. The trial ended in favor of Class 3 on both liability and damages. The district court then found defendant liable to Class 3 on other claims and set a damages trial for those other claims. 575 F.2d at 1012. The cases were all then settled. The settlement agreement expressly provided that

no part of the settlement fund would revert to defendant regardless of the number or amount of claims allowed against the fund. *Id.* at 1013.

Claims were less than expected, much less. The defendant moved to have the settlement modified to have the surplus revert to the defendant on the ground that otherwise the few class members who had filed claims would get an inequitable windfall. *Id.* at 1014-15. The district court rejected the request for reversion. Instead, the district court doubled the amount paid to those members of Class 1 and Class 2 who had filed claims, and transferred the balance to be paid to the members of Class 3. *Id.* at 1014. This type of reallocation was expressly permitted under the settlement agreement. *Id.*

No one contended that members of Class 1 or Class 2 were fully compensated even with the increased payments, and as to Class 3, payment under the settlement remained capped at actual loss.

> Although the court's reallocation will allow members of Class 3 to receive approximately $160 per debenture as opposed to $30 per debenture (or actual loss if less) [provided by the settlement agreement], there was testimony at trial of the Class 3 action that damages to Class 3 members might have been as much as $470 per debenture.

Id. at 1016.

Finally, *cy pres* was not an issue in *Beecher*. The question was simply whether undistributed funds should be returned to the defendant, notwithstanding a contractual agreement to the contrary, or divided among the class members, as directed by the contract.

If there is any lesson to be gathered from *Klier* and *Beecher*, it is that courts read the terms of the settlement agreement negotiated by the parties and approved by the district court, and hold those terms binding. Thus, in *Klier*, funds were to be reallocated for the benefit of the class members; in *Beecher*, no refund was to be made to the defendant; and here the surplus is to be distributed to a charity selected by the district court.

D. The district court did not clearly err in finding that a third distribution to the NationsBank Class would be impracticable.

Courts use *cy pres* distributions in class actions where class members "are difficult to identify or where they change constantly," or where there are unclaimed funds. *In re Airline Ticket Comm'n Antitrust Litig.*, 268 F.3d 619, 625 (8th Cir. 2001), quoting *Powell v. Georgia-Pacific Corp.*, 119 F.3d 703, 706 (8th Cir.1997).

In deciding that a *cy pres* was appropriate here, the district court stated:

> Further identification of members for additional distribution would be difficult and costly, considering the time that has passed since the initial distribution. The 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.…
>
> 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.

J.A. 138, 139. *See also* J.A. 52-53 (discussion in brief in support of *cy pres* motion).

While Oetting mocks the district court's findings, he does not offer any *facts* from the record to show that a third distribution is feasible, other than the fact that prior distributions were made, simply assuming that it "was entirely feasible" to make a third distribution to the NationsBank

Class. *Brief* at 25, 29-30. Oetting thus ignores the clearly-erroneous standard of review applicable to the district court's finding.

Oetting mistakes delivering checks that get cashed with getting settlement proceeds into the hands of the persons who actually suffered financial loss. Oetting's assumptions cannot withstand scrutiny when the institutional investors who owned the bulk of NationsBank shares are considered.

If a claims administrator sends checks for $100,000 or more to Vanguard or Fidelity, the checks will be cashed. But where will the cash go? Or, in other words, who will ultimately benefit from the distribution?

Vanguard currently operates 120 mutual funds for individuals. *See https://personal.vanguard.com/us/funds/vanguard/all*. Vanguard offers an additional 11 mutual funds to individuals who make a required minimum investment of $50,000. *Id.* Vanguard also markets funds for institutional investors, such as defined contribution pension plans (such as 401(k) plans), defined benefit plans (traditional pensions), and nonprofits. *See https://institutional.vanguard.com/VGApp/iip/site/institutional/home*.

Some of Vanguard's funds are actively managed; others are index funds. But all of the securities held in the portfolios of all of Vanguard's funds are held in Vanguard's street name. As a result, one cannot tell by looking at the shareholder register of a publicly-traded corporation, such as BAC, which Vanguard fund owns the stock, let alone the identities of the ultimate beneficial owners.

All of these relationships among funds, shareholdings, and beneficial owners are constantly changing. Funds buy and sell shares in the securities that make up their portfolios. Even index funds buy and sell shares to rebalance their portfolios as the indexes they track rebalance, and also to reflect the addition and removal of specific securities from an index. For example, when BAC was removed by Standard & Poor from the Dow Jones Industrial Average on September 23, 2013,[16] every Dow Jones Industrial Average index fund sold its shares of BAC to continue matching the index.

At the same time, investors are constantly buying and selling funds themselves, while the beneficial owners of the institutional investors that

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[16] "Dow Jones index announces biggest shake-up in a decade," Reuters News Service (Sept. 10, 2013), available on the internet at *http://www.reuters.com/article/2013/09/10/us-usa-stocks-dow-components-idUSBRE9890MK20130910*.

invest in the funds also change through time as people change jobs and cease participating in a particular 401(k) program or defined benefit pension, change their allocations within their self-directed accounts, get divorced and have assets transferred pursuant to a QDRO, or otherwise change their investments and asset allocation because of changes in their lives.

This constant flux means that one cannot easily, if at all, get the dollars from a putative third distribution into the hands of the persons who were actually injured by the misconduct at issue in this class action. And "the dollars" would actually be cents for most shareholders, unless one set a minimum amount to be distributed to any shareholder. As a result, it is unrealistic and uneconomical to spend the money and the effort necessary to locate the persons who beneficially owned this stock in 1998, at the time of the merger and subsequent events, and who are therefore entitled to compensation if there were a third distribution.

These arguments were presented to the district court in the reply brief filed in support of the *cy pres* motion. Doc. 791. The reply brief included a section captioned, "Why no third distribution?," which explained lead counsel's reasoning in detail, stating:

The initial distribution in July 2004 went to 99,201 NationsBank Class members. Each class member received a check for his proportionate share of the initial distribution of $275,770.689.41. The distribution worked out to $0.49203401492 per damaged share, rounded to the nearest cent. There was no minimum cutoff amount for a check, and a shareholder owning one share received her 49 cents — although it cost the class over $10 to process her claim.…

The second distribution, for a much smaller total sum, $4.7 million, yielded only about $0.008 per damaged share, and was distributed only to those class members who would receive a distribution of at least $50. The per share distribution was only about 1.6% of the per share distribution in the initial distribution. Only a few thousand class members received a check in this second distribution, and those checks went overwhelmingly to institutional investors, such as mutual funds, as these institutions had owned the largest blocks of NationsBank shares.

It is assumed that a third distribution, if one were ordered, would be subject to a minimum distribution cutoff of at least $50, as was the case in the second distribution. At the time a third distribution was being considered, minimum cutoffs of $500 and $1,000 were also examined. If $50 was used as a cutoff, slightly more than 1,000 class members would get checks; the higher cutoffs would reduce the pool of recipients to two to three hundred total. In either case, almost all of the recipients of a third distribution would be institutional investors, such as mutual funds, hedge funds, and pension funds,

> as few if any individual shareholders would have owned the 1,250,000 shares of NationsBank stock required to generate a $50 payout assuming a calculated distribution of approximately $0.004 per damaged share.
>
> Lead counsel concluded that a third distribution would put little money into the hands of the shareholders who actually suffered a financial loss as a result of the misconduct that was the subject of the class action. This was true both because of the exclusion of essentially all individual shareholders from the pool of shareholders who would receive distributions as well as because of the nature of large institutional shareholders. Large institutional shareholders typically own shares for the benefit of someone else, such as an investor in a mutual fund, and those beneficial owners typically turn over (buy and sell) their interests in these entities at a fairly rapid pace. Thus, lead counsel concluded, if a distribution were made to the large institutional shareholders who had owned 1,250,000-plus shares each of NationsBank stock, such a distribution would effectively benefit random investors having little or no relationship to the persons who were actually damaged by the misconduct that was the subject of the class action.

Doc. 791 at 2-4 (footnotes omitted).

Oetting never disputed these facts, even though he filed a surreply in response. J.A. 98-103; *but see* J.A. 99 ("Green Jacobson's assumption as to the parameters of a 'third distribution' is presumptuous… Clearly the

minimum check size could have been smaller and more money distributed to more shareholders").[17]

This court's decision in *Powell v. Georgia-Pacific* presents a situation similar to that in the present case. In *Powell*, as here, almost eight years had passed from the date of the original distribution of settlement funds to the class members. *Powell* 119 F.3d at 705. The unclaimed settlement funds in *Powell* totaled about a million dollars: $350,000 that had been set aside to distribute to unidentified class members plus interest that had accumulated on the settlement funds. *Id.* Here, the unclaimed settlement funds consist of funds from settlement checks that were never cashed by class members, money recovered from the Lagerveld fraud, and accumulated interest.

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[17] Oetting attempts to interpret class counsel's and the court's concern with distributing the surplus to large institutional investors as a form of discrimination against "very wealthy" investors, suggesting that even an especially odious billionaire, like the cartoon character Montgomery Burns, would be entitled to receive his money. *Brief* at 31. We agree. If the money belonged to an identifiable individual, such as a Montgomery Burns, we would not have recommended a distribution to charity. But it does not. It belongs to the millions of unidentified individuals who were invested in the large institutional investors, and if distributed, the funds will end up in the hands of the institutions and not the individuals.

In *Powell*, each class member had been fully compensated according to the terms of the settlement agreement approved by the court. *Id.* The same is true here: every class member who submitted a claim received a check for the full amount to which he, she, or it was entitled under the settlement agreement. This is true not only for those class members who submitted timely claims, but also for the many class members who submitted late claims — some, filed years after the initial cut-off date.

In *Powell*, this court held that a *cy pres* distribution is particularly appropriate when substantial time has passed and class members are difficult to identify or change constantly. *Id.* at 706. It noted that the district court's primary reason for ordering a *cy pres* distribution in that case was the fact that locating individual class members for an additional distribution would be very difficult and costly. *Id.* at 706.

These factors are present here, too. The district court had sufficient undisputed evidence on the record to conclude that a third distribution to the NationsBank Class would have been impracticable and would not have put the money in the hands of those who had lost it. The district court's findings were not clearly erroneous and its decision should be affirmed.

II. The district court did not clearly err in finding that Legal Services of Eastern Missouri was an appropriate recipient of the surplus settlement funds.

The district court's choice of a *cy pres* recipient is reviewed for clear error. *In re Lupron Marketing and Sales Practices Litigation*, 677 F.3d 21, 30-31 (1st Cir. 2012) ("We apply the same abuse of discretion standard to questions regarding a court's approval of distribution from a *cy pres* fund as part of a settlement agreement").

A. Oetting waived any objection to Legal Services as a recipient of the district court's *cy pres* award.

The law of waiver has been discussed at length above.

As described in detail in the counterstatement of facts, when Green Jacobson suggested three possible recipients of a *cy pres* distribution (LSEM, Mathew Dickey, and The Backstoppers), Oetting only objected to Mathew Dickey and The Backstoppers. *Supra* at 25-26, citing J.A. 69-70 (Oetting opposition), J.A. 98-103 (Oetting surreply).

Oetting had every opportunity to object to LSEM, too, if he wanted. By objecting to two of the three proposed recipients, Oetting led the district court to believe that Oetting had no objection to the third.

The district court took Oetting's objection to heart, and ruled that it would not award *cy pres* funds to Mathew Dickey and The Backstoppers. J.A. 142-43.

Oetting's decision not to object to LSEM as a *cy pres* recipient appears to have been intentional and not merely an oversight. LSEM, Mathew Dickey, and The Backstoppers were all discussed in sequence in the *cy pres* motion and brief. It strains credulity to believe that Oetting simply overlooked adding LSEM to his opposition. Rather it appears to have been a conscious decision. "If, however, the party consciously refrains from objecting as a tactical matter, then that action constitutes a true 'waiver,' which will negate even plain error review." *United States v. Yu-Leung*, 51 F.3d 1116, 1123 (2d Cir. 1995) (defendant's lawyer "would have had to have suffered from aggravated narcolepsy for us to believe that his failure to object did not reflect a clear and conscious tactical decision").

Oetting's appeal from the selection of LSEM as the *cy pres* recipient should be denied on the ground that he waived his objection.[18]

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[18] In none of his filings with the district court did Oetting raise the issue of local versus national charity, thereby waiving that issue, too.

B. LSEM is an appropriate recipient of the *cy pres* award.

In cases where a *cy pres* award is appropriate, "the court, guided by the parties' original purpose, directs that the unclaimed funds be distributed 'for the indirect prospective benefit of the class.'" *In re Airline Ticket*, 268 F.3d at 625, quoting 2 Newberg and A. Conte, *Newberg on Class Actions*, § 10.17 at 10-41 (3d ed.1992).

"Under the broad equitable powers that underlie the distribution of cy pres funds, however, courts may distribute these funds to benefit a public interest, even if that interest is unrelated to the plaintiff's original claims." *Shapira v. City of Minneapolis*, 06-CV-02190-MJD-SRN, 2012 WL 1438813 (D. Minn. Apr. 26, 2012), citing *Van Gemert v. Boeing, Co.*, 739 F.2d 730, 737 (2nd Cir.1984) (holding that trial courts have broad discretionary powers when distributing unclaimed class funds), and *In re Motorsports Merch. Antitrust Litig.*, 160 F. Supp.2d 1392, 1394 (N.D. Ga. 2001) (collecting cases where cy pres funds were distributed to charitable organizations unrelated to the original claims).

The suitability, or match, of a *cy pres* recipient depends largely on how one frames the nature of the class action. For example, was this a case

concerning proxy and prospectus violations? Was it a case about hedge funds and hyper-complex derivatives? Was it a case concerning the misuse of retail customers' deposits to fund excessively risky investment activity? Was it about securities fraud generally? Or was it about access to the legal system for individuals whose losses are too small standing alone to enable them to get redress through the employment of a private attorney in an individual case? How one frames the case controls what charity or charities are more or less like the case.

Appellees proposed, and the district court found, that the appropriate framing was a more general one in this case: "vindicat[ing] the rights of victims of fraud and deter future fraudulent schemes." J.A. 142. This was a discretionary decision and the district court did not abuse its discretion in reaching it. As framed, LSEM and legal services agencies generally were sufficiently related to the case to provide a satisfactory match for purposes of *cy pres*.

In his appeal, Oetting raises two objections to LSEM as a *cy pres* recipient. First is his contention that the beneficial work LSEM performs is not sufficiently closely related to the issues in this case. Second is his

contention that the district court was required to give the *cy pres* award to a national entity because this was a national class action with class members across the United States.[19]

With regard to the first point, Oetting suggests in his appeal brief that there were a number of entities that better matched the underlying litigation than LSEM, and that the funds should have gone to one of them instead. Setting aside for the moment the fact that the Settlement Agreement placed the choice of *cy pres* recipient in the sole discretion of the district court, let us examine the alternative recipients that Oetting had suggested to the district court. These are the proper alternatives to consider, rather than those he now suggests in his appeal brief, as the district court did not have the benefit of Oetting's appeal brief in reaching its decision.

Oetting's initial opposition to the *cy pres* motion did not suggest any alternative recipients of a *cy pres* award, although it was certainly within

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[19] Oetting describes LSEM as local, but the *cy pres* award is actually statewide in its affect. The four Missouri legal aid societies have a longstanding agreement to share any *cy pres* award any of the four may receive between themselves in proportions reflecting the relative number of persons served by each agency.

his capacity to do so. Oetting's surreply, however, did make recommendations to the district court. Oetting's recommendation, in their entirety, are as follows:

> In determining its *cy pres*, Green Jacobson did not make a "reasonable inquiry." It failed to discuss the same with Lead Plaintiff Oetting. A non-profit which would advance the specific interests of the class is: Center for Class Action Fairness, 1718 M Street, N.W. #236, Washington, DC 20036 or, perhaps, Stanford Class Action Securities Clearinghouse at Stanford Law School. However, Oetting readily concedes that there are many worthwhile charities in the country i.e. The Red Cross and the Humane Society. In any event, it should not be Green Jacobson that picks the charity which gets the "victims' assets."

J.A. 98-99.

Thus, although Oetting objected to either Mathew Dickey or The Backstoppers receiving any *cy pres* funds, he declined to offer any alternatives except by dropping a few names in his surreply, giving no information about any of his recommendations and giving the district court no basis to conclude that his recommendations were more suitable than the entities recommended by class counsel.

Appellee would offer some observations, however, about one of the alternatives mentioned by Oetting: The Center for Class Action Fairness (the "Center"). The Center is the law office of Oetting's appeal lawyer Theodore Frank. *See Brief* at cover.[20] The connection between the Center and the interests of the NationsBank Class is remote at best. Frank describes the Center as "support[ing] class members who are getting ripped off by bad class action settlements, like the ones that give injured consumers worthless coupons while paying the attorneys millions."[21] *http://www.chickenoffset.com/* (accessed Oct. 6, 2013). It appears that a major focus of the Center is to oppose *cy pres* awards in class actions through a variety of means, including court action, editorials and articles in newspapers and magazines, educational material, and testimony before

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[20] We accept Frank's assertion that his organization was suggested as a possible *cy pre* recipient without his knowledge or consent, and that he would not accept such an award in this case.

[21] It should be noted that this case did not involve a "bad class action settlement." Class members did not get coupons. They got cash. At the time the settlement was agreed, this case was the largest all-cash securities class action settlement in history. The district court and this court both specifically held that this was not lawyer-driven litigation. *BankAmerica I*, 210 F.R.D. at 710; *BankAmerica IV*, 350 F.3d at 750.

Congress. *See, e.g, https://www.facebook.com/classactionfairness* and *http://centerforclassactionfairness.blogspot.com/*.

While the Center's work may be socially-beneficial, its connection to this case (as opposed to its connection to the *cy pres* motion, which, if used as a basis for a connection, would certainly be the tail wagging the dog) appears non-existent. The Center's work is not as closely related to the issues in the case as is the work done by LSEM, which the district court found was to vindicate the rights of victims of fraud and deter future fraudulent schemes. J.A. 142. The Center works to improve the class action system. LSEM works to obtain compensation for victims of fraud. This case is about the latter, not the former.

With respect to his other, casually-mentioned alternatives, Oetting gave the district court no information and no reason to believe that any of the entities he mentioned (the Center for Class Action Fairness, the Stanford Law School Securities Class Action Clearinghouse, the Red Cross, and the Humane Society) would be a better fit for *cy pres* purposes than LSEM. Thus the district court did not err in not considering alternatives for which no reason was given.

Oetting — or, to be more accurate, his counsel, the Center for Class Action Fairness — presents a large number of public policy grounds, largely supported by articles written by persons associated with the Center as well as Mr. Frank's testimony to Congress — why *cy pres* should be eliminated or, at a minimum, severally cabined.

Appellee respectfully suggests that Congress is the right place to fight over these public policy issues. This case is not the right place, particularly in light of the factual record and all of Oetting's waivers. Oetting lacks standing to bring this appeal; the district court's authority to make a *cy pres* distribution is the law of the case; and Oetting failed to provide the district court with any reason not to grant the *cy pres* motion.

Appellee has been contacted by organizations stating they intend to file *amicus* briefs on the public policy issues. Appellee will leave those issues to them, as those issues do not need to be resolved to affirm the judgment.

III. The district court did not err in awarding Green Jacobson additional attorneys' fees for its legal work after completion of the initial distribution of settlement proceeds.

The final issue on this appeal is the district court's award to Green Jacobson of an additional $98,114.34. The district count found "lead counsel are entitled to a reasonable fee, to supplement the fee granted in 2002. The complexities of this case were unforeseeable at that time…" J.A. 144. This factual finding is reviewed under the clearly erroneous standard. *Kingman*, 721 F.3d at 616.

As a result of its finding, the district court held, "it would be unjust to deny lead counsel recompense for nearly a decade of additional effort and involvement in this case." J.A. 144. This conclusion is reviewed for abuse of discretion, as is the district court's conclusion that the additional fee should be $98,114.34, J.A. 145. "This court's standard of review of an order awarding or denying attorney's fees is abuse of discretion." *Consolidated Beef Indus., Inc. v. New York Life Ins. Co.*, 949 F.2d 960, 966 (8th Cir. 1991).

> An abuse of discretion occurs "when a relevant factor that should have been given significant weight is not considered; when an irrelevant or improper factor is considered and given significant

> weight; and when all proper factors, and no improper ones, are considered, but the court, in weighing those factors, commits a clear error of judgment."

EEOC v. Prod. Fabricators, Inc., 666 F.3d 1170, 1172 (8th Cir. 2012), quoting *Kern v. TXO Prod. Corp.*, 738 F.2d 968, 970 (8th Cir. 1984).

Here, the district court had substantial evidence in the record, including Judge Jackson's own involvement in the case since December 2008 following Judge Nangle's death, *see* Doc. 702, to conclude that Green Jacobson was entitled to an additional fee. The affidavit of Martin M. Green filed in support of the fee award is one source of such evidence. This affidavit describes the numerous, post-distribution events that prolonged the case and required unanticipated work by Green Jacobson for the benefit of the class and various members of the class. Doc. 777-1 at 2-5, ¶ 5.(A.-G.); *see also* J.A. 57-59. The district court also had detailed time records showing the services provided to the NationsBank Class by Green Jacobson from December 2004 through April 2012. Doc. 777-1 at 9-29.

In short, the district court had all of the record evidence it needed to conclude that Green Jacobson was equitably entitled to fees for these legal services because it has expended a great deal of time to effectuate the

distribution in the face of unanticipated obstacles. As this court stated in *Powell*, "the work performed in this proceeding is analogous to postjudgment monitoring of a consent decree, which is a compensable activity for which counsel is entitled to a reasonable fee." *Powell*, 119 F.3d at 707 (internal quotations omitted), quoting *Pennsylvania v. Delaware Valley Citizens' Council*, 478 U.S. 546, 559 (1986). "Although the amount of the fees requested may be subject to reduction for factors such as those discussed in [cases], the complete denial of a fee award is not appropriate." *Id.* (citations omitted).

Oetting asserts several arguments for why the additional fee should not have been awarded. The first is that the class received no notice of the "supplemental fee request." *Brief* at 43, citing *In re Mercury Interactive Corp. Sec. Litig.*, 618 F.3d 988, 993 (9th Cir. 2010).

Oetting's argument is frivolous. The record establishes that the class was given Notice in 2002 that class counsel would be awarded fees of up to $83.3 million. Addn. 1. Almost no one objected. *See* Doc. 493 (overview of objections); *BankAmerica I*, 210 F.R.D. at 704 & n.6. Oetting supported the $83.3 million fee request, telling the district court: "We don't object to

the fee request. We don't object to the expense request. We felt the NationsBank lead counsel did a good job with the case for three and a half years." Addn. 16.

The district court, however, awarded NationsBank class counsel significantly smaller fees than requested — approximately $58.8 million. Thus, even with the supplemental fee, the attorneys' fees awarded to class counsel remain $24.5 million less than the possible fee to which the class and Oetting did not object. The supplemental fees were within the scope of what was included in the Notice and thus there is no violation of F.R.Civ.P. Rule 23(h).

Oetting's citation to *Mercury* as his sole authority makes the frivolous nature of his argument obvious. *Mercury* did not involve a supplemental fee application. It involved the original fee application in a class action where the district court "requir[ed] objections to be filed before the filing of the fee motion itself and its supporting papers…" *Mercury*, 618 F.3d at 993. This violated the requirement of Rule 23(h) that a class member be allowed an opportunity to object to the fee motion, since they would not see the motion until the deadline for filing objections had passed. *Id.* 993-94.

Here, in contrast, the motions, objections, and rulings all took place in the proper sequence back in 2002, and the few objections to the Notice (none made by members of the NationsBank Class) were overruled. *Bank-America I*, 210 F.R.D. at 707-08.

The remaining objections to the supplement fees are Oetting's contentions that class counsel were already overpaid and should be judicially estopped from requesting additional fees on an hourly basis having already been paid a percentage of the settlement. Neither had merit. The first is barred by *res judicata* and the second is contrary to the district court's finding that Green Jacobson's post-distribution services were unanticipated additional work not covered by the initial fee award.

CONCLUSION

The appeal should be dismissed for lack of jurisdiction. Alternatively, the judgment should be affirmed in all respects.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 32(a)(7)(C) of the Federal Rules of Appellate Procedure and Local Rule 28A(c), the attorney signing this brief certifies as follows:

Appellee's Brief complies with the type-volume limitations set in Rule 32(a)(7)(B) in that, according to WordPerfect's word-count function, the brief contains 13,990 words, excluding those portions of the brief excluded from the volume limitations under the rule.

The brief complies with the typeface requirements established by Rule 32(a)(5) and the type style requirements established by Rule 32(a)(6) because it has been prepared in a proportionally-spaced typeface using WordPerfect word-processing software version X3 in 14-point Century Schoolbook font.

The electronic (PDF) copy of appellee's brief and of appellee's addendum filed electronically with the Clerk of the Court through the ECF/CM system have been scanned for viruses, and the brief and addendum are virus-free.

CERTIFICATE OF SERVICE

The filing attorney certifies that on October 7, 2013, the foregoing Appellee's Brief and accompanying Appellee's Addendum were filed electronically with the Clerk of the Court through the ECF/CM system to be served by operation of that electronic filing system.