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

Opening Brief of Appellant William Yeatman

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Corporate Disclosure Statement (FRAP 26.1)

Pursuant to the disclosure requirements of Federal Rule of Appellate Procedure 26.1, William Yeatman declares that he is an individual and, as such, is not a subsidiary or affiliate of a publicly owned corporation and there is no publicly held corporation that owns ten percent or more of any stock issued by him.

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Statement of Subject Matter and Appellate Jurisdiction

The district court had subject matter jurisdiction under the Class Action Fairness Act, 28 U.S.C. § 1332. The action was brought as a class action on behalf of proposed classes that each exceeded 100 members. The amount in controversy exceeds $5,000,000, exclusive of interest and costs. The plaintiff class includes members whose citizenship is different from the defendants' Delaware citizenship. A-78-79.[1]

This court has appellate jurisdiction under 28 U.S.C. § 1291. Following settlement of this class action, appellant class member William Yeatman objected to certification of the class, approval of the proposed settlement, and the plaintiffs' attorneys' fee request. The district court certified the class, approved the settlement, and rejected the fee request by a final approval order dated October 9, 2020. SPA-1. Yeatman timely appealed under Fed. R. App. P. 4(a)(1)(A) on November 2, 2020. A-657. Yeatman, as a class member who objected to settlement approval below, has standing to appeal from a final approval of a class action settlement without the need to intervene formally in the case. *Devlin v. Scardelletti*, 536 U.S. 1 (2002).

Statement of the Issues

1. Certification under Rule 23(b)(2) is proper only when the "final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole." Fed. R. Civ. P. 23(b)(2). Did the district court err as a matter of law by certifying a

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[1] "A" stands for the joint appendix for this appeal. "SPA" stands for the special appendix in this appeal. "Dkt." stands for docket numbers in the underlying district-court case, No. 18-cv-9031 (S.D.N.Y.).

settlement class under Rule 23(b)(2) where a substantial portion of the retrospectively defined class will not benefit from the future-oriented injunctive relief, and the claims being settled allege economic harm such that class members have an adequate remedy at law, yet the settlement provides only injunctive relief and waives class members' right to pursue money damages in an aggregate action?

Standard of Review: "Certification of a class is reviewed for abuse of discretion." *Berni v. Barilla S.p.A.*, 964 F.3d 141, 146 (2d Cir. 2020) (internal quotation omitted). A court abuses its discretion if its decision "(i) rests on a legal error or clearly erroneous factual finding, or (ii) falls outside the range of permissible decisions." *Id.* Such review is "more stringent than usual" when the class is certified for settlement purposes only. *Id.*

2. Courts recognize that as a non-compensatory use of class funds, *cy pres* should not be selected by the parties as an *ex ante* remedy but rather serve as an inferior avenue of last resort only after finding it infeasible to distribute funds to the class. *See, e.g.*, *In re BankAmerica Corp. Secs. Litig.*, 775 F.3d 1060 (8th Cir. 2015); *Pearson v. NBTY, Inc.*, 772 F.3d 778, 784 (7th Cir. 2014); *see also Masters v. Wilhelmina Model Agency, Inc.*, 473 F.3d 423, 436 (2d Cir. 2007); Fed. R. Civ. P. 23(e)(2)(C)(ii). Further, a "cy pres remedy should not be ordered if the court or any party has any significant prior affiliation with the intended recipient that would raise substantial questions about whether the selection … was made on the merits." American Law Institute, *Principles of the Law of Aggregate Litigation* ("ALI Principles") § 3.07 cmt. b; *In re Google Cookie Placement Consumer Privacy Litig.*, 934 F.3d 316, 331 (3d Cir. 2019). Here, class counsel negotiated a settlement that directs the only monetary relief to a newly formed organization with input from

individuals who have served as co-counsel with class counsel and represented their "nonprofit partner" American Federation of Teachers ("AFT") and which intends to engage in advocacy and take positions on public policy.

(a) Did the district court err as a matter of law by approving a settlement that favors a third party over class members through its *cy pres* provision where distribution of settlement funds to the class is feasible?

(b) Did the district court err as a matter of law when it failed to apply ALI Principles § 3.07 and approved a *cy pres* distribution that paid money to form an organization whose work coordinates with class counsel's "nonprofit partner" and to whom AFT's counsel and class counsel's co-counsel will contribute?

(c) Is a *cy pres* settlement that awards money to a group that advances public policy positions with which at least some class members disagree impermissible compelled speech or subsidy under the First Amendment?

Standard of Review: Settlement approval is reviewed for abuse of discretion. *Central States Se. & Sw. Areas Health & Welfare Fund v. Merck-Medco Managed Care*, 504 F.3d 229, 246 (2d Cir. 2007). A court abuses its discretion if its decision "rests on a legal error or clearly erroneous factual finding, or falls outside the range of permissible decisions." *In re Payment Card Interchange Fee & Merchant Discount Antitrust Litig.*, 827 F.3d 223, 231 (2d Cir. 2016) ("*Payment Card*"). "This Court reviews *de novo* questions of statutory interpretation, including a district court's interpretation of the Federal Rules of Civil Procedure." *L-3 Commc'ns Corp. v. OSI Sys.*, 607 F.3d 24, 27 (2d Cir. 2010).

3. This Court and others hold that class counsel and class representatives are inadequate representatives when they agree to settlement terms that subordinate the

interests of absent class members. *E.g.*, *Gallego v. Northland Group*, 814 F.3d 123, 129 (2d Cir. 2016); *see also In re Pampers Dry Max Litig.*, 724 F.3d 713, 722 (6th Cir. 2013). Did the district court err by finding class counsel and class representatives adequate where they agreed to release class members' claims in exchange for $500,000 to partially reimburse their "nonprofit partner" that had paid $5.9 million in attorneys' fees to class counsel over the course of the litigation outside the purview of the district court; $15,000 to each class representative; $1.75 million to a third-party organization, and $0 to the class?

Standard of Review: "Certification of a class is reviewed for abuse of discretion." *Payment Card*, 827 F.3d at 231. A court abuses its discretion if its decision "rests on a legal error or clearly erroneous factual finding, or falls outside the range of permissible decisions." *Id.*

4. To better review class settlements, this Court has long instructed district courts to ferret out "those situations short of actual abuse, in which the client's interests are somewhat encroached by the attorney's interests." *In re Agent Orange Prods. Liab. Litig.*, 818 F.2d 216, 224 (2d Cir. 1987). Similarly, the 2018 amendments to Rule 23 direct courts to consider, *inter alia*, whether the settlement relief is adequate in relation to "the terms of any proposed award of attorney's fees" and "the effectiveness of any proposed method of distributing relief to the class." Fed. R. Civ. P. 23(e)(2)(C)(ii)-(iv). Did the district court err by approving a settlement that disproportionately compensated the attorneys and class representatives, directed all class relief to a third party while the class recovered $0, and prevented any reduction in the fee and incentive awards from being paid to the class members?

Standard of Review: Settlement approval is reviewed for abuse of discretion. *Central States*, 504 F.3d at 246. A court abuses its discretion if its decision "rests on a legal error or clearly erroneous factual finding, or falls outside the range of permissible decisions." *Payment Card*, 827 F.3d at 231. "This Court reviews *de novo* questions of statutory interpretation, including a district court's interpretation of the Federal Rules of Civil Procedure." *L-3 Commc'ns Corp.*, 607 F.3d at 27.

Statutes and Rules

Federal Rule of Civil Procedure 23. Class Actions.

(a) Prerequisites. One or more members of a class may sue or be sued as representative parties on behalf of all members only if:

….

(4) the representative parties will fairly and adequately protect the interests of the class.

(b) Types of Class Actions. A class action may be maintained if Rule 23(a) is satisfied and if:

….

(2) the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole….

….

(e) Settlement, Voluntary Dismissal, or Compromise. The claims, issues, or defenses of a certified class—or a class proposed to be certified for purposes of settlement—may be settled, voluntarily dismissed, or compromised only

with the court's approval. The following procedures apply to a proposed settlement, voluntary dismissal, or compromise:

….

(2) Approval of the Proposal. If the proposal would bind class members, the court may approve it only after a hearing and only on finding that it is fair, reasonable, and adequate after considering whether:

(C) the relief provided for the class is adequate, taking into account:

….

(ii) the effectiveness of any proposed method of distributing relief to the class, including the method of processing class-member claims;

(iii) the terms of any proposed award of attorney's fees, including timing of payment; and

(iv) any agreement required to be identified under Rule 23(e)(3); ….

(g) Class Counsel.

(1) Appointing Class Counsel. Unless a statute provides otherwise, a court that certifies a class must appoint class counsel. In appointing class counsel, the court …

(B) may consider any other matter pertinent to counsel's ability to fairly and adequately represent the interests of the class….

Statement of the Case

This is an appeal from an order of Judge Denise Cote approving a class-action settlement over the objection of appellant William Yeatman. SPA-1. The decision is not reported. *See Hyland v. Navient*, No. 18-cv-9031, 2020 U.S. Dist. LEXIS 211676 (S.D.N.Y. Oct. 9, 2020).

A. Plaintiffs bring a class action, and the parties settle.

The underlying lawsuit is a class action brought by plaintiffs working for public service employers whose loans were serviced by defendant Navient and whose allegations focus on the Public Service Loan Forgiveness ("PSLF") Program. The PSLF Program forgives the balances of certain federal loans for borrowers working full-time for a public-service employer after they make 120 on-time qualifying payments and complete the required paperwork. Every named plaintiff is a member of the American Federation of Teachers ("AFT"). Dkt. 163 Ex. 2 at 3. AFT is a union group that helped to recruit named plaintiffs for this case and then publicized filing of the lawsuit by its members. *See, e.g.*, Dkt. 163 at 19, Ex. 3. Defendant Navient Corporation holds a portfolio of billions of dollars of federal student loans, while its subsidiary and co-defendant Navient Solutions LLC services billions of dollars in student loans for millions of borrowers. A-47 ¶¶ 176, 178. Together, Navient Corporation and Navient Solutions LLC are referred to as "Navient" or "defendants."

Plaintiffs allege that Navient unlawfully gave borrowers inaccurate or misleading information about their repayment options and thus hindered efforts to satisfy PSLF requirements—motivated by a financial interest in retaining more revenue and fees for itself. A-42-47, 114-15. As a result, plaintiffs allege, student loan borrowers made excess payments, accrued unpaid interest, or lost PSLF eligibility altogether. A-42.

Plaintiffs filed their complaint on behalf of a nationwide damages class ("Nationwide Class"), a nationwide injunctive class consisting of individuals who intend to contact Navient in the future regarding PSLF eligibility ("Nationwide Injunctive Class"), and subclasses of borrowers in Maryland, Florida, New York, and California ("State Subclasses"). A-131-32 ¶ 396. The complaint sought certification under Rule 23(b)(2) for the Nationwide Injunctive Class, A-134 ¶ 405, and also sought certification under Rule 23(b)(3) for the classes, A-134 ¶ 406. On behalf of the Nationwide Class, plaintiffs alleged an unjust enrichment claim (among other claims) to prevent Navient from retaining the loan servicing fees they paid. Plaintiffs also alleged this claim on behalf of the State Subclasses in the alternative, but did not allege it on behalf of the Nationwide Injunctive Class. A-143 ¶ 452. Plaintiffs alleged claims under New York General Business Law ("GBL") § 349 on behalf of the New York subclass. A-153 ¶ 519. Plaintiffs estimated that there were tens of thousands of New York class members with estimated damages of $20,000 to $30,000 per person, and represented to the court that "a substantial number of damages [was] at issue in this case." A-200:6-10.

The district court dismissed all but one claim—plaintiffs' claims under GBL § 349. A-160. The court expressed the view that this sole remaining claim could not be certified and was unlikely to succeed as a class action if the litigation were to continue because of the individualized nature of class members' conversations with Navient. A-214-215.

The parties settled. The Rule 23(b)(2) settlement class was defined to include all individuals who "have or had [Federal Family Education Loans ("FFEL")] or Direct Loans serviced by Navient; (ii) are or were employed full-time by a qualifying public

service employer or employers for purposes of PSLF; and (iii) spoke to a Navient customer service representative about subjects relating to eligibility for PSLF" from October 1, 2007 to the present. A-316.[2] The class comprises "up to 324,900" class members whose identities are known. Dkt. 120 at 21.

The relevant settlement terms are as follows:

- Settlement fund: Navient agreed to pay **$2.4 million**. A-316.
- No monetary recovery: The class recovered **no cash**.
- *Cy pres*: From the $2.4 million fund, the settlement would pay **$1.75 million to *cy pres* recipient Public Service Promise**, a new organization formed as part of the settlement, if the court awarded the full attorneys' fees and class representative incentive awards requested. A-322.
- Future business practice changes: Navient agreed to implement **certain operational practices** to help ensure that **in the future** it will provide accurate information to borrowers seeking to qualify for the PSLF program. The business practice changes included enhanced internal resources for call center representatives, updated written and internet communications with borrowers, and training and monitoring of call center representatives. A-319-322.
- Release of claims: Class members were required to release their **injunctive relief claims** related to the alleged conduct as well as the **right to pursue money damages through "aggregate actions,"** defined to mean "any litigation proceeding in which five or more separate individuals propose to prosecute their Claims in the context of the same legal proceeding." A-312, 315, 327-328. Class members retained their right to sue Navient for monetary damages as individual plaintiffs.

[2] Direct Loans are student loans in which the federal government issues loans directly to the borrower, while FFEL are student loans that were issued by private companies and reinsured by the federal government. *See* A-313-314.

- No opt out: Class members could not opt out of the settlement class. A-318.

- Attorneys' fees: Navient would pay attorneys' fees of **$500,000 to class counsel**. A-326.

- Incentive awards: Navient would pay **$15,000 to each of the ten class representatives**. A-326.

- AFT identified as a releasing class representative: The settlement defined AFT as a "releasing class representative party." Although every named plaintiff is a member of AFT, AFT is not itself a class representative. A-315; Dkt. 163, Ex. 2 at 3.

- Clear sailing: Navient agreed **not to challenge** class counsel's request for $500,000 in fees. A-326.

- Reversion to Third-Party *Cy Pres*: If the court reduced the payments requested by class counsel or class representatives, the **reduced amounts would be paid to the *cy pres* recipient** and not to the class. A-323.

The parties' *cy pres* term sheet attached to the settlement agreement (A-354) stated that the new Public Service Promise would be formed through the work of the National Student Legal Defense Network ("Student Defense"). The term sheet contemplated the potential ongoing involvement of certain senior attorneys from Student Defense who have a preexisting relationship with AFT and class counsel. A-357-358. The Student Defense officers whom the term sheet specified as being involved are counsel for AFT in *AFT v. DeVos*, No. 5:20-cv-455 (N.D. Cal.) and co-counsel with class counsel for AFT in *Weingarten v. DeVos*, No. 1:19-cv-02056 (D.D.C.). At least one of them has had at least one other co-counsel relationship with class counsel. *See Wackenhut Corp. v. SEIU*, 593 F. Supp. 2d 1289 (S.D. Fla. Dec. 4, 2008).

The *cy pres* term sheet further stated that Public Service Promise would "advocate for administrative, regulatory, and legislative" changes to the PSLF program, with a team member spending half-time on such advocacy. A-355-356. Public Service Promise plans to provide education and student loan counseling to borrowers employed in public service and to assist those seeking PSLF. A-355.

The district court preliminarily approved the settlement. A-290. The court subsequently asked the parties to respond to *Berni v. Barilla S.p.A.*, 964 F.3d 141 (2d Cir. 2020), in which "the Second Circuit held that a class of past purchasers may not properly be certified under Rule 23(b)(2)." Dkt. 109. The parties submitted letter responses. The court kept the preliminary approval order in place unaltered. A-310.

B. Class counsel's fee request reveals for the first time that it planned use the entire award to "partially reimburse" AFT for its ongoing payment of their fees.

Class counsel filed a motion requesting an award of attorneys' fees of $500,000. Dkt. 121. In their supporting memorandum, class counsel revealed for the first time that class counsel intended to use the awarded fees to "partially reimburse AFT for funding this litigation." Dkt. 122 at 2. Class counsel further revealed for the first time that AFT had been paying "significant, up-front" legal fees to class counsel as their "non-profit partner who sponsored this litigation on behalf of the entire Class and the Class Representatives (who are AFT members)." *Id.* at 1. Although class counsel stated that their lodestar equaled approximately $5.9 million after a 20% reduction to their hourly rates, class counsel did not disclose that AFT had paid that full amount in connection with the case until the fairness hearing. *See* Dkt. 122 at 8; A-652 (court:

"today is the day I learned that that [$5.9 million] sum had been paid in its entirety"). Nor did the parties disclose to class members in the class notice that the attorneys' fees would be paid to "partially reimburse" AFT or even mention AFT at all. *See* A-653.

Class counsel also did not disclose to the district court their business relationship with AFT, which includes both class counsel firms representing AFT in other cases. *See, e.g.*, *Weingarten*, No. 1:19-cv-02056; *Pennsylvania v. Navient Corp.*, No. 19-2116, 2020 U.S. App. LEXIS 23531 (3d Cir. July 27, 2000); *Lawson-Ross v. Great Lakes Higher Educ. Corp.*, 955 F.3d 908 (11th Cir. 2020) (Selendy & Gay as counsel to *amicus* AFT in case litigated by Student Defense).

C. Yeatman objects to the settlement and class counsel's fee request.

Appellant William Yeatman is a class member, as he had FFEL or Direct Loans serviced by Navient during the class period, has been employed full-time by a qualifying public service employer for purposes of PSLF during that time, and spoke to a Navient customer service representative about the PSLF program and his eligibility. A-484. Yeatman filed a timely objection challenging the certification of the class, fairness of the proposed settlement, and class counsel's fee request. Dkt. 161.

Yeatman objected that the settlement improperly favored a third party chosen by conflicted representatives over class members through its *cy pres* provision. The settlement, *ex ante*, directed the full $1.75 million in cash available for class relief to a newly formed organization without making any effort to compensate class members when there was no suggestion that such direct compensation was infeasible. Yeatman objected to the absence of class relief and preference for third parties over the class,

and the settlement's release of class members' claims for monetary damages brought in any aggregate action of more than five plaintiffs. Yeatman argued that the *cy pres* award was particularly impermissible because of the appearances of conflicts of interest: The settlement provided for the formation of a new organization in which individuals involved in its operations have overlapping relationships with class counsel and AFT, which have their own intertwined business relationship. Further, by ordering class settlement funds to be paid to an organization that would advocate for policy positions and advance a legislative agenda, he argued, the settlement approval order violated class members' First Amendment rights to refrain from supporting or associating with a third party's agenda and activities. *See* Dkt. 161 at 12.

Yeatman objected to certification of the settlement under Rule 23(b)(2) because (i) not all class members will benefit from the proposed injunctive relief, and (ii) the claims allege economic harm on behalf of individual class members such that the class has an adequate remedy at law, yet the settlement provides only injunctive relief and waives class members' right to pursue money damages in an aggregate action. Dkt. 161 at 14. For example, Yeatman's loans were transferred to another servicer in 2020, and he has no prospective relationship with Navient. A-484.

Yeatman further objected to class certification due to inadequate representation in violation of Rules 23(a)(4) and (g)(4). Yeatman argued that the preexisting conflicts of interest with respect to the *cy pres* recipient, AFT, the class representatives, and class counsel alone were disqualifying, with the settlement terms demonstrating that those conflicts actually harmed the class. The settlement directs money to *cy pres* when the funds instead could feasibly be distributed to class members; the change in business

practices would not benefit the many class members no longer eligible for the PSLF program; the settlement releases class members' right to bring monetary damages in an aggregate action without providing any monetary compensation; and the settlement pays to reimburse AFT $500,000, the class representatives $15,000 each, and a third party $1.75 million, while paying the class $0. *See* Dkt. 161 at 21.

Yeatman also objected that the settlement was unfair under Rule 23(e) and could not be approved due to the disproportionate allocation such that class representatives and class counsel recovered substantial sums while the class recovered $0, a "clear sailing" provision in which Navient agreed to counsel's proposed fee, and the reversion of any fee reduction to the *cy pres* recipient rather than to the class. *See* Dkt. 161 at 23.

Finally, Yeatman argued that the attorneys' fee request should be rejected in its entirety because it violated the ethical rule against fee-splitting with non-attorneys, class counsel had not disclosed their funding and fee-splitting agreement to the court at the time the agreement was made, and class counsel had not met their burden of justifying the award. *See id.* at 24.

D. After a fairness hearing, the court approves the settlement and redirects the requested attorneys' fees to the *cy pres* recipient.

The district court held a fairness hearing at which Yeatman appeared through counsel. A-601. The district court discussed the factors set forth in *City of Detroit v. Grinnell*, 495 F.2d 448 (2d Cir. 1974). A-645. The court noted that individual class member circumstances differed "so dramatically" that an individual action or a government enforcement action was the "only avenue for obtaining a monetary award." A-646-647. The district court expressed the view that the lack of an opt-out provision

was "adequately dealt with by the fact that individual class members retain their right to bring individual lawsuits." A-648. The court awarded the requested $15,000 to each class representative. A-652; SPA-7. The court declined to grant class counsel's request for $500,000 in fees. A-654; SPA-7. The court based its decision on the lack of notice due to class counsel's "misleading" statements to the court and the class. "There was no statement [in the notice to the class or in filings with the court] that the attorney's fees have been paid on a monthly basis and that this would be a request to reimburse the AFT for those payments." A-653. The court noted that it nevertheless believed that AFT's work led to the class achieving a "significant benefit" because "[b]y funding Public Service Promise, we have an independent, well-qualified board overseeing the work of its employees in the education and training and outreach that will help public service employees…." A-654-655. As a result of the denial of the requested fees, the *cy pres* award increased to $2.25 million. *See* SPA-7.

Class counsel acknowledged at the hearing that only six of the ten class representatives still have loans serviced by Navient. A-637.

The court asked class counsel to submit a revised judgment. A-656; Dkt. 181-1. On October 9, 2020, the court issued its final approval order approving the settlement, awarding $15,000 to each class representative, and declining to award attorneys' fees. SPA-3, 7.

In neither its final approval order nor during the fairness hearing did the district court address Yeatman's objections to *cy pres*. Nor did the district court address Yeatman's objections to class certification under Rule 23(b)(2) due to the mismatch between the prospective relief and retrospective class definition, or under Rule 23(a)(4)

and (g) due to the conflicts of interest among class counsel, the class representatives, AFT, and individuals involved in forming Public Service Promise. Nor did the district court address Yeatman's objection that the imbalanced settlement represented a lawyer-driven settlement that should be rejected under Rule 23(e).

Yeatman timely appealed the decision. A-657.

Summary of Argument

In this case, the attorneys recovered $5.9 million in a side agreement that circumvented court review of their fees, the class representatives each recovered $15,000, and the class members releasing aggregated damages claims recovered $0 beyond some forward-looking injunctive relief that will not benefit nearly half of the class. The main "relief" is $1.75 million in *cy pres*—raised to $2.25 million after the district court rejected class counsel's attempt to "reimburse" their "nonprofit partner" AFT for $500,000 of the millions in fees AFT paid to them—to form a new nonprofit group whose contributors include co-counsel who represent AFT with class counsel in other cases. The district court's approval of the settlement presents multiple reversible errors.

First, certification of the settlement class under Rule 23(b)(2) is improper. This Court's precedent establishes that (b)(2) applies only when every class member's injury is remediable by a single injunction or declaratory judgment. *Berni*, 964 F.3d at 146; *see also Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 360 (2011). But nearly half the class will not benefit from the injunctive relief—future changes to Navient's business practices—because they, like Yeatman, no longer have loans serviced by Navient. Rule (23)(b)(2)

certification is also improper because monetary damages are the proper relief for the settled unjust enrichment claims—and is requested in the complaint, yet the settlement provides no monetary relief and releases the class members' right to pursue money damages in any action brought with four or more other plaintiffs. Where monetary damages are an adequate remedy, (b)(2) certification is improper. *Wal-Mart*, 564 U.S. at 360-61. *See* Section I.

Second, the *cy pres* relief makes the settlement unfair under Rule 23(e). *Cy pres* raises "fundamental concerns"[3] and therefore has been limited to a "last resort" where settlement funds cannot feasibly be distributed to class members. *See e.g., BankAmerica*, 775 F.3d at 1063-66; Fed. R. Civ. P. 23(e)(2)(C)(ii). Here, the parties did not argue and the district court did not find that the settlement funds could not be paid directly to the class. As such, it was impermissible for the court to approve a settlement that preemptively pays all of the monetary relief to a third party that engages in work supportive of the work of class counsel's "nonprofit partner" AFT and is supported by counsel representing AFT in other cases. Further, the court order that settlement funds, which belong to the class members, be used to fund a group engaged in policy and advocacy work, without providing the class an opportunity to opt out, constitutes compelled speech in violation of class members' First Amendment rights. *See* Section II.

Third, the *cy pres* selection, combined with the flush recovery for class representatives, out-of-court payment of $5.9 million to class counsel, and injunctive relief that fails to benefit nearly a majority of the class indicates that class certification

[3] *Marek v. Lane*, 571 U.S. 1003, 1006 (2013) (Roberts, C.J., respecting the denial of certiorari).

is improper due to inadequate representation under Rules 23(a)(4) and (g)(4). *See* Section III.

And, when a settlement contains such signs of being a lawyer-driven deal, the settlement fails the fairness requirement of Rules 23(e). *See* Section IV.

Preliminary Statement

Attorneys with the Center for Class Action Fairness ("CCAF"), which became part of the non-profit Hamilton Lincoln Law Institute in 2019, bring Yeatman's objection and appeal. The Center's mission is to litigate on behalf of class members against unfair class-action procedures and settlements, and it has won hundreds of millions of dollars for class members. *See* Andrea Estes, *Critics hit law firms' bills after class-action lawsuits,* Boston Globe (Dec. 17, 2016); *see also, e.g.*, Adam Liptak, *When Lawyers Cut Their Clients Out of the Deal*, N.Y. Times, Aug. 13, 2013, at A12; Editorial Board, *The Class-Action Con*, Wall St. J. (Feb. 11, 2018); *Pearson*, 772 F.3d at 787 (praising CCAF's work); Decl. of Theodore H. Frank, Dkt. 164 (documenting dozens of successful objections). Yeatman brings this appeal in good faith to protect class members in this and future class actions against unfair and abusive settlements.

Argument

I. The district court erred by certifying a class under Rule 23(b)(2) when the injunctive relief will not benefit all class members.

In conjunction with the settlement, plaintiffs sought to certify a class under Rule 23(b)(2). A Rule 23(b)(2) class is limited to situations where plaintiffs seek a single, "indivisible injunction" against defendants that will provide relief to all class members.

Equally. *Wal-Mart*, 564 U.S. at 361-63; Fed. R. Civ. P. 23(b)(2) (certification proper only when "final injunctive relief … is appropriate respecting the class as a whole"). This requirement of Rule 23(b)(2) demands "undiluted, even heightened, attention in the settlement context." *Amchem Prods. v. Windsor*, 521 U.S. 591, 620 (1997); *accord Berni*; 964 F.3d at 146; *Payment Card.*, 827 F.3d at 235.

The district court's (b)(2) certification of the settlement is improper here because (1) not all class members will benefit from the proposed injunctive relief; and (2) the claims allege economic harm on behalf of the individual class members such that the class has an adequate remedy at law, yet the settlement provides only injunctive relief and waives class members' right to pursue any money damages in an aggregate action. In short, (b)(2) certification is improper because the class members are "victims of a completed harm" who "would be entitled to damages," but not every member has standing to seek injunctive relief. *Hecht v. United Collection Bureau, Inc.*, 691 F.3d 218, 223-24 (2d Cir. 2012).

A. Rule 23(b)(2) certification is improper because members of the putative class obtain no benefit from the prospective injunctive relief.

"Rule 23(b)(2) applies only when a single injunction or declaratory judgment would provide relief to each member of the class." *Wal-Mart*, 564 U.S. at 360. As the Second Circuit recently stated in *Berni*, "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." 964 F.3d at 146 (emphasis in original). A court therefore "must determine if that relief is proper for each and every member" of a class defined based on past activity.

"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)." *Id.*

The "prospective-orientation" of this analysis is rooted in the Article III standing requirement. "Past exposure to illegal conduct does not in itself show a present case or controversy regarding injunctive relief … if unaccompanied by any continuing, present adverse effects." *O'Shea v. Littleton*, 414 U.S. 488, 495-96 (1974). "Although past injuries may provide a basis for standing to seek money damages, they 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). A plaintiff seeking forward-looking injunctive relief, therefore, "must show a likelihood that he will be injured in the future" if the court does not act in equity. *Berni*, 964 F.3d at 147 & n.25 (internal quotations omitted). Otherwise, "[i]f the injury occurred in the past—or if some future injury is merely conjectural or hypothetical—then plaintiffs will lack the kind of injury necessary to sustain a case or controversy, and necessary to establish standing, under Article III." *Id.*; *see also Hecht*, 691 F.3d at 223-24 ("every member" in (b)(2) class must "have standing to seek injunctive relief."). Applied in the (b)(2) context, "no matter what, [each class member] *must* stand to benefit." *Berni*, 964 F.3d at 147 n.28 (emphasis in original) (applying *Sykes v. Mel. S. Harris & Assocs.*, 780 F.3d 70, 97 (2d Cir. 2015)); *see also Wal-Mart*, 564 U.S. at 357.

The structure of Rule 23 further demonstrates why courts must vigilantly ensure that all class members benefit from a settlement's injunctive relief. Unlike Rule 23(b)(3) classes, (b)(2) class members do not have the right to the "best notice practicable" and

the security of judicial findings that common issues predominate over individual ones and that the use of the class action is superior to other methods of adjudication. *See Google Cookie*, 934 F.3d at 322-23, 329-30. Unlike Rule 23(b)(3), (b)(2) does not afford individuals the opportunity to exclude themselves from the class as a matter of right. Without these safeguards, class members are more dependent on the court to protect their interests in settlements that may not actually benefit them.

The district court erred by failing to analyze whether the injunctive relief was "proper for each and every member." *See Berni*, 964. F.3d at 146. The court included no analysis of this issue either in the final approval order or at the fairness hearing or in its order (Dkt. 113) reaffirming its preliminary approval order. The court's only note of the certification issue in the final approval order is its finding that defendants "are alleged to have acted or refused to act on grounds that apply generally to the Settlement Class, and that Settlement Class certification is accordingly proper under Rule 23(b)(2)." SPA-4. At the fairness hearing, the district court relied upon plaintiffs' attempt to differentiate *Berni* on the grounds that the alleged misrepresentations regard "complex and individualized financial issues, not a simple, repetitive deception easily understood upon purchase and visual inspection of a product," A-606-607, and on class members' right to bring an individual suit for damages, A-648. The court further appeared to rely on its view that the case was unsuitable for certification as a (b)(3) class action to recovery damages to justify the (b)(2) certification. A-607.

But just because the individualized nature of class members' damages foreclose (b)(3) certification does not make (b)(2) certification proper. *See Berni*, 964 F.3d at 148 (repudiating notion that (b)(2) certification is appropriate to resolve a remedial

"dilemma"). The separate standards of (b)(2) certification must be met; in particular, the injunctive relief underlying the (b)(2) class certification must provide relief to each class member—a matter the district court did not consider at all. Indeed, many courts interpret this as requiring a *higher* level of cohesiveness and homogeneity in (b)(2) classes than in (b)(3) classes. *E.g.*, *Ebert v. Gen. Mills, Inc.*, 823 F.3d 472, 480 (8th Cir. 2016).

Under the proper analysis, the settlement falls far short. The injunctive relief relates exclusively to business practices and communications relating to PSLF as applied to borrowers whose loans are currently serviced by Navient. *See* A-319-322. The settlement, however, defines the class as all individuals who, from October 2007 to the present, "(i) have *or had* FFEL or Direct Loans serviced by Navient, (ii) are *or were* employed full-time by a qualifying public service employer … for purposes of PSLF; and (iii) spoke to a Navient customer service representative about subjects relating to eligibility for PSLF." A-316 (emphasis added).

Here, at least four of the ten representative plaintiffs handpicked by ATF and class counsel will not benefit from the changes in business practices required by the settlement because their loans are no longer serviced by Navient. A-637. The same is true for Yeatman, whose loans were transferred from Navient to another loan servicer in February 2020. A-484.

Applying that ratio to the class, nearly half of all class members will not obtain any benefit at all from the changes in business practices required by the settlement. That estimate is overly generous because many other class members also will not benefit because—during the 13-year class period—they either paid off their loan balances and/or have left the public service sector and therefore have no reason to contact

Navient about their eligibility for PSLF. Because these class members will not interact with Navient regarding PSLF in the future, they will realize no benefit from Navient's plan to improve communications and call center representative training, among other changes. Where such a material portion of the class no longer has the relationship with the defendant that underlies the alleged claims, (b)(2) certification is improper. *See Wal-Mart*, 564 U.S. at 365 (repudiating (b)(2) certification when "about half the class" was no longer employed by defendant).

This case is analogous to *Berni*, which follows the longstanding recognition that (b)(2) certification is improper when there is a mismatch between prospective injunctive relief. *E.g.*, *Wal-Mart*, 564 U.S. at 365; *Hecht*, 691 F.3d at 223-24; *Brown v. Kelly*, 609 F.3d 467, 482 (2d Cir. 2010). In *Berni*, plaintiffs alleged claims under GBL § 349—the same statute under which plaintiffs' sole remaining claim arises—due to Barilla's alleged underfilling of its pasta boxes deceiving consumers. The proposed settlement required Barilla to include a minimum "fill-line" on its boxes going forward, in addition to language about how its pasta is sold by weight, required Barilla to pay up to $450,000 in attorneys' fees, and required class members to release Barilla from future claims. Because the class of former purchasers of Barilla pasta did not all stand to benefit from injunctive relief relating to disclaimer language on pasta packages, (b)(2) certification could not be maintained. 964 F.3d at 146.

Similar to *Berni*, here there is a discontinuity between the class definition—which includes former Navient loan borrowers—and the prospective injunctive relief obtained in the settlement. All settlement relief has only the potential to benefit borrowers with loans serviced by Navient in the future, but the class comprises

borrowers who have already allegedly suffered all the injuries that Navient can inflict on them.

The parties attempted to distinguish the settlement class from *Berni* before the district court in ways that are not based in fact. First, plaintiffs claimed that the class borrowers had a "perpetual relationship" with Navient; however, that claim is false because many borrowers—like Yeatman and nearly half of the class representatives—in the course of the 13-year class period have had their loans transferred to other servicers or perhaps they have paid off their loans, thus ending any relationship with Navient. Many others have left public service employment such that they have no interest in PLSF or how Navient communicates about the program. This fact is fatal to (b)(2) certification under *Berni* and *Wal-Mart*.

Second, the parties also referenced the more "complex" PSLF program terms compared to the fill-line issue in *Berni*. But that distinction is irrelevant where a large swath of the class will never again interact with Navient or the newly formed Public Service Promise. The district court's reference to this distinction at the fairness hearing included no analysis of this fact.

Plaintiffs' complaint itself recognizes the inapplicability of injunctive relief to a retrospectively defined class. The complaint defined a proposed Nationwide Injunctive Class to include the requirement that a class member, *inter alia*, "intend to contact Navient in the future regarding their eligibility for PSLF." A-131 ¶ 396(b). This injunctive relief class did not allege the unjust enrichment claim that underpins the settlement; it was only the broader Nationwide Class—whose members need not have any intent to contact Navient in the future—that alleged the unjust enrichment claim.

It was on behalf of this claim and this broader Nationwide Class that the settlement was reached. A-143. This weighs further against the (b)(2) certification. *See Hecht*, 691 F.3d at 223-24 (examining complaint's proposed class definition and the relief sought).

During settlement negotiations, defendants had a natural incentive to obtain the broadest release possible—and the Nationwide Class by definition includes more people than the Nationwide Injunction Class. For class counsel, the larger class provided them with more leverage to negotiate a higher fee reimbursement for AFT and *cy pres* distribution fund. Through these dual incentives, the litigation class that sought injunctive relief morphed into the legally infirm settlement class that includes even those who have no future intention to contact Navient. *See Pampers*, 724 F.3d at 715.

Plaintiffs will likely rely out-of-circuit *Berry v. Schulman* in their response, just as they did before the district court. 807 F.3d 600, 609-10 (4th Cir. 2015). But *Berry* fundamentally conflicts with in-circuit precedent by allowing the provision of the injunctive relief in the settlement to dictate the propriety of a (b)(2) certification, without regard to the class's claims. *Contrast* 807 F.3d at 609-10 *with Berni*, 964 F.3d 141 *and Hecht*, 691 F.3d at 223-24 & n.1. *Berry* also involved different facts—in particular, the finding that "[t]here was no realistic prospect that [defendant] could or would provide meaningful monetary relief to a class of 200 million people," and all class members had an ongoing relationship with the defendant because their personal information was housed within its databases. 807 F.3d at 615.

B. Rule 23(b)(2) certification is independently improper because class members have an adequate remedy of monetary relief.

The district court's (b)(2) certification was independently improper because the claims underlying the settlement allege economic harm on behalf of individual class members and accrue on an individual basis such that the class has an adequate remedy at law. Yet, the settlement provides only injunctive relief and waives the class members' right to pursue money damages in any aggregate action.

Rule 23(b)(2) "does not authorize class certification when each class member would be entitled to an individualized award of monetary damages," as they are here. *Wal-Mart*, 564 U.S. at 360-61; *see also Kartman v. State Farm Mut. Auto. Ins. Co.*, 634 F.3d 883, 892 (7th Cir. 2011). Rather, "[i]t is clear that individualized monetary claims belong in Rule 23(b)(3)." *Wal-Mart*, 564 U.S. at 362. "Of course injunctive relief where an adequate remedy at law exists is inappropriate," thus making (b)(2) inappropriate. *Petereit v. S.B. Thomas, Inc.*, 63 F.3d 1169, 1185 (2d Cir. 1995).

Plaintiffs sought settlement class certification based on the unjust enrichment claims they alleged on behalf of the Nationwide (non-injunctive relief) Class in their complaint. 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.

A district court must analyze the complaint and remedy sought by the class in its (b)(2) certification analysis. *Hecht*; 691 F.3d at 223; *Crawford v. Equifax Payment Servs, Inc.*, 201 F.3d 877, 881 (7th Cir. 2000). Yet the district court undertook no analysis of the complaint and remedy at all, nor did the court address Yeatman's objection on this

ground. "To survive appellate review, the district court must show it has explored comprehensively all factors and must give a reasoned response to all non-frivolous objections. *Dennis v. Kellogg*, 697 F.3d 858, 864 (9th Cir. 2012) (internal quotations omitted). The court's deficient analysis alone is grounds for remand. *See Foman v. Davis*, 371 U.S. 178, 182 (1962) ("A decision without reasoning is a textbook abuse of discretion.").

The district court erred substantively and should be reversed because the complaint shows that monetary relief was the predominant form of relief sought by the class for the unjust enrichment claim upon which certification was based. The claim sought money damages because Navient allegedly unlawfully obtained greater loan servicing fees as a result of providing incorrect information about the PSLF program to Nationwide Class and State Subclass members. A-143 ¶¶ 452-456. Plaintiffs alleged a monetary-based benefit conferred on Navient—"loan servicing fees"—and claimed "it would be unequitable for Navient to retain the benefit of the loan servicing fees that borrowers would otherwise not have paid to Navient had Navient provided truthful and accurate information to borrowers regarding their student loans." A-143 ¶ 456. Reflecting these allegations, the Nationwide Class sought, *inter alia*, monetary relief and (b)(3) certification. A-143, 157.

Only the Nationwide Class and State Subclasses—not the Nationwide Injunction Class—alleged an unjust enrichment claim to prevent Navient from retaining the loan servicing fees they paid. A-143. This is as it should be. "Such a past harm is of the kind that is commonly redressable at law through the award of damages." *Berni*, 964 F.3d at 147 (regarding allegations of common law unjust enrichment and GBL § 349(a)); *see*

also, e.g., *Famular v. Whirlpool Corp.*, 2019 WL 1254882, 2019 U.S. Dist. LEXIS 44907, at *24-*25 (S.D.N.Y. Mar. 18, 2019) ((b)(3) certification of GBL § 349 and unjust enrichment claims for damages). "In general, remedies based on claims of unjust enrichment … are certainly quantifiable and subject to money damages, and would thus support a legal remedy." *Metro. Life Ins. Co. v. RJR Nabisco, Inc.*, 716 F. Supp. 1504, 1522 n.31 (S.D.N.Y. 1989). The additional fees for servicing class members' loans by which Navient unjustly enriched itself are indeed quantifiable and support money damages and are unsuited for injunctive relief.[4] Because a monetary remedy is appropriate, "[i]n light of *Wal-Mart*, Plaintiffs' damages claims cannot be certified under (b)(2)." *Janes v. Triborough Bridge & Tunnel Auth.*, 2011 WL 10885430, 2011 U.S. Dist. LEXIS 115831 (S.D.N.Y. Oct. 4, 2011).

The district court's failure to analyze the complaint as compared to the settlement class resulted in its improper certification of a (b)(2) class that includes a substantial portion of members who will realize no benefit from the injunctive relief.

C. The settlement requires class members to release their right to recover monetary claims on an aggregate basis in contravention of Rule 23(b)(2).

The settlement releases class members' right to bring claims for monetary damages against Navient with four or more other plaintiffs—despite achieving no monetary relief for the class. A-315, 327-328. This feature further forecloses

[4] Even if injunctive relief were available for the unjust enrichment claims, "an injunction is generally unavailable where there is no showing of any real or immediate threat that the plaintiff will be wronged again." *Hecht*, 691 F.3d at 223-24 (cleaned up); *see* Section I.A.

certification because a (b)(2) settlement release must confine itself to future claims for injunctive relief, without encroaching on class members' right to bring claims for monetary relief in the future. *Wal-Mart*, 564 U.S. at 362. Here, class counsel settled on the basis of the unjust enrichment claims for they sought damages; however, they agreed to forego any monetary recovery for the class, while agreeing to release class members' right to recover money damages in a class action or even an ordinary litigation that includes more than four plaintiffs and without providing a way for class members to opt out of the settlement.

This incongruency is not permitted under Rule 23(b)(2) nor the constitutional rule of *Phillips Petroleum v. Shutts*, 472 U.S. 797 (1985). Contrary to the district court, A-648, a settlement cannot waive a class member's ability to use the class action device to bring monetary claims when it fails to provide "at a minimum" the due process protection of a right to opt out. *Id.* at 811-12. In *Hecht*, the court rejected a (b)(2) settlement because class members with damages claims "had a due process right under *Shutts* to notice and an opportunity to opt out." 691 F.3d at 224. The district court's approval of the (b)(2) settlement that provided no such opt out right for class members whose damages claims are being severely curtailed is in direct contravention of these precedents. *See also Payment Card*, 827 F.3d at 242 (Leval, J., concurring) ("Because the terms of this settlement preclude all future merchants that will accept the Defendants' cards (the (b)(2) class) from bringing claims without their having had an opportunity to opt out (or even object), the Supreme Courts rulings in *Shutts* and *Dukes* make clear that a court cannot accept it.").

The district court's approval of these settlement deficiencies denied class members the due process represented in the structural differences between (b)(2) and (b)(3) certifications. The Seventh Amendment and due process rights underlie the notice and opt-out provisions of Rule 23 for damages classes under (b)(3)—a core reason that (b)(2) class actions are permissible only when plaintiffs seek an "indivisible injunction" that will benefit the entire class. *Crawford*, 201 F.3d at 881-82 (disapproving a near-identical waiver because class members "gain nothing, yet lose the right to the benefit of aggregation in a class"). This structure is aligned with the fact that an injunction against a defendant provides the same benefit to all class members equally even if they were able to opt out of the settlement. Here, however, with the waiver of the benefit of aggregate litigation and no cash benefit paid to the class, the settlement is just as "substantively troubling" as the one the Seventh Circuit rejected in *Crawford*.

The settlement's limited carve-out scheme for certain monetary damages brought in an individual capacity does not comport with the unabridged *Shutts* right of exclusion. *Cf. Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 847 n.23 (1999) (limited opt-out mechanism doesn't satisfy *Shutts*). Instead, "absent class members will be precluded from bringing a class action for damages in the future, … without being given the chance to opt out." *Richardson v. L'Oreal USA*, 991 F. Supp. 2d 181, 199 (D.D.C. 2013) (refusing to certify (b)(2) settlement class notwithstanding the preservation of individual damages claims). The reason a defendant would settle for a release of class-wide damages claims but not individual damages claims is simple: the defendant's risk from individual actions is far smaller, and the time and expense of such litigation in comparison to the likely recovery deters class members from ever bringing such suits. Indeed, one of class representatives'

asserted justifications for their $15,000 incentive payments is that they are releasing their right to bring individual monetary damages claims, saving them the expense and inconvenience that absent class members will face in vindicating their own claims.

In short, a plaintiff whose lawsuit meets the requirements of Rule 23 has a "categorical" right "to pursue his claim as a class action." *Shady Grove Orthopedic Assocs. v. Allstate Ins. Co.*, 559 U.S. 393, 398 (2010). In attempting to end run *Wal-Mart*, the settlement improperly deprives class members of that "categorical rule" with respect to monetary 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.

The settlement fails on both Rule 23 and constitutional grounds because it directs nearly the entire settlement fund to a third party engaged in advocacy work even though it was feasible to provide those funds directly to the class.

A. *Cy pres* is part of a larger problem of conflicts of interest in class-action settlements.

The district court improperly approved a settlement agreement that favored class counsel, its behind-the-scenes partner AFT, and the class representatives at the expense of absent class members. Under Rule 23, the courts have a duty to protect absent class members from this precise scenario. *E.g.*, *Grant v. Bethlehem Steel Corp.*, 823 F.2d 20, 23 (2d Cir. 1987); *Goldberger v. Integrated Res.*, 209 F.3d 43, 53 (2d Cir. 2000). "Class-action settlements are different from other settlements. The parties to an ordinary settlement bargain away only their own rights—which is why ordinary settlements do not require

court approval." *Pampers*, 724 F.3d at 715. To combat the ever-present "danger that the parties and counsel will bargain away the interests of the unnamed class members in order to maximize their own," the district court must act as a fiduciary of the class and apply zealous scrutiny to he proposed settlement. *Id.*; *Grant*, 823 F.2d at 23.

The court has this special role in class actions because class counsel will bargain effectively with defendants to reach the efficient settlement amount, but "a defendant is interested only in disposing of the total claim asserted against it," "and the allocation between the class payment and the attorneys' fees is of little or no interest to the defense." *In re Bluetooth Headset Prod. Liab. Litig.*, 654 F.3d 935, 943, 949 (9th Cir. 2011) (cleaned up). Class attorneys, like other attorneys, have a fiduciary duty to their clients, the class members; class representatives likewise have a fiduciary duty to the absent class members they represent. *Pampers*, 724 F.3d at 718; ALI Principles § 1.05 cmt. (f); *see also* Fed. R. Civ. P. 23(a)(4), (g)(4). But in the absence of sufficient judicial scrutiny under Rule 23(e), class counsel can easily game class-action settlements to self-deal at the expense of their clients, with *cy pres* or other settlement gimmicks.

Cy pres settlements raise "fundamental concerns" and are especially prone to abuse. *Marek v. Lane*, 571 U.S. 1003, 1006 (2013) (Roberts, C.J., respecting denial of certiorari). More recently and more bluntly, Justice Thomas declared that "*cy pres* payments are not a form of relief to the absent class members and should not be treated as such." *Frank v. Gaos*, 139 S. Ct. 1041, 1047 (2019) (Thomas, J., dissenting).

"By disincentivizing class attorneys from vigorously pursuing individualized compensation for absent class members, cy pres threatens the due process rights of those class members." Martin H. Redish, *et al.*, *Cy Pres Relief and the Pathologies of the*

Modern Class Action, 62 Fla. L. Rev. 617, 650 (2010). When courts treat a dollar of *cy pres* as equivalent to a dollar of direct class recovery for settlement approval or fee awards, class counsels are tempted to shirk their constitutional duties to adequately defend class members' legal rights because their personal future is no longer tied to such advocacy. Their all-too-human predilection will prefer to fund their favorite causes over thousands or millions of anonymous class members unlikely to ingratiate themselves to class counsel for a few dollars.

Another fundamental concern with *cy pres* that manifests in this case is that *cy pres* awards typically fail to redress class members' alleged injuries for which they are waiving their rights. The Seventh Circuit stated the problem plainly: "There is no indirect benefit to the class from the defendant's giving the money to someone else." *Mirfasihi v. Fleet Mortg. Corp.*, 356 F.3d 781, 784 (7th Cir. 2004). "[S]ettlement-fund proceeds, having been generated by the value of the class members' claims, belong solely to the class members." *Klier v. Elf Atochem N. Am., Inc.*, 658 F.3d 468, 474 (5th Cir. 2011) (citing ALI Principles § 3.07 *comment* (b)). This would unquestionably be the case had class members pursued individual litigation. Rule 23 cannot operate to "abridge, enlarge or modify any substantive right." 28 U.S.C. § 2072(b). Neither lower courts nor class attorneys should have the discretion to distribute that property to third parties before class members have been compensated. *Cf. Caplin v. Drysdale Chartered v. United States*, 491 U.S. 617, 628 (1989) ("There is no constitutional principle that gives one person the right to give another's property to a third party.").

More generally, an open-ended *cy pres* doctrine is fundamentally incompatible with the judicial role, which "is limited to providing relief to claimants, in individual or

class actions, who have suffered, or will imminently suffer, actual harm." *Tyson Foods Inc. v. Bouaphakeo*, 136 S. Ct. 1036, 1053 (2016) (Roberts, J., concurring) (cleaned up). "Federal judges are not generally equipped to be charitable foundations…." *In re Compact Disc Minimum Advertised Price Antitrust Litig.*, 236 F.R.D. 48, 53 (D. Me. 2006); *accord Keepseagle v. Perdue*, 856 F.3d 1039, 1071 (D.C. Cir. 2017) (Brown, J., dissenting).

As discussed below, many *cy pres* recipients, including the one in this case, have political valence sympathetic to the preferences of class counsel (and AFT) and in some cases the defendant, but contrary or offensive to a substantial proportion of class members. *E.g.*, *In re Citigroup Sec. Litig.*, 199 F. Supp. 3d 845, 853-54 (S.D.N.Y. 2016).

Stated succinctly, there are good reasons for making *cy pres* a last, rather than first resort. Those reasons are reinforced by the abusive nature of the *cy pres* provision in the settlement at issue.

B. The district court erred by approving the settlement with an abusive *cy pres* provision that the parties negotiated *ex ante*, even though it is feasible to distribute funds to the class.

The Second Circuit recognizes this "last-resort rule" of *cy pres* to limit its application: "'Courts have utilized Cy Pres distributions where 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)). On the other hand, "[i]f individual class members can be identified through reasonable effort, and the

distributions are sufficiently large to make individual distributions economically viable, settlement proceeds should be distributed directly to individual class members." ALI Principles § 3.07(a); *see also Masters*, 473 F.3d at 436 (endorsing ALI principle). Rule 23(e)(2)(C)(ii) codifies these principles by requiring courts to consider the "effectiveness of any proposed method of distributing relief to the class."

Cy pres is, by definition, "next best." Thus, the *cy pres* "option arises only if it is not possible to put those funds to their very best use: benefitting the class members directly." *Klier*, 658 F.3d at 475; *accord BankAmerica*, 775 F.3d at 1063-66; *Pearson*, 772 F.3d at 784; *Ira Holtzman, C.P.A. & Assocs. v. Turza*, 728 F.3d 682, 689 (7th Cir. 2013). Accordingly, any *cy pres* distribution should occur only when it is no longer feasible to distribute funds to the class to ensure class members recover the fullest possible recovery. But that is not what the settlement at issue does.

The settlement instead directs the full $2.25 gross settlement fund to a new organization without making any effort to compensate class members. That organization, Public Service Promise, purportedly will provide education and student loan counseling to borrowers employed in the public sector, but that mission provides no restitution or other appropriate relief for class members, including for the unjust enrichment claims on which the settlement is based, and particularly with respect to class members no longer eligible for PSLF, or for those who already understand the program terms. (Dkt. 98-1 at 11-12 & Ex. E).

The settlement preemptively pays all of the monetary relief to a third party not connected to the litigation, while the class does not receive a penny. There is no dispute that the settlement funds could have been distributed directly to class members. Yet the

district court rubber stamped the settlement without even considering whether available funds could or should be distributed to class members. The district court was required to consider this factor under Rule 23(e)(2)(C)(ii) and under Circuit precedent holding that *cy pres* may be utilized in conditions not present here, *i.e.*, class members are difficult to identify or there are remaining funds that cannot be distributed feasibly. Affirming the approval of this settlement would elevate *cy pres* from "next best" to best and make the factors of Rule 23(e)(2)(C) meaningless.

Plaintiffs never argued that distribution was infeasible, and for good reason—it's not. The class contains "up to 324,900" class members whose identities are known. Dkt. 120 at 21. Multiple class actions have distributed lower funds-to-class members ratios, further demonstrating the feasibility of direct relief here. *See* Dkt. 164 ¶¶ 13-14 (identifying such cases).

Ex ante cy pres—where, as here, "the entire award was given to at least one charity with no attempt to compensate the absent class members"—is especially harmful individually to the class members as well as systemically because it ignores the concern for compensating victims that underlies the class action system. *See* Redish, 62 Fla. L. Rev. at 657 n.171; Jay Tidmarsh, *Cy Pres and the Optimal Class Action*, 82 Geo. Wash. L. Rev. 767, 770-71 (2014). Courts have repeatedly rejected settlements that provide for *ex ante cy pres*. *See, e.g.*, *Koby v. ARS Nat'l Servs., Inc.*, 846 F.3d 1071 (9th Cir. 2017) (rejecting all-*cy pres* settlement); *Molski v. Gleich*, 318 F.3d 937, 954-55 (9th Cir. 2003) (same); *Graff v. United Collection Bureau, Inc.*, 132 F. Supp. 3d 470, 485-86 (E.D.N.Y. 2016) (same); *Zepeda v. Paypal*, 2014 U.S. Dist. LEXIS 24388, at *21 (N.D. Cal. Feb. 24, 2014) (same); *Fraley v. Facebook*, 2012 WL 5838198, 2012 U.S. Dist. LEXIS 116526, at *4-*7

(N.D. Cal. Aug. 17, 2012) (same); *Zimmerman v. Zwicker & Assocs.*, 2011 WL 65912, 2011 U.S. Dist. LEXIS 2161 (D.N.J. Jan. 10, 2011) (same).

When courts have focused on the need for a class-action settlement to compensate class members rather than support third parties as *cy pres*, settlements have found ways to distribute money directly to the class. In *Park v. Thomson Corp.*, the parties initially proposed a settlement that would have paid more to *cy pres* than as direct class compensation. No. 05 Civ. 2931, 2008 U.S. Dist. LEXIS 84551 (S.D.N.Y. Oct. 22, 2008). The parties revised the settlement to "distribute[] the entirety of the Fund to Class Members," with only residual sums distributed to a *cy pres* fund after the court expressed "concerns that the ethereal, albeit well intentioned, *cy pres* component of the Initial Settlement would overwhelm the purpose for the lawsuit—payment to the class." *Id.* at *4,*11-*12. The settlement could have taken a similar course here.

The district court's approval of an *ex ante cy pres* settlement also undermines the purpose of Article III. Rule 23 is not a substantive bounty-hunting provision that allows class counsel to treat the class as a free-floating entity existing only to permit counsel to operate as a private attorney general. Rule 23 is a procedural joinder device that aggregates real individuals with real claims into a class if certain prerequisites are satisfied. *Shady Grove*, 559 U.S. at 408. This device works in conjunction with the judiciary in its role of "providing relief to claimants, in individual or class actions, who have suffered, or will imminently suffer, actual harm." *Tyson Foods*, 136 S. Ct. at 1053 (Roberts, C.J., concurring) (cleaned up). *Cy pres* is not consistent with this principle because it provides no redress to the parties in interest—class members. *See Graff*, 132

F. Supp. 3d at 485-86 (rejecting settlement because "*cy pres* payment represent[ed] no measurable benefit to class members").

Plaintiffs are likely to argue that the settlement structure is acceptable because the class is subject to (b)(2) certification such that monetary relief is not appropriate and the "only" monetary damages claims that class members are waiving are those brought with multiple plaintiffs. Monetary restitution, however, is the appropriate relief for the unjust enrichment arising from Navient's capture of the class's loan servicing fees that forms the basis for the requested certification. *See* Dkt. 120 at 22; *see also* Section I. Because class members are waiving all aggregate monetary claims, then monetary relief is appropriate. *See Pampers*, 724 F.3d at 721 (vacating (b)(2) settlement that waived only class-based damages because class counsel and *cy pres* appropriated the only "concrete and indisputable" cash benefit); *Crawford*, 201 F.3d at 882 (similar). The settlement effectively releases all monetary claims because individual damages for the settled claims are unlikely to be large enough to support an individual case against Navient. *See* Dkt. 97 at 20.

By explicitly adopting the presumption in favor of class distributions, this Court can help to cabin unfettered use of *cy pres* and again make class members the "foremost beneficiaries" of class settlements. *In re Baby Prods. Antitrust Litig.*, 708 F.3d 163, 179 (3d Cir. 2013).

C. Even if *cy pres* were generally appropriate, the "significant prior affiliation" among class representatives, class counsel, Student Defense, and AFT as they relate to the recipient made settlement approval legal error.

Reversal is independently required because of the "significant prior affiliation" among the various actors and the *cy pres* recipient discussed above. Yet again, the district court failed to scrutinize the affiliation.

Such affiliation suggests a motive for the settlement's failure to provide direct compensation. "Cy pres distributions present a particular danger" that "incentives favoring pursuit of self-interest rather than the class's interests in fact influenced the outcome of negotiations." *Dennis*, 697 F.3d at 867; *see also Nachshin v. AOL LLC*, 663 F.3d 1034, 1039 (9th Cir. 2011) (criticizing *cy pres* where "the selection process may answer to the whims and self interests of the parties [or] their counsel"); *Google Cookie*, 934 F.3d at 327 (vacating settlement approval where class counsel sat on the board of one *cy pres* recipient and defendant already donated to another, noting the "misalignment of interests" where a settlement's only monetary distributions are to class representatives, counsel, and *cy pres*).

The correct legal standard comes from ALI Principles § 3.07: a "cy pres remedy should not be ordered if the court or any party has any significant prior affiliation with the intended recipient that would raise substantial questions about whether the selection … was made on the merits." ALI Principles § 3.07 cmt. b; *accord Google Cookie*, 934 F.3d at 331 (adopting § 3.07 cmt. b standard). This settlement flunks that test.

Without close analysis of such affiliations, "the cy pres doctrine … poses many nascent dangers to the fairness of the distribution process." *Nachshin*, 663 F.3d at 1038

(citing authorities). The district court's failure to analyze the affiliations among the settlement actors and *cy pres* recipient here was far from harmless: The settlement provides for the formation of a new organization in which individuals involved in its operations have overlapping relationships with class counsel and AFT—the union to which class representatives belong, which recruited class representatives, which funded the litigation, and which retained class counsel in other cases.

The class representatives are not an independent check either. Every named plaintiff in this case is a member of AFT, which helped recruit them as representatives. *See* Dkt. 163 Ex. 2 at 3. Class counsel and officers of Student Defense who will be involved in Public Service Promise have represented and continue to represent AFT in other cases and thus have a financial incentive to remain in good favor with the group. Having other, non-conflicted individuals on the board of Public Service Promise does not negate these conflicts.

Further, AFT pre-paid legal fees of $5.9 million to class counsel for the litigation and was willing to be reimbursed a fraction of that amount—though it will not actually be reimbursed at all after the district court denied the fee motion. *See* Dkt. 122 at 2; Dkt. 163 Ex. 2 at 3. As a rational actor, AFT is gaining some benefit from this settlement; otherwise, it would not spend millions on the case. Among the possible reasons: This case supported and provided publicity for AFT's *Weingarten* litigation, as AFT claimed that Navient "serviced borrowers eligible for PSLF on DeVos' behalf" as it litigated what it called the "gross mismanagement and out-and-out sabotage of the [PSLF] program by DeVos." Dkt. 163 Ex. 3. Public Service Promise appears poised to take over some of the PSLF-related work that AFT already does, freeing up its resources

for other endeavors.[5] And, AFT has an ideological interest in the formation of an organization to support its causes through advocacy and public policy work. While AFT gains all of these potential benefits from its investment in the case, the class "gain[s] nothing, yet lose[s] the right to the benefits of aggregation in a class." *Crawford*, 201 F.3d at 882. In the face of these facts and the $0 class recovery, the district court's reference to AFT's motive as "admirable" is unsupported and unsupportable. *See* A-655.

AFT does not have any sort of fiduciary duty to the class that would require it to put their interests first. Indeed, AFT has long and fiercely been criticized for prioritizing teachers over students by, for example, defending policies that make it very difficult to remove ineffective teachers, opposing parental choice in schools, and supporting teacher strikes that disrupt student learning. *See* Dkt. 163 Exs. 4-5. Yet, the structure of this action indicates that AFT improperly influenced the result for a class of *student* borrowers, through relationships with both class attorneys and class representatives. Ultimately, the conflict manifests itself in AFT's ties to the newly formed political advocacy organization.

Yeatman cited these precedents—Section 3.07, *Nachshin*, *Dennis*, and *Google Cookie*—to the district court. Dkt. 161 at 10. The district court nevertheless did not scrutinize the affiliations among the settlement actors or apply the test of Section 3.07 or any other precedent on this issue or provide a "reasoned response" to Yeatman's

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[5] For example, plaintiffs assert that Public Service Promise will provide an educational website as a PSLF resource. AFT already runs such a site. *See* http://www.forgivemystudentdebt.org/. *See* Dkt. 161 at 12.

objection to these preexisting relationships. *See Dennis*, 697 F.3d at 864. The conflicts create an independent reason to require reversal of the settlement approval.

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

The *cy pres* component of the settlement is also unlawful because it violates the First Amendment right of class members to refrain from supporting or associating with a third party's agenda and activities. Through the district court's approval order, funds belonging to the class members must be paid to form an organization that will take policy positions and advance a legislative agenda without the class members' consent or even an option for them to withhold their monetary support.

The forced speech comes about through the principle that "settlement-fund proceeds, generated by the value of the class members' claims, belong solely to the class embers." *Klier*, 658 F.3d at 474 (citing ALI Principles § 3.07 cmt. (b)). Though each class member's share of the fund is "small in amount, because it is spread across the entire [class]," the monetary support to the third parties is "direct." *Cahill v. PSC*, 556 N.E.2d 133, 136 (N.Y. 1990).

A third-party donation is an expression of support, association, and endorsement of the third party's agenda and activities. *See, e.g.*, *Buckley v. Valeo*, 424 U.S. 1 (1976); *In re Asbestos Sch. Litig.*, 46 F.3d 1284, 1294 (3d Cir. 1994) (Alito, J.) ("Joining organizations that participate in public debate, [and] making contributions to them … are activities that enjoy substantial First Amendment protection."). Just as making a charitable contribution is First Amendment-protected expressive and associational activity, individuals concomitantly have a right to refrain from making such a donation—a right to not be compelled to engage in expressive and associational activity. *See, e.g.*, *Janus v.*

AFSCME, Council 31, 138 S. Ct. 2448, 2464 (2018) ("Because the compelled subsidization of speech seriously impinges on First Amendment rights, it cannot be casually allowed."); *Amidon v. Student Ass'n of SUNY*, 508 F.3d 94, 99 (2d Cir. 2007) (recognizing view that "to compel a man to furnish contributions of money for the propagations of opinions which he disbelieves is sinful and tyrannical" (cleaned up)).

With this Court's order of approval, the settlement forces absent class members to pay their damages to Public Service Promise no matter their view of the group's policy positions or overall focus. A-322. The settlement puts "First Amendment values … at serious risk" because, by approving the settlement, the court is compelling "a discrete group of citizens[] to pay special subsidies for speech" without their consent. *See United States v. United Foods, Inc.*, 533 U.S. 405, 411 (2001); *see also Keller v. State Bar of Cal.*, 496 U.S. 1 (1990) (attorney bar dues cannot be used for political or ideological purposes); *Wooley v. Maynard*, 430 U.S. 705, 715 (1977) (recognizing right of individual to reject state measure that forces him "as part of his daily life … to be an instrument for fostering public adherence to an ideological point of view he finds unacceptable"). Class members must give "clear[] and affirmative[] consent" before money is taken from them to subsidize speech. *See Janus*, 138 S. Ct. at 2486 (silence is not consent and a waiver of First Amendment rights "cannot be presumed"). As a result, the settlement violates the principle that "except perhaps in the rarest of circumstances, no person in this country may be compelled to subsidize speech by a third party that he or she does not wish to support." *Harris v. Quinn*, 573 U.S. 616, 656 (2014).

Perhaps worst of all, the association and speech the settlement forces class members to support is directly political. The *cy pres* term sheet states that Public Service

Promise will engage in political advocacy by "advocat[ing] for administrative, regulatory, and legislative improvements to the PSLF program" and vaguely references "meaningful changes" and "reforms" it hopes to enact. A-355. The class includes individuals who, like Yeatman, may not wish to support additional, undefined government administration, regulations, subsidies, and spending—particularly when Public Service Promise is apparently endorsed by an organization whose views appear sharply ideological. *See* Dkt. 163 Ex. 6. AFT also takes controversial positions on hot-button political issues that many class members disagree with and raise concerns about the neutrality of the advocacy work undertaken by a group founded by a lawsuit AFT funded and for which it apparently hand-picked class representatives and counsel. *See, e.g.*, Dkt. 163 Exs. 7-9 (AFT resolutions "support[ing] a Green New Deal," "oppos[ing] privatization of public services," and supporting abortion access).

While plaintiffs may claim that Public Service Promise will provide services beneficial to student loan borrowers, any benefit the group provides will be both over- and under-inclusive. Many class members will not benefit from such services because they are no longer borrowers or no longer work in public service. Meanwhile, many non-class members stand to benefit from increased loan forgiveness. Either way, class members should not be forced to support such activities through the donation of their settlement recovery. "In simple terms, the First Amendment does not permit the government to compel a person to pay for another party's speech just because the government thinks that the speech furthers the interests of the person who does not want to pay." *Janus*, 138 S. Ct. at 2467.

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

The settlement terms and conflicts discussed above reveal another, independent reason that the district court erred by certifying the settlement class: inadequate representation under Rules 23(a)(4) and 23(g).

At its essence, the parties negotiated a settlement that dedicated $500,000 to partially reimburse AFT for the $5.9 million AFT paid class counsel for their work on the case, $150,000 to the class representatives, $1.75 million to a third party, and $0 to the class. On these terms alone, the "fact that class counsel and the named plaintiffs were willing to settle the class claims without obtaining any relief for the class—while securing significant benefits for themselves—strongly suggests that the interests of the class were not adequately represented." *Frank*, 139 S. Ct. at 1047 (Thomas, J., dissenting) (citing Rules 23(a)(4), (g)(4), and *Amchem*, 521 U.S. at 619-20). That "strong suggestion" becomes something stronger still in the light of the multifaceted conflicts of interest among those tasked with representing the class and the recipients of the settlement fruits.

Rule 23(a)(4) requires the representative parties to demonstrate that they "fairly and adequately protect the interests of the class." *See also* Fed. R. Civ. P. 23(g). Together, Rule 23(a)(4) and 23(g) demand that representatives manifest "undivided loyalties to absent class members." *Broussard v. Meineke Discount Muffler Shops*, 155 F.3d 331, 338 (4th Cir. 1998). "The requirements of Rule 23(a) are applied with added solicitude in the settlement-only class context" because of the "heightened risk of conflating the fairness requirements of Rule 23(e) with the independent requirement of rigorous adherence to

those provisions of the Rule designed to protect absentees." *Payment Card*, 827 F.3d at 235 (cleaned up); *Amchem*, 521 U.S. at 620.

The preexisting conflicts of interest discussed above with respect to Public Service Promise, AFT, the named plaintiffs, and class counsel are alone disqualifying. Courts do not require "a showing of actual danger of conflict of interest rather than the mere possibility of a conflict of interest … to support a finding that a fiduciary will not adequately represent the interest of others." *In re Southwest Voucher Litig.*, 799 F.3d 701, 715 (7th Cir. 2015). When class fiduciaries are motivated by a desire to maintain a lucrative financial relationship instead of a desire to secure the best settlement for the class, they violate their ethical duty to the class. *Tech. Training Assocs., Inc. v. Buccaneers Ltd. P'ship*, 874 F.3d 692, 694 (11th Cir. 2017).

That situation exists here. Class counsel and individuals involved in Public Service Promise have a business and financial relationship with AFT that creates the appearance a conflict of interest between their financial benefactor on the one hand and the absent class members on the other. AFT paid class counsel's millions of dollars in attorneys' fees throughout the litigation, regardless of what relief counsel secured for the class, thus reducing counsel's incentive to achieve the best result possible for the class and reinforcing counsel's incentive to achieve a result acceptable to AFT. Courts have found similar conflicts in representative parties to be disqualifying. *See, e.g.*, *Southwest Voucher*, 799 F.3d at 715 (named plaintiff conflicted where there exists a close "professional and financial relationship" with class counsel); *Aliano v. CVS Pharm., Inc.*, 2018 WL 3625336, 2018 U.S. Dist. LEXIS 85986 (E.D.N.Y. May 21, 2018) (similar); *Dugan v. Lloyds TSB Bank, PLC*, 2013 WL 1703375, 2013 U.S. Dist. LEXIS 56617, at

*10 (N.D. Cal. Apr. 19, 2013) (nonparty's business dealings with class representatives and counsel "create a risk" they "will be motivated to take positions that favor [nonparty] to the detriment of other absent class members"). Even more problematic, class counsel did not disclose the conflicting relationships, or the funding and fee-splitting arrangements, to the court during the litigation or to the class in the settlement notice. *See Southwest Voucher*, 799 F.3d at 715-16; *Agent Orange*, 818 F.3d at 226 ("in all future class actions counsel must inform the court of the existence of a fee sharing agreement at the time it is formulated.").

The settlement terms—and in particular the *ex ante cy pres* provision and the reversion of any unawarded attorneys' fees to *cy pres* rather than to the class—indicate that these conflicts in fact adversely affected the class:

- The settlement distributes funds to *cy pres ex ante* when the funds instead could be feasibly distributed to class members directly.
- Navient's future business practice changes are of no benefit to the substantial portion of the class who no longer work in the public interest sector, whose loans have been transferred to a different servicer, or who paid off their loans.
- The settlement releases class members' right to bring monetary damages in aggregate actions, without providing monetary compensation in return.
- AFT spent millions of dollars funding the case, brought by the same attorneys representing it in other cases, with AFT recruiting its members as class representatives who then agreed to a settlement that spent the entire monetary relief to create a new organization to which other attorneys who represent AFT will contribute. AFT's prepayment of fees unmoored counsel's fees from the class relief, suggesting a misalignment of interests.

- The settlement provided for the reversion of the rejected $500,000 fee request to the *cy pres* recipient rather than the class.

- Class representatives recovered $15,000 for themselves, in violation of the principle that named representatives may not "leverage" "the class device" for their own benefit. *Murray v. GMAC Mortg. Corp.*, 434 F.3d 948, 952 (7th Cir. 2006); *see also Radcliffe v. Experian Info. Solutions Inc.*, 715 F.3d 1157, 1165 (9th Cir. 2013) (class representatives are inadequate when they are "more concerned with maximizing their own gain than with judging the adequacy of the settlement as it applies to class members at large").

This Court has rejected class certification where similarly meager class relief, paired with class representatives' recovery of a large payment for themselves, and class counsel's recovery of fees demonstrated they had not adequately represented the class. *E.g.*, *Gallego v. Northland Group*, 814 F.3d 123, 129 (2d Cir. 2016); *see also Pampers*, 724 F.3d at 722 ("having been promised the [incentive] award, the class representatives had no interest in vigorously prosecuting the interests of unnamed class members" (cleaned up)). In *Gallego*, the Court noted that absent class members' interests would not be best served by a settlement that released their claims for less than 17 cents. Here, the result is worse, with the $0 benefit to class members. Considering the only concrete components of the settlement are the $2.25 million directed to a third party and the $150,000 incentive awards, it is clear that all representatives have indeed "leverage[d]" "the class device" for their own benefit, while class counsel have prosecuted the suit "just in their interests as lawyers," as they recovered nearly $6 million without court approval through their side arrangement with AFT. *See Murray*, 434 F.3d at 952. A settlement cannot be certified where the attorneys are the central beneficiary of that

agreement; it should be "dismissed out of hand." *In re Subway Footlong Sandwich Mktg. & Sales Practices Litig.*, 869 F.3d 551, 553 (7th Cir. 2017) (internal quotation omitted).

Despite these strong indications of inadequate representation and Yeatman's direct objection on this ground, the district court undertook no analysis of the adequacy of representation—and certainly did not provide any reasoned analysis of the apparent conflicts, the imbalanced settlement terms, or the case law finding inadequate representation in similar settlements. *See* SPA-1. Once again, the district court's approval should be remanded at a minimum for failing to "explore comprehensively all factors and [to] give a reasoned response to all non-frivolous objections." *Dennis*, 697 F.3d at 864 (cleaned up). Reversal is the more appropriate course, however. The settlement terms are not in dispute; the relationships among the actors are not in dispute; and the law in this Circuit is clear that, together, they create such an overwhelming appearance of conflict that there can be no finding that the class was adequately represented.

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

For many of the same reasons that the settlement certification was error, the settlement is unfair and cannot be approved under Rule 23(e). Nevertheless, there are independent reasons for this Court to reject the settlement as unfair under Rule 23(e) even if it accepts that class certification was not in error and that the *cy pres* terms meet the requirements of Rule 23(e). Specifically, the combination of fully recovered attorneys' fees through an opaque fee agreement with counsel's "nonprofit partner,"

hefty incentive awards for the class representatives, and the lack of monetary relief for the class signals an unfair, lawyer-driven settlement.

The district court focused almost exclusively on the *Grinnell* factors, 495 F.2d 448, to find that the settlement should be approved. A-644-645. The *Grinnell* factors may be necessary for settlement approval, but they are not sufficient. Even after Yeatman identified the legal standard in his objection, the district court failed to follow this Court's precedent requiring courts also to examine whether the class's "interests are somewhat encroached upon by the attorneys' interests" and failed to consider the factors in Rule 23(e)(2)(C)(ii)-(iv.) *Agent Orange*, 818 F.2d at 224; *e.g.*, *Plummer v. Chemical Bank*, 668 F.2d 654, 660 (2d Cir. 1982) (affirming settlement rejection where "preferential treatment was afforded named plaintiffs).

Consistent with Second Circuit principles set forth in these cases, and the Ninth Circuit's express warning signs articulated *Bluetooth*, the settlement should have been rejected as unfair due to (i) disproportionate fee allocation; (2) clear sailing; and (3) fee reversion to *cy pres*. 654 F.3d 935. The class representatives negotiated a $15,000 payment for each of themselves while agreeing to $0 for the class. Class counsel recovered $5.9 million for themselves from their "nonprofit partner," while themselves while seeking a half-million "partial reimbursement" for that partner—and negotiated clear sailing for that requested fee reimbursement such that Navient did not object to it. That the district court ultimately denied the reimbursement for AFT is inconsequential to the analysis because the settlement terms prevented the reimbursement from becoming direct class relief, and counsel still benefited to the tune of millions of dollars, which they arranged separately away from court review.

These settlement terms show that the class's interests were subordinated to those of class counsel and the class representatives. The settlement should have been rejected under *Agent Orange* and *Plummer*.

Conclusion

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

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Respectfully submitted,

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