20-3765(L); 20-3766

In the
United States Court of Appeals
for the Second Circuit

KATHRYN HYLAND, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED, MELISSA GARCIA, JESSICA SAINT-PAUL, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED, REBECCA SPITLER-LAWSON, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED, MICHELLE MEANS, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED, ELIZABETH KAPLAN, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED, JENNIFER GUTH, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED, MEGAN NOCERINO, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED, ELIZABETH TAYLOR, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED, ANTHONY CHURCH, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,
Plaintiffs - Appellees,

ELDON R. GAEDE, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,
Plaintiff,
v.

NAVIENT CORPORATION, NAVIENT SOLUTIONS LLC,
Defendants – Appellees,
v.

WILLIAM YEATMAN, RICHARD ESTLE CARSON, III,
Objectors – Appellants.

On Appeal from the United States District Court
for the Southern District of New York, No. 18-cv-9031

Reply Brief of Appellant William Yeatman

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Summary of Argument

The parties offer little rebuttal to support the district court's approval of an unlawful settlement.

Plaintiffs don't dispute that not every class member will benefit from the injunctive relief requiring changes to Navient's business communications with borrowers about Public Service Loan Forgiveness ("PSLF"). They acknowledge that a substantial portion of the class—including 40% of class representatives and appellant Yeatman—no longer have loans serviced by Navient. Still others have paid off their loans, while others have left public service employment and no longer are concerned with PSLF eligibility. Because Rule 23(b)(2) unreservedly requires that a single injunction provide relief to every class member, class certification was improper. Plaintiffs are wrong that any benefit from the *cy pres* distribution can support (b)(2) certification, but, in any event, there is no evidence that the newly formed recipient Public Service Promise ("Promise") has the mission or capability to offer the kind of litigation advice that they claim would benefit class members who do not benefit from the injunctive relief.

Even apart from the class definition, monetary relief still predominates. The class complaint seeks the natural monetary remedy for unjust enrichment claims that anchor the nationwide class. The settlement releases class members' right to pursue monetary relief against Navient using aggregate litigation. The district court's view that Rule 23(b)(3) certification was unlikely doesn't address the value of such aggregation of

claims or the availability of class actions by subgroups of the nationwide class. *See* Section I.

Plaintiffs also fail to rebut the clear signs of inadequate representation by class counsel and the class representatives. The appearance of conflict is far from "speculative." Yeatman detailed the overlapping professional relationships and financial interests among the American Federation of Teachers ("AFT"), which recruited its members to be class representatives, funded the litigation, and supported class counsel who represent them in other cases; the class representatives; class counsel, whom AFT paid nearly $6 million in fees; and officers of Student Defense, which will be involved in Promise and who represent AFT and serve as co-counsel with class counsel in other cases. Ultimately, and in the clearest sign of inadequate representation, class representatives and counsel negotiated a settlement that benefited themselves financially while diverting the class's share of the settlement to a third party entangled within their web of connections. They agreed to these terms even though it was feasible to hold a claims process for class members to receive financial compensation. Choosing to give these funds to *cy pres* rather than the class is improper under Circuit law and Rules 23(a)(4) and (g). *See* Sections II-III.[1]

[1] The record shows that plaintiffs' references to Yeatman as a "professional objector" and his counsel as having an "ideological campaign against class actions" (PB2) are entirely false. Yeatman objected in good faith; has not filed any other class-action objection in at least the past three years; and was willing to stipulate to an injunction forbidding him from seeking compensation for settling his objection without court approval. A-484. His counsel, Hamilton Lincoln Law Institute, has never withdrawn an objection in exchange for payment, and its "ideology" is merely

Argument

I. The district court erred by certifying a Rule 23(b)(2) class.

A. Rule 23(b)(2) certification is improper because not all members of the class benefit from the prospective injunctive relief.

The law is clear: "Rule 23(b)(2) applies only when a single injunction or declaratory judgment would provide relief to each member of the class." *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 360 (2011). "[A] class may *not* be certified under Rule 23(b)(2) if *any* class member's injury is not remediable by the *injunctive or declaratory relief* sought." *Berni v. Barilla S.p.A.*, 964 F.3d 141, 146 (2d Cir. 2020) (emphasis added).

Plaintiffs don't dispute that a significant portion of the class will not benefit from the injunctive relief provided by the settlement. PB24[2] (remarking that business practice enhancements provide only "class members whose loans continue to be serviced by Navient [with] material benefits"). The injunctive relief is a set of business practice changes to how Navient's customer service representatives communicate with borrowers who may qualify for PSLF. *See* A-319-22. There is simply no argument that class members who no longer have student loans serviced by Navient will benefit from such changes. Nor is there any dispute that nearly half of the class representatives no longer have loans serviced by Navient. A-637. By definition, these are representatives

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the correct application of Rule 23 to ensure the fair treatment of class members. Dkt. 164 ¶ 26.

[2] "PB" stands for plaintiffs' brief; "DB" stands for defendants' brief; and "OB" stands for opening brief. "A" stands for the joint appendix in this appeal. "Dkt." stands for docket numbers in the underlying district court case.

of the class, indicating an equivalent percentage of class members (including Yeatman) similarly no longer have any business relationship with Navient such that they would ever call its customer service hotline.

Plaintiffs also don't dispute that the district court neglected the required finding that every class member will benefit from the settlement's injunctive relief. *See* OB21; PB23 (noting court references to general benefits from settlement rather than injunctive relief); A-279:8-9 (court revised class notice because "It's unclear whether any individual class member will personally benefit" from settlement). An ambiguous reference to "the class" as a whole achieving a "significant benefit" that is also realized by all public service employees falls short of the required finding. A-654:22-24.

That should end the analysis. Rule 23(b)(2) certification is plainly improper here, where there is no finding by the district court that every class member will benefit from the injunctive relief and no dispute between the parties that not every class member will benefit from it.

Plaintiffs nevertheless make the extra-legal argument that (b)(2) certification is permissible because every class member could potentially benefit from the *cy pres* payment to a third party. And they omit critical words while quoting *Berni* to support their novel interpretation. They deceptively claim that *Berni* stands for the proposition that (b)(2) certification is permissible "so long as each class member 'stand[s] to benefit' from *the settlement relief*, even if 'different class members … benefit differently.'" PB22 (quoting *Berni*, 964 F.3d at 147 n.28) (emphasis added). But *Berni* echoes Rule 23(b)(2) by holding that every class member must benefit "from an injunction." 964 F.3d at 147 n.28. The full sentence is: "That means that different class members can benefit

differently from an injunction—but no matter what, they must stand to benefit (it cannot be the case that some members receive no benefit while others receive some)." *Id.* The problem isn't that "different class members benefit differently" from the injunction; the problem is that some class members "receive no benefit," just as in the defective *Berni* settlement.

Leaving aside for a moment the problem with *cy pres* as class relief more broadly, it cannot serve as the grounds upon which a class member benefits from a settlement for the (b)(2) analysis. Rule 23(b)(2) is express: A class action may be certified only if "final injunctive relief or corresponding declaratory relief is appropriate respecting the class *as a whole*." *See also Dukes*, 564 U.S. at 360. "Only if the injunctive relief is proper on such an individualized basis is the group as a whole then eligible for class certification under Rule 23(b)(2)." *Berni*, 964 F.3d at 146. *Cy pres* is not injunctive or declaratory relief, and plaintiffs rightly do not argue otherwise.[3] They instead try to rewrite the requirement that it is the injunctive or declaratory relief that must benefit class members for (b)(2) certification to be proper. PB24.

Neither *Sykes*, *Amara*, nor *Jermyn* leads to a different result. In *Sykes v. Mel S. Harris & Associates*, 780 F.3d 70, 97-98 (2d Cir. 2015), the proposed injunctive relief *did* "sweep[] broadly enough to benefit each class member." In *Amara v. CIGNA Corp.*, 775 F.3d 510, 522 (2d Cir. 2014), the question of benefit was not at issue, as defendants'

[3] Plaintiffs vaguely cite a line from *Amara* suggesting that reformation was a proper form of (b)(2) remedy, but the court directly found that "reformation in this context is essentially a declaration of the rights" conferred. 775 F.3d at 523 (cleaned up). The settlement here provides no declaration of rights.

argument was based on the assumption that all class members benefited. *Jermyn v. Best Buy Stores*, 256 F.R.D. 418 (S.D.N.Y. 2009), meanwhile, predates *Berni* and *Dukes*; provides little analysis of the relevant issues; and is frankly wrong on the merits.

Plaintiffs distinguish *Berni* as involving past purchasers who "would never again be misled about" the volume of pasta in a box, while the borrowers here—as they put it—"lack the autonomy" to avoid future injuries from Navient's misrepresentations. PB19. This ignores the fact, however, that nearly half of the class here also will "never again be misled" by Navient because they no longer have loans serviced by Navient, while others of this highly educated class surely have taken steps to fully understand PSLF and therefore also will not be misled again. Again, however, plaintiffs don't claim that the business practice enhancements provide the sort of full-class relief required by (b)(2) and *Berni*. Instead, they resort to claiming that the business-practices injunction combined with the *cy pres* relief is what benefits the majority of the class. As is appropriate, *Berni* grounded its (b)(2) analysis on settlement relief that was entirely injunctive.

Even if *cy pres* counted toward the (b)(2) analysis (and it doesn't), many class members still wouldn't benefit for the same reasons. Many class members already understand the PSLF requirements or they have repaid their federal student loans. Neither group has a need for "education and counseling." PB24. Plaintiffs claim that Promise will advise past borrowers of "their options to pursue relief in the future" through individual litigation claims, *id.*, yet the term sheet expressly states that the organization's "activities will exclude litigation activities" and its activities are focused on PSLF-related loan repayment and reform. A-354. More broadly, Promise offers no

incremental benefit to class members compared to non-class members. *Anyone* employed in public service can obtain information from Promise. A-354. The district court's primary reference to settlement benefit at the fairness hearing was to acknowledge that it "will have or may have a profound impact on *all public service employees*." A-654:23-24 (emphasis added); *see also* A-655:2-3. The district court undertook no stronger analysis of the particular benefit to class members in ruling on plaintiffs' motion for final approval.

Plaintiffs similarly don't deny the constitutional requirement that class members are entitled to notice and an opportunity to opt out of representative actions for money damages—which this case is because it settles and implicates a monetary claim, even if they recover no damages under the settlement. *Hecht v. United Collection Bureau, Inc.*, 691 F.3d 218, 222 (2d Cir. 2012). The due process underpinnings of the Rule 23 notice and opt-out rights are not met when those rights were not available to class members who give up their right to bring any aggregate action seeking monetary relief. *Id.*, *cf. also In re Google Inc. Cookie Cookie Placement Consumer Privacy Litig.*, 934 F.3d 316, 329 (3d Cir. 2019) (criticizing settling parties for obtaining "the precise benefits" of a (b)(3) class for themselves while "having sidestepped" the class's (b)(3) safeguards).

Amara, 775 F.3d at 518-19, 523-24 (PB30) is inapposite because the settlement in fact provided monetary relief as a consequence of reformation of a pension plan such that class members had no separate damages claims to bring individually. It is thus puzzling that plaintiffs rely on *Amara* so heavily. And *Dukes*, 564 U.S. at 362, makes clear that "individualized monetary claims belong in Rule 23(b)(3)" because of the (b)(3) procedural protections. In contrast, (b)(2) does not require notice and opt-out rights

because they have little purpose when the class is mandatory and everyone is subject to and benefits from the same injunctive relief. When the strict requirements of (b)(2) aren't met, and class members are denied best notice and an opportunity to opt-out when their monetary damages are at stake, they are denied due process. *Id.*

B. Regardless of the perceived difficulty of (b)(3) certification, (b)(2) certification was improper because class members have an adequate remedy of monetary relief.

The parties do not deny that the claim underlying class certification sought monetary relief. *See* A-269:1 (action was "principally brought for damages"). Monetary relief undisputedly is an adequate remedy for the certified unjust enrichment claims. The complaint alleged that Navient unlawfully obtained large loan servicing fees as a result of misrepresenting PSLF-related information to the Nationwide Class and Navient's retention of those fees is unequitable and, accordingly, alleged claims for monetary relief that were subject to (b)(3) certification. A-143 ¶¶ 452-456. Because this monetary remedy is available and proper, Rule 23(b)(2) "does not authorize class certification." *Dukes*, 564 U.S. at 360-61 ((b)(2) certification improper "when each class member would be entitled to an individualized award of monetary damages"); *see also Petereit v. S.B. Thomas, Inc.*, 63 F.3d 1169, 1185 (2d Cir. 1995) (similar). *See* OB27-28 (quoting *Berni*, 964 F.3d at 147, and citing other cases establishing that unjust enrichment and consumer protection claims are "commonly redressable at law through the award of damages").

It is of no relevance that the district court deemed (b)(3) certification unlikely. *See* PB19; DB3. Rule 23(b)(2) has requirements that must be met, and the unavailability

of (b)(3) certification is not among them. *See* OB21-22 (citing *Berni*, 964 F.3d at 148 as repudiating the notion that (b)(2) certification is appropriate to resolve a remedial "dilemma").

Plaintiffs distinguish *Hecht* by claiming that "[u]nlike in that case, the class here 'seeks prospective injunctive relief and involves members that would benefit from such a decree.'" PB30 (quoting *Amara*, 775 F.3d at 524 n.9). But plaintiffs identified a separate forward-looking "Nationwide Injunctive Class" in the complaint that befit (b)(2) certification (and which they requested only for that subclass, A-134 ¶ 405); the larger Nationwide Class that the district court later certified under 23(b)(2) alleged claims for monetary damages. *See* A-134 ¶ 405-406; A-143 ¶ 452; *see also* OB8, 24-26. Plaintiffs sought settlement class certification based on the unjust enrichment claims they alleged on behalf of the Nationwide (non-injunctive relief) Class. Dkt. 97 at 20; Dkt. 120 at 21-22; *see* A-143. They did not argue, and the district court did not find, that any other claim met the Rule 23 certification requirements.

Article III's standing requirements are relevant to the constitutional grounding for (b)(2)'s requirement that every class member must benefit from injunctive relief. Plaintiffs dismiss this argument seemingly without understanding the import. PB28. Only those plaintiffs whose loans continue to be serviced by Navient will suffer from future injury from a continuation of Navient's alleged wrongdoing. For those who have paid off their loans or had their loans transferred, there is no ongoing controversy that allows them to seek prospective injunctive relief. The harm is completed. Past injuries "do not confer standing to seek injunctive relief unless the plaintiff can demonstrate that she is likely to be harmed again in the future in a similar way." *Nicosia v. Amazon.com,*

Inc., 834 F.3d 220, 239 (2d Cir. 2016). The 40% of the class representatives who no longer have loans serviced by Navient can make no such demonstration. *See* A-637.

Nor could the district court make any finding that these class representatives and the class members similarly situated were likely to be harmed by Navient's alleged misrepresentations regarding PSLF in the future. For (b)(2) certification, "a court should, at a minimum, satisfy itself that: (1) even in the absence of a possible monetary recovery, reasonable plaintiffs would bring suit to obtain the injunctive or declaratory relief sought; and (2) the injunctive or declaratory relief sought would be both reasonably necessary and appropriate were the plaintiffs to succeed on the merits." *Hecht*, 691 F.3d at 223 (cleaned up). The district court did not make any such findings, and the retrospectively defined class does not meet either prong. Rather, just as in *Hecht*, "the damages remedy was the only remedy awarded that clearly applied to every class member." *Id.* at 224.[4] Thus, (b)(2) certification is improper.

Plaintiffs' primary response to this argument is to point out the district court's view that (b)(3) certification was unlikely. From this, they posit that class members' release of their right to seek monetary damages through aggregate actions has little value. Again, (b)(2) certification is not a matter of pragmatic value or exigency. *Berni*, 964 F.3d at 148. Still, it begs two questions. First, if (b)(3) class certification was so unlikely, why did defendants demand, and plaintiffs agree, to release class members' right to bring any sort of aggregate action for damages? Second, how can that justify

[4] *Laumann v. National Hockey League*, 907 F. Supp. 2d 465 (S.D.N.Y. 2012), involved a ruling on a motion to dismiss, not class certification nor settlement approval.

broadening the release to any sort of aggregate action (even non-class actions) that involves just four or more additional plaintiffs? Even if (b)(3) certification of the class as currently defined seems to involve too many individualized facts, it is entirely conceivable that class members could form subclasses based on the particular types of misinformation allegedly provided by Navient. For example, there could be a subgroup of borrowers who were channeled into forbearance without being informed of the implications for the PSFL eligibility and another subgroup of borrowers with a particular type of loan who were misinformed about the eligibility of their particular loan for PSLF.

Contrary to plaintiffs' representation (PB29), the district court did not find that (or consider whether) an action of as few as five individual plaintiffs was of little value. The court was frank in acknowledging that it "ha[d] no idea one way or another what the merits are of the individual conversations between a class member and the defendant and what that proof could ultimately be that could be developed in the discovery period on behalf of individual claimant's attempts to seek damages …." A-269:13-17. Plaintiffs' reference to the district court's comment at the preliminary approval order hearing that "the class members aren't giving up really a viable claim for relief, that is, a class action claim for damages," A-276:9-11, therefore should be viewed as misinformed and as addressed to only the release of class-action claims rather than all aggregate actions required by the settlement.

A class action with smaller classes remained a way for absent class members to recover damages without individually taking on the time and expense of litigation. *Contra* PB31 n.12 (wrongly asserting that *Richardson v. L'Oreal USA, Inc.*, 991 F. Supp.

2d 181 (D.D.C. 2013), is "inapposite" because the court observed that a class action was essentially the only way for absent class members to recover damages); DB7 (incorrect and irrelevant to (b)(2) analysis that value of release of aggregate claims justified settlement benefits under *City of Detroit v. Grinnell Corp.*, 495 F.2d 448 (2d Cir. 1974)). Individual actions remain expensive, time-consuming, and unlikely to be pursued by many, if any, class members. Class representatives themselves asserted that they could not bring individual actions. *E.g.*, A-404; A-416. There is no indication that it is within Promise's mission or capabilities to help a class member "understand their options and locate attorneys," PB32, but even so, such advice does not change the time and expense that individual actions require. Plaintiffs provide no evidence that a substantial number of class members have five-figure damages claims against Navient, and even if they did, it is incredibly naïve for plaintiffs to suggest that a class member could hire an attorney on a contingency basis where a 30% recovery for litigation against a sophisticated entity like Navient will net the attorney maybe $17,000. *See* PB31.

Plaintiffs attempt to distinguish *Crawford v. Equifax Payment Services*, 201 F.3d 877 (7th Cir. 2000), but *Crawford* was not premised on the settlement foreclosing participation in two other existing class actions for damages. *Contra* PB30 n.11. Both this case and *Crawford* involve settlements that "gain nothing" for class members, not even "a concession of liability that would facilitate individual suits," while both take away "the possibility of any collective proceeding for damages" for past harms. *Crawford*, 201 F.3d at 880. Both involved complaints that sought (b)(3) certification, only for the settlements to seek only (b)(2) certification with no opt-out right. Both denied the opt-out right for claims for money damages in contravention of the Seventh Amendment,

constitutional due process, and Rule 23. *Id.* at 881-82 (citing, *e.g.*, *Ortiz v. Fibreboard Corp.*, 527 U.S. 815 (1999)).

Plaintiffs' basis for distinguishing *Koby v. ARS National Services*, 846 F.3d 1071 (9th Cir. 2017), also falls short. That case similarly rejects a (b)(2) settlement of monetary claims on the grounds that the parties failed to carry their burden of demonstrating that members of the class—defined as those subject to unlawful debt collection practices in the past—"were likely to face future collection efforts" by the defendant such that the injunction would be of value to them. *Id.* at 1079. In a belt-and-suspenders ruling, the Ninth Circuit held that "[e]ven for class members who might become targets" of future collection efforts, the injunctive relief was of no real value because it did not obligate the defendant to do anything it was not already doing. *Id.* at 1080.

C. The release of class members' right to recover monetary claims on an aggregate basis contravenes Rule 23(b)(2).

Plaintiffs cite only two cases in support of their flawed argument that the settlement's release of class members' right to bring an aggregate action for monetary damages against Navient is acceptable based on their view that a class action for damages is not viable. PB32.

The first is *Berry v. Schulman*, 807 F.3d 600 (4th Cir. 2015), which Yeatman discussed in his opening brief. Plaintiffs offer little analysis to rebut Yeatman's preemptive critique of *Berry*, where all class members necessarily had an ongoing relationship with the defendant and which conflicts with circuit precedent.

With respect to the second case, *In re NCAA Student-Athlete Concussion Injury Litigation*, 314 F.R.D. 580, 605 (N.D. Ill. 2016), the court in fact rejected the broad

release of class action claims. The court recognized that it "lack[ed] the factual record to evaluate the likelihood of class certification for a narrowly defined class action." *Id.* As a result, the court required that the scope of the release of class-wide claims to be significantly narrowed. Here, the scope of the release is even broader, while the district court similarly lacked any record on which to evaluate the feasibility of claims brought by even just a handful of class members.

Plaintiffs' discussion of *Dukes* also misses the mark. In *Dukes* the Supreme Court didn't "simply" hold that individualized monetary claims belong in Rule 23(b)(3). The Court expounded at length about the different protections offered to class members in (b)(2) and (b)(3) classes and the reasons for those protections. The Court was clear that "[p]ermitting the combination of individualized and classwide relief in a (b)(2) class is also inconsistent with the structure of Rule 23(b)." 564 U.S. at 361. It discussed the comparative lack of procedural protections being unnecessary to a (b)(2) class "[w]hen a class seeks an indivisible injunction benefiting all its members at once." *Id.* In contrast, "[i]n the context of a class action predominantly for money damages we have held that absence of notice and opt out violates due process." *Id.* (citing *Phillips Petro. Co. v. Shutts*, 472 U.S. 797, 812 (1985)). As discussed above, the claims forming the basis for class certification—unjust enrichment—as well as the remaining claims in the case—New York General Business Law § 349—are monetary claims that provide individualized monetary damages to claimants. It was improper for the class to be certified under Rule 23(b)(2), and it was improper for a (b)(2) settlement to release *any* monetary damages claims. *See* OB30 (citing *Ortiz*, 527 U.S. at 847 n.23 (1999) (limited opt-out mechanism

doesn't satisfy *Shutts*), and *Richardson*, 991 F. Supp. 2d at 199 (refusing to certify (b)(2) settlement class notwithstanding the preservation of individual damages claims)).

II. The district court erred by approving a settlement negotiated by conflicted representatives that favored third parties over the class without considering whether it was feasible to benefit the class directly.

A. Plaintiffs' response does not excuse the district court's errant approval of a settlement with an abusive *cy pres* provision that the parties negotiated *ex ante* even though it is feasible to distribute funds to the class.

Plaintiffs don't cite a single Second Circuit case that rebuts the Circuit's express recognition of the "last-resort" rule and limits *cy pres* to settlements where the class members "are difficult to identify, or where they change constantly, or where there are unclaimed funds.'" *Masters v. Wilhelmina Model Agency, Inc.*, 473 F.3d 423, 436 (2d Cir. 2007) (internal quotation omitted); *see also In re Holocaust Victim Assets Litig.*, 424 F.3d 132, 141 n.10 (2d Cir. 2005) ("In the class action context, it may be appropriate for a court to use *cy pres* principles to distribute unclaimed funds." (cleaned up)). Instead, they offer the red herring that *cy pres* awards are not "categorically prohibited." PB19. Perhaps not, but under Circuit law and Rule 23(e)(2)(C)(ii), they are constrained and unavailable in the present circumstances. *See Masters*, 473 F.3d at 436 (endorsing ALI Principles § 3.07(a) that settlement proceeds should be distributed directly to individual class members if they can be identified and distributions are economically viable). And Plaintiffs cite no support for their view that the (b)(2) nature of the class alters the *cy pres* rules.

Nothing in these precedents or Rule 23(e) limits these constraints on *cy pres* to (b)(3) classes. *See Molski v. Gleich*, 318 F.3d 937, 953-55 (9th Cir. 2003) (rejected attempt to substitute *cy pres* as an injunctive (b)(2) remedy for individual monetary recoveries). If anything, *cy pres* should be even more limited in the (b)(2) context because of the absence of class-member protections such as notice and opt-out rights. Plaintiffs don't dispute that the funds directed to *cy pres* belong to the class, as damages for their settled claims.[5] Their argument that, to receive the *cy pres* funds directly, class members would have to release not only their right to bring aggregate actions but also their right to bring individual actions for damages makes little sense. They offer no authority for the proposition that a settlement cannot provide class members monetary relief over and above a limited release. *See Cobell v. Salazar*, 679 F.3d 909, 917-18 (D.C. Cir. 2012) (allowing (b)(2) certification of settlement that provided uniform monetary payments). True fiduciaries should recognize that additional releases by the class would warrant substantially increased settlement funds paid by Navient.

There is no "class *as a whole*" (PB35) existing as an entity to be leveraged by class counsel to promote deterrence in corporate defendants through *cy pres* distributions. Andrew J. Trask, *The Roberts Court and the End of the Entity Theory*, 48 Akron L. Rev. 831,

[5] Contrary to plaintiffs' statement (PB37 n.16), Yeatman's argument that *cy pres* violates the Rules Enabling Act was not waived. His objection argued that because the settlement funds were generated by the value of the class's claims, the funds belong solely to the class and therefore cannot be directed to a non-compensatory use if class members have not been fully compensated. Dkt. 161 at 7. This is just as true in a class action as in individual litigation, encompassing the point that any other interpretation of Rule 23 would modify substantive rights in individual litigation and thus abridge the Rules Enabling Act.

851-54 (2015). Entity theory flouts Rule 23's status as a procedural joinder device that brings together individuals' claims only under certain conditions and provides redress to those aggrieved individuals. OB37-38; *Shady Grove Orthopedic Assocs., v. Allstate Ins. Co.*, 559 U.S. 393, 408 (2010) (class action is a "species" of joinder). The only case plaintiffs cite regarding *cy pres* as potentially "belonging to the class as a whole" is *Google Cookie*, 934 F.3d at 320. But there, the Third Circuit vacated the settlement approval order due to the "particularly concerning" broad release of money damages and designation of potentially conflicted *cy pres* recipients—similar to concerns Yeatman raises here. *Hughes v. Kore of Indiana Enterprise, Inc.*, 731 F.3d 672 (7th Cir. 2013), does not support plaintiffs' argument or represent Seventh Circuit law on *cy pres* settlements. *Hughes*'s sole holding in an *ex parte* case was that the district court did "not provide adequate grounds" in decertifying the class and remanded to redecide the certification issue. *Id.* at 678. Further, *Hughes* involved no compromise whatsoever: class counsel obtained the $10,000 statutory maximum. The court recognized that "[o]rdinarily of course class action damages go to the class." *Id.* One year later, the same circuit decided *Pearson v. NBTY, Inc.*, 772 F.3d 778 (7th Cir. 2014), holding that plaintiffs should have distributed $1.1 million of *cy pres* to 12 million class members.

Finally, plaintiffs' claims about Promise's benefits to the class are grossly overstated. *See* Section I.A. It is not a benefit to the class "as a whole" because the many class members who are no longer employed in public service or who have paid off their student loans will not obtain any benefit. Plaintiffs' comment that Promise might advise on potential damages claims for those class members finds no support in the record and is contrary to descriptions of its mission and competencies. A-354.

B. The district court did not find distribution of *cy pres* funds to the class was infeasible or address the issue at all.

The district court made no finding that distribution was infeasible. And it did not consider plaintiffs' absurd claim that an individual claims process would be so burdensome as to require "detailed documentation of class members' individual financial circumstances." PB37. Navient certainly has a record of the loans it serviced during the class period, and class members could simply check a claim form that they were employed full-time by a public service employer and communicated with Navient regarding PSLF eligibility. Those are the only elements of class membership. A-292. Relying on self-identification is common in claims processes. *Cf. Pearson*, 772 F.3d at 783 (impugning "burdensome" claims process). The district court's adjudication of a discovery dispute over the production of call records is not relevant here, A-253-254, and the court provided no analysis of any potential burden of a claims process in its final approval determination. Accordingly, *Masters*'s observation that *cy pres* may be appropriate in the limited case where distribution of funds is economically infeasible or proof of individuals claims is burdensome does not apply.

Plaintiffs' only effort to distinguish Yeatman's multiple cases denying *cy pres* settlements (OB36-37) is to claim vaguely that the settlements were denied for unspecified "factual reasons inapplicable here," PB38, thus forfeiting any rebuttal argument to the application of those cases.

Distributing the $2.25 million in *cy pres* funds to the up to 324,900 class members is not "frivolous" (PB39) but based on the fact that far more disproportionate settlement funds and class sizes have achieved direct monetary recovery for the class.

Yeatman presented evidence of these settlements to the district court; plaintiffs did not challenge more than one example among that evidence, and the district court failed to consider it. Dkt. 164 at 22-24. (Again, it's unclear why plaintiffs would want to also release individual damages claims, and they cite no authority in support of this path. PB39.) Plaintiffs note that a 10% claims rate would result in a $70 payment to the claimants—well above the $0 all class members now recover. "Class members are not indifferent to whether fund are distributed to them or *cy pres* recipients, and class counsel should not be either." *In re Baby Products Antitrust Litig.*, 708 F.3d 163, 178 (3d Cir. 2013). And we know doing direct distribution is possible from the many, many cases where the settlements did so. Dkt. 164 ¶¶ 13-14. The settlement funds represent the value of the claims released; class members would still retain their individual claims for damages.

C. Plaintiffs fail to rebut the "significant prior affiliation" among class representatives, class counsel, Student Defense, and AFT as they relate to the *cy pres* recipient, making settlement approval an independent legal error.

The legal standard of ALI Principles § 3.07 examines not only concrete conflicts involving prior affiliations with the proposed *cy pres* recipient but also whether such prior affiliation "raise[s] substantial questions about whether the selection was made on the merits. ALI Principles § 3.07 cmt. b; *see also Nachshin v. AOL, LLC*, 663 F.3d 1034, 1038 (9th Cir. 2011). Plaintiffs don't dispute that such prior affiliations would call into question the fairness of a *cy pres* remedy. Nor do they dispute that class counsel, AFT, the class representatives, and certain individuals involved with Promise have multiple overlapping professional and financial relationships—incentives to stay in each other's

good graces. Even in presenting their presumably best argument for independence, plaintiffs acknowledge that one of only three members of Promise's board also serves on the advisory board of Student Defense, where certain senior attorneys have a preexisting attorney-client relationship with AFT and co-counsel relationship with class counsel. PB40 n.18; OB10.

Plaintiffs identify nowhere in the record where the district court considered the prior affiliations among class counsel, AFT, and those involved with Promise. The best citation they muster is to the district court's recitation of class counsel's assertion that Promise will have an "independent, well qualified board." PB40-41. The district court's failure to analyze these overlapping relationships and affiliations is reversible error. *Google Cookie*, 934 F.3d at 331.

Plaintiffs are incorrect that Promise will benefit the class and is thus distinguishable from conflicted *cy pres* recipients rejected in precedent cited by Yeatman. *See* Section I.A; OB35; OB44. It is cold comfort that "the parties and their counsel" selected the *cy pres* recipient rather than AFT directly (PB41), when all of the class representatives are members of AFT and class counsel has an ongoing attorney-client relationship with AFT. OB10; OB39-41. It also defies logic to suggest that AFT spent nearly $6 million on this litigation without expectation of any benefit to itself or its members. Even if AFT were truly concerned about the student loan debt of public servants—many of whom include public-interest employees at organizations with opposing policy positions such as Yeatman—the settlement itself falls short. Our public servants are still overburdened with student debt, with no financial relief or altered loan terms from this litigation. Instead, the settlement sends what should be class relief to a

third party that just so happens to have interests that overlap with AFT's mission and with their hand-picked counsel. Of course AFT is benefitting from this settlement. *See* OB39-41.

D. Distribution of a settlement fund that belongs to the class by court order without allowing class members to opt out is state action in violation of the First Amendment.

Plaintiffs' two arguments opposing Yeatman's argument that the *cy pres* award violates the First Amendment are wrong.

First, the district court's order approving the settlement was state action for purposes of the First Amendment. Approval of class settlements implicates the constitutional rights of absent class members, a principle established eighty years ago in *Hansberry v. Lee*, 311 U.S. 32, 42-43, 45 (1940). Plaintiffs cannot navigate their way around *Hansberry*, *Ortiz*, or other cases all showing that binding absent class members is a question of constitutional dimension. Settlement approval constitutes state action for due process purposes; it also constitutes state action for First Amendment purposes.

Second, the speech is compelled from class members, not Navient. The settlement funds, "generated by the value of the class members' claims, belong solely to the class members." *Klier v. Elf Atochem N. Am.*, 658 F.3d 468, 474 (5th Cir. 2011). They represent the value of the claims being released, including the right to bring an aggregate action for damages. The release of those rights had value; that value is represented by the settlement amount. Plaintiffs' view of the settlement funds as a "voluntary contribution" from Navient has no basis in reality. That is especially true when a half-million dollars was originally allocated as attorneys' fees for class counsel's

work until the court rejected the fee request because of class counsel's secrecy in accepting fees from AFT throughout the litigation.

III. The abusive *cy pres* selection, combined with other settlement terms, demonstrate that the class was not adequately represented.

Class counsel can't rebut the clearest sign of their inadequacy: They agreed to a settlement that dedicated $1.75 million to a third party; $500,000 to partially reimburse AFT for the $5.9 million in fees AFT paid them; $150,000 to the class representatives who are also AFT members; and $0 to the class.

Their effort to untangle the web of affiliations among these entities falls short. First, that the district court denied an attorneys' fee award for what it called class counsel's "misleading" statements both to the court and to the class does not fully resolve the issue, as the underlying conflict manifests in the terms of the settlement as well. Even if class counsel are "qualified, experienced, and generally able to conduct the litigation," PB51, those traits alone cannot compensate for the fact that they and the class representatives settled the class claims without obtaining any monetary relief for the class and for injunctive relief that benefits only half the class at most—"while securing significant benefits for themselves." *Frank v. Gaos*, 139 S. Ct. 1041, 1047 (Thomas, J., dissenting).

There is nothing "speculative" about the conflicts. PB52. There is no dispute that class representatives are members of AFT, which helped to recruit them; there is no dispute that class counsel represents AFT in other litigation; there is no dispute that AFT paid class counsel nearly $6 million in fees throughout this litigation; and there is

no dispute that class representatives each recovered $15,000 while the class recovered $0.

Plaintiffs surely see the conflict in having class counsel's hourly bills paid regularly throughout the litigation by AFT. PB53. This arrangement divorces the interests of class counsel and the class. Ordinarily, class counsel recovers fees that are reasonable and commensurate with the benefit they achieved for the class. *See* Fed. R. Civ. P. 23(h). Class counsel has less incentive to favor the class if their own recovery is not affected by the class's recovery, and more incentive not to "bite the hand that feeds it" in this case and others. This alteration in their incentives is true regardless of AFT's motives—an issue on which the district court did not have facts in the record to opine, other than the deeply interwoven relationships among AFT, the class representatives, class counsel, and Promise.

Plaintiffs primarily rely on *Meredith Corp. v. SESAC, LLC*, 87 F. Supp. 3d 650, 667-71 (S.D.N.Y. 2015), as supposedly endorsing their unorthodox fee splitting with non-party AFT while "misleading" the court and the class about the arrangement. But there, the attorneys submitted a lodestar calculation with their fee request that showed its actual billings to a nonprofit client that represented absent class members, with no suggestion that an outside group of non-class members secretly pre-paid counsel's fees with the expectation that counsel would later transfer its fee award to partially reimburse that group. *Id.* at 670. *Meredith Corp.* would be comparable only if class counsel followed the traditional contingency path of direct payment from their actual client. Plaintiffs cite no authority for what amounts to fee-splitting with AFT, which was not a party to the case or even an absent class member. Plaintiffs' other cases are not on point. For

example, unlike in *Kaplan v. S.A.C. Capital Advisors*, 2015 WL 530101 (S.D.N.Y. Sept. 10, 2015), the funding arrangement with AFT is not "speculative" but admitted. And, unlike in *Capsolas v. Pasta Resources Inc.*, 2020 WL 7230688 (S.D.N.Y. Dec. 8, 2020), the apparent conflicts in this case go well beyond the recipient of residual funds remaining after class members received settlement checks serving as co-counsel with class counsel in other cases.

IV. The settlement is unfair under Rule 23(e).

Plaintiffs barely respond to Yeatman's Rule 23(e) argument and authorities. The reasons the settlement is unfair under Rule 23(e) are substantially the same as the reasons that the class should not have been certified, the *cy pres* distribution is unfair, and the class received inadequate representation. This settlement favored the attorneys, class representatives, and their favored nonprofit over the class. It allocated substantial sums to those actors and was structured so that any reduction benefited them rather than the class, *i.e.*, the reduction in attorneys' fees resulted in an increase in the *cy pres* distribution. And, the district court failed to analyze these issues or consider the factors of Rule 23(e)(2)(C)(ii)-(iv).

Because several of the errors here could be repeated in the (b)(3) context, Yeatman suggests a decision on these grounds would benefit district courts by addressing "the operational question" of how the ruling should "apply in practice" and avoiding a "halfway-decision." *Maslenjak v. United States*, 137 S. Ct. 1918, 1927 & n.4 (2017); *see also In re Dry Max Pampers Litig.*, 724 F.3d 713 (6th Cir. 2013) (reaching question of settlement fairness even where certification was infirm).

Conclusion

For the foregoing reasons, this Court should reverse the district court's certification of the settlement class and approval of the settlement.

Dated: June 3, 2021

Respectfully submitted,

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