No. 22-___

In the Supreme Court of the United States

WILLIAM YEATMAN,

Petitioner,

v.

KATHRYN HYLAND, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

The Second Circuit affirmed Rule 23(e)(2) approval of a *cy-pres* class-action settlement that paid no money to the class of student-loan borrowers, but millions of dollars to form a new organization operated by individuals affiliated with class counsel and the teachers' union secretly funding the litigation. Class members will receive no pecuniary benefit from the $2.4 million settlement fund, no incremental benefit from the formation of the new organization, and many will not even realize any benefit from the settlement's prospective injunctive relief because they no longer do business with the defendant.

The question presented is:

> Whether, or in what circumstances, a court may approve a settlement as "fair, reasonable, and adequate" under Rule 23(e) or certify a class under Rule 23(b) when it pays a *cy pres* award to third parties from the settlement fund.

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

Petitioner William Yeatman is a member of the plaintiff class and was an objector in the district court proceedings and the appellant in the court of appeals proceedings.

Respondents Kathryn Hyland, Melissa Garcia, Jessica Saint-Paul, Rebecca Lawson, Michelle Means, Elizabeth Kaplan, Jennifer Guth, Megan Nocerino, Elizabeth Taylor, and Anthony Church were the named plaintiffs in the district court proceedings and appellees in the court of appeals proceedings.

Respondents Navient Corporation and Navient Solutions LLC were the defendants in the district court proceedings and appellees in the court of appeals proceedings.

Richard Estle Carson, III, is a member of the plaintiff class and was an objector in the district court proceedings and an appellant in the court of appeals proceedings.

Because Yeatman is not a corporation, a corporate disclosure statement is not required under Supreme Court Rule 29.6.

STATEMENT OF RELATED PROCEEDINGS

There are no other proceedings in any court that are directly related to this case.

Yeatman expects that co-appellant below, Richard Estle Carson III, may also petition for writ of certiorari.

Along with this petition, Yeatman's counsel filed a certiorari petition in *St. John v. Jones*, No. 22-___, which raises related issues of the propriety of *cy pres* under Rule 23(e)(2).

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PETITION FOR WRIT OF CERTIORARI

The Second Circuit upheld approval of a settlement that paid the class of student loan borrowers $0—no compensatory relief at all—in exchange for the release of their injunctive relief and aggregate damages claims, but paid $2.25 million to form a new nonprofit that will engage in political advocacy. Worse, the new nonprofit's participants have affiliations with class counsel and the American Federation of Teachers ("AFT"), a union that "partnered" with class counsel to recruit its members to serve as named plaintiffs and paid class counsel's fees throughout the case.

While these terms might seem a figment of the overactive imagination of a fictional anti-class-action corporate villain, they are instead in an actual settlement approved and then affirmed by the Second Circuit as fair, reasonable, and adequate under Rule 23. Despite widespread recognition that *cy pres* presents fundamental concerns in class-action settlements, parties to class actions continue to rely on the doctrine in their settlements as the circuits have failed to approach the issue with any consistency. Instead, they deeply divide over how and when settlement funds paid in exchange for the release of class members' claims can instead be given to third parties.

With the decision below, the Second Circuit established a rule that allows settlement funds to be directed to third parties even when the money could feasibly be distributed to individual class members; even when the recipient engages in politicized advocacy work with which class members disagree; and even when selected by conflicted actors, unless there is additional evidence of actual bad faith

presented to the court. The Second Circuit rejected Yeatman's objection that the settlement violated his and other class members' First Amendment rights on the ground that there was no state action, despite the need for a court order approving the settlement and precedent establishing that class-action settlement approvals implicate due process and other constitutional rights. And it also held that the settlement funds did not belong to the class members, even though the settlement released class members' damages claims in actions of more than five plaintiffs.

The decision deepens an already fractured circuit split on *cy pres*, with every circuit to reach the issue adopting its own idiosyncratic approach in the absence of overarching guidance. Many courts recognize that *cy pres* awards require special scrutiny because they can facilitate tacit or explicit collusion between defendants, who are eager to settle at the lowest price and with a minimum of fuss, and class counsel, who are seeking to maximize their fees and may be willing to accommodate defendants' interests in exchange for illusory relief. They recognize that, in this way, *cy pres* awards present a heightened risk of conflict between class counsel and their putative clients, the members of the class. They recognize that *cy pres* awards may provide little or no benefit to class members. And above all else, they recognize that *cy pres* awards to third parties are not appropriate when any reasonable opportunity exists to compensate class members directly for their injuries—always the first-best use of settlement funds that, after all, are the property of the class.

The Fifth Circuit, for example, properly views settlement funds as belonging to the class, unlike the Second

Circuit. The Fifth and Seventh Circuits prohibit *cy pres* if settlements funds can feasibly be distributed to class members, "the intended beneficiaries." *Pearson v. NBTY, Inc.*, 772 F.3d 778, 784 (7th Cir. 2014); *see Klier v. Elf Atochem N. Am., Inc.*, 658 F.3d 468, 475 (5th Cir. 2011).

Meanwhile, the Ninth Circuit joins the Second Circuit at the other extreme. The Ninth allows *cy pres* if the district court determines that it would be "burdensome" to make payments that require individualized conclusive proof of class membership or would be too small once divided across the entire class (rather than a subset of claimants as other circuits allow). *Joffe v. Google, Inc.*, 21 F.4th 1102 (9th Cir. 2021). A court in the Ninth Circuit therefore need not consider alternatives to a *cy pres*-only settlement, such as funding a claims process where class members self-identify or requiring some sort of direct distribution. *Id.* And a *cy pres* beneficiary can even be a nonprofit run by the defendant. *Lane v. Facebook, Inc.*, 709 F.3d 791 (9th Cir. 2013) (Smith, J., dissenting from denial of rehearing *en banc*).

The Eighth Circuit, in a case with a parallel petition to this one, affirmed approval of a $39.5 million class-action settlement where about $16 million will be diverted to left-wing charities as *cy pres*, even though over 97% of the class will go uncompensated. *Jones v. Monsanto Co.*, 38 F.4th 693 (8th Cir. 2022). Like the Second here, the Eighth Circuit rejected the First Amendment argument that the settlement compelled speech on the ground that class members had no rights to the settlement proceeds.

Politicized recipients exacerbate the inherent problems of *cy pres* by "direct[ing] money to groups whose interests are purportedly aligned with the class members, but whom they have likely never heard of or may even oppose." *Joffe*, 21 F.4th at 1124 (Bade, J., concurring) (calling for "reconsideration" of Ninth Circuit's permissive *cy pres* standards). Such payments implicate the First Amendment because of the absence of affirmative consent for class counsel to divert each class member's money to a third party. *Janus v. Am. Fed'n of State, Cty., & Mun. Employees, Council 31*, 138 S. Ct. 2448, 2486 (2018). Regrettably, the Second Circuit nullified *Janus*'s consent requirement, and the resulting *cy pres* makes petitioner Yeatman worse off by funding a group that works against his political beliefs.

In this way, the decision below deepened a circuit split that already created an enormous incentive for forum-shopping by plaintiffs' attorneys seeking to bring and settle nationwide class actions like this one. Bringing suit within the footprint of the right circuit guarantees that minor things like compensating class members for their injuries, holding defendants liable to the extent that the law allows, and preventing defendants from injuring class members in the same manner will not impede reaching a quick settlement to the mutual benefit of defendants and class counsel, at the expense of class counsel's putative clients. This permissiveness has not gone unnoticed among the plaintiffs' bar, judging by the explosion in consumer class-action settlements featuring *cy pres* awards within the Ninth Circuit, and we can expect the same in the Second and Eighth Circuits now.

The Court should grant *certiorari* to resolve the circuit conflict, provide guidance to the lower courts on when (if ever) *cy pres* remedies are permissible, and correct a serious abuse of the class-action mechanism that puts the interests of those it is intended to protect, class members, dead last.

OPINIONS BELOW

The Second Circuit's decision is reported at 48 F.4th 110, and is reproduced at App.1a. The district court's decision approving the class-action settlement under Rule 23 is reported at 2020 U.S. Dist. LEXIS 211676, 2020 WL 6554826, and is reproduced at App.24a. Relevant excerpts from the district court's fairness hearing are reproduced at App.39a.

JURISDICTION

The Second Circuit issued its opinion on September 7, 2022, and denied co-appellant and objector Richard E. Carson III's petition for rehearing and for rehearing *en banc* on October 7, 2022. This Court has jurisdiction under 28 U.S.C. §1254(1).

RULES INVOLVED

Rules 23(b)(2) and (e) are reproduced at App.36a.

STATEMENT OF THE CASE

A. Plaintiffs sue Navient over its service of loans potentially eligible for Public Service Loan Forgiveness, and the parties settle.

A class of plaintiffs working for public service employers sued Navient, their loan service provider, regarding 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. App.4a.

To administer the program, the U.S. Department of Education contracts with for-profit servicing companies such as Navient. App.4a. 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.

Plaintiffs alleged that Navient, motivated by its financial interest in retaining revenue and fees, unlawfully gave borrowers inaccurate or misleading information about their repayment options and thus hindered efforts to satisfy PSLF requirements for loan forgiveness. App.4a–5a.

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 from certain states ("State Subclasses"). Plaintiffs sought

certification under Rule 23(b)(2) for the Nationwide Injunctive Class, and also sought certification under Rule 23(b)(3) for the other classes. On behalf of the Nationwide Class, plaintiffs alleged unjust enrichment, seeking to prevent Navient from retaining the loan servicing fees paid. Plaintiffs also alleged this claim for the State Subclasses in the alternative, but did not allege it for the Nationwide Injunctive Class. Plaintiffs alleged claims under New York General Business Law ("GBL") § 349 for the New York subclass. 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 substantial damages were at issue.

The district court dismissed all but one claim—the New York GBL § 349 claim. The court stated 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. App.5a.

The parties settled. The Rule 23(b)(2) settlement class comprises roughly 300,000 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. App.27a.

The settlement provides the following:

- Settlement fund: Navient agrees to pay **$2.4 million**. App.55a.
- No monetary recovery: The class recovers **no cash**. App.60a.
- *Cy pres*: From the $2.4 million fund, the settlement would pay all of the amounts remaining after attorneys' fees **to *cy pres* recipient Public Service Promise**, a new organization formed by the settlement. App.60a.
- Future business practice changes: Navient agrees to implement **operational practices** to help ensure that **in the future** it will provide accurate information to borrowers seeking to qualify for the PSLF program. App.61a.
- Release of claims: The settlement releases class members' **injunctive relief claims** related to the alleged conduct as well as the **right to pursue money damages through "aggregate actions,"** defined as "any litigation proceeding in which five or more separate individuals propose to prosecute their Claims in the context of the same legal proceeding." App.48a, 78a. Class members retain their right to sue Navient for monetary damages as individual plaintiffs.
- No opt out: Class members **cannot opt out** of the settlement class. App.58a.
- Attorneys' fees: Navient would pay attorneys' fees of **$500,000 to class counsel**. App.75a.

- Incentive awards: Navient would pay **$15,000 to each of the ten class representatives**. App.75a.
- American Federation of Teachers ("AFT") identified as a releasing class representative: The settlement defines AFT as a "releasing class representative party." Although every named plaintiff is a member of AFT, AFT is not itself a class representative. App.54a.
- Clear sailing: Navient agrees **not to challenge** class counsel's request for $500,000 in fees. App.75a.
- Reversion to conflicted 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. App.67a.

Every named plaintiff is a member of AFT. AFT is a union group that helped recruit named plaintiffs for the class-action lawsuit and then publicized filings in the case brought by its members. The parties' *cy pres* term sheet attached to the settlement agreement (App.93a) 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. They served as 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. 2008).

The *cy pres* term sheet added 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. App.94a, 97a. Public Service Promise stated its plans to provide education and student loan counseling to borrowers employed in public service and to assist those seeking PSLF.

In connection with their request for final approval of the settlement, class counsel filed a motion requesting an award of attorneys' fees of $500,000. In their supporting memorandum, class counsel revealed for the first time that they intended to use the awarded fees to partially reimburse AFT for funding the litigation. Class counsel further revealed for the first time that AFT had been paying "significant, up-front" legal fees to class counsel as its "non-profit partner who sponsored this litigation on behalf of the entire Class and the Class Representatives (who are AFT members)." Although class counsel stated that their lodestar equaled around $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. 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.

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.*, 967 F.3d 273 (3d Cir. 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).

B. Yeatman objects to the settlement and the fee request.

Class member William Yeatman objected, challenging the certification of the class, fairness of the proposed settlement, and class counsel's fee request. App.103a.

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 net settlement fund to a newly formed organization without making any effort to compensate class members despite the feasibility of direct compensation. 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 impermissible because of the appearances of conflicts of interest: the new organization was to be run by people with overlapping relationships with class counsel and AFT, which have their own intertwined business relationship. Further, by ordering settlement funds to be paid to an organization that would advocate for policy positions and advance a legislative agenda, the settlement approval order violated class members' First Amendment rights to refrain from supporting or associating with a

third party's agenda and activities. App.119a–132a, 144a–145a.

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 individual economic harm for which there is 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. For example, Yeatman's loans were transferred in 2020, and he has no prospective relationship with Navient. App.133a–141a.

Yeatman further objected to class certification under Rules 23(a)(4) and (g)(4) because of inadequate representation. 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. Demonstrating that those conflicts harmed the class's interest, the settlement directs money to *cy pres* instead of class members; any change in business practices would not benefit class members no longer eligible for the PSLF program; the settlement releases class members' right to bring monetary damages in an aggregate action without any monetary consideration; and the settlement reimburses AFT $500,000, the class representatives $15,000 each, and a third party $1.75 million, while paying the class $0. App.141a–144a.

Yeatman also argued that the attorneys' fee request should be entirely rejected. App.145a–147a.

C. The district court approves the settlement and redirects the attorneys' fees to *cy pres*.

At a fairness hearing, the district court discussed the factors for settlement approval set forth in *City of Detroit v. Grinnell*, 495 F.2d 448 (2d Cir. 1974). 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." App.42a. The district court contended 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." App.44a.

The court denied class counsel's request for $500,000 in fees because of class counsel's "misleading" statements to the court and the class omitting the role of AFT. 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…." App.45a. Because of this denial, the *cy pres* increased to $2.25 million.

Nowhere 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) because of the mismatch between the prospective relief and retrospective class definition, or under Rule 23(a)(4) and (g) because of 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.

D. The Second Circuit affirms.

On Yeatman's appeal, the Second Circuit affirmed.

The Second Circuit held that the class could be certified under Rule 23(b)(2) even though nearly half of all class members—including four of the ten named plaintiffs and Yeatman—no longer had loans serviced by Navient or were otherwise now unqualified for PSLF. The Second Circuit reasoned that the settlement's business practice enhancements would benefit Navient borrowers and even those who no longer have loans with Navient or even any student loans at all. The court held that such class members would benefit because the business practices changes would provide them "accurate information about PSLF and help[] them determine whether they have viable claims for damages." App.12a. The Second Circuit relied entirely on plaintiffs' counsel's advocacy statements. It did not explain how a nonprofit's provision of publicly available information about a federal loan forgiveness program could assist with any alleged damages claim, or explain how such reasoning would not justify approval of an anemic informational benefit any time a defendant provided a consumer with account-specific data. In a footnote, the Second Circuit also noted that the *cy pres*-funded nonprofit Public Service Promise would help all borrowers learn whether they are eligible for loan forgiveness and provide guidance on PLSF applications or

assistance in challenging denials. The court rejected Yeatman's argument that *cy pres* cannot serve as a settlement benefit for the 23(b)(2) analysis because it is not injunctive or declaratory relief and instead viewed it as a mandatory injunction. App.13a n.2.

The Second Circuit also affirmed approval of the settlement under Rule 23(e). It held that *cy pres* awards generally could constitute a class benefit because the defendant's payment of funds to a third party could indirectly benefit class members and did so here by assisting "all class members in navigating PSLF and determining whether they have a viable individual monetary claim against Navient." App.17a–18a. The Second Circuit rejected Yeatman's argument that a *cy pres* award is not appropriate when it is feasible to distribute funds directly to the class because "the settlement fund never belonged to class members as damages" and Navient might not have agreed to distribute funds directly to the class. App.18a.

It rejected Yeatman's objection that the *cy pres* award to Public Service Promise unlawfully compels speech in violation of the First Amendment on the ground that the district court's approval of the settlement did not constitute state action but was merely "an exercise in compliance with Rule 23(e)." App.18a (internal quotation omitted).

It also brushed aside the relationship between plaintiffs' counsel and AFT as evidencing inadequate representation of the class. The Second Circuit did not dispute the multi-pronged relationship between plaintiffs' counsel and AFT, the millions of dollars in funding AFT gave

to class counsel to support the litigation, or AFT's recruitment of its members to serve as the sole named plaintiffs. The Second Circuit instead affirmed based on the district court's finding that AFT's motive and commitment was "admirable" and that class counsel had not "abandoned the litigation or otherwise acted in bad faith in pursuing this case." App.20a. The court cited no authority supporting its examination of motives or reliance on the lack of evidence of bad faith as the proper analysis for conflicts, and did not address out-of-circuit precedent to the contrary.

REASONS FOR GRANTING THE PETITION

Among the lower courts, it has become a truism that *cy pres* settlements raise "fundamental concerns" in the nearly ten years since the Chief Justice made that observation in *Marek v. Lane*, 571 U.S. 1003, 1006 (2013) (Roberts, C.J., respecting denial of cert.). Without guidance from this Court, however, the lower courts have struggled to impose uniform or even effective rules, and the use of *cy pres* in class-action settlements has proliferated.

Below, the Second Circuit held that an all-*cy pres* settlement is acceptable—even when distribution of the funds to the class is feasible; even when the recipient engages in political advocacy work that many class members oppose; even when class members are releasing both damages and injunctive relief claims; and even when there are apparent conflicts among the class representatives, class counsel, and *cy pres* recipient—just so long as

an objector doesn't present the court with additional "evidence" beyond the face of the settlement that parties have acted in bad faith.

This approach to *cy pres* differs materially from that taken by each of the other six circuits to consider the question. The issue of how courts should analyze class-action settlements that provide for *cy pres* relief, and when to approve such settlements, is a recurring question of law and policy that the lower courts confront repeatedly. Yet none seems to have found a solution on which they can agree.

Without this Court's intervention, *cy pres* settlements will continue to direct millions of dollars in class-member damages to third parties selected by class counsels and defendants rather than provide direct relief to the injured class members. The Court recognizes that this is a problem. Along with Chief Justice's comment in *Marek*, the Court granted *certiorari* in *Frank v. Gaos*, 139 S. Ct. 1041 (2019), to review whether *cy pres* settlements satisfy Rule 23's standard, but remanded for the Ninth Circuit to address standing. This case is just one of many class-action settlements that have abused *cy pres* relief since *Gaos*. *See, e.g.*, *Jones v. Monsanto*, 38 F.4th 693 (8th Cir. 2022) (*certiorari* pending *sub nom. St. John v. Jones*, No. 22-___); *Joffe*, 21 F.4th at 1119; *Rawa v. Monsanto Co.*, 934 F.3d 862 (8th Cir. 2019).

This case is an ideal vehicle for addressing *cy pres*. The class of student-loan borrowers who contacted Navient about PSLF eligibility indisputably have standing. Yeatman fully raised the Rule 23 and First Amendment *cy pres* issues below. The settlement is not a hybrid of relief;

rather, every penny of the net settlement fund is being paid to *cy pres* recipient Public Service Promise.

I. The circuits are fractured over *cy pres*.

The Second Circuit established below an outlier rule that class member funds may be directed to third parties (i) engaged in political advocacy, (ii) selected by conflicted representatives, (iii) even when the funds can feasibly be distributed to class members—just so long as there is no *evidence* of actual bad faith among the conflicted parties. No other circuit takes a similar approach.

In the settlement approved below, class members release the right to bring an aggregate action, defined as an action of five or more plaintiffs, for money damages, as well as their injunctive relief claims. The settlement funds are consideration for this broad release. Class members are left only with the right to pursue money damages individually or joined with four or fewer plaintiffs. Such a right exists primarily in form only, given the expense of litigation compared to the small value of class members' claims which made a class action attractive in the first place. *Amchem Prods. Inc. v. Windsor*, 521 U.S. 591, 616-17 (1997).

The Second Circuit's approach is an extreme position in a multi-Circuit split remarkable for its lack of uniformity.

The Eighth Circuit recently held that a district court must "make its own assessment of the damages 'that would be recoverable' by class members" before *cy pres* can be awarded from a residual settlement fund. *Jones*, 38 F.4th at 699. If the court concludes that class members have not been fully compensated, and further distribution

to class members is feasible, then *cy pres* is not permissible. *Id.* at 698-99; *In re BankAmerica Corp. Secs. Litig.*, 775 F.3d 1060, 1064-66 (8th Cir. 2015); *accord In re Lupron Mktg. Litig.*, 677 F.3d 21, 34 (1st Cir. 2012). This holding has a similar shortcoming in that the district court is tasked with a vague analysis—in particular, the requirement that district courts conduct a damages assessment rather than to require further distributions to the class when feasible and when damages are unliquidated. Settling parties will have a perverse incentive to shortchange the class's claims to maximize *cy pres* contributions.

But the Second Circuit's approach doesn't even require any consideration of actual feasibility or the relative compensation recovered by the class.[1] Unless objectors can provide evidence that the Defendant "would have otherwise agreed to distribute the funds" to class members, *cy pres* is permissible because the settlement funds "never belonged to class members as damages." App.18a. No

[1] The Second Circuit analysis of settlement benefit was separately flawed. In considering whether class members who no longer have loans serviced by Navient, paid off their student loans, do not work in eligible public interest jobs, or otherwise are no longer eligible for PSLF, the court found that Navient's provision of information to "help[] them determine whether they have viable individual claims for damages" was adequate benefit for purposes of (b)(2) certification. App.12a. This standard is so woefully low that any class settlement in which a defendant who could be asked or subpoenaed for records could be approved—regardless of actual class benefit. And it is another circuit split. *Compare In re Subway Footlong Sandwich Mktg. Litig.*, 869 F.3d 551 (7th Cir. 2017) (reversing settlement approval after scrutinizing district court's finding that valueless injunction had value).

other circuit authorizes *cy pres* merely by the subjective declaration of the settling parties' intentions. *E.g.*, *Klier*, 658 F.3d at 479 (payment under the settlement "does not mean" class members are fully compensated).

The Ninth Circuit follows a different *cy pres*-friendly approach. Courts may consider settlement funds eligible for *cy pres* distribution whenever a settlement fund cannot be spread among *all* members of the class. This rule was reached through a series of cases. First, in *Lane v. Facebook, Inc.*, the Ninth Circuit affirmed approval of a *cy pres*-only arrangement because it would result in only "*de minimis*" payments if the fund was distributed to the entire class. 696 F.3d 811 (9th Cir. 2012), *cert. denied sub nom.*, *Marek*, 571 U.S. 1003. The Ninth Circuit turned this comment into a holding in *In re Google Referrer Header Privacy Litig.*, 869 F.3d 737, 742 (9th Cir. 2017), *vacated and remanded on other grounds sub nom. Gaos*, 139 S. Ct. 1041. Then, in *In re EasySaver Rewards Litigation*, the Ninth Circuit held that even when it is "technically feasible" to distribute funds to every class member, a court can decide that millions of dollars was "*de minimis*" and approve *cy pres* to local schools in a judge's home district establishing chairs in the defendant's name. 906 F.3d 747, 761–62 (9th Cir. 2018). Most recently, the Ninth Circuit held *cy pres* permissible where a defendant chose to insist on a burdensome proof of claim process. In such cases, a *cy pres* award need only bear "a direct and substantial nexus to the interests of absent class members." *Joffe*, 21 F.4th at 1112 (quoting *Lane*, 696 F.3d at 821).

Other circuits require that settlement funds are paid directly to class members whenever feasible. The Seventh Circuit, for example, holds that even residual *cy pres* is impermissible when the funds can "feasibly be awarded to the intended beneficiaries" (the class members), by providing broader notice, simplifying the claims process, or simply mailing checks to people known to have purchased the product at issue from the defendant. *Pearson v. NBTY, Inc.* 772 F.3d 778, 784 (7th Cir. 2014) (rejecting settlement that permitted $1.13 million residual *cy pres* to a politically neural nonprofit). This holding recognizes that "[t]here 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).

The Fifth Circuit likewise splits with the decision below. *Klier* rejected *cy pres* of unclaimed funds from a class-action settlement, holding that such awards are impermissible if it is "logistically feasible and economically viable to make additional pro rata distributions to class members." 658 F.3d at 475. Under this test, a *cy pres* award may be made "only if it is not possible to put those funds to their very best use: benefitting the class members directly." *Id.* As the court stressed, "[t]he settlement-fund proceeds, having been generated by the value of the class members' claims, belong solely to the class members" and "*[c]y pres* comes on stage only to rescue the objectives of the settlement when the agreement fails to do so." *Id.* at 475–76. This holding directly contrasts with the Second Circuit holding that "the settlement fund never belonged to class members as damages," App.18a,

even though the settlement was based on the money-damages claim for unjust enrichment and class members released their right to seek damages in any action with five or more plaintiffs.

The Third Circuit suggested in dicta that a *cy-pres* only settlement can be acceptable for a properly-cabined Rule 23(b)(2) settlement class, because in that scenario the settlement funds "'belong' to the class *as a whole*, and not to individual class members as monetary compensation." *In re Google Inc. Cookie Placement Consumer Priv. Litig.*, 934 F.3d 316, 328 (3d Cir. 2019). The Third Circuit nevertheless cautioned that where a settlement's "*only* monetary distributions are to class counsel, class representatives, and *cy pres* recipients, as in this case," there is a risk of "a greater misalignment of interests: the settlement clearly benefits the defendant (who obtains peace at a potentially reduced cost), class counsel (who are guaranteed payment in the settlement [or, here, by AFT, the driving force behind the case]), and the named representatives (who are given an incentive award in the settlement)." *Id.* at 327. Meanwhile, "any benefit to other class members is indirect and inconsequential monetarily." *Id.* Unlike the decision below, the Third Circuit vacated and remanded because, despite seeking (b)(2) certification, the parties obtained a release of claims for money damages and attorneys' fees calculated as a percentage of the settlement fund without the protections provided by (b)(3). *Id.* at 329-30.

While *Google Cookie* is perhaps the precedent that most closely approximates the Second Circuit's holding below, the Third Circuit has also rejected the Second and

Ninth Circuit's permissive approach to *cy pres* relief in settlements of damages claims. In *In re Baby Products Antitrust Litigation,* the court vacated district court approval of a Rule 23(b)(3) class-action settlement that, because of a low claims rate, would have distributed the bulk of the settlement fund to *cy pres* recipients. 708 F.3d 163 (3d Cir. 2013). "*Cy pres* distributions," the court emphasized, "are inferior to direct distributions to the class because they only imperfectly serve the purpose of the underlying causes of action—to compensate class members." *Id.* at 169. "Barring sufficient justification," the court held, "*cy pres* awards should generally represent a small percentage of total settlement funds." *Id.* at 174. By contrast, the Second Circuit now broadly sanctions *cy pres*-only settlements.

The Second Circuit also deepens an existing split by joining the Ninth in rejecting the Third Circuit's standard adopting ALI Principles § 3.07. That standard disallows *cy pres* if there is "a significant prior affiliation with any party, counsel, or the court." *Compare Google Cookie*, 934 F.3d at 331 *with Joffe*, 21 F.4th at 1120 (rejecting "significant prior affiliation" test citing egregious conflicts in *Lane*). The Second Circuit's *laissez-faire* approach to *cy pres* becomes even more harmful to absent class members given the court's failure to rigorously root out conflicts.

Conflicts of interest are inherent in *cy pres* at the settlement stage. It is thus unsurprising that multiple settlements have involved *cy pres* recipients who were intertwined with the defendants' and class counsel's interests. *See, e.g.*, *Google Cookie*, 934 F.3d at 330; *Google Referrer*,

869 F.3d at 744 (*cy pres* recipients included class counsel's *alma maters* and had previously received funding from defendant); *Joffe*, 21 F.4th at 1119 (*cy pres* recipients had previously received funding from the defendant, one had a preexisting relationship with class counsel, and another supported plaintiffs in an earlier appeal in the case and threatened to object). Unlike the Second and Ninth, the Third Circuit would not permit approval of a *cy pres* remedy without investigation of "the nature of the relationships between the *cy pres* recipients and [the defendant] or class counsel." *Google Cookie*, 934 F.3d at 330.

Yeatman identified troubling conflicts below. In particular, the settlement provides for the formation of a new organization that will be operated by individuals who have overlapping relationships with class counsel and its "partner" AFT—the union to which class representatives belong, which recruited class representatives, which funded the litigation, and which retains class counsel in other cases. The class representatives are not an independent check: Every named plaintiff in this case is a member of AFT. Class counsel and individuals who will be part of 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 or involved in its operations of Public Service Promise does not negate these conflicts. Further, AFT shockingly 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 after the district court denied the fee motion) without telling the class or the court until after

the settlement agreement had been reached. 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 AFT's *Weingarten* litigation, as AFT claimed that Navient "serviced borrowers eligible for PSLF on [then-Secretary of Education] DeVos' behalf" as it litigated what it called the "gross mismanagement and out-and-out sabotage of the [PSLF] program by DeVos." 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. And AFT has an ideological interest in the formation of Public Service Promise to support its causes through advocacy and public policy work.

While AFT gains all 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 v. Equifax Payment Servs.*, 201 F.3d 877, 882 (7th Cir. 2000). AFT does not have any sort of fiduciary duty to the class members that would require it to put their interests first. Yet the structure of this action demonstrates that AFT improperly influenced the result—including the formation of a political advocacy organization that many absent class members actively oppose. In the face of these facts and the $0 class recovery, the Second Circuit's refusal to require any critical analysis of the conflicts of interest is inexplicable.

The Second Circuit abandoned any inquiry into whether *cy pres* is distributable to some class members, and set a limited test for conflicts—actual evidence of bad

faith—that contradicts the Third Circuit and ALI Principles. This test is also less stringent than the Ninth Circuit's test requiring a *cy pres* distribution to "'be guided by (1) the objectives of the underlying statute(s) and (2) the interests of the silent class members.'" *Joffe*, 21 F.4th at 1120 (quoting *Nachshin v. AOL, LLC*, 663 F.3d 1034, 1039 (9th Cir. 2011)).

The Second Circuit's position ignores Rule 23(e)(2)(C)(ii)'s requirement that district courts consider "the effectiveness of any proposed method of distributing relief to the class, including the method of processing class-member claims." If courts permit settling parties to dispense with class claims entirely, it erases Rule 23(e)(2)(C)(ii) from the books by making it automatic to clear the bar.

Settling parties continue to include *cy pres* as settlement relief to their own advantage but to the detriment of class members, who recover nothing and are even harmed further when settlement funds meant to compensate them are sent to third parties selected by often conflicted counsel and who engage in work that many class members oppose.

II. The questions presented are important and recurring.

The Rule 23 questions presented here are important and recurring. As *cy pres* festers in class-action jurisprudence without clear rules, the fundamental concerns about its use that many courts and the Chief Justice's *Marek* opinion voiced show that courts should sharply curtail

if not flatly prohibit application of the *cy pres* doctrine to class-action settlements.

A. Application of *cy pres* to class-action settlements is a poor fit for the doctrine.

Cy pres was never intended to be a form of relief in class-action settlements. *Gaos*, 139 S. Ct. at 1047 (Thomas, J., dissenting). The original use of *cy pres*—or, properly, *cy près comme possible*, meaning "as near as possible"—was to permit "a benefit to be given other than to the intended beneficiary or for the intended purpose because changed circumstances make it impossible to carry out the benefactor's intent." *Pearson*, 772 F.3d at 784. The doctrine originated in the area of charitable trusts and allowed, for example, the March of Dimes to shift to addressing birth defects once vaccines conquered polio. *Id.*

But *cy pres* is a poor fit for class actions when courts permit settlements to be gamed to divert material amounts of money away from the class. There are no "changed circumstances" in these class-action settlements. There is no original "benefactor" whose wishes must be accommodated "as near as possible," once the true beneficiary purpose ceased to exist. Even more fundamentally, there is no "charitable" objective in a Rule 23 class action. *In re Pet Food Prods. Liab. Litig.*, 629 F.3d 333, 363 (3d Cir. 2010) (Weis, J., concurring and dissenting in part). Rather, a class action is a procedural device to aggregate private claims for compensation to class members—not to create a charitable trust. *Cf. Shady Grove Orthopedic Assocs., P.A., v. Allstate Ins. Co.*, 559 U.S. 393, 408 (2010). In short, application of *cy pres* to

Rule 23 class settlements unquestionably extends the doctrine far beyond its original roots and rationale into an area where the doctrine's premises are not only absent but *contrary* to the purposes of Rule 23.

The settlement here epitomizes the most "egregious" form of "*cy pres* gone wrong." D. Brooks Smith, *Class Action and Aggregate Litigation: A Comparative International Analysis*, 124 Penn St. L. Rev. 303, 337 (2020). Class members give up their right to bring aggregate damages actions against Navient in exchange for funding for an organization that will make its website and help line available to *anyone*, not just class members. There are no changed circumstances justifying *cy pres* and, with no incremental benefit to the class, it does not serve as relief "as near as possible" as the monetary relief sought by the nationwide class. As in *Joffe*, the settlement provides "no unique consideration to class members because they receive the same generalized benefits as non-class-members." 21 F.4th at 1124 (Bade, J., concurring, and calling for reconsideration of Ninth Circuit's *cy pres* jurisprudence).

B. *Cy pres* creates improper incentives for class counsels and district judges.

Cy pres creates two types of improper incentives for class counsel. First, *cy pres* is one way to create the illusion of relief that class counsel then can use to justify an excessive attorneys' fee. When courts award attorneys' fees based on the size of the *cy pres* fund rather than on the amount the class directly received, *cy pres* will "increase the likelihood and absolute amount of attorneys'

fees awarded without directly, or even indirectly, benefiting the plaintiff." Martin H. Redish *et al.*, *Cy Pres Relief and the Pathologies of the Modern Class Action: A Normative and Empirical Analysis*, 62 Fla. L. Rev. 617, 661 (2010). As a result, class attorneys are financially indifferent over whether a settlement is structured to compensate their clients or to funnel settlement proceeds to third parties.

Second, and the one present here, is lawyers' use of *cy pres* to promote their own personal, financial, political, or charitable preferences. It is not uncommon to see publicity photographs of attorneys handing oversized checks to their selected *cy pres* recipients or to see recipients issue public statements of gratitude to the class attorneys. *E.g.*, Chris J. Chasin, *Modernizing Class Action Cy Pres Through Democratic Inputs*, 163 U. Penn. L. Rev. 1463, 1484 & n.114 (2015).

Class attorneys are tempted to shirk their constitutional and fiduciary duties to adequately defend class members' legal rights because their compensation is no longer tied to their recovery. Chasin, *supra*. When courts treat a dollar of *cy pres* as equivalent to a dollar of direct class recovery, class attorneys' all-too-human predilection will prefer to fund their favorite nonprofits or causes—or support their paying clients, as here—over millions of anonymous and less grateful class members.

AFT paid class counsel nearly $6 million. AFT recruited plaintiffs for class counsel, and class counsel represents AFT as a client in other cases. It thus comes as little surprise that the class counsel structured the *cy pres* to form an organization with officers who also served as

AFT counsel and as co-counsel with class counsel and whose work bolstered AFT's. Yet the Second Circuit did not consider these facts sufficient "evidence" of actual bad faith to undermine settlement fairness.

Cy pres similarly creates the appearance of impropriety for district court judges. It tempts judges to play benefactor with someone else's money. Adam Liptak, *Doling Out Other People's Money*, N.Y. Times (Nov. 26, 2007); *see, e.g.*, *EasySaver*, 906 F.3d at 761–62; *cf. also* Jeremy Kidd & Chas Whitehead, *Saving Class Members from Counsel*, 58 San Diego L. Rev. 579, 613–14 (2021) (case of *cy pres* to charity where judge's spouse sat on board); *In re Google Buzz Privacy Litig.*, No. C 10-00672, 2011 WL 7460099, at *3 (N.D. Cal. June 2, 2011) (district court without notice to class *sua sponte* redirected proposed *cy pres* to local university where judge taught as visiting law professor).

These apparent conflicts of interest undermine broader confidence in our judicial system and have no place in it.

C. *Cy pres* raises First Amendment concerns that the Second Circuit improperly dismissed.

Cy pres awards, approved and enforced by the federal courts, also infringe on the First Amendment rights of class members by requiring them to subsidize political organizations or charities, chosen by the district court, class counsels, or defendants, but which individual class members may not support or approve. Such forced payments require the "affirmative[] consent" of the class member and that consent may not be implied or "presumed." *Janus*, 138 S. Ct. at 2486 (2018).

Governmental power (in the form of a district court order binding class members) may not sanction the redirection of property (a monetary recovery belonging to class members) to third parties to engage in expressive activity without the affirmative consent of the persons to whom those funds belong. "'The government may not prohibit the dissemination of ideas that it disfavors, *nor compel the endorsement of ideas that it approves*.'" *Harris v. Quinn*, 573 U.S. 616, 647 (2014) (quoting *Knox v. SEIU*, 567 U.S. 298, 309 (2012)) (emphasis added). *Knox* established that "compelled funding of the speech of other private speakers or groups" is unconstitutional in all but the most limited of circumstances, none of which are present in the context of *cy pres*. 567 U.S. at 309–11.

Class counsel did not obtain the "affirmative consent" of each class member for to this *cy pres* award. Class members did not even have the opportunity to opt out of the class. App.58a. Instead, the Second Circuit allowed a class action brought for the benefit of petitioner Yeatman to fund an organization that works against his policy preferences. App.132a. Even beyond the First Amendment implications, the selection of politicized beneficiaries implicates the fairness of *cy pres* settlements.

The Second Circuit held that the First Amendment was not implicated because the district court's order approving the settlement was not state action. But class-action settlements approved and enforced by courts, and constitutional due process rights underlie many provisions of Rule 23, including notice and opt-out rights. *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 846 (1999) (mandatory class

actions aggregating damages claims implicate due process); *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 811 (1985). Class-action procedures must protect class members' First Amendment rights just as they must protect other constitutional guarantees.

The Eighth Circuit recently upheld a settlement that provided for payment of over half of the $39.5 million fund to charities with a leftward political affiliation, rejecting the objector's compelled speech argument on the ground that class members had no right to the remaining settlement funds paid to these organizations. *Jones*, 38 F.4th at 700.

The Second Circuit's First Amendment holding, in combination with *Joffe* and *Jones*, means that three circuits now refuse to apply *Janus* and instead allow settlement parties to choose who receives the proceeds from the settlement of class members' claims—often based on their personal financial, charitable, or policy preferences—when class members actively oppose or are made worse off by the choice in recipients.

D. Class members benefit when courts preclude *cy pres* abuse.

When courts limit the ability of class counsel to profit from *cy pres*, class counsel will respond to this incentive to "maximize the settlement benefits actually received by the class." *Pearson*, 772 F.3d at 781. That is more than abstract theory; experience bears it out:

- While *Baby Products* left open the possibility of approving *cy pres*, it reversed a settlement approval and ordered the district court to consider whether

class counsel had adequately prioritized direct recovery. 708 F.3d at 178. On remand, the parties arranged for direct distribution of settlement proceeds, paying another $14.45 million to over one million class members instead of *cy pres*, an "exponential increase" in class recovery. *McDonough v. Toys "R" Us, Inc.*, 80 F. Supp. 3d 626, 660 (E.D. Pa. 2015).

- After objection to a claims-made settlement of a consumer class action over aspirin labeling where nearly all funds would have gone to *cy pres*, the parties used subpoenaed third-party retailer data to identify over a million class members and paid another $5.84 million to the class, increasing class compensation from the less than $100,000 the original settlement provided. Order 4, *In re Bayer Corp. Litig.,* No. 09-md-2023, Dkt. 254 (E.D.N.Y. Nov. 8, 2013); *id.* Dkt. 218-1.

- A similar successful objection to residual *cy pres* in an antitrust settlement increased class recovery from $2.2 million to $13.7 million. *Pecover v. Electronic Arts, Inc.*, No. 08-cv-2820, 2013 WL 12121865 (N.D. Cal. May 30, 2013); *id.* Dkt. 466.

- After this Court decided *Gaos*, Google broke its streak of four consecutive *cy pres*-only privacy class settlements with a successful direct electronic distribution of funds and a claims process for a class of tens of millions of members, though only $7.5 million was in the settlement fund. *In re Google Plus Profile Litig.*, No. 5:18-cv-06164-EJD, 2021 WL 242887 (N.D. Cal. Jan. 25, 2021). (Google has since reverted to its old ways in the *Google Cookie* remand.)

- On remand in *Pearson*, a renegotiated settlement gave class members over $4 million more in cash. Settlement ¶¶7–8, No. 1:11-cv-07972, Dkt. 213-1 (N.D. Ill. May 14, 2015).

In short, as *Pearson* reasoned, if courts make lawyers direct money to clients to get paid, that is *exactly* what happens. Alison Frankel, *By Restricting Charity Deals, Appeals Courts Improve Class Actions*, Reuters (Jan. 12, 2015).

E. The circuit split encourages forum shopping and has cost class members hundreds of millions of dollars.

The problem of the circuit split is especially acute because class-action settlements—being both nationwide and non-adversarial—can be easily forum shopped. Class-action settlements often feature a new complaint alleging a larger class to facilitate global settlement; little stops settling parties from relocating such a complaint in a more favorable jurisdiction for the breezier review. *Cf. Adams v. USAA Cas. Ins. Co.*, 863 F.3d 1069 (8th Cir. 2017) (reversing district court's sanctions of counsel for abuse of process for dismissing federal action "for the improper purpose of seeking a more favorable forum and avoiding an adverse decision").

While the effects of the Second Circuit's decision are still developing, the experience of other circuits after loosening restrictions on *cy pres* offers a guidepost. After the Ninth Circuit began analyzing the feasibility of direst distribution to the class by reference to the number of class members, a district court issued an order permitting class

counsel to divert *$76.1 million* of a Volkswagen-owner class's settlement fund to *cy pres* with no penalty to their previously awarded fee. The Ninth Circuit's permissive approach meant that there was no effort to provide direct distribution to the vast majority of class members (who received direct notice but failed to jump through the hoops of making a claim); no new notice to the class of the 55 newly identified *cy pres* recipients; no disclosure of potential conflicts of interest; no press coverage; and thus no objections before the court's rubber stamp of a short proposed order. *In re Volkswagen "Clean Diesel" Litig.*, No. 3:15-md-02672-CRB, Dkt. 7961 (N.D. Cal. May 16, 2022).

In another district, the court approved a settlement that paid $142 million to *cy pres*; $5 million to the class; and $50 million to the class attorneys. *Krueger v. Wyeth, Inc.*, No. 3-cv-2496, 2020 WL 6688838 (S.D. Cal. Nov. 12, 2020). The examples go on. Other recent decisions in the Ninth Circuit have too readily accepted contentions that *cy pres* is appropriate because distributing $28/class member is too "burdensome and inefficient" or because $9.71 checks are "*de minimis*." *See respectively Beaver v. Tarsadia Hotels*, No. 11-cv-01842, 2020 U.S. Dist. LEXIS 40415, at *5, *7 (S.D. Cal. Mar. 9, 2020), *and Knell v. FIA Card Servs, N.A.*, No. 3:12-cv-00426, 2020 U.S. Dist. LEXIS 217452, at *4 (S.D. Cal. Nov. 19, 2020); *see also Norcia v. Samsung Telcoms. Am., LLC,* No. 14-cv-00582, 2021 U.S. Dist. LEXIS 135256, *6 (N.D. Cal. Jul. 20, 2021) ($74,680 to class; over $2 million *cy pres* to Berkeley law school clinic).

As the circuit split grows, plaintiffs' attorneys have more options to forum shop their cases to circuits such as the Second, Eighth, and Ninth that are more permissive of *cy pres*. Unfortunately, these precedents will encourage class counsel to breach their fiduciary duties to class members and forum-shop settlements to these circuits for higher attorneys' fees and the opportunity to divert millions of dollars of their clients' recovery to ideological causes that they or their paying clients and allies support, at the expense of the absent class members. It is time for the Court to step in.

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CONCLUSION

The Court should grant the petition in this case; grant the petition in *St. John v. Jones*, No. 22-___, and hold this
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petition pending *St. John*; or grant both petitions and consider consolidating the cases.

Respectfully submitted,

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December 16, 2022

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Appendix A

20-3765-cv (L)
Hyland v. Navient Corporation

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

August Term, 2021

(Argued: March 10, 2022 Decided: September 7, 2022)

Docket Nos. 20-3765-cv, 20-3766-cv

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

Plaintiffs-Appellees,

v.

NAVIENT CORPORATION, NAVIENT SOLUTIONS LLC,

Defendants-Appellees,

v.

WILLIAM YEATMAN, RICHARD ESTLE CARSON, III,

Objectors-Appellant.[*]

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[*]The Clerk of Court is directed to amend the caption to conform to the caption above.

Before:

SACK, LOHIER, and NARDINI, *Circuit Judges*.

In this class action, the United States District Court for the Southern District of New York (Cote, J.) certified a settlement class under Federal Rule of Civil Procedure 23(b)(2), approved a settlement agreement that included a cy pres award to establish a nonprofit that would provide student loan counseling to borrowers, and approved $15,000 in service awards for the named plaintiffs. We conclude that the District Court acted within the bounds of its discretion in making each of these decisions. AFFIRMED.

CAITLIN J. HALLIGAN (Faith E. Gay, Yelena Konanova, David A. Coon, Max Siegel, *on the brief*), Selendy & Gay PLLC, New York, NY; Mark Richard, Phillips, Richard & Rind, P.A., Miami, FL, *for Plaintiffs-Appellees* Kathryn Hyland, Melissa Garcia, Jessica Saint-Paul, Rebecca Spitler-Lawson, Michelle Means, Elizabeth Kaplan, Jennifer Guth, Megan Nocerino, Elizabeth Taylor, and Anthony Church, each individually and on behalf of all others similarly situated.

Ashley M. Simonsen, Covington & Burling LLP, Los Angeles, CA; Andrew A. Ruffino, Covington & Burling LLP, New York, NY, *for Defendants-Appellees* Navient Corporation, Navient Solutions, LLC.

ANNA ST. JOHN, Hamilton Lincoln Law Institute, Center for Class Action Fairness, Washington, DC, *for Objector-Appellant* William Yeatman.

ERIC ALAN ISAACSON, Law Office of Eric Alan Isaacson, La Jolla, CA, *for Objector-Appellant* Richard Estle Carson, III.

LOHIER, *Circuit Judge*:

This appeal concerns a settlement that a class of public servants negotiated with the loan servicing companies Navient Corporation and Navient Solutions, LLC (together, "Navient"). As part of the settlement, Navient agreed to deliver better and more accurate information to borrowers and to contribute a cy pres award of $2.25 million to establish a nonprofit organization that provides counseling to borrowers at all stages of the repayment process. In exchange, the class agreed to release their claims for non-monetary relief, though they retain the right to sue Navient individually for money damages.

The United States District Court for the Southern District of New York (Cote, J.) certified a class for settlement purposes under Federal Rule of Civil Procedure 23(b)(2) and approved the settlement as "fair, reasonable, [] adequate," and "in the best interest of the Settlement Class as a whole." Hyland v. Navient Corp., 18 Civ. 9031, 2020 WL 6554826, at *1 (S.D.N.Y. Oct. 9, 2020). Two objectors now appeal that judgment, arguing that the District Court erred in certifying the class, approving the settlement, and approving service awards of $15,000 to the named plaintiffs. Because we conclude that the District Court did not abuse its discretion in making any of these determinations, we **AFFIRM**.

BACKGROUND

In 2007 the federal government created the Public Service Loan Forgiveness program ("PSLF") to help address the problem of overwhelming student debt. See College Cost Reduction and Access Act, Pub. L. No. 110–84, § 401,

121 Stat. 784, 800 (2007). Under PSLF, teachers, social workers, police officers, and others working in public service may have their federal student debt forgiven after 120 qualifying payments. To administer the program, the federal Department of Education contracts with for-profit "servicing companies," including Navient, which alone services more than $205.9 billion in federal student loans.

Navient aims to help borrowers "understand the complex array of federal loan repayment options so they can make informed choices about the plans that are aligned with their financial circumstances and goals." App'x 35. In October 2018, however, a group of public servants who had contacted Navient for help repaying their loans (collectively, "Plaintiffs") filed a putative class action lawsuit in the Southern District of New York, alleging that Navient had not "liv[ed] up to its obligation to help vulnerable borrowers get on the best possible repayment plan and qualify for PSLF." App'x 36. They claimed that Navient had "[d]eceived borrowers by [erroneously] informing them PSLF was not available to them," "[m]isled borrowers by stating they were 'on track' for PSLF when in fact their repayment plan did not qualify for PSLF," and "[a]dvised borrowers not to submit paperwork that would verify their employment and other qualifying factors for PSLF." App'x 37. As a result, according to the Plaintiffs' amended complaint, borrowers were "denied loan forgiveness at alarming rates, with horrifying effects on the borrowers and their families and communities." App'x 37.

Plaintiffs brought a number of tort and contract claims, as well as claims under state statutes protecting against unfair and deceptive trade practices. Navient's business practices, they asserted, were largely to blame for their injuries. Plaintiffs alleged that Navient structured employee compensation "to incentivize short calls by

rewarding employees for rushing borrowers off the phone, thereby preventing borrowers from receiving full and accurate information about their best repayment options." App'x 39. They also alleged that Navient's employees, looking for quick and easy solutions to present on the phone, pushed cash-strapped borrowers to enter loan forbearance, despite the availability of more flexible repayment plans and the fact that forbearance pauses PSLF-qualifying payments and can increase the total amount a borrower ultimately owes. In addition to various sub-classes based on geography, Plaintiffs proposed a nationwide class of public servants who have or had loans serviced by Navient and who contacted the company regarding their eligibility for PSLF, as well as a nationwide injunctive class of borrowers who have loans actively serviced by Navient, previously contacted Navient about PSLF eligibility, and intended to contact Navient in the future regarding PSLF eligibility.

Navient moved to dismiss the amended complaint under Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim, which the District Court (Cote, J.) granted in part, dismissing all claims except "the claim brought under New York's General Business Law Section 349," App'x 160, which prohibits "deceptive acts or practices in the conduct of any business . . . or in the furnishing of any service" in the state, App'x 154. At a hearing in July 2019 Judge Cote informed the parties that she saw "an enormous hurdle to certifying this class." App'x 214. "I just can't imagine there would be any uniform[] oral representation," she explained, "[b]ecause anyone who picks up a phone to call Navient has a question . . . [that] comes out of their individual circumstances and needs." App'x 215. She reiterated this concern at a hearing a few months later, saying that "there [was] an underlying problem . . .

with respect to the plaintiffs' theory, which [she had] been frank about in [her] prior conferences." App'x 253.

Spurred in part by Judge Cote's comments, the parties reached a settlement in April 2020 in which they agreed to seek certification of a mandatory nationwide settlement class pursuant to Rule 23(b)(2). Class members also agreed to release their claims for non-monetary relief, though they retained the right to "file individual lawsuits for monetary relief on a non-class basis and excluding Aggregate Actions" of five or more individuals. App'x 328. In return, Navient agreed to implement a number of business reforms, including (1) enhancing internal resources for call-center representatives by, among other things, "updat[ing] job aids to clarify that customer service representatives should discuss loan forgiveness including PSLF with borrowers prior to offering forbearance"; (2) updating written communications with borrowers by "creat[ing] forms that can be sent via email to borrowers who request additional information about PSLF"; (3) improving its website and chat communications with borrowers by "requiring customer service representatives to look for keywords or phrases that indicate borrowers' possible eligibility for forgiveness programs"; and (4) training customer service representatives to follow the new practices, and regularly monitoring their calls to ensure compliance. App'x 319–21. In what the parties and the District Court called a cy pres – or "next best" – award, Navient also agreed to contribute $1.75 million (later increased to $2.25 million) to establish a nonprofit that would "provide education and student loan counseling to borrowers employed in public service," App'x 354, and "generate administrative and legislative reforms" to improve PSLF, App'x 355. A project proposal estimated that the new organization could reach a projected 7,700 to 11,250 borrowers a year. App'x 357.

In June 2020 the District Court preliminarily approved the settlement agreement and the cy pres recipient. The District Court also conditionally certified a Rule 23(b)(2) settlement class of:

> [a]ll individuals who, at any point from October 1, 2007 to the Effective Date (i) 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.

App'x 292. The District Court found that "Defendants [were] alleged to have acted or refused to act on grounds that appl[ied] generally to the Settlement Class," and that certification was therefore proper under Rule 23(b)(2). App'x 293.

Less than a month later, this Court decided Berni v. Barilla S.p.A., 964 F.3d 141 (2d Cir. 2020), which held that a class of past purchasers of a product (in that case, Barilla pasta) could not be certified under Rule 23(b)(2) because they were "not likely to encounter future harm of the kind that makes injunctive relief appropriate." Id. at 147. In response to the District Court's request for briefing on the effect of Berni on their proposed settlement, both parties insisted that Berni was distinguishable. At a fairness hearing in October 2020 the District Court agreed with the parties that Berni did not prevent final approval of the settlement.

A number of class members at the hearing — including the appellants here, William Yeatman and Richard E. Carson, III (together, "Appellants") — objected to the settlement, arguing that the cy pres award would not

benefit the class, that the settlement improperly released monetary claims, and that class counsel were compromised by a conflict of interest. The District Court rejected their objections and, citing the factors in City of Detroit v. Grinnell Corp., 495 F.2d 448 (2d Cir. 1974), abrogated on unrelated grounds by Goldberger v. Integrated Resources, Inc., 209 F.3d 43, 49–50 (2d Cir. 2000), found the settlement to be fair, adequate, and reasonable.

The District Court also granted $15,000 incentive awards to the named plaintiffs based on "evidence that they have suffered attack[s] personally because they have served in their role here . . . and tried to achieve a benefit on behalf of absent class members." App'x 651–52. The District Court acknowledged that incentive awards could encourage class representatives to agree among themselves to a settlement that was not in the best interests of the class, but it found that such collusion was unlikely in this case. App'x 649–50. Finally, the court denied a request for $500,000 in attorney's fees after learning that the money would be used to reimburse a labor union, the American Federation of Teachers ("AFT"), that had been paying Plaintiffs' counsel's bills on a monthly basis. See App'x 653–54.

On October 9, 2020, consistent with the fairness hearing and its preliminary approval of the settlement, the District Court entered a final order certifying the settlement class, approving the settlement agreement as "in the best interest of the Settlement Class as a whole," approving the $15,000 service awards, denying class counsel's application for attorney's fees, and dismissing the case. Navient Corp., 2020 WL 6554826, at *1-3.

This appeal followed.

DISCUSSION

I.

Appellants challenge the District Court's decision to certify a Rule 23(b)(2) class, approve the settlement, and approve service awards for the named plaintiffs. We review each of these decisions for abuse of discretion. See Berni, 964 F.3d at 146 (class certification); McReynolds v. Richards-Cantave, 588 F.3d 790, 800 (2d Cir. 2009) (approval of settlement); Melito v. Experian Mktg. Sols., Inc., 923 F.3d 85, 95 (2d Cir. 2019) (grant of service awards). A district court abuses its discretion when its decision "rests on a legal error or clearly erroneous factual finding, or [] falls outside the range of permissible decisions." Berni, 964 F.3d at 146 (quotation marks omitted).

II.

Before considering whether the District Court properly certified the class under Rule 23(b)(2), we address the threshold issue of standing. Some class members were no longer using Navient to service their loans when the class was certified. Appellants, citing Berni, argue that the class as a whole therefore lacked standing to pursue injunctive relief. See Yeatman Br. 20; Carson Br. 36–37. We disagree.

"Whether a plaintiff has constitutional standing is a question of law that we review de novo." Cent. States Se. & Sw. Areas Health & Welfare Fund v. Merck-Medco Managed Care, L.L.C. ("Cent. States"), 504 F.3d 229, 241 (2d Cir. 2007). Standing is satisfied so long as at least one named plaintiff can demonstrate the requisite injury. Dep't of Commerce v. New York, 139 S. Ct. 2551, 2565 (2019) ("For a legal dispute to qualify as a genuine case or controversy, at least one plaintiff must have standing to sue."); Town of Chester v. Laroe Estates, Inc., 137 S. Ct.

1645, 1651 (2017) ("[W]hen there are multiple plaintiffs[,] [a]t least one plaintiff must have standing . . . ."); Village of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 264 & n.9 (1977) ("[We] have at least one individual plaintiff who has demonstrated standing . . . Because of the presence of this plaintiff, we need not consider whether the other . . . plaintiffs have standing to maintain the suit."). Class actions are no exception to this long-standing rule. See Frank v. Gaos, 139 S. Ct. 1041, 1046 (2019) ("A court is powerless to approve a proposed class settlement if it lacks jurisdiction over the dispute, and federal courts lack jurisdiction if no named plaintiff has standing."); Liberian Cmty. Ass'n of Conn. v. Lamont, 970 F.3d 174, 185 n.14 (2d Cir. 2020) ("Because we conclude that none of the named plaintiffs has standing to pursue their claims for prospective relief, the class proposed by Appellants necessarily fails as well."); Cent. States, 504 F.3d at 241 ("As a threshold matter, we note that only one of the named Plaintiffs is required to establish standing in order to seek relief on behalf of the entire class."); Comer v. Cisneros, 37 F.3d 775, 788 (2d Cir. 1994) (noting that, in the context of a class action, "only one named plaintiff need have standing with respect to each claim"); see also 1 Newberg and Rubenstein on Class Actions § 2:1 (6th ed. 2022) ("Once threshold individual standing by the class representative is met, a proper party to raise a particular issue is before the court; there is no further, separate 'class action standing' requirement.").[1]

[1] Some may interpret a single sentence in Denney v. Deutsche Bank AG, 443 F.3d 253 (2d Cir. 2006), as suggesting that all class members must have standing for the class to proceed. See id. at 264 ("[N]o class may be certified that contains members lacking Article III standing."). But Denney was decided before the Supreme Court in Gaos clarified the minimal requirement for standing in class actions. And, in any event, we acknowledged in Denney that "[o]nce it is

Here, the amended complaint plausibly alleged that the named plaintiffs were likely to suffer future harm because they continued to rely on Navient for information about repaying their student loans. See, e.g., App'x 53, 61, 63. At least six of the named plaintiffs continue to have a relationship with Navient. See App'x 574. That is enough to confer standing on the entire class. See Amador v. Andrews, 655 F.3d 89, 99 (2d Cir. 2011) ("In a class action, once standing is established for a named plaintiff, standing is established for the entire class." (quotation marks omitted)).

III.

Having satisfied ourselves that the class has standing, we turn to whether the District Court abused its discretion in certifying the settlement class. "According to the Federal Rules of Civil Procedure, a class may be certified under Rule 23(b)(2) in a single circumstance: when '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.'" Berni, 964 F.3d at 146 (quoting Fed. R. Civ. P. 23(b)(2)). "Rule 23(b)(2) applies only when a single injunction or declaratory judgment would provide relief to each member of the class." Id. (quoting Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338,

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ascertained that there is a named plaintiff with the requisite standing, [] there is no requirement that the members of the class also proffer such evidence." Id. at 263–64 (quotation marks omitted); see also 1 Newberg and Rubenstein on Class Actions § 2:3 (noting that, "[w]hile [Denney] did contain that sentence, it was embedded in a paragraph that also stated, . . . [in an explanatory parenthetical] that: '[P]assive members need not make any individual showing of standing, because the standing issue focuses on whether the plaintiff is properly before the court, not whether represented parties or absent class members are properly before the court.'").

360 (2011)). As we put it 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." Id.

Appellants first argue that certification was improper because not all members of the class stand to benefit from the proposed injunctive relief. As part of the settlement, however, Navient has agreed to implement a number of business-practice enhancements, including requiring call center representatives to listen for keywords indicating PSLF eligibility; updating forms sent to borrowers to include more information about PSLF; and improving website and chat communications to better reach borrowers who might be eligible for loan forgiveness. See App'x 304. Navient's reforms will benefit class members whose loans continue to be serviced by Navient. But the reforms will also benefit the remaining class members who, for example, are no longer with Navient or who no longer have student loans, by providing them accurate information about PSLF and helping them determine whether they have viable individual claims for damages. See App'x 635 (Plaintiffs' counsel explaining that the proposed reforms "help borrowers advance their individual claims [] because they are now able to receive accurate information from Navient" regarding their loan histories); see also Oral Arg. at 17:28–18:22 (same). Specifically, improvements to Navient's communications system will make it easier for class members to access their loan-repayment record, learn how PSLF is supposed to work, and assess whether they would have been eligible for loan forgiveness had Navient initially provided them with accurate information. See Oral Arg. at 18:46–19:23. Access to payment records will be particularly useful to class members who may need to explain their credit history to secure mortgages or other loans. See Oral Arg. at 20:21–21:15; see also App'x 379

(declaration of a named plaintiff explaining how his "inflated loan balance posed a substantial barrier while [he] was attempting to purchase a home, as [he] was disqualified from a number of mortgage options in light of [his] outstanding debt alone"). The evidence of these benefits, which plausibly accrue to even those class members who have paid off their loans in full or no longer have Navient-serviced loans, supports the District Court's finding that the settlement was in the best interest of the class.[2]

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[2] Though we need go no further, we note that the settlement's cy pres award also benefits the whole class by funding a nonprofit, Public Service Promise, that will help all borrowers learn whether or not they are eligible for loan forgiveness and "provid[e] guidance on [PSLF] applications or assistance in challenging denials." App'x 355. Yeatman broadly resists these descriptions of the award's class-wide benefits, responding that a cy pres award "cannot serve as the grounds upon which a class member benefits from a settlement for the (b)(2) analysis" because "[c]y pres is not injunctive or declaratory relief." Yeatman Reply Br. 5. We disagree that a cy pres award cannot be characterized as injunctive, or equitable, relief. See Restatement (Third) of Trusts § 67, cmt. a. (Am. L. Inst. 2003) (noting that "[t]he judicial power of cy pres has evolved in this country along lines generally similar to the equity power under English common law"). That is especially so here. The award in this case was not a court-fashioned remedy aimed at repurposing funds that would otherwise have been distributed to the class as money damages. It was instead a provision of a settlement reached by private parties. Where, as here, the parties in a Rule 23(b)(2) injunctive class action reach a settlement that requires the defendant to make a monetary contribution to a third party, the award is more accurately described as a mandatory injunction to establish or contribute to a selected organization than as a refashioning of monetary relief. See In re Google Inc. Cookie Placement Consumer Priv. Litig., 934 F.3d 316, 328 (3d Cir. 2019) (certifying a Rule 23(b)(2) class where the cy pres award was "never intended to compensate class members monetarily" but instead served as equitable relief that "enhance[d] the settlement's deterrent effect"). In deciding whether the settlement's equitable relief benefits the class, we may

Appellants offer two additional reasons why Rule 23(b)(2) certification was improper, neither of which we find persuasive.

First, Yeatman argues that the class should have been certified under Rule 23(b)(3) instead of (b)(2) because the class primarily sought monetary relief for the unjust enrichment claim upon which certification was based. See Yeatman Br. 27–28. But we determine whether certification was appropriate by assessing the District Court's justification for certifying the settlement class. The District Court explained that "Defendants [were] alleged to have acted or refused to act on grounds that apply generally to the Settlement Class." Navient Corp., 2020 WL 6554826, at *2; see Barrows v. Becerra, 24 F.4th 116, 130 (2d Cir. 2022) (certification is proper under Rule 23(b)(2) if defendants have "acted or refused to act on grounds that apply generally to the class, so that final injunctive relief . . . is appropriate respecting the class as a whole" (quoting Fed. R. Civ. P. 23(b)(2))). That justification finds support in the record, as Plaintiffs' amended complaint sought injunctive relief on behalf of the class to prevent Navient from, among other things, "providing incorrect information to Plaintiffs and members of the Classes regarding PSLF," and "incentiviz[ing] Navient's employees to steer Plaintiffs and members of the Classes into" non-PSLF repayment plans. App'x 157. Because that conduct clearly applies to all Plaintiffs, we decline Yeatman's invitation to

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therefore consider the benefits class members receive from the cy pres award in addition to those they obtain from the injunction related to Navient's business practices. See 4 Newberg and Rubenstein on Class Actions § 12:26 (6th ed. 2022) (describing how a cy pres award "furthers the deterrence goals of the class suit" and "fund[s] activities that are in the class's interest").

find that the District Court abused its discretion on this ground. See Barrows, 24 F.4th at 132 ("Rule 23(b)(2) does not require that the relief to each member of the class be identical, only that it be beneficial. That means that different class members can benefit differently from an injunction." (quotation marks omitted)).

Second, Appellants challenge the certification on the ground that the release obtained by the certified class eliminates the right of individual class members to pursue claims for monetary damages "on an aggregate basis." Yeatman Br. 28. Fundamentally, they argue that the settlement violates the due process rights of absent class members by denying them the opportunity to opt out of the class and sue for money damages in addition to injunctive relief. But as the District Court explained, "individual class members [in fact] retain their right to bring individual lawsuits," and the settlement does not prevent absent class members from pursuing monetary claims.[3] See App'x 648; see also Navient Corp., 2020 WL 6554826, at *3 ("[A]ll other Settlement Class Members do not release or discharge, but instead expressly preserve, their right to file individual lawsuits for monetary relief on a non-class basis and excluding Aggregate Actions."). We therefore conclude that the District Court did not abuse

[3] Carson insists that class members will not be able to bring individual actions in practice because such lawsuits "are beyond the[ir] financial means." Carson Br. 48. But one of the functions of Public Service Promise is to advise class members of their litigation options and refer them to outside organizations for further assistance, including representation at lower costs. See Oral Arg. at 19:23–19:50; see also App'x 635 (Plaintiffs' counsel explaining that the organization can "refer borrowers out for litigation of the individual claims").

its discretion when it certified the settlement class under Rule 23(b)(2).

IV.

Appellants' challenge to the District Court's approval of the settlement itself fares no better.

A. Fairness of the Settlement

First, Appellants ask us to reject the settlement as unfair under Rule 23(e), which authorizes a district court to approve a class action settlement only if the settlement is "fair, reasonable, and adequate." Fed. R. Civ. P. 23(e)(2). To evaluate the fairness, reasonableness, and adequacy of a class settlement, courts employ the nine factors set out in City of Detroit v. Grinnell Corp.:

> (1) the complexity, expense and likely duration of the litigation; (2) the reaction of the class to the settlement; (3) the stage of the proceedings and the amount of discovery completed; (4) the risks of establishing liability; (5) the risks of establishing damages; (6) the risks of maintaining the class action through the trial; (7) the ability of the defendants to withstand a greater judgment; (8) the range of reasonableness of the settlement fund in light of the best possible recovery; (9) the range of reasonableness of the settlement fund to a possible recovery in light of all the attendant risks of litigation.

495 F.2d at 463 (citations omitted). On appeal, "[t]he trial judge's views" of these factors are entitled to "great weight." Joel A. v. Giuliani, 218 F.3d 132, 139 (2d Cir. 2000) (quoting Grinnell, 495 F.2d at 454).

The District Court carefully analyzed each of the nine factors. See App'x 645–48. In particular, in considering the final three factors, the court reasonably concluded that although Navient could have "withst[ood] a greater judgment," the settlement was "absolutely within the range of

reasonable settlements," especially "because there [was] a grave risk that there would have been no recovery at all" had the case proceeded. App'x 647–48. We find no abuse of discretion in the District Court's application of the Grinnell factors to the facts before it.

B. Cy Pres Award

Appellants separately object to the cy pres award in this case. As an initial matter, they say that a cy pres award is never appropriate in a class action settlement because it provides no direct benefit to class members. See Yeatman Br. 33 ("[C]y pres awards typically fail to redress class members' alleged injuries for which they are waiving their rights."); id. at 37 ("Cy pres . . . provides no redress to . . . class members."); see generally Yeatman Br. 31–44; Carson Br. 37–44. We disagree. As our sister circuits have recognized, class members can "benefit – albeit indirectly – from a defendant's payment of funds to an appropriate third party." In re Google Inc. Street View Elec. Commc'ns Litig., 21 F.4th 1102, 1116 (9th Cir. 2021); see id. (where a cy pres award has a "direct and substantial nexus" to the interests of the class and "account[s] for the nature of the plaintiffs' lawsuit," as the award in question does here, it "necessarily prioritizes class members' interests, even if it also provides a diffuse benefit to society at large" (quotation marks omitted)); see also In re Google Inc. Cookie Placement, 934 F.3d at 330 (recognizing that the "proposed cy pres awards would be used for a purpose directly and substantially related to the class's interests"); In re Lupron Mktg. and Sales Practices Litig., 677 F.3d 21, 35 (1st Cir. 2012) (recognizing that cy pres award in the form of funded research can "accrue both to the claimant class members and to the living absent class members"). So it is here: The cy pres award funds Public Service Promise and thereby assists all class members in

navigating PSLF and determining whether they have a viable individual monetary claim against Navient.

Appellants also argue that a cy pres award is not appropriate if it is feasible to distribute the funds that support the award directly to the class instead. This argument, however, misconstrues the settlement fund as a damages award that was redistributed to Public Service Promise through the cy pres doctrine. But the settlement fund never belonged to class members as damages (indeed, the class members expressly reserved their individual right to later sue Navient for money damages), and there is no evidence to suggest that Navient would have otherwise agreed to distribute the funds to the class. See App'x 646 (the District Court rejecting objections over "the lack of an award of damages," in part because "there is no sound argument to suggest[] that there could be a class action that would result in a monetary award to individual class members").

C. First Amendment Challenge

Finally, Appellants maintain that the cy pres award to Public Service Promise unlawfully compels speech in violation of the First Amendment. "We review a First Amendment challenge to the district court's approval of a settlement," including a cy pres award, "de novo." In re Google Street View, 21 F.4th at 1110.

We reject Appellants' constitutional challenge to the settlement. The settlement agreement does not involve state action that implicates the First Amendment. Instead, the "[D]istrict [C]ourt's review of the settlement agreement in this case essentially determined whether it was 'fair, reasonable, and adequate' and was merely an exercise in compliance with Rule 23(e)." Christina A. ex rel. Jennifer A. v. Bloomberg, 315 F.3d 990, 992 (8th Cir.

2003); see also 5 Moore's Federal Practice – Civil 23.161[1] (2022) ("A class-action settlement, like an agreement resolving any other legal claim, is essentially a private contract negotiated between the parties."). Nothing about the settlement "require[d] the court to establish the terms of the agreement." Bloomberg, 315 F.3d at 992-93. Without more (and outside the context of a claim of discrimination under the Equal Protection Clause), "[m]ere approval of or acquiescence in the initiatives of a private party is not sufficient" to constitute state action. Blum v. Yaretsky, 457 U.S. 991, 1004–05 (1982); see In re Motor Fuel Temperature Sales Practices Litig., 872 F.3d 1094, 1114 (10th Cir. 2017). The private class settlement agreement in this case thus "may be enforced, without implicating the First Amendment." IMDb.com Inc. v. Becerra, 962 F.3d 1111, 1120 (9th Cir. 2020) (citing Cohen v. Cowles Media Co., 501 U.S. 663, 671 (1991)); see In re Motor Fuel Temperature Sales Practices Litig., 872 F.3d at 1114.

D. Involvement of the Labor Union

Appellants object to the relationship between Plaintiffs' counsel and AFT, the labor union that paid Plaintiffs' counsel's bills. They argue that AFT's presence "strongly suggests that the interests of the class were not adequately represented" under Rules 23(a)(4) and 23(g).[4] Yeatman Br. 45 (quotation marks omitted); see Marisol A.

[4] Appellants also argue that Plaintiffs ought to have notified the class of AFT's role in the litigation. See Carson Br. 64; Yeatman Br. 47. We agree with Plaintiffs, however, that "[n]othing in Rule 23 required that the class notice disclose the proposed reimbursement [to AFT]." Plaintiffs-Appellees' Br. 56 n.28. In any event, the District Court took the lack of notice into account in denying the motion for attorney's fees; beyond that, Appellants do not establish how the alleged deficiencies in notice are grounds for invalidating the settlement as a whole. See App'x 654.

v. Giuliani, 126 F.3d 372, 378 (2d Cir. 1997) (per curiam) ("Rule 23(a)(4) requires that plaintiffs demonstrate that class counsel is qualified, experienced, and generally able to conduct the litigation." (quotation marks omitted)); Fed. R. Civ. P. 23(g)(1)(B) (providing that a court, in appointing class counsel, may consider any matter "pertinent to counsel's ability to fairly and adequately represent the interests of the class").

In advancing this claim, however, Appellants have not pointed to any evidence that conflicts with Judge Cote's finding that "the motive behind AFT acting as it has and the commitment it has shown in this litigation . . . is nothing but admirable." App'x 655; see also id. at 654 ("[B]ecause of AFT's work and its decision and its generosity, the class has achieved a significant benefit, and that significant benefit will have or may have a profound impact on all public service employees."). Nor, on review of the record, do we see evidence that class counsel abandoned the litigation or otherwise acted in bad faith in pursuing this case. To the contrary, counsel agreed to settle only after the District Court indicated that Rule 23(b)(3) certification would likely fail. See Plaintiffs-Appellees' Br. 54. Absent settlement, the class members here may not have received anything at all. See App'x 648 (the District Court noting "a grave risk that there would have been no recovery at all" without the settlement).

V.

Finally, Appellants challenge the District Court's decision to approve service awards for the named plaintiffs, arguing that such awards are prohibited under a pair of nineteenth-century Supreme Court cases, Trustees v. Greenough, 105 U.S. 527 (1882), and Central R.R. & Banking Co. v. Pettus, 113 U.S. 116 (1885). We are not persuaded.

Greenough involved a suit brought by a bondholder of the Florida Railroad Company, Francis Vose, against the trustees of the Internal Improvement Fund of Florida, which "consisted of ten or eleven million acres of lands belonging to the State," the proceeds of which were "pledged for the payment of the interest accruing on the bonds." 105 U.S. at 528. On behalf of himself and other bondholders, Vose alleged that the trustees were "wasting and destroying the fund by selling [the land] at nominal prices." Id. at 528–29. The litigation was successful: The trustees were ultimately removed from their positions, and the court appointed agents to sell the land, which resulted in "a large number of sales" and "a considerable amount of money" for the bondholders. Id. at 529.

Vose, who had financed most of the litigation personally, petitioned to have his expenses reimbursed by the fund. The Supreme Court held that Vose could receive "reasonable costs, counsel fees, charges, and expenses incurred in the fair prosecution of the suit," id. at 537, explaining that it would be "unjust" and an "unfair advantage" for the rest of the bondholders to benefit from his efforts without some compensation for the time and money he spent "work[ing] for them as well as for himself," id. at 532. But the Court held that he could not receive a refund for "his personal services and private expenses," id. at 537, reasoning that "[i]t would present too great a temptation to parties to intermeddle in the management of valuable property or funds . . . if they could calculate upon the allowance of a salary for their time and of having all their private expenses paid," id. at 538; see also Pettus, 113 U.S. at 122–23 (same).

Although Greenough was decided decades before the adoption of Rule 23, Carson argues that it stands broadly for the proposition that "[a] class representative cannot

claim reimbursement from a common-fund settlement for his or her own service on behalf of the class." Carson Br. at 60. That reading is foreclosed by our decision in Melito. In that case, we considered whether the district court had abused its discretion by approving incentive awards of $2,500 for the class representatives in recognition of their litigation efforts. See Melito, 923 F.3d at 96. The appellant, the lone objector to the settlement, argued that such awards were unlawful under Greenough and Pettus. We rejected that argument, explaining that Greenough and Pettus were "inapposite" because they did not "provide factual settings akin to those" present in Melito. Id. at 96. Melito compels our conclusion that Rule 23 does not per se prohibit service awards like the ones at issue here.[5]

Turning to the awards themselves, we note that the District Court offered compelling reasons for compensating the class representatives, including that they "opened their lives to scrutiny"; "laid bare their financial circumstances, their career choices, and their personal histories"; suffered personal attacks; and were "subjected to vitriol." App'x 651–52. These determinations, which were supported by the record, see App'x 402, 434, 443–44, 456–57 (declarations of named plaintiffs), did not lie outside the bounds of the District Court's discretion.[6]

---

[5] We are bound by Melito's holding unless or until it is overruled by the Supreme Court or the Second Circuit in banc. See Anilao v. Spota, 27 F.4th 855, 873 n.13 (2d Cir. 2022).

[6] Carson also cites New York State cases prohibiting service awards under state law, see Carson Br. 61, but those cases are inapposite here since they do not address the grant of service awards under Rule 23.

CONCLUSION

We have considered Appellants' remaining arguments and conclude that they are without sufficient merit to warrant reversal. For the foregoing reasons, we AFFIRM the judgment of the District Court.

Appendix B

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

KATHRYN HYLAND, MELISSA GARCIA, ELIZABETH TAYLOR, JESSICA SAINT-PAUL, REBECCA SPITLER-LAWSON, MICHELLE MEANS, ELIZABETH KAPLAN, JENNIFER GUTH, MEGAN NOCERINO, and ANTHONY CHURCH, individually and on behalf of all others similarly situated,

Plaintiffs,

v.

NAVIENT CORPORATION and NAVIENT SOLUTIONS, LLC,

Defendants.

No. 18-cv-9031-DLC-BCM

USDC SDNY
DOCUMENT
ELECTRONICALLY
FILED
DOC#_____
DATE FILED:10/9/2020

FINAL APPROVAL ORDER

WHEREAS, Plaintiffs Kathryn Hyland, Melissa Garcia, Elizabeth Taylor, Jessica Saint- Paul, Rebecca Spitler-Lawson, Michelle Means, Elizabeth Kaplan, Jennifer Guth, Megan Nocerino, and Anthony Church ("Plaintiffs" or "Class Representatives," and collectively with the other members of the Settlement Class, the "Settlement Class") entered into a Settlement Agreement and Release (the "Settlement Agreement")[1] with Defendants Navient Solutions, LLC and Navient Corporation (collectively, "Defendants" or "Navient"), on April 24, 2020 to resolve the claims in the above-captioned class action lawsuit (the "Litigation");

WHEREAS, the Court on June 19, 2020 issued an order granting preliminary approval of the Settlement Agreement and conditional certification of the Settlement Class, and appointing the Plaintiffs as Class Representatives and Plaintiffs' counsel as Class Counsel (the "Preliminary Approval Order");

WHEREAS, the Settlement Administrator has filed proof of dissemination and publication of the Short-Form Notice and the Long-Form Notice, and proof of maintenance of the Class Settlement Website and Toll-Free Number (the "Class Notice"), in accordance with the Notice Plan set forth in Section VI of the Settlement Agreement, as modified by the Court in the Preliminary Approval Order;

WHEREAS, Plaintiffs filed a Motion for Final Approval of the Settlement Agreement and Certification of the Settlement Class (the "Final Approval Motion"), an Application for Service Awards for Class Representatives

[1] All terms not defined herein have the meaning ascribed to them in the Settlement Agreement.

(the "Service Awards Application"), and an Application for Award of Reasonable Attorneys' Fees and Reimbursement of Expenses (the "Fees Application") on August 28, 2020, none of which was opposed by Navient;

WHEREAS, on October 2, 2020, a hearing was held before the Court to consider the fairness, reasonableness, and adequacy of the proposed settlement and whether it should be finally approved by the Court pursuant to a final approval order and judgment (the "Final Approval Hearing"), after which hearing the Court requested that Class Counsel submit a revised proposed final approval order (the "Final Approval Order");

and

WHEREAS, the Court, having read and considered the Settlement Agreement and its exhibits, the Final Approval Motion and its accompanying memorandum of law, the Service Awards Application and its accompanying memorandum of law, the Fees Application and its accompanying memorandum of law, the pleadings, all other papers filed in this Litigation, and all matters submitted to it at the Final Approval Hearing, hereby finds that the Final Approval Motion and the Service Awards Application should be **GRANTED** and the Fees Application should be **DENIED**.

NOW, THEREFORE, IT IS HEREBY ORDERED THAT:

FINAL APPROVAL OF THE SETTLEMENT AGREEMENT

1. The Settlement Agreement, including the releases contained therein, is approved as being fair, reasonable, and adequate under Federal Rules of Civil Procedure 23(b)(2) and 23(e) and in the best interest of the

Settlement Class as a whole. Class Representatives and Defendants are directed to implement the settlement in accordance with the terms and conditions of the Settlement Agreement.

2. The Court further approves the Cy Pres Recipient, described in Section V.C of the Settlement Agreement, to launch the PSLF Project, as set forth in the Term Sheet for Cy Pres Recipient and PSLF Project Proposal, Dkt. 125-8, and to receive a total distribution of $2,250,000 from the Settlement Fund.

3. The Court finds that the Settlement Agreement was entered into at arm's length by experienced counsel, including after an in-person mediation supervised by the Honorable Barbara C. Moses, United States Magistrate Judge of the United States District Court for the Southern District of New York.

CERTIFICATION OF THE SETTLEMENT CLASS

4. The Settlement Class described herein is certified pursuant to Federal Rules of Civil Procedure 23(b)(2) and 23(e):

> All individuals who, at any point from October 1, 2007 to the Effective Date (i) 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

5. Pursuant to Rule 23(a) of the Federal Rules of Civil Procedure, the Court finds, for settlement purposes only, that: (a) the Settlement Class Members are so numerous as to make joinder of all the Settlement Class Members

impracticable; (b) there are questions of law and fact common to the Settlement Class Members; (c) the claims of the Class Representatives are typical of the claims of the Settlement Class Members; and (d) the Class Representatives and Class Counsel will fairly and adequately protect the interests of the Settlement Class Members.

6. The Court further finds, for settlement purposes only, 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) of the Federal Rules of Civil Procedure.

NOTICE TO SETTLEMENT CLASS MEMBERS

7. The Court finds that the Class Notice as modified by the Court in the Preliminary Approval Order (a) fairly and adequately described the terms and effects of the Settlement Agreement, (b) fairly and adequately described the date by which Class Counsel were required to file the Final Approval Motion and Fees Application, (c) fairly and adequately described the method and date by which any member of the Settlement Class could object to or comment upon the Settlement Agreement, (d) set a date by which Class Counsel could respond to any objections to the Settlement Agreement, and (e) provided notice to the Settlement Class of the time and place of the Final Approval Hearing. Subject to paragraph 16 below, the Court finds that the Class Notice constituted appropriate and reasonable notice under the circumstances and otherwise met all requirements of applicable law

RELEASES

8. In accordance with the terms of Section IX.A.3 of the Settlement Agreement, upon distribution to the Cy Pres Recipient, each Settlement Class Member and their

related parties (defined in the Settlement Agreement as "Releasing Class Member Parties") release all claims for monetary relief brought on an aggregate or class basis or for non-monetary relief arising out of the same facts underlying this lawsuit (defined in the Settlement Agreement as "Released Class Claims") against Navient and its related parties (defined in the Settlement Agreement as "Released Defendant Parties"). In accordance with the terms of Section IX.A.7 of the Settlement Agreement, the Settlement Class does not release or discharge, but instead expressly preserves, the right of any and all Settlement Class Members to file individual lawsuits for monetary relief on a non-class basis and excluding Aggregate Actions.

9. In accordance with the terms of Section IX.A.2 of the Settlement Agreement, upon payment of the Incentive Awards, each Class Representative and their related parties (defined in the Settlement Agreement as "Releasing Class Representative Parties") release all claims for monetary or non-monetary relief arising out of the same facts underlying this lawsuit (defined in the Settlement Agreement as "Released Class Representative Claims") against each of the Released Defendant Parties. In accordance with the terms of Section IX.A.8 of the Settlement Agreement, the Class Representatives do not release, waive, or discharge claims to enforce any provision of the Settlement Agreement. As set forth above in paragraph 8, all other Settlement Class Members do not release or discharge, but instead expressly preserve, their right to file individual lawsuits for monetary relief on a non-class basis and excluding Aggregate Actions.

10. In accordance with the terms of Section IX.A.9 of the Settlement Agreement, as of the Effective Date of the Settlement Agreement, Navient and its related parties

(enumerated in Settlement Agreement § IX.A.9) release all claims for any damages or other relief relating to the prosecution of this Litigation that Navient may have against the Class Representatives, Class Counsel, and their related parties.

APPROVAL OF THE SERVICE AWARDS

11. The Court finds that the requested service awards are justified under the circumstances of this case in recognition of the time and effort that each Class Representative expended in furtherance of this case and the personal risks and burdens incurred by the Class Representatives on behalf of the class.

12. Each Class Representative is or was a public service employee who holds or held at one time significant debts, and if properly advised, they would have had significant opportunity to have those debts forgiven. An award of $15,000 will compensate each Class Representative for only a fraction of the debt that they held at some point in time, if not currently. Nevertheless, the Class Representatives agreed to give up the right to sue Navient individually.

13. In addition, the Class Representatives opened their lives to scrutiny when they stepped forward on behalf of the class and laid bare their financial circumstances, their career choices, and their personal histories, without which commitment this litigation could not have been brought. There is evidence that the Class Representatives have suffered personal attacks because they have served in their role as named Plaintiffs in order to benefit all class members. These attacks should not be part of the burden of serving as Class Representatives.

14. Finally, because individualized issues regarding any misrepresentations or omissions by Navient would

likely have prevented class certification, and therefore there is likely no monetary relief that could have been awarded to absent class members on an aggregate basis, there is little risk that the Class Representatives breached their duty to absent class members in agreeing to this settlement.

15. Weighing all of those factors, the requested service awards are approved and each Class Representative is awarded $15,000 pursuant to the Settlement Agreement.

ATTORNEYS' FEES

16. The Court declines to reach the merits of the Fees Application because counsel's papers, and therefore the Class Notice, did not disclose that the American Federation of Teachers ("AFT") had paid counsel's fees or that an attorneys' fees award would be used to reimburse AFT for those payments. Therefore, under Settlement Agreement § V.C.4, the $500,000 requested for such award shall be distributed to the Cy Pres Recipient, for a total distribution to the Cy Pres Recipient of $2,250,000.

17. The Court reserves continuing and exclusive jurisdiction over Plaintiffs, Defendants, and the Settlement Class with respect to the Settlement Agreement and this Order. Subject to the foregoing, this Litigation is hereby dismissed with prejudice and without costs.

IT IS SO ORDERED.

This ninth day of October, 2020

By: */s/Denise Cote*
Hon. Denise Cote
United States District Court Judge

Appendix C

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 7th day of October, two thousand twenty-two.

Kathryn Hyland, Melissa Garcia, Jessica Saint-Paul, Rebecca Spitler-Lawson, Michelle Means, Elizabeth Kaplan, Jennifer Guth, Megan Nocerino, Elizabeth Taylor, and Anthony Church, each individually and on behalf of all others similarly situated,

Plaintiffs - Appellees,

v.

Navient Corporation, Navient Solutions LLC,

Defendants - Appellees,

v.

William Yeatman, Richard Estle Carson, III,

Objectors - Appellants.

ORDER

Docket Nos:

20-3765 (Lead)

20-3766 (Con)

Appellant, Richard Estle Carson, III, filed a petition for panel rehearing, or, in the alternative, for rehearing *en banc*. The panel that determined the appeal has considered the request for panel rehearing, and the active members of the Court have considered the request for rehearing *en banc*.

IT IS HEREBY ORDERED that the petition is denied.

FOR THE COURT:
Catherine O'Hagan Wolfe,
Clerk

/s/Catherine O'Hagan Wolfe

Appendix D

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 7th day of September, two thousand twenty-two,

Before: Robert D. Sack,
Raymond J. Lohier, Jr.,
William J. Nardini,
Circuit Judges.

Kathryn Hyland, Melissa Garcia, Jessica Saint-Paul, Rebecca Spitler-Lawson, Michelle Means, Elizabeth Kaplan, Jennifer Guth, Megan Nocerino, Elizabeth Taylor, and Anthony Church, each individually and on behalf of all others similarly situated,

Plaintiffs - Appellees,

v.

Navient Corporation, Navient Solutions LLC,

Defendants - Appellees,

v.

JUDGMENT

Docket Nos. 20-3765(L), 20-766(CON)

William Yeatman, Richard Estle Carson, III,

Objectors - Appellants.

The appeals in the above captioned case from a judgment of the United States District Court for the Southern District of New York were argued on the district court's record and the parties' briefs. Upon consideration thereof,

IT IS HEREBY ORDERED, ADJUDGED and DECREED that the judgment of the district court is AFFIRMED.

For the Court:
Catherine O'Hagan Wolfe,
Clerk

/s/Catherine O'Hagan Wolfe

MANDATE ISSUED ON 10/14/2022

Appendix E

Fed. R. Civ. P. 23

Rule 23. Class Actions

…

(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; or
>
> (3) the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy. The matters pertinent to these findings include:
>
> > (A) the class members' interest in individually controlling the prosecution or defense of separate actions.
> >
> > (B) the extent and nature of any litigation concerning the controversy already begun by or against class members;
> >
> > (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and

(D) the likely difficulties in managing a class action.

…

(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:

(A) the class representative and class counsel have adequately represented the class;

(B) the proposal was negotiated at arm's length;

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

(i) the costs, risks, and delay of trial and appeal;

(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); and

(D) the proposal treats class members equitably relative to each other.

…

Appendix F

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------x
KATHRYN HYLAND, *et al.*

Plaintiffs,

v.

NAVIENT CORPORATION, *et al.*,

Defendants.
----------x

New York, N.Y.

18 Civ. 9031 (DLC)

Teleconference

Fairness Hearing

October 2, 2020
3:10 p.m.

Before:

HON. DENISE L. COTE,

District Judge

APPEARANCES

SELENDY & GAY, PLLC
Attorneys for Plaintiffs
BY: FAITH E. GAY
YELENA KONANOVA

PHILLIPS RICHARD & RIND, P.A.
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DR. JANE HANSON
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MICHAEL LOMBARDO
Pro Se Objector

GREGORY CLAUSS
Pro Se Objector

PROCEEDINGS

***

[Court Remarks, Fairness Hearing pp. 45:23-49:22]

THE COURT: So let me turn now to my task, and there are really, as I outlined before, three separate issues:

First, for me to judge, under the legal standards I must follow, which are set forth in a case named *Grinnell*, whether or not the settlement should be approved as fair, adequate, and reasonable in the circumstances as judged by the factors set forth in the Grinnell case.

And the first factor I have to look at, in judging a settlement, is the factor that is directed to the complexity, expense, and likely duration of this litigation. I find, and I don't think there is much dispute here, that this is complex litigation. It's been expensive to pursue to date and would be far more expensive if it had continued to the end. I believe that if the litigation had continued that it would have ended as a class action through the litigation of a class certification motion, that the application by plaintiffs' counsel to certify as a class this lawsuit would have been denied.

That would have left the claims of the New York named plaintiffs, and I very much doubt that I would have been able to grant a defendant's motion for summary judgment, and therefore I think those claims would, in all likelihood, have proceeded to trial.

So this is a complex litigation, with massive discovery ahead, with complex motion practice ahead, and probably a trial for some named plaintiff.

The second factor I must look at in evaluating the reasonableness of a settlement is the reaction of the class to this settlement. I must say that the reaction of the class has been mixed. This is a very large class, and I think there were only 115 objections filed that were timely. There were four more objections, I believe, that were filed late, making a total of 119 objections.

But that really is a large number of objections, even though the class is so large. Most class actions don't have the involvement of class members the way this one has, and I think my ability to make judgments about the reasonableness of this settlement has been enhanced by the comments received from the objectors, and so I thank them for those comments.

Most of the objections have raised concern about the lack of an award of damages. They complain that the individual class members are not receiving any monetary compensation here, and they complain, at least some of them, bitterly about that based on their individual circumstances, and that is absolutely understandable.

But, again, I don't believe, and I think really there is no sound argument to suggest, that there could be a class action that would result in a monetary award to individual class members because the circumstances for each individual member differ so dramatically; and therefore, the only recourse, the only avenue for obtaining a monetary award for an individual class member is to pursue your own individual action or, as I understand it, you may be benefited by lawsuits brought by government entities. I certainly hope, if that is an appropriate avenue in those litigations, that that benefits one and all.

The third issue I must address is the stage of the proceedings and the amount of discovery completed when

settlement was reached. The parties had exchanged some discovery materials, but this was at the early stage of discovery. Much more discovery remained to be done.

The fourth factor is the risk of establishing liability. I think that it is very difficult for me to evaluate the likelihood that the New York named plaintiffs would have been successful at trial. I'm just not in a position to evaluate that.

The fifth factor is the risk of establishing damages. Well, as I have already mentioned, there was a grave risk that the class would not receive any damages award because it could not be certified as a class action and, as I have already explained, it is unknown to me whether the New York plaintiffs would have been able to recover anything.

The sixth factor is the risk of maintaining the class action through trial. I have already said there is a grave risk that it would not have been maintained through the trial.

The seventh factor is the ability of the defendants to withstand a greater judgment. Navient is able to pay a judgment far larger than that it has agreed to here.

The eighth factor is the range of reasonableness of the settlement fund in light of the best possible recovery, and I find that this settlement is absolutely within the range of reasonable settlements, given the weighing of all of the factors I have just discussed.

And the last factor is the range of reasonableness of the settlement fund to a possible recovery in light of all of the attendant risks of litigation and, again, I find that this settlement is within the range of reasonable settlements because there is a grave risk that there would have been no

recovery at all, certainly none for the class, and possibly none for the named New York plaintiffs.

This is a (b)(2), using the jargon from the Federal Rule of Civil Procedure under which we are operating here, and there are certain issues about when it is or isn't appropriate to approve a settlement for a class action when there is no opt-out provision. I think that is adequately dealt with by the fact that individual class members retain their right to bring individual lawsuits. And to the extent that there has been reference to the Second Circuit decision in *Berni*, I think those concerns are adequately addressed in the parties' letters of July 20 that I have already referred to.

***

[Court Remarks, Fairness Hearing pp. 53:9-56:10]

THE COURT: Therefore, let me turn to the last aspect of this request, and that is the request for attorney's fees.

Let me start by giving some context as I understand it.

Counsel for the class reduced their rates by 20 percent and the American Federation of Teachers has paid counsel's bills, as we learned today, monthly based on those reduced rates. As plaintiffs' counsel describe in their papers, they spent over 11,000 hours on this litigation, and the attorney's fees have been close to $6 million—$5,915,000 roughly—and today is the day I learned that that sum had been paid in its entirety.

I am and remain concerned about notice issues here. As counsel know I typically, and certainly in this case as well, take the step of a preliminary approval of a class action seriously and spend time looking at the settlement agreement, the papers supplied asking for preliminary approval, as well as the notice that will go out to the class,

and I make suggestions for revision to that class notice, and I did so here. This was no exception.

The settlement agreement provided me with no notice that counsel's fees were being paid on an ongoing basis or that there would be a request to reimburse AFT for those payments. The preliminary approval papers that counsel submitted to me gave me no notice of those facts. Now, AFT is mentioned in the settlement agreement in two places, but not in connection with the fee request here in any way that would put me on notice that it was a request to reimburse AFT.

And because I didn't have that knowledge and counsel did not advise me of those facts, the notices to the class also did not alert the class to those facts. Indeed, what they included were statements that I think now, based on my current understanding, are misleading. For instance, the notice—one notice said that the request would be made for up to $500,000 to plaintiffs' lawyers for their attorney's fees. Another notice, the short-form notice, said "these attorneys will request that a Court award fees and expenses up to $500,000." There was no statement 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.

In the papers submitted to me requesting payment of the attorney's fees, I did not understand, even at that time, that AFT had fully paid the attorney's fees accumulated to date and that the $500,000 would be going to AFT. The situation was described as AFT having made a significant up-front payment, and the supporting documentation didn't indicate to me that AFT had paid all the bills submitted by counsel.

So I am left with concern here about notice to the Court and the class, and so I am not going to address the merits of the application of the request for approval to use 500,000 of the settlement fund to reimburse AFT.

Now, that said, I want to make a couple of points:

The impact of this, as I understand it, will mean that Public Service Promise will be even more significantly funded, since that $500,000 will now be part of the *cy-près* fund for Public Service Promise.

The second point I would like to make, my decision to not award this sum to AFT is not a criticism of AFT and should not be heard as such. They spent about $6 million on this litigation to help all public service employees get loan forgiveness to the extent that the law permits and damages for any role Navient played in interfering with that important right. In my judgment, because of AFT's work and its decision and its generosity, the class has achieved a significant benefit, and that significant benefit will have or may have a profound impact on all public service employees.

By 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 be better informed and better able to take advantage of all their rights. And of course Navient itself has benefited because of the work the AFT has done here to improve its own practices and be a better corporate citizen. So I think that the motive behind AFT acting as it has and the commitment it has shown in this litigation and funding fully this litigation is nothing but admirable.

***

Appendix G

EXECUTION COPY

SETTLEMENT AGREEMENT AND RELEASE

I. PREAMBLE

This Settlement Agreement and Release (the "Agreement") is entered into by and among the individuals defined below as "Plaintiffs" and the entities defined below as "Navient" (collectively, the "Parties").

This Agreement is intended by the Parties to fully, finally, and forever resolve, discharge, and settle the Released Class Representative Claims and the Released Class Claims (as those terms are defined below), upon and subject to the terms and conditions of this Agreement, and subject to Preliminary and Final Approval of the Court.

II. DEFINITIONS

For purposes of this Agreement, including the Preamble above, the following terms shall have the following meanings:

1. "Administrative Expenses" means all of the expenses incurred by the Settlement Administrator in the administration of this Settlement including, without limitation, all expenses or costs associated with the Notice Plan and providing Notice to the Settlement Class. Administrative Expenses also include all reasonable third-party fees and expenses incurred by the Settlement Administrator in administering the terms of this Agreement.

2. "AFT" means the American Federation of Teachers AFL-CIO.

3. "Aggregate Action" means any litigation proceeding in which five or more separate individuals propose to prosecute their Claims in the context of the same legal proceeding. Aggregate Action shall not include litigation proceedings in which an external authority or court requires particular actions to be prosecuted together including, but not limited to: (i) multi-district litigation as determined by the Judicial Panel on Multidistrict Litigation; (ii) actions that the court determines should be coordinated or consolidated for efficiency; (iii) actions that individuals mark as potentially related and are deemed related by the court; or (iv) actions that are required to be brought together based on the Federal Rules of Civil Procedure or the local rules of the local, state, or federal court.

4. "Agreement" means this Settlement Agreement and Release, including all exhibits attached hereto.

5. "Business Practice Enhancements" has the meaning set forth in Section V.B below.

6. "Claim" or "Claims" means any and all manner of claims, counterclaims, demands (including, without limitation, demands for arbitration), actions, suits, judgments, causes of action, allegations of wrongdoing, and liabilities of any kind, whether direct, indirect, or otherwise in nature, known or unknown, suspected or unsuspected, accrued or unaccrued, asserted or unasserted, whether in law, in equity, or otherwise.

7. "Class Counsel" means the law firms listed on the signature page of this Agreement representing the Class Representatives and the Settlement Class.

8. "Class Representatives" means Kathryn Hyland, Melissa Garcia, Elizabeth Taylor, Michelle Means, Elizabeth Kaplan, Jennifer Guth, Rebecca Spitler-Lawson, Jessica Saint-Paul, Anthony Church, and Megan Nocerino.

9. "Complaint" means the Class Action Complaint filed on October 3, 2018 and the Amended Class Action Complaint filed on January 16, 2019 in the Litigation.

10. "Court" means the United States District Court for the Southern District of New York where this Litigation is pending.

11. "Covered Conduct" means any act, omission, fact, or matter occurring or existing on or prior to the Final Approval Order and Final Judgment and that arises out of the identical factual predicate of the Complaint.

12. "Cy Pres Recipient" means the entity that provides education and student loan counseling to public service borrowers and will be mutually agreed upon by the Parties and approved by the Court to receive a cy pres distribution from the Settlement Fund under this Agreement.

13. "Day" or "Days" refers to calendar days.

14. "Direct Loans" means loans made pursuant to the Direct Loan program introduced in 1994 in which the federal government issues loans directly to the borrower.

15. "Effective Date" means the first date after either (i) the time to appeal the Final Approval Order and Final Judgment has expired with no appeal having been filed or (ii) the Final Approval Order and Final Judgment is affirmed on appeal by a reviewing court and is no longer reviewable by any court.

16. "Execution" means the signing of this Agreement by all signatories hereto.

17. "FedLoan Servicing" is a division of Pennsylvania Higher Education Assistance Agency that handles student loan servicing operations for federally owned loans and is the designated servicer for PSLF.

18. "Federal Student Aid" is a performance-based organization within the United States Department of Education.

19. "Fee Award" means the attorneys' fees, reimbursement of expenses, and other costs awarded by the Court to Class Counsel as allowed by this Agreement.

20. "FFEL Loans" means Federal Family Education Loans that were issued by private companies and reinsured by the federal government.

21. "Final Approval Hearing" means the hearing before the Court where (i) the Parties request that the Court approve this Agreement as fair, reasonable, and adequate; (ii) the Parties request that the Court enter its Final Approval Order and Final Judgment in accordance with this Agreement; and (iii) Class Counsel request approval of their petition for the Fee Award, as well as any requested Incentive Awards to the Class Representatives.

22. "Final Approval Order" means the order entered by the Court, in a form that is mutually agreeable to the Parties, approving this Agreement as fair, reasonable, adequate, and in the best interest of the Settlement Class as a whole, and making such other findings and determinations as the Court deems necessary and appropriate to effectuate the terms of this Agreement, without modifying any terms of this Agreement that either Party deems material.

23. "Final Judgment" means the final judgment entered following issuance of the Final Approval Order.

24. "Incentive Award" means any amount awarded by the Court to the Class Representatives as compensation for serving as Class Representatives.

25. "Litigation" means the civil action captioned *Kathryn Hyland, et al. v. Navient Corp., et al.*, Case No. 18-cv-9031, pending in the United States District Court for the Southern District of New York.

26. "Navient" means Defendants Navient Solutions, LLC and Navient Corporation.

27. "Notice Date" means forty-five (45) days after the Preliminary Approval Order, when notice is to be disseminated to potential Settlement Class Members.

28. "Notice Plan" means the plan for providing notice of this settlement to Settlement Class Members under Rules 23(c)(2)(A) and 23(e)(1) of the Federal Rules of Civil Procedure, as set forth in Section VI.

29. "NSLDS" means National Student Loan Data System, which is the United States Department of Education's central database for federal student aid.

30. "Parties" means, collectively, the Plaintiffs and Navient, and "Party" means any one of them.

31. "Person" or "Persons" means an individual or legal entity, including, without limitation, natural persons, firms, corporations, limited liability companies, joint ventures, joint stock companies, unincorporated organizations, agencies, bodies, associations, partnerships, limited liability partnerships, trusts, and their predecessors, successors, administrators, executors, heirs, and/or assigns.

32. "Plaintiffs" means the Class Representatives acting on behalf of themselves and all Settlement Class Members.

33. "Preliminary Approval" and "Preliminary Approval Order" means the order issued by the Court provisionally (i) granting preliminary approval of this Agreement; (ii) certifying the Class for settlement purposes; (iii) appointing Class Representatives and Class Counsel; (iv) approving the form and manner of the Notice Plan and appointing a Settlement Administrator; (v) approving the proposed Cy Pres Recipient; (vi) establishing deadlines for the filing of objections to the proposed settlement contemplated by this Agreement; and (vii) scheduling the Final Approval Hearing.

34. "PSLF" means the Public Service Loan Forgiveness Program created by Congress in 2007 as part of the College Cost Reduction and Access Act, Pub. L. No. 110-84, § 401, 121 Stat. 784, 800 (2007) (codified at 20 U.S.C. § 1087e(m)).

35. "Public Statement" means any press release, announcement, or statement made to the press, or to any public outlet, or to a representative or agent of the press or a public outlet with respect to this Agreement.

36. "Release" or "Releases" means the release of Claims described in Section IX.

37. "Released Class Representative Claims" means any and all Claims for monetary relief or non-monetary relief that the Releasing Class Representative Parties or any one of them ever had, now has, or hereafter can, shall, or may have, claim, or assert in any capacity against the Released Defendant Parties with respect to the Covered Conduct.

38. "Released Class Claims" means any and all Claims that the Releasing Class Member Parties or any one of them ever had, now has, or hereafter can, shall, or may have, claim, or assert against the Released Defendant Parties with respect to the Covered Conduct (a) for non-monetary relief or (b) for monetary relief, if and to the extent such Claims are brought (i) as a representative or member of any class of claimants in a class action, whether under Rule 23 of the Federal Rules of Civil Procedure or under state laws analogous to Rule 23 of the Federal Rules of Civil Procedure or (ii) through any other form of Aggregate Action.

39. "Released Defendant Parties" means (i) Navient and (ii) Navient's past and present parents, subsidiaries, divisions, affiliates, officers, directors, insurers, employees, agents, attorneys, and any of their legal representatives (and the predecessors, heirs,

executors, administrators, successors, purchasers, and assigns of each of the foregoing).

40. "Releasing Class Representative Parties" means each Class Representative and any executors, administrators, representatives, agents, attorneys, partners, successors, predecessors-in-interest, and assigns of the Class Representatives, including AFT.

41. "Releasing Class Member Parties" means each Settlement Class Member and any executors, administrators, representatives, agents, attorneys, partners, successors, predecessors-in-interest, and assigns of any of the Settlement Class Members.

42. "Settlement Administrator" means a third-party class action settlement administrator to be selected by Navient, subject to Class Counsel's approval (which shall not be unreasonably withheld), to implement aspects of this Agreement.

43. "Settlement Class" means all individuals who from October 1, 2007 to the Effective Date (i) have or had 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.

44. "Settlement Class Members" means any person who qualifies under the definition of the Settlement Class, excluding: (i) Navient, its parents, subsidiaries, successors, affiliates, officers, and directors; (ii) the judge(s) to whom the Litigation is assigned and any member of the judges' immediate families; and (iii) Persons who may already have settled with and

released Navient from individual Claims substantially similar to those alleged in the Litigation.

45. "Settlement Fund" means the $2,400,000 total sum, excluding costs payable to the Settlement Administrator and costs associated with the Notice Plan, that Navient will pay in connection with this Agreement, deposited into a common fund for payment of (i) a distribution to the Cy Pres Recipient; (ii) the Incentive Awards; and (iii) the Fee Award.

III. RECITALS

WHEREAS, on October 3, 2018, nine Class Representatives brought a putative nationwide class action in the United States District Court for Southern District of New York, alleging (among other things) that Navient misrepresented borrowers' eligibility for PSLF (Dkt. 1); and

WHEREAS, on January 16, 2019, eleven Class Representatives filed an Amended Class Action Complaint in the United States District Court for the Southern District of New York, alleging (among other things) that Navient misrepresented borrowers' eligibility for PSLF (Dkt. 32); and

WHEREAS, on October 16, 2019, the Court approved the voluntary dismissal of Class Representative Eldon R. Gaede from the Litigation (Dkt. 78); and

WHEREAS, Navient denies each and every one of the Class Representatives' allegations of wrongful conduct and damages, and Navient has asserted numerous defenses to the Class Representatives' claims and disclaims any wrongdoing or liability whatsoever, and Navient further denies that this matter satisfies the requirements to be tried as a class action under Rule 23 of the Federal Rules of Civil Procedure; and WHEREAS, this

Agreement has been reached after the Parties exchanged discovery and a substantial number of documents and information relevant to the Class Representatives' claims, and is a product of sustained, arm's length settlement negotiations over the course of several months and with the assistance of an experienced Magistrate Judge acting as a mediator; and

WHEREAS, in light of the substantial likelihood that Settlement Class Members will remain customers of Navient in the future, the most effective way to afford them full and final relief in a negotiated resolution of their Claims is for Navient to implement a program of business practice enhancements; and

WHEREAS, during the course of discussing the nature and scope of such business practice enhancements, it became apparent that because Navient operates on a nationwide basis, the benefits of those enhancements would need to be provided broadly to borrowers located across the country; and

WHEREAS, the Class Representatives and Navient recognize that the outcome of this matter is uncertain, and that a final resolution through the litigation process would require several more years of protracted adversarial litigation and appeals; substantial risk and expense; the distraction and diversion of Navient's personnel and resources and the expense of any possible future litigation raising similar or duplicative Claims; and

WHEREAS, the Class Representatives, Navient, and their counsel have agreed to resolve this matter as a settlement class action according to the terms of this Agreement; and

WHEREAS, the Parties believe that this Agreement is fair, reasonable, and adequate in its resolution of the

Claims being released by the Settlement Class because it: (i) provides for certification of a Settlement Class, even though the Court has not yet determined whether this Litigation could properly be brought as a class action, and Navient maintains that certification of any class for litigation purposes would not be proper under Rule 23 of the Federal Rules of Civil Procedures; (ii) provides substantial benefits to the Settlement Class; (iii) preserves the right of the Settlement Class Members to bring individual lawsuits for Claims for monetary relief on their own behalf based on any damages they claim to have sustained; and (iv) waives further use of the class action procedural device and the ability to bring further Aggregate Actions for pursuit of Claims arising from the Covered Conduct; and

NOW, THEREFORE, without (i) any admission or concession on the part of the Class Representatives of the lack of merit of the Litigation whatsoever or (ii) any admission or concession of liability or wrongdoing or the lack of merit of any defense whatsoever by Navient, it is agreed that, in consideration for the undertakings, promises, and payments set forth in this Agreement and upon the entry by the Court of a Final Approval Order and Final Judgment approving and directing the implementation of the terms and conditions of this Agreement, the Litigation will be settled, compromised, and dismissed on the merits and with prejudice as to Navient upon the terms and conditions set forth below.

IV. APPLICATION FOR PRELIMINARY APPROVAL

1. For purposes of settlement only, and upon the express terms and conditions set forth in this Agreement, the Parties agree to seek certification of a mandatory, nationwide Settlement Class pursuant to Rule 23(b)(2) of the Federal Rules of Civil

Procedure. Navient agrees not to contest certification of the conditional Settlement Class.

2. Because the Settlement Class is being certified as a mandatory class under Rule 23(b)(2) of the Federal Rules of Civil Procedure, Settlement Class Members shall not be permitted to opt out of the Settlement Class.

3. Navient contends that this Litigation could not be certified as a class action under Rule 23 of the Federal Rules of Civil Procedure for litigation purposes. Nothing in this Agreement shall be construed as an admission by Navient that this Litigation or any similar case is amenable to class certification for litigation purposes.

4. Unless the Court orders otherwise, by April 24, 2020, Plaintiffs shall file with the Court a Motion for Preliminary Approval of the Proposed Settlement, Conditional Certification of the Rule 23(b)(2) Settlement Class, Appointment of Class Counsel, and Approval and Direction of the Rule 23(b)(2) Notice Plan, that seeks entry of an order substantially similar to the proposed order attached hereto as Exhibit A, that would, for settlement purposes only:

    4.1 Preliminarily approve this Agreement;

    4.2 Conditionally certify the Settlement Class under Rule 23(b)(2) of the Federal Rules of Civil Procedure composed of the Settlement Class Members;

    4.3 Appoint Class Counsel;

4.4 Approve the retention of the Settlement Administrator;

4.5 Approve the Rule 23(b)(2) Notice Plan, including the form(s) of notice substantially similar to attached Exhibits B and C;

4.6 Preliminarily approve the proposed Cy Pres Recipient;

4.7 Establish deadlines for the filing of objections to the proposed settlement contemplated by this Agreement;

4.8 Schedule the Final Approval Hearing; and

4.9 Stay all other proceedings in this Litigation pending the Court's adjudication of the Motion for Final Approval.

5. Class Counsel shall provide Navient's counsel with an opportunity to review and comment on the draft Motion for Preliminary Approval of the Proposed Settlement, including all supporting materials such as the memorandum and exhibits before it is submitted to the Court. The draft Motion for Preliminary Approval and supporting materials shall be provided to Navient's counsel eight (8) days before the Motion for Preliminary Approval is submitted to the Court. Class Counsel reserves the right to further revise the draft Motion for Preliminary Approval of the Proposed Settlement after providing a draft to Navient's counsel. Navient's counsel shall provide any comments to Class Counsel no later

than three (3) business days before the Motion for Preliminary Approval of the Proposed Settlement is submitted to the Court. Class Counsel will consider comments provided by Navient's counsel but retains ultimate authority over the final text of the Motion for Preliminary Approval of the Proposed Settlement.

V. RELIEF

A. Settlement Fund

1. Navient will deposit in an interest-bearing bank account designated and controlled by the Settlement Administrator the total sum of $2,400,000. That Settlement Fund will represent the total monetary obligations of Navient under this Agreement, excluding the expenses of the Settlement Administrator, costs associated with the Notice Plan, and any other administrative fees and expenses in connection with this Agreement. The Settlement Administrator will draw from the Settlement Fund to cover the distribution to the Cy Pres Recipient, the Fee Award, and the Incentive Awards.

2. Navient will deposit the total sum of $2,400,000 into the interest-bearing account within twenty-one (21) days after the later of (a) the date the court enters the Preliminary Approval Order and (b) the date Navient receives wire instructions and a Form W-9 for the payment. The Fee Award, distribution to the Cy Pres Recipient, and the Incentive Awards will be paid from the Settlement Fund within five (5) days after the Effective Date. If this Agreement is terminated, the Settlement Administrator will return all funds to Navient within ten (10) days of the termination date.

3. Other than the Settlement Fund, Navient will have no financial obligations to the Class Representatives, the Settlement Class, the Cy Pres Recipient, or Class Counsel.

4. The Parties agree that the Settlement Fund is intended to be a Qualified Settlement Fund within the meaning of § 468B of the Internal Revenue Code and the Treasury regulations thereunder and agree not to take any position for Tax purposes inconsistent therewith.

5. Under no circumstances will Navient have any liability for taxes or the tax expenses of any Person that receives a portion of the Settlement Fund under this Agreement.

B. Business Practice Enhancements

As part of the consideration Navient is providing to the Settlement Class in exchange for the Releases it is receiving, Navient agrees to implement the following business practice enhancements (the "Business Practice Enhancements"). Navient acknowledges that the Litigation was a factor in Navient's decision to implement the Business Practice Enhancements.

1. <u>Enhance Internal Resources for Call Center Representatives</u>

    1.1. Navient will update job aids to clarify that customer service representatives should discuss loan forgiveness including PSLF with borrowers prior to offering forbearance.

    1.2. Navient will update call flow procedures for repayment options to clarify that customer service

representatives should review and determine borrowers' possible eligibility for loan forgiveness including PSLF during calls in which borrowers express an interest in repayment options or indicate that they are having difficulty repaying their loans.

1.3. Navient will implement procedures requiring customer service representatives to listen for keywords or phrases that indicate borrowers' possible eligibility for forgiveness programs and to ask leading questions regarding employment by a government or not- for-profit organization. Borrowers who are interested and appear to be eligible for forgiveness including PSLF will be provided with additional information regarding forgiveness options, directed to the Federal Student Aid website, directed to call FedLoan Servicing, or sent the form email referenced in Paragraph V.B.2.2 below for additional information.

2. Update Written Communications With Borrowers

2.1. Navient will update template forms sent to borrowers when the borrowers consent to forbearance to provide another reminder that there may be loan forgiveness options available, including PSLF, and to direct them to the Federal Student Aid website

and FedLoan Servicing to learn more about PSLF.

2.2. Navient will create forms that can be sent via email to borrowers who request additional information about PSLF or express interest in PSLF.

3. Update Website and Chat Communications With Borrowers

3.1. Navient will maintain direct links to NSLDS on its website.

3.2. Navient will implement procedures requiring customer service representatives to look for keywords or phrases that indicate borrowers' possible eligibility for forgiveness programs and to ask leading questions regarding forbearance and repayment options and/or provide additional information about loan forgiveness, including PSLF, during webchat conversations, including by directing borrowers to the Federal Student Aid website or directing them to call FedLoan Servicing.

4. Training and Monitoring of Call Center Representatives

4.1. Navient will provide training to customer service representatives on the aforementioned practice enhancements in Sections V.B.1–.3 and will maintain required training (including classroom training and on-the-

job training) on PSLF for customer service representatives.

4.2. Navient will maintain regular monitoring of a sample of calls by customer service representatives to ensure that they are complying with and adhering to policies and procedures including the policies and procedures described herein.

4.3. When a job aid is changed or updated, Navient will alert all customer service representatives providing the updated job aid for review.

5. Implementation of Business Practice Enhancements

5.1. Navient will implement the Business Practice Enhancements described herein not later than sixty (60) days after Execution of the Agreement.

5.2. Notwithstanding this provision, if Navient is unable to comply with this deadline, Navient shall receive a reasonable extension of time sufficient to permit completion of the task upon submission of an application to the Court showing good cause for the extension.

5.3. Within ten (10) business days following (i) implementation of the Business Practice Enhancements described in Section V.B or (ii) the Effective Date, whichever is later,

Navient will provide Class Counsel with documentation on a confidential basis sufficient to show such implementation.

6. Maintenance of Business Practice Enhancements

6.1. Navient will maintain the Business Practice Enhancements outlined herein for a minimum of three (3) years from the Effective Date.

6.2. Navient agrees to certify compliance with the Business Practice Enhancements specified in Section V.B on an annual basis for three years. The form of that certification is attached as Exhibit D to the Agreement.

a. Navient will provide Class Counsel with the First Certification within a year and sixty days after Execution of this Agreement.

b. Navient will provide Class Counsel with the Second Certification within a year after the First Certification.

c. Navient will provide Class Counsel with the Third Certification within a year after the Second Certification.

6.3. Navient agrees to update the materials forming the basis of the Business Practice Enhancements in Section V.B within sixty (60) days after any changes in the statutory and regulatory scheme governing loan forgiveness; provided that Navient is not required to maintain the Business Practice Enhancements if and to the extent that changed circumstances (such as, for example, a change in applicable laws or regulations) cause Navient to determine in its sole discretion that changes in relevant practices are necessary or appropriate.

a. Navient will notify Class Counsel of any substantive updates to the materials forming the basis of the Business Practice Enhancements in Section V.B within twenty (20) business days after implementation, together with an explanation of the reason for the update(s).

C. Cy Pres Recipient

1. Subject to Court approval, the Parties have agreed that a $1.75 million cy pres award will be provided to an organization that will be newly formed in accordance with the parties' Term Sheet for Cy Pres

Recipient and PSLF Project Proposal contained in Exhibit E. Plaintiffs will submit this proposal to the Court for the Court's approval with the Motion for Preliminary Approval of this Agreement.

2. If the Court does not approve the Parties' proposed Cy Pres Recipient, the parties will propose an alternate Cy Pres Recipient that is acceptable to all Parties. The selection criteria for any alternate proposed Cy Pres Recipient shall conform to applicable law and be guided by the criteria identified in governing case law, statute, or other binding legal authority. In no event shall Plaintiffs propose a Cy Pres Recipient in which any of the Parties or their counsel or family members have a financial, commercial, or other pecuniary interest. Nor shall Plaintiffs propose a Cy Pres Recipient that has filed litigation or an enforcement action directly adverse to Navient within the past five (5) years. If the Parties are unable, following reasonable efforts, to agree on any alternate proposed Cy Pres Recipient, Plaintiffs and Navient may identify alternative proposed recipients to the Court. The Parties agree that any selection made by the Court shall be final and binding on them.

3. As a condition to receiving a cy pres distribution under this Agreement, the Cy Pres Recipient has agreed to devote the funds to providing education and student loan counseling to borrowers employed in public service. The Parties agree that no portion of the cy pres award may be used by the Cy Pres Recipient to fund litigation.

4. The total distribution from the Settlement Fund to the Cy Pres Recipient will equal the total amount of the Settlement Fund, including any accrued

interest, less the Fee Award and the Incentive Awards.

5. Because the Cy Pres Recipient will receive the remaining amount due after the Effective Date and after all other payment obligations are met, no portion of the Settlement Fund or interest thereon will revert to Navient.

6. The Settlement Administrator will make payment to the Cy Pres Recipient within five days after the Effective Date.

D. Stakeholder Meeting

1. Navient will hold one Stakeholder Meeting with the Class Representatives to gather feedback on issues the Class Representatives allegedly faced with respect to PSLF.

    1.1 This Stakeholder Meeting shall take place within thirty (30) days after the Effective Date, or at such other time as may be agreed by the Parties. The Stakeholder Meeting shall take place in person at a location to be determined by Navient unless the Class Representatives elect to appear by telephone or video conference. A representative from Navient with decision-making authority with respect to the Business Practice Enhancements is required to be in attendance.

    1.2 Navient will notify Class Counsel of any updates to the Business Practice Enhancements in Section V.B on the

basis of the Stakeholder Meeting within sixty (60) days after the Stakeholder Meeting.

VI. NOTICE OF PROPOSED CLASS ACTION SETTLEMENT

A. Notice Plan

1. As this Agreement provides for a Settlement Class under Rule 23(b)(2) of the Federal Rules of Civil Procedure, individual notice is not required. However, Plaintiffs and Navient have developed an appropriate Notice Plan that is reasonably calculated to reach Settlement Class Members. The Parties will recommend this Notice Plan to the Court, and it will be administered by a qualified Settlement Administrator, which will employ at least the following methods for circulating information about the settlement to Settlement Class Members:

    a. Public Statements, as described in Section XIII, after the issuance of the Court's Preliminary Approval Order;

    b. Direct email and/or postcard communications including the Short-Form Notice to all individuals who have or had FFEL or Direct Loans currently serviced by Navient or that Navient has serviced at any time since October 1, 2007 and (a) whose correspondence histories in Navient's servicing systems contain at least one reference to PSLF, PSFL, public service, public srv, or publ serv in entries from and including October 3, 2012 through and including the Effective Date or (b) whose loans were transferred for servicing to FedLoan Servicing;

c. Publication notice in national newspapers and on Navient's website including the Short-Form Notice;

d. A Class Settlement Website to be activated as soon as possible but no later than five (5) business days after the Court's Preliminary Approval Order that contains the Agreement, the Short-Form Notice, the Long-Form Notice, the Preliminary Approval Order, and other relevant information regarding the Court-approval process;

e. A toll-free number to be activated as soon as possible but no later than five (5) business days after the Court's Preliminary Approval Order that provides live responders and recorded information and directs Settlement Class Members to the Class Settlement Website; and

f. An active hyperlink to the Class Settlement Website on Class Counsel's website after the issuance of the Court's Preliminary Approval Order.

2. Direct Email and/or Postcard Communications: Navient will identify all recipients of federal FFEL or Direct Loans whose loans it services or has serviced at any time since October 1, 2007 and (a) whose correspondence histories in Navient's servicing systems contain at least one reference to PSLF, PSFL, public service, public srv, or publ serv in entries from and including October 3, 2012 through and including the Effective Date or (b) whose loans were transferred for servicing to FedLoan Servicing, and will be responsible for sending

direct email and/or postcard communications to these recipients in a form substantially similar to the form of Short-Form Notice provided in Exhibit B. These communications will both be in English (with a Spanish version available at the Class Settlement Website) and, at a minimum, notify the recipients that they are potential members of the Settlement Class (and the definition of the Settlement Class), a settlement has been reached, their rights may be affected, and they may be permitted to object to the settlement. The Short-Form Notice will also refer them to the Class Settlement website.

3. Class Settlement Website: The Settlement Administrator will create and maintain the Class Settlement Website. The Settlement Administrator will secure an appropriate URL for the Class Settlement Website that does not identify Navient, including any of Navient's predecessors, and shall be subject to the approval of Class Counsel and Navient's counsel (which shall not be unreasonably withheld). The Class Settlement Website will post important settlement documents such as the Complaint, the Agreement, the Short-Form Notice, the Long-Form Notice as described in Paragraphs VI.A.2 and VI.A.4 (in both English and Spanish), and the Preliminary Approval Order. In addition, the Class Settlement Website will include a description of the Business Practice Enhancements, a section for frequently asked questions, and procedural information regarding the status of the Court-approval process, such as an announcement when the Final Approval Hearing is scheduled, when the Final Approval Order and Final Judgment has been entered, and when the Effective Date is expected or has been reached. The Class

Settlement Website may be terminated within sixty (60) days after either (i) the Effective Date or (ii) the date on which the Agreement is terminated, whichever is sooner.

4. Long-Form Notice: The Parties have agreed that they will jointly recommend the Long-Form Notice, substantially in the form attached as Exhibit C, to the Court for approval. The Long-Form Notice is designed to provide comprehensive and easily understandable notice of the terms of the Agreement. The Long-Form Notice shall be posted on the Class Settlement Website as provided by Paragraph VI.A.3 above.

5. Toll-Free Number: The Settlement Administrator will create and maintain a toll-free telephone number. The toll-free number will provide Settlement Class Members with access to live responders and to recorded information that includes answers to frequently asked questions and directs them to the Class Settlement Website. The Settlement Administrator shall be responsible for securing an appropriate toll-free number.

B. Notice Administration

1. At the Preliminary Approval hearing, the Parties will propose that the Court appoint Rust Consulting as Settlement Administrator. The Settlement Administrator will facilitate the notice process by assisting the Parties and providing professional guidance in the implementation of the Notice Plan.

2. Navient will pay the Administrative Expenses of the Notice Plan and the costs and expenses of the Settlement Administrator as approved by the Court.

3. As soon as reasonably practicable after the Court's Preliminary Approval Order, the Parties and the Settlement Administrator will implement the Notice Plan.

C. CAFA Notice

1. The Parties agree that Navient shall serve notice of the settlement that meets the requirements of CAFA, 28 U.S.C. § 1715, on the appropriate federal and state officials not later than ten (10) days after the filing of the Motion for Preliminary Approval of the settlement.

2. Navient shall file with the Court a certification of compliance with the CAFA Notice requirement.

VII. OBJECTIONS

1. Any Settlement Class Member may object to the fairness, reasonableness, or adequacy of this Agreement.

2. No later than twenty-one (21) days before the Final Approval Hearing, any Settlement Class Member who wishes to object to any aspect of this Agreement must send to the Settlement Administrator, Class Counsel, and Navient's counsel, and file with the Court, a written statement of the objection(s). The written statement of the objection(s) must include (i) the name of the Litigation; (ii) a detailed statement of the Settlement Class Member's objection(s), as well as the specific reasons, if any, for each objection, including any legal authority the Settlement Class Member wishes to bring to the Court's attention and any evidence the Settlement Class Member wishes to introduce in support of his/her objection(s); (iii) the Settlement Class

Member's full name, address and telephone number; (iv) the number of class actions in which the Settlement Class Member or his or her counsel have filed an objection in the last three (3) years; (v) the Settlement Class Member's signature; and (vi) information demonstrating that the Settlement Class Member is a member of the Settlement Class.

3. Settlement Class Members may raise an objection either on their own or through an attorney hired at their own expense. If a Settlement Class Member hires an attorney other than Class Counsel to represent him or her, the attorney must (i) file a notice of appearance with the Court no later than twenty-one (21) days before the Final Approval Hearing or as the Court otherwise may direct and (ii) deliver a copy of the notice of appearance on Class Counsel and Navient's counsel, no later than twenty-one (21) days before the Final Approval Hearing. Class Members, or their attorneys, intending to make an appearance at any hearing relating to this Agreement, including the Final Approval Hearing, must deliver to Class Counsel and Navient's counsel, and file with the Court, no later than twenty-one (21) days before the date of the hearing at which they plan to appear, or as the Court otherwise may direct, a notice of their intention to appear at that hearing, along with a list of any witnesses the Settlement Class Member wishes to call to testify, or any documents or exhibits the Settlement Class Member or his or her counsel may use, at the Final Approval Hearing.

4. Any Party shall have the right to respond to any objection prior to the Final Approval Hearing by

filing a response with the Court and serving a copy on the Settlement Class Member (or his or her counsel) and counsel for the other Parties.

5. Any Settlement Class Member who fails to comply with the provisions of the preceding subsections shall waive and forfeit any and all rights he or she may have to appear separately and/or object and shall be bound by all the terms.

VIII. CLASS COUNSEL FEE AWARD AND INCENTIVE AWARDS

1. Navient will pay Incentive Awards to each of the Class Representatives in the amount of $15,000.

2. Navient will not object to Class Counsel's application for an award of reasonable attorneys' fees, costs, and expenses in the amount of $500,000.

3. The Parties agree that Navient will pay a $500,000 Fee Award to Class Counsel, subject to Court approval, from the funds in the Settlement Fund. This Fee Award shall cover fees, costs, and other expenses for attorneys (and their employees, consultants, experts, and other agents) who performed work in connection with the Litigation on behalf of the Settlement Class Members. Regardless of the number of Persons sharing in the Court's award of attorneys' fees, costs, and other expenses, Navient shall not be required to pay any Fee Award that exceeds $500,000 in connection with the Agreement.

4. Any order or proceeding relating to the amount of the Fee Award or Incentive Awards, or any appeal from any order relating thereto, or reversal or modification thereof, shall not operate to modify,

terminate, or cancel this Agreement, or affect or delay the finality of the Final Approval Order and Final Judgment, except that any modification, order, or judgment cannot result in Navient's overall obligation exceeding the agreed-upon amount of the Settlement Fund.

5. The Settlement Administrator shall pay the Fee Award and the Incentive Awards out of the Settlement Fund within five (5) days after the later of (a) the Effective Date or (b) the date when the Settlement Administrator receives payment instructions and, if necessary, Forms W-9.

6. Except as otherwise provided in this Section, each Party will bear its own costs, including attorneys' fees, incurred in connection with the Litigation.

IX. RELEASE AND DISMISSAL

A. Scope of Release

1. The obligations incurred pursuant to this Agreement shall be in full and final disposition of the Litigation as against Navient.

2. Class Representatives' Release and Covenant Not To Sue. Without limiting the foregoing in Paragraph IX.A.1, above, upon payment of the Incentive Awards, the Releasing Class Representative Parties, and each of them, (a) shall be deemed to have, and by operation of law and of the Final Approval Order and Final Judgment shall have, fully, finally, and forever compromised, released, relinquished, settled, and discharged all Released Class Representative Claims by the Releasing Class Representative Parties against each of the Released Defendant Parties; (b) shall have

covenanted not to sue any of the Released Defendant Parties with respect to any of the Released Class Representative Claims; and (c) shall be permanently barred and enjoined from instituting, commencing, or prosecuting any of the Released Class Representative Claims against any of the Released Defendant Parties. The foregoing releases, covenants, and injunctions incorporate the waivers and other terms in Paragraphs IX.A.3–.5, below.

3. Class Release and Covenant Not To Sue. Without limiting the foregoing in Paragraph IX.A.1, above, upon distribution to the Cy Pres Recipient, the Releasing Class Member Parties, and each of them, (a) shall be deemed to have, and by operation of law and of the Final Approval Order and Final Judgment shall have, fully, finally, and forever compromised, released, relinquished, settled, and discharged all Released Class Claims against each of the Released Defendant Parties; (b) shall have covenanted not to sue any of the Released Defendant Parties with respect to any of the Released Class Claims; and (c) shall be permanently barred and enjoined from instituting, commencing, or prosecuting any of the Released Class Claims against any of the Released Defendant Parties.

4. Upon the Effective Date, the Releasing Class Representative Parties and Releasing Class Member Parties, and each of them, shall be deemed to have, and shall have, expressly waived and relinquished, to the fullest extent permitted by law, the provisions, rights, and benefits of California Civil Code Section 1542, which provides, "A GENERAL RELEASE DOES NOT EXTEND TO CLAIMS THAT THE CREDITOR OR RELEASING

PARTY DOES NOT KNOW OR SUSPECT TO EXIST IN HIS OR HER FAVOR AT THE TIME OF EXECUTING THE RELEASE AND THAT, IF KNOWN BY HIM OR HER, WOULD HAVE MATERIALLY AFFECTED HIS OR HER SETTLEMENT WITH THE DEBTOR OR RELEASED PARTY," and any statutory, common law, or other doctrines of similar effect under the law of any state or other jurisdiction.

5. The Class Representatives and Class Counsel acknowledge that they may discover facts other than, different from, or in addition to, those that they know or believe to be true with respect to the Covered Conduct but that it is their intention to fully, finally, and forever settle and release the Released Class Representative Claims and Released Class Claims, notwithstanding any known or unknown, suspected or unsuspected, contingent or non-contingent Claims the Releasing Class Representative Parties or Releasing Class Member Parties may have based on the Covered Conduct, whether or not concealed or hidden, and without regard to the subsequent discovery or existence of such other, different, or additional facts.

6. The Class Representatives and the Settlement Class Members recognize that as part of this Agreement, Navient is not contesting the certification of a conditional Settlement Class.

7. The Settlement Class does not release or discharge, but instead expressly preserves, the right of any and all Settlement Class Members to file individual lawsuits for monetary relief on a non-class basis and excluding Aggregate Actions.

8. The Class Representatives do not release, waive, or discharge Claims to enforce any provision of this Agreement.

9. As of the Effective Date, Navient, as well as its respective agents, directors, officers, attorneys, employees, affiliates, parents, subsidiaries, divisions, successors, and assigns, releases all Claims for any damages or other relief relating to the prosecution of this Litigation, including any known or unknown, suspected or unsuspected, contingent or non-contingent Claims relating to the prosecution of this Litigation, that Navient may have, whether or not concealed or hidden, and without regard to the subsequent discovery or existence of such other, different, or additional facts, against the Class Representatives, Class Counsel and their heirs, assigns, executors, administrators, predecessors, successors, and any other Person purporting to claim on their behalf, and agrees to refrain from instituting, directing, or maintaining any contested matter, adversary proceeding, or miscellaneous proceeding, or participating in any contested matter, miscellaneous proceeding, or adversary proceeding by a third party relating to the prosecution of this Litigation against the Class Representatives, Class Counsel, and their heirs, assigns, executors, administrators, predecessors, successors, and any other Person purporting to claim on their behalf.

B. Binding Effect

1. Upon the Effective Date, no default by any Person in the performance of any covenant or obligation under this Agreement or any order entered in connection therewith shall affect the dismissal of the Litigation, the res judicata effect of the Final

Approval Order and Final Judgment, the foregoing Releases, or any other provision of the Final Approval Order and Final Judgment; provided, however, that all other legal and equitable remedies for violation of a court order or breach of this Agreement shall remain available to all Parties.

2. Any and all Releases pursuant to this Agreement are not intended to have any preclusive or res judicata effect upon actions or investigations currently pending or brought in the future by any governmental agency including, but not limited to, the United States Consumer Financial Protection Bureau, the United States Department of Justice, and other state or federal attorneys general against Navient, including for restitution benefiting Class Representatives or members of the Settlement Class.

C. Dismissal

1. Upon entry of the Final Approval Order and Final Judgment, the claims of the Class Representatives asserted in the Litigation shall be dismissed with prejudice.

X. NO ADMISSION

1. This Agreement, whether or not it shall become final, and any and all negotiations, communications, and discussions associated with it, shall not be:

    a. Offered or received by or against any Party as evidence of, or be construed as or deemed to be evidence of, any presumption, concession, or admission by a Party of the truth of any fact alleged by Class Representatives on behalf of Settlement Class Members or

defense asserted by Navient, of the validity of any Claim that has been or could have been asserted in the Litigation, or the deficiency of any defense that has been or could have been asserted in the Litigation, or of any liability, negligence, fault, or wrongdoing on the part of the Class Representatives or Navient;

b. Offered or received by or against Class Representatives or Navient as a presumption, concession, admission, or evidence of any violation of any state or federal statute, law, rule, or regulation or of any liability or wrongdoing by Navient, or of the truth of any of the Claims, and evidence thereof shall not be directly or indirectly admissible, in any way (whether in the Litigation or in any other action or proceeding), except for purposes of enforcing this Agreement and the Final Approval Order and Final Judgment including, without limitation, asserting as a defense the Release and waivers provided herein;

c. Offered or received by or against Class Representatives or Navient as evidence of a presumption, concession, or admission with respect to a decision by any court regarding the certification of a class, or for purposes of proving any liability, negligence, fault, or wrongdoing, or in any way referred to for any other reason as against Navient, in any other civil, criminal, or administrative action or proceeding, other than such proceedings as may be necessary to effectuate the

provisions of this Agreement; provided, however, that if this Agreement is approved by the Court, then the Class Representatives or Navient may refer to it to enforce their rights hereunder; or

d. Construed as an admission or concession by the Class Representatives, the Settlement Class, or Navient that the consideration to be given hereunder represents the relief that could or would have been obtained through trial in the Litigation.

2. These prohibitions on the use of this Agreement shall extend to, but are not limited to, any individual lawsuit preserved from the Released Class Claims in Section IX above.

XI. ENTRY OF FINAL APPROVAL ORDER AND FINAL JUDGMENT

1. The Parties shall jointly seek entry by the Court of a Final Approval Order and Final Judgment as soon as is practical that includes the follow provisions:

   a. Granting final approval of this Agreement, and directing its implementation pursuant to its terms and conditions;

   b. Ruling on Class Counsel's application for the Fee Award;

   c. Discharging and releasing the Released Defendant Parties from the Released Class Representative Claims and Released Class Claims as identified in Section IX above;

   d. Permanently barring and enjoining the Class Representatives and Settlement

Class Members from instituting, maintaining, or prosecuting, either directly or indirectly, any lawsuit that asserts Released Class Representative Claims or Released Class Claims, respectively;

e. Directing that, as to Navient, this Litigation be dismissed with prejudice and without costs; and

f. Reserving to the Court continuing and exclusive jurisdiction over the Parties with respect to the Agreement and Final Approval Order and Final Judgment.

XII. TERMINATION OF THE AGREEMENT

1. Navient's willingness to settle this Litigation on a nationwide class-action basis and not to contest the accompanying certification of a Settlement Class is dependent upon achieving finality in this Litigation and the desire to avoid the expense of this and other litigation, except to the extent Settlement Class Members' individual lawsuits are expressly preserved in Section IX. Consequently, Navient has the right to terminate this Agreement, declare it null and void, and have no further obligations under this Agreement to the Class Representatives, if any of the following conditions subsequent occurs:

    a. The Parties fail to obtain and maintain preliminary approval of the proposed settlement of the Settlement Class Claims;

    b. Any court, in reviewing the Agreement, the Final Approval Order, and Final Judgment, or an appeal thereof, orders Navient to pay,

in the aggregate, a Fee Award, Incentive Awards, and a distribution to the Cy Pres Recipient that are collectively in excess of $2,400,000, excluding costs paid to the Settlement Administrator and costs associated with the Notice Plan, in connection with the settlement of the Settlement Class Claims;

c. The Court fails (in a manner that is material and adverse to Navient) to enter a Final Approval Order and Final Judgment consistent with the provisions in Section XI;

d. The settlement of the Settlement Class Claims is not upheld on appeal, including review by the United States Supreme Court; or

e. The Effective Date does not occur for any reason including, but not limited to, the entry of an order by any court that would require either material modification or termination of the Agreement.

2. The Class Representatives' willingness to settle this Litigation on a nationwide class-action basis on behalf of the Settlement Class Members is dependent upon achieving finality in this Litigation and the desire to avoid the expense of this and other litigation, except to the extent Settlement Class Members' individual lawsuits are expressly preserved in Section IX. Consequently, Class Representatives have the right to terminate this Agreement, declare it null and void, and have no further obligations under this Agreement, if any of the following conditions subsequent occurs:

a. The Parties fail to obtain and maintain preliminary approval of the proposed settlement of the Settlement Class Claims;

b. Any court, in reviewing the Agreement, the Final Approval Order, and Final Judgment, or an appeal thereof, orders Navient to pay, in the aggregate, a Fee Award, Incentive Awards, and a distribution to the Cy Pres Recipient that are collectively less than $2,400,000 in connection with the settlement of the Settlement Class;

c. The Court fails (in a manner that is material and adverse to the Class Representatives) to enter a Final Approval Order and Final Judgment consistent with the provisions in Section XI;

d. The settlement of the Settlement Class Claims is not upheld on appeal, including review by the United States Supreme Court; or

e. The Effective Date does not occur for any reason including, but not limited to, the entry of an order by any court that would require either material modification or termination of the Agreement.

3. Notwithstanding anything herein, the Parties acknowledge and agree that the Court's failure to approve, in whole or in part, any Fee Award or Incentive Award pursuant to Section VIII, or the reversal or modification of a Fee Award and/or Incentive Award on appeal or in a collateral proceeding, is not grounds for termination of this Agreement.

4. A Party electing to terminate this Agreement Pursuant to Section XII shall provide written notice of its election to do so to all other Parties.

5. In the event of a termination of this Agreement pursuant to Section XII, or if this Agreement and the settlement proposed herein are canceled or otherwise fail to become effective for any reason whatsoever, then (a) any order entered by the Court in accordance with the terms of this Agreement shall be treated as vacated, nunc pro tunc; (b) the Settlement Fund in its entirety shall be promptly repaid to Navient; and (c) the Parties shall be returned to the status quo ante with respect to the Litigation as of the Agreement's Execution date, as if the Parties had never entered into this Agreement, with all of their respective legal Claims and defenses preserved as they existed on that date.

XIII. CONFIDENTIALITY AND PUBLIC STATEMENTS

1. Other than responses to inquiries from governmental entities or as necessary to comply with federal, state, or local laws or to comply with the terms of this Agreement, no Party shall make any Public Statement regarding this Agreement until the Court grants the Preliminary Approval Order.

2. Unless and until all Parties execute this Agreement and present it to the Court in a motion seeking the Preliminary Approval Order, the Parties agree that all terms of this Agreement will remain confidential and subject to Rule 408 of the Federal Rules of Evidence.

3. The parties agree that Navient and Navient's counsel, on the one hand, and Plaintiffs, Class Counsel, and AFT, on the other hand, will not make Public Statements about this Agreement without express prior written approval by the other side of the content of the statement, including in advance of the public announcement of any settlement; provided, however, that each of the foregoing may respond to queries, following the Court's Preliminary Approval Order, about the Agreement without further approval from the other side if the response is consistent with the pre-approved Public Statements for that side, as described in Paragraph XIII.4 below.

4. Following the Court's grant of the Preliminary Approval Order, AFT may make a Public Statement in the form agreed to by the Parties on April 23, 2020 at 5:27 pm EST. Navient may make a Public Statement in the form agreed to by the Parties on April 24, 2020 at 5:59 pm EST. Class Counsel may make a Public Statement in the form agreed to by the Parties on April 24, 2020 at 5:59 pm EST.

5. All proprietary or confidential documents or information that have been previously provided to the Parties, as of the Effective Date of this Agreement, including under the Stipulated Confidentiality Agreement and Protective Order (Dkt. 38), shall be returned to the producing party or, upon permission of the producing party, destroyed, as provided for in that Order, with certification of the destruction to be provided to the producing party within sixty (60) days of the Effective Date.

XIV. ENFORCEMENT OF THE AGREEMENT

1. The Court will retain exclusive jurisdiction to enforce the terms of this Agreement, and all Parties hereto submit to the jurisdiction of the Court for purposes of implementing and enforcing the settlement embodied in this Agreement. As part of its continuing jurisdiction, the Court may amend, modify, or clarify orders issued in connection with this Agreement upon good cause shown by a party. No other court or tribunal will have any jurisdiction over Claims or causes of action arising under this Agreement.
2. This Agreement will be governed by and construed in accordance with the internal laws of the State of New York without regard to conflicts of law principles that would direct the application of the laws of another jurisdiction.

XV. MISCELLANEOUS

1. Representations. Class Counsel represent that as of the Execution of this Agreement, they have no other current clients or cases against Navient other than the Litigation and have no present intention of soliciting new clients to sue Navient.
2. Successors and Assigns. This Agreement and all of its terms and provisions shall inure to the benefit of and bind the Parties and each of their predecessors, successors, assigns, heirs, executors, administrators, and transferees.
3. Drafting. The Parties agree that no single Party shall be deemed to have drafted this Agreement, or any portion thereof, for purpose of the invocation of the doctrine of contra proferentum. This

Agreement is a collaborative effort of the Parties and their attorneys that was negotiated on an arm's-length basis between parties of equal bargaining power. Accordingly, this Agreement shall be neutral, and no ambiguity shall be construed in favor of or against any of the Parties. The Parties expressly waive the presumption of California Civil Code section 1654 that uncertainties in a contract are interpreted against the party who caused the uncertainty to exist.

4. Entire Agreement. This Agreement, including all attached Exhibits, contains the entire Agreement and understanding of the Parties with respect to the subject matter hereof, and supersedes all prior agreements and understandings, if any, with respect hereto, whether oral or written.

5. Exhibits. All of the Exhibits to this Agreement are material and integral parts thereof and are fully incorporated herein by this reference.

6. Amendment. This Agreement may not be amended, altered, modified, or otherwise changed except in a writing executed by all of the Parties or their successors in interest expressly stating that it is an amendment to this Agreement. The Parties shall not make any Claims, and hereafter waive any right they now have or may hereafter have based upon any oral alteration, oral amendment, oral modification, or other changes of this Agreement not in writing.

7. Cooperation. The Parties agree to cooperate fully and to take all additional action that may be necessary or appropriate to give full force and effect to the basic terms and intent of this Agreement.

8. Headings. The headings of the Sections of this Agreement are included for convenience only and shall not be deemed to constitute part of this Agreement or to affect its construction.

9. Severability. In the event that any provision hereof becomes or is declared by a court of competent jurisdiction to be illegal, unenforceable, or void, this Agreement shall continue in full force and effect without said provision, subject, however, to the Parties' rights to terminate the Agreement under Section XII, above.

10. Interpretation. As used in this Agreement, the masculine, feminine, or neuter gender, and the singular or plural number, shall be deemed to include the others wherever the context so indicates. The Preamble and Recitals are incorporated herein and made a part hereof. The words "include," "includes," and "including" shall be deemed to be followed by the phrase "without limitation."

11. Counterparts. This Agreement may be executed in several counterparts, each of which shall be deemed an original, but all of which together shall constitute one and the same instrument.

12. Facsimile and Electronic Signatures. Facsimile transmission of signatures on this Agreement shall be deemed to be original signatures and shall be acceptable to the Parties to this Agreement for all purposes. In addition, transmission by electronic mail of a PDF document created from the originally signed document shall be acceptable to the Parties to this Agreement for all purposes.

13. Representation by Counsel. The Parties have relied upon the advice and representation of counsel,

selected by them, concerning their respective rights and obligations with respect to this Agreement. The Parties have read and understand fully the above and foregoing Agreement and have been fully advised as to the legal effect thereof by counsel of their own selection and intend to be legally bound by the same.

14. Res Judicata. Except as provided herein, if this Agreement is approved by the Court, any Party may file and otherwise rely upon this Agreement in any action that may be brought against such Party in order to support a defense or counterclaim based on the principles of res judicata, collateral estoppel, release, good faith settlement, judgment bar or reduction, or any other theory of claim preclusion or issue preclusion or similar defense or counterclaim.

15. Waiver. The waiver by one Party of any breach of this Agreement by any other Party shall not be deemed as a waiver of any other prior or subsequent breaches of this Agreement.

16. Representations and Warranties. The Class Representatives represent and warrant that they have not assigned any Claim or right or interest therein as against Navient to any other Person and that they are fully entitled to release the same. Each counsel or other Person executing this Agreement, any of its Exhibits, or any related settlement documents on behalf of any Party hereto hereby warrants and represents to the other Parties hereto that such counsel or other Person has the authority to execute and deliver this Agreement, its Exhibits, and related settlement documents, as applicable.

17. Survival. The Parties agree that the terms set forth in this Agreement shall survive the signing of this Agreement.

18. Governing Law. All terms and conditions of this Agreement shall be governed by and interpreted according to the laws of the State of New York, without reference to its conflict of law provisions, except to the extent the federal law of the United States requires that federal law governs.

[Signatures pages omitted.]

Appendix H

Term Sheet and PSLF Project Proposal for Cy Pres Recipient in *Hyland, et al. v. Navient Corp., et al.* Settlement

Term Sheet

This term sheet memorializes the terms and conditions that will govern the cy pres component of the parties' Settlement Agreement dated April 24, 2020 in the *Hyland, et al. v. Navient Corp., et al.* action.

1. An established law firm with experience in advising non-profit organizations will be engaged by Student Defense (defined below) to prepare appropriate formation and governance documents for a new 501(c)(3) organization ("NewOrg") that will be the cy pres recipient under the Settlement Agreement.

2. NewOrg's purpose will be to provide education and student loan counseling to borrowers employed in public service. NewOrg's activities will exclude litigation activities.

3. NewOrg's governance and activities will be consistent with the PSLF Project Proposal set forth below.

4. NewOrg's activities will be managed, as outlined in the PSLF Project Proposal, by a newly-hired Executive Director reporting to the NewOrg Board of Directors. Within six months of his or her appointment, the NewOrg Executive Director will travel to Navient's Wilkes-Barre, Pennsylvania call center site for an informational presentation and tour.

5. NewOrg will be distinct from Student Defense.

    5.1. NewOrg will maintain independent decision-making authority from Student Defense and will be

governed by a separate Board of Directors. A majority of the members of the NewOrg Board of Directors will be individuals who are not employed by or on the Board of Directors of Student Defense.

5.2. There will be no commingling of funds between NewOrg and Student Defense (or any other organization), and NewOrg's funds will be used only for the intended education and counseling purposes.

5.3. NewOrg will be branded as a separate and distinct institution from Student Defense. It will use a separate logo and separate website and will engage in its own outreach to borrowers. None of the marketing or outreach materials used by NewOrg will identify Student Defense.

5.4. NewOrg will not refer borrowers to Student Defense for purposes related to potential litigation.

6. NewOrg will give reasonable consideration to board member and Executive Director candidates proposed by any stakeholder.

PSLF Project Proposal

NewOrg will launch the Public Service Loan Forgiveness Project ("PSLF Project") to provide services to thousands of student loan borrowers, either directly or through partners as detailed below, in need of guidance on how to navigate the PSLF program and advocate for administrative, regulatory, and legislative improvements to the PSLF program.

This newly-formed organization will be the first comprehensive national project to use public education, direct services, and advocacy devoted to assisting student loan borrowers in obtaining relief and bringing meaningful changes to the PSLF program. A goal of the initiative will

be to generate administrative and legislative reforms, including the U.S. Department of Education's issuance of written determination letters and the consideration of administrative appeals processes. NewOrg's team will use all tools available in helping student loan borrowers seeking PSLF and anticipates assisting borrowers with administrative appeals once a system is implemented to consider them. NewOrg also will plan to leverage Student Defense's network of attorneys across the country to assist student loan borrowers by providing guidance on applications or assistance in challenging denials.[1]

NewOrg will maintain a separate Board of Directors with funding segregated from Student Defense. This organization will not represent clients in litigation and will not refer borrowers to Student Defense for purposes related to potential litigation.

Detail on PSLF Public Education and Counseling Work

NewOrg will target multiple constituencies, including borrowers, career services offices, and qualifying employers, with the goal of providing services to borrowers throughout the continuum of the repayment process—from the time they take out their loans to when they finally receive forgiveness.

NewOrg will help borrowers in the digital era by developing digital toolkits that address a number of relevant topics, including the requirements for PSLF, qualifying repayment plans, assistance with filling out necessary forms, and information on the process for consolidation,

[1] The National Student Legal Defense Network ("Student Defense") is a 501(c)(3) non-profit, non-partisan organization, created in late 2017, by former high-ranking officials at the U.S. Department of Education ("Department").

among many others. NewOrg will have a staff member solely dedicated to communicating with student loan borrowers on email and social media. Through these channels, NewOrg hopes to expand direct services to student loan borrowers needing assistance with PSLF and to work with partners in order to reach thousands more borrowers.

In addition, NewOrg will build a robust public education program across college campuses to provide instructions and information for students who are planning to go into public service and are interested in PSLF. In an effort to reach borrowers even before they begin repayment, NewOrg hopes to train law students across the country to serve as PSLF Project "ambassadors," who will conduct trainings and answer questions from student loan borrowers about PSLF.

To ensure that borrowers have access to reliable information about PSLF throughout the cycle of repayment, NewOrg's attorneys and staff members will conduct in-person and online trainings for career services offices across the country that want to offer their own sessions for students and alumni. In addition, the team plans to conduct trainings and webinars for partner organizations, including public employee unions, state and federal government agencies, and local school districts. The webinars, which will be posted on YouTube and other widely trafficked sites, will provide additional instructions on enrollment in eligible repayment plans and information on qualifying employers to their members. The webinars will also be publicly available on NewOrg's website, along with an FAQ and other PSLF resources to ensure that they are easily accessible to a broad audience.

Estimated Budgetary and Staffing Needs

NewOrg will start by hiring a PSLF Project Executive Director who will oversee the organization and focus on PSLF issues, working to allow the organization to reach thousands of student loan borrowers each year through direct services and partners, and to provide those borrowers with the tools and information needed to get loan relief. NewOrg will also hire a Program Manager to implement a new web portal and intake system so that the organization can strategically allocate legal and counseling resources to student loan borrowers seeking assistance. The team will provide instructions on how to consolidate FFEL loans, complete employment certification forms, share details on eligible repayment plans, and provide assistance in gathering documents for administrative appeals that it is hoped the Department will soon consider. NewOrg will also include a team member focused on communications and advocacy, who will spend half-time on the PSLF Project to advocate for needed improvements to the PSLF program.

The hope is to fund the PSLF Project through the cy pres award and initial fundraising for four years and to create an initiative that will sustain itself over time. Included in the preliminary budget is funding for hours of staff who are highly experienced in higher education and specifically student debt issues (referred to as Senior Counsel in the chart below). These individuals will offer supervision and guidance as the work of the PSLF Project gets off the ground.

The estimated approximation of annual costs associated with launching the PSLF Project is provided below:[2]

Annual Cost Estimates	Salary	Benefits/ Associated Costs (27%)	Overhead (Office)	Training Costs	Total
PLSF Project Executive Director	$100,000	$27,000	$14,400	$6,700	$148,100
PSLF Project Program Director	$85,000	$22,950	$14,400	$4,500	$126,850
Senior Counsel Time	$72,500	$19,575	$5,760	$2,680	$100,515
Communications	$37,500	$10,125	$14,400	$4,500	$66,525

[2] It is anticipated that the cy pres distribution will be supplemented with additional funds raised as the PSLF Project evolves.

Associate Time					
Digital and Technology Intake Costs	N/A	N/A	N/A	N/A	$40,000
Overhead Costs	N/A	N/A	N/A	N/A	$35,000
Travel Costs	N/A	N/A	N/A	N/A	$30,000
Total	$295,000	$79,650	$48,960	$18,380	$546,990

Estimates of Student Loan Borrowers That Can Be Reached

Although it is difficult to project the exact number of student loan borrowers that will be reached each year by the PSLF Project, a forecast of the impact of each of the categories of proposed services that will be provided both by NewOrg and the broader network of law firm and organization partners that NewOrg plans to recruit to further the Project's goals is set forth below. This chart projects the number of student loan borrowers that could be reached through the Project's activities on an annual

basis:

PSLF Project Activities	PSLF Project Work	Non-profit partners	Law firm partners	Total Projected Borrowers Reached
Individual Borrower Services/ Comms	75-125	75-100	50-75 (first year)	200-300
Webinars	350-500	1,750-2,500	N/A	2,100-3,000
In-person sessions/ school visits	500-750	900-1,200	N/A	1,400-1,950
Email/ Social Media Interaction	1,000-1,500	3,000-4,500	N/A	4,000-6,000
TOTAL	**1,925-2,875**	**5,725-8,300**	**50-75**	**7,700-11,250**

PSLF Project Team Members

Though the exact staffing is subject to change and will be subject to approval and oversight by NewOrg's Board

of Directors, in addition to the new hires outlined above, the following individuals[3] may contribute to the PSLF Project and dedicate a percentage of their time to outreach, educational, and advocacy activities of the PSLF Project:

Aaron Ament – Aaron most recently served in President Obama's administration as a Special Counsel for higher education issues and subsequently as Chief of Staff of the Department's Office of the General Counsel. Prior to joining the federal government, he served as an Assistant Attorney General in Kentucky.

Aaron served as counsel in the investigations of Corinthian Colleges, Inc., ITT Technical Institute, and several other significant enforcement actions. While serving as Chief of Staff, he worked to help create the Student Financial Aid Enforcement Office and the Federal Interagency Task Force on Predatory Lending and For-Profit College Abuses.

While serving in Kentucky, Aaron was one of two attorneys supervising non-profit oversight and charitable asset enforcement litigation. He also represented Kentucky on the U.S. Financial Fraud Enforcement Task Force and served on the Residential Mortgage-Backed Securities ("RMBS") Subcommittee. Aaron received his B.A. and M.A. Degrees in Political Science from Northwestern University, and he graduated with his J.D. from the Washington University School of Law in St. Louis, MO. He is currently the President of Student Defense.

Dan Zibel – Dan is an experienced attorney and an expert on consumer protection in higher education and the

[3] There may be additional individuals, who are currently Senior Counsel or Counsel at Student Defense, who may dedicate a percentage of their time to the PSLF Project.

authority of the Department to oversee schools and other participants in Federal Student Aid programs. Dan served as the Deputy Assistant General Counsel for Postsecondary Education at the Department, where he oversaw that office's legal advice and litigation on higher education matters. Dan played a key role in some of the most high-profile and impactful efforts to protect students from predatory actors in higher education. He served as the lead legal counsel to the Enforcement Unit at Federal Student Aid and managed a team of attorneys handling matters involving institutions of higher education.

Dan earned his J.D., *cum laude*, from the University of Michigan Law School, where he served as an editor of the Michigan Law Review. He also earned the William Allan Lewis Kaufmann Award, given to the author of the best student contribution to the Michigan Law Review. Dan has a B.A. in political science from Haverford College. He is currently Vice President and Chief Counsel at Student Defense.

Appendix I

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

KATHRYN HYLAND, MELISSA GARCIA, ELIZABETH TAYLOR, JESSICA SAINT- PAUL, REBECCA SPITLER-LAWSON, MICHELLE MEANS, ELIZABETH KAPLAN, JENNIFER GUTH, MEGAN NOCERINO, and ANTHONY CHURCH, individually and on behalf of all others similar situated, Plaintiffs, v. NAVIENT CORPORATION and NAVIENT SOLUTIONS, LLC, Defendants.	Case No. 18-cv-9031-DLC CLASS ACTION

OBJECTION OF WILLIAM YEATMAN TO THE PROPOSED CLASS ACTION SETTLEMENT AND ATTORNEYS' FEE REQUEST

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INTRODUCTION

Plaintiffs ask this Court to approve a settlement that provides zero direct relief to the class. The settlement's "relief" comes in two forms. First, the settlement pays $1.75 million in *cy pres* relief to fund an entirely new third-party organization. *Cy pres* is, on its own, a suspect form of relief and therefore only appropriate when distributing the funds remaining in a settlement fund is infeasible. *See Masters v. Wilhelmina Model Agency, Inc.*, 473 F.3d 423, 436 (2d Cir. 2007). Here, the *cy pres* was preferred ex ante, and the parties do not claim infeasibility.

At least two individuals who have business relationships with the American Federation of Teachers ("AFT")—a union group that is unusually involved in a case in which it is not a named party—will be involved in the new Public Service Promise ("PSP"). AFT's involvement raises red flags aplenty: It recruited named plaintiffs; funded the case; publicized the case; and now seeks a $500,000 fee even though it has not itself claimed an hour of legal work on the case. All of the class representatives are AFT members. Class counsel and the two PSP individuals have an ongoing client relationship with AFT. And, the settlement class is composed of student borrowers, while AFT has long been criticized for favoring teachers at the expense of students. The new PSP will perform work AFT already undertakes, in addition to lobbying and advocacy work, suggesting a complimentary mission that will expand the work of AFT or at least free up resources. Even without these conflicts of interest, the settlement should be rejected for improperly favoring *cy pres* over the class. *See* Section III.

Second, the settlement requires Navient to change its *future* business practices with respect to its communications and training regarding the Public Service Loan

Forgiveness ("PSLF") program for three years. These changes will not benefit class members such as objector William Yeatman who have had their loans transferred to other servicers, left the public service sector, or paid off their loans. Certification under Rule 23(b)(2) is appropriate "only when a single injunction or declaratory judgment would provide relief to each member of the class." *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 360 (2011). Plaintiffs initially sought monetary damages and (b)(3) certification for the classwide unjust enrichment claim. Now the settlement waives claims for monetary damages brought as a class action, without affording class members any monetary relief. Injunctive relief does not befit the class and is inappropriate for these claims. Certification should be denied. *See* Section IV.

Certification is also improper for another reason. The terms—which provide no compensation and near valueless relief to the class while releasing class members' right to file a class action for money damages—evidence inadequate representation by the class representatives and class counsel, who recover large incentive fees and a hefty but partial reimbursement for AFT. The many entanglements among those charged with representing the class, AFT, and the *cy pres* recipient further compound adequacy problems. *See* Section V.

Separately, the allocation of all concrete settlement benefit to class counsel and the class representatives (over $650,000), combined with Navient's agreement not to challenge class counsel's fee request and the reversion of any amount below the request to the third-party *cy pres* recipient make the settlement unfair under Rule 23(e). *See* Section VI.

Finally, class counsel's fee request would constitute improper fee sharing with AFT and should be rejected in its

entirety. Even if such fee splitting were allowed, AFT has not submitted evidence of any legal work on the class's behalf, and the benefit to the class is too small to support the half-million fee request. *See* Section VII.

ARGUMENT

I. Objector is a member of the Settlement Class.

Objector William Merriwether Yeatman 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. Decl. of William Yeatman ("Yeatman Decl.") ¶ 3. Yeatman therefore is a member of the class with standing to object to the settlement. Fed. R. Civ. P. 23(e)(5). Yeatman's business address is 1000 Massachusetts Ave. NW, Washington, DC 20001. His telephone number is (202) 216-1433. Yeatman Decl. ¶ 2.

Hamilton Lincoln Law Institute's Center for Class Action Fairness ("CCAF"), through attorney Anna St. John, represents Yeatman *pro bono*. St. John gives notice of her intent to appear at the fairness hearing, where she wishes to discuss matters raised in this Objection. CCAF represents class members *pro bono* in class actions where class counsel employs unfair class action procedures to benefit themselves at the expense of the class. *See, e.g.*, *Berni v. Barilla S.P.A*, 964 F.3d 141 (2d Cir. 2020) (sustaining CCAF's objection to improper settlement certification). CCAF's track record—and preemptive response to the most common false *ad hominem* attacks made against it by attorneys defending unfair settlements and fee requests—can be found in the Declaration of Theodore H. Frank. To avoid doubts about his motives, Yeatman is

willing to stipulate to an injunction prohibiting him from accepting compensation in exchange for the settlement of this objection. Yeatman Decl. ¶ 6. Yeatman brings this objection through CCAF in good faith to protect the interests of the class, and his objection applies to the class. *Id.* ¶¶ 6, 9. He adopts any arguments filed or submitted to the Court regarding the settlement and fee request that are not inconsistent with this objection.

II. A court owes a fiduciary duty to unnamed class members.

A "district court ha[s] a fiduciary responsibility to the silent class members," *Grant v. Bethlehem Steel Corp.*, 823 F.2d 20, 23 (2d Cir. 1987), and must act "with a jealous regard" for the rights and interests of such absent class members, *Goldberger v. Integrated Res.*, 209 F.3d 43, 53 (2d Cir. 2000) (cleaned up). The fiduciary role is necessary because unlike in bilateral settlements, "there is always the danger that the parties and counsel will bargain away the interests of unnamed class members in order to maximize their own." *In re Dry Max Pampers*, 724 F.3d 713, 715 (6th Cir. 2013). The representatives assume a fiduciary obligation to the class, and the Court, through its oversight responsibility, assumes a derivative fiduciary obligation to the class. *Plummer v. Chemical Bank*, 668 F.2d 654, 658 (2d Cir. 1982).

"The concern is not necessarily in isolating instances of major abuse, but rather is for those situations, short of actual abuse, in which the client's interests are somewhat encroached upon by the attorney's interests." *In re "Agent Orange" Prod. Liab. Litig.*, 818 F.2d 216, 224 (2d Cir. 1987) (internal quotation omitted). The Court's oversight role thus does not end at making sure that the parties engaged in arm's length settlement negotiations. "[T]the adversarial process—or ... 'hard-fought' negotiations—

extends only to the amount the defendant will pay, not the manner in which that amount is allocated between the class representatives, class counsel, and unnamed class members." *Pampers*, 724 F.3d at 717. Due to the defendant's indifference as to the allocation of settlement funds, courts must look for "subtle signs that class counsel have allowed pursuit of their own self-interests and that of certain class members to infect the negotiations." *Id.* at 718 (internal quotation omitted). That a mediator helped to ensure collusion-free arms-length negotiations, Dkt. 97 at 10, is thus not sufficient to ensure settlement fairness. *See In re Payment Card Interchange Fee & Merchant Discount Antitrust Litig.*, 827 F.3d 223, 235 (2d Cir. 2016). The proponents bear the burden to demonstrate the settlement is fair, reasonable, and adequate under Rule 23. *Ma v. Harmless Harvest*, 2018 WL 1702740, at *4 (E.D.N.Y. Mar. 31, 2018). And because the settlement was reached before certification, an even heightened standard of scrutiny applies. *E.g.*, *Payment Card*, 827 F.3d at 235-36.

III. The settlement should be rejected because it improperly favors a third party chosen by conflicted representatives over class members through its *cy pres* provision.

The legal construct of *cy pres* has its origins in trust law as a vehicle to realize the intent of a settlor whose trust cannot be implemented according to its literal terms. *Nachshin v. AOL*, 663 F.3d 1034, 1038 (9th Cir. 2011). A classic example of *cy pres* is found in a 19th-century case where a court repurposed a trust that had been created to abolish slavery in the United States to instead provide charity to poor African-Americans. *Jackson v. Phillips*, 96 Mass. 539 (1867). Imported to the class action context, it has become an increasingly popular way to distribute

settlement funds to non-class third parties—a practice that raises "fundamental concerns." *Marek v. Lane*, 571 U.S. 1003, 1006 (2013) (Roberts, C.J., respecting the denial of certiorari).

"Cy Pres means 'as near as possible,' and 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*, 473 F.3d at 436 (cleaned up). The Second Circuit recognizes *cy pres* should be limited to these circumstances. *Id.* (rejecting *cy pres* and endorsing then-draft American Law Institute, Principles of the Law of Aggregate Litigation on *cy pres*). *Cy pres* is "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). Consistent with this non- compensatory nature, *cy pres* is not requested as relief in class complaints. Dkt. 32 at 128.

A. The settlement deploys the worst form of cy pres relief which has been rejected by courts nationwide for its failure to compensate the class.

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 if it is not feasible to distribute funds to the class. *See, e.g.*, *In re BankAmerica Corp. Secs. Litig.*, 775 F.3d 1060 (8th Cir. 2015) (many courts have "criticized and severely restricted" *cy pres*); *Pearson v. NBTY, Inc.*, 772 F.3d 778, 784 (7th Cir. 2014) ("A *cy pres* award is supposed to be limited to money that can't feasibly be awarded to ... the class members."); *Klier v. Elf Atochem N. Am., Inc.*, 658 F.3d 468, 475 (5th Cir. 2011) ("[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.").

Ex ante cy pres is defined to include awards "designated as part of a settlement agreement … where … the entire award was given to at least one charity with no attempt to compensate the absent class members." Martin H. Redish, Peter Julian, & Samantha Zyontz, *Cy Pres Relief and the Pathologies of the Modern Class Action: A Normative and Empirical Analysis*, 62 Fla. L. Rev. 617, 657 n.171 (2010). *Ex ante cy pres* relief such as that proposed by the parties is especially troublesome—as compared to *ex post cy pres*, which makes third-party awards only after class members fail to cash checks that are distributed.

"This form of cy pres stands on the weakest ground because cy pres is no longer a last-resort solution for a problem of claims administration. The concern for compensating victims is ignored (at least unless the indirect benefits of the *cy pres* award flow primarily to the victims)." Jay Tidmarsh, *Cy Pres and the Optimal Class Action*, 82 Geo. Wash. L. Rev. 767, 770-71 (2014). Courts have repeatedly rejected this sort of settlement. *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).

The settlement directs the full $1.75 million to a new organization without making any effort to compensate class members. 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, 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).

By proposing an *ex ante cy pres* settlement, the settling parties have lost sight of the underpinnings 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 Orthopedic Assocs. v. Allstate Ins. Co.*, 559 U.S. 393, 408 (2010). "Lead Counsel continues to have responsibilities to each individual member of the class even when negotiating." *Piambino v. Bailey*, 757 F.2d 1112, 1144 (11th Cir. 1985) (cleaned up). Counsel's duty to their client works hand in glove with the proper role of the judiciary—"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, 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").

B. The settlement resorts to *cy pres* prematurely because it is feasible to distribute funds to the class.

The Second Circuit has recognized the "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*, 473 F.3d at 436 (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." American Law Institute, *Principles of the Law of Aggregate Litigation* § 3.07(a); *see also Masters*, 473 F.3d at 436 (endorsing ALI principle).

The last-resort rule follows from the precept that because the settlement proceeds were "generated by the value of the class members' claims, [they] belong solely to the class members." *Klier*, 658 F.3d at 474. 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. *See Xiao Ling Chen v. Xpresspa at Terminal 4 JFK, LLC*, 2019 WL 5792315, 2019 U.S. Dist. LEXIS 195988, at *56-*57 (E.D.N.Y. Aug. 20, 2019) ("it would be premature to approve the *cy pres* designee until after there has been a second distribution to the Class....").

Plaintiffs are wrong that their proposed settlement structure with *cy pres* is acceptable because the settlement is subject to (b)(2) certification such that monetary relief is not appropriate and class members are waiving "only" their claims for monetary damages brought as a class action. Dkt. 97 at 9; Dkt. 98-1 at 4. Monetary restitution is the appropriate relief for the unjust enrichment arising from Navient's capture of the class's loan servicing

fees that form the basis for the requested certification as well as other claims. *See* Dkt. 120 at 22. Because class members are waiving all class-based monetary claims, then monetary relief is the appropriate relief. *See Pampers*, 724 F.3d at 721 (vacating (b)(2) settlement that waived only class-based damages because class counsel appropriated the only "concrete and indisputable" cash benefit); *Crawford v. Equifax Payment Servs.*, 201 F.3d 877, 882 (7th Cir. 2000) (same). As the parties well know, 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; Dkt. 32 at 114; Section IV.

Plaintiffs cite out-of-circuit *Berry v. Schulman*, but Berry fundamentally conflicts with in-circuit precedent by allowing the provision of 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 600, 609-10 (4th Cir. 2015) with *Berni*, 964 F.3d 141 and *Hecht v. United Collection Bureau*, 691 F.3d 218, 223-24 & n.1 (2d Cir. 2012). *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 necessarily had an ongoing relationship with the defendant because their personal information was housed within its databases. 807 F.3d at 615. *See also* Section IV.[1]

[1] In *In re NCAA Student-Athlete Concussion Injury Litigation*, also cited by plaintiffs, the court ordered further direct relief to the class before allowing any remainder for *cy pres* and required a research fund donation provided in the settlement to be made over and above any amounts defendant already planned to give. 314 F.R.D. 580, 607-08 (N.D. Ill. 2016).

Plaintiffs also cite *In re Google Inc. Cookie Placement Consumer Privacy Litigation*, but the Third Circuit rejected the *cy pres* settlement certified under (b)(2) due to the release of claims for monetary damages and its designation of *cy pres* recipients with pre-existing relationships with class counsel and the defendant. 934 F.3d 316 (3d Cir. 2019).

The issue is thus whether the available $1.75 million settlement fund can feasibly be distributed to self-identifying class members through a claims process. Plaintiffs never suggest that distribution is infeasible. *See, e.g.*, Dkt. 120 at 16. The class contains "up to 324,900" class members. Dkt. 120 at 21. As such, distribution is entirely feasible, and plaintiffs have forfeited any claim to the contrary. *See* Frank Decl. ¶¶ 13-14.

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. A similar revision could be made here.

Other claims processes have achieved direct payment to class members even where counsel has claimed such payments infeasible. For example, *Fraley* involved a recovery of $10 million and a class of Facebook users that

numbered over one hundred million. The parties initially proposed a *cy pres*-only settlement, alleging that class distributions "[were] simply not practicable in this case, given the size of the class." 2012 U.S. Dist. LEXIS 116526, at *6. The district judge refused to accept the proposal because "[m]erely pointing to the infeasibility of dividing up the agreed-to $10 million recovery ... is insufficient ... to justify resort to purely *cy pres* payments." *Id.* at *5. After the court denied approval, the agreement was then restructured as a claims-made settlement disbursing cash directly to class members. 966 F. Supp. 2d 939 (N.D. Cal. 2013). *Zepeda*, also cited above, followed a similar trajectory. *Compare Zepeda*, 2014 U.S. Dist. LEXIS 24388 (rejecting all-*cy pres* proposal), *with Zepeda*, 2017 WL 1113293, 2017 U.S. Dist. LEXIS 43672 (N.D. Cal. Mar. 24, 2017) (approving revised settlement providing real monetary relief to class members).

The nature of representational litigation under Rule 23 and the Due Process Clause of the U.S. Constitution necessitates prioritizing class relief even though it will always be more efficient to distribute settlement proceeds to a hand-picked charity; the settling parties can eliminate the bulk of administrative overhead costs that way. But maximizing efficiency cannot be sufficient justification for a *cy pres*-heavy settlement. *BankAmerica*, 775 F.3d at 1065 ("flatly reject[ing]" the idea that *cy pres* recipients could ever be more "worthy" than class members).

C. The Court must scrutinize potential conflicts of interest and pre-existing relationships among class representatives, class counsel, Student Defense, and AFT as they relate to the *cy pres* recipient.

Even worse, the *cy pres* recipient raises a host of conflict of interest concerns that independently require

rejection of the settlement. "The responsibility of class counsel to absent class members whose control over their attorneys is limited does not permit even the appearance of divided loyalties of counsel." *Radcliffe v. Experian Info. Solutions*, 715 F.3d 1157, 1167 (9th Cir. 2013) (internal quotation omitted). "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 v. Kellogg Co.*, 697 F.3d 858, 867 (9th Cir. 2012); *see also Nachshin,* 663 F.3d at 1039 (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*).

Accordingly, 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). 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). If a *cy pres* recipient is related to or otherwise benefits class counsel, counsel would be double-compensated: by indirectly benefitting from the cy pres distribution and recovering fees based upon the size of the *cy pres*. *SEC v. Bear, Stearns, & Co. Inc.*, 626 F. Supp. 2d 402, 415 (S.D.N.Y. 2009) (rejecting *cy pres*); Adam Liptak, *Doling Out Other People's Money*, N.Y. Times (Nov. 26, 2007).

The appearances of conflict here are unmistakable and polycentric. 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 located the class representatives, which funded the litigation, and which is a current client of class counsel in other cases.

Every named plaintiff in this case is a member of AFT, which is defined as a "releasing class representative party" and which supported the litigation since before it was filed. *See* Dkt. 98-1 at 4; St. John Decl. Ex. 2 at 3. Class counsel and officers of Student Defense who will be involved in PSP have represented and continue to represent AFT in other cases. Daniel Zibel and Aaron Ament—the Student Defense officers who will have dedicate an unspecified amount of time to the new organization (Dkt. 98-6 at 4-5)—are counsel for AFT in *AFT v. DeVos*, No. 5:20-cv-455 (N.D. Cal.) and serve as 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). Both class counsel firms likewise represent AFT in other cases and thus have a financial incentive to remain in good favor with the group. *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, 2020); *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).

Further, AFT pre-paid legal fees to class counsel for the litigation and will be reimbursed only $500,000. *See* Dkt. 122 at 2; St. John Decl. Ex. 2 at 3. There's no such

thing as a free lunch. AFT is gaining some benefit from this settlement; why else would it spend millions on the case? There are several possible reasons: This case supports and provides publicity for AFT's Weingarten litigation, as AFT claims that Navient "serviced borrowers eligible for PSLF on DeVos' behalf" as it goes after what it calls the "gross mismanagement and out-and-out sabotage of the [PSLF] program by DeVos." St. John Decl. Ex. 3.[2] PSP appears poised to take over some of the PSLF-related work that AFT already does, freeing up its resources for other endeavors.[3] And, AFT has an ideological interest in the formation of a new 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.

As is its right, AFT focuses on benefiting its own members and their families—not on improving the lives of students more broadly. 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* St. John Decl. Exs. 4-5.[4] Yet, there are indications that this group improperly influenced the result for a class of student borrowers.

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[2] *Available at* https://www.aft.org/press-release/major-lawsuit-launched-against-betsy- devos-over-national-student-debt.

[3] 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/.

[4] *See*, *e.g.,* https://www.nytimes.com/2018/02/23/us/west-virginia-teachers-strike.html; https://www.influencewatch.org/labor-union/american-federation-of-teachers/.

Finally, the proposed recipient potentially violates the settlement itself: Section V.C.2 states, "In no event shall Plaintiffs propose a Cy Pres Recipient in which any of the Parties or their counsel or family members have a financial, commercial, or other pecuniary interest."

D. Especially with no right to opt out, *cy pres* constitutes compelled speech in violation of the First Amendment.

The *cy pres* settlement also violates the First Amendment rights of class members to refrain from supporting or associating with a third party's agenda and activities. It does so by having this Court order that funds belonging to the class members 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 that 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 Thomas Jefferson's 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 giving effect to the settlement, the settlement forces absent class members to pay their damages to PSP. Dkt. 98-1 at 11. 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 cannot give the "clear[] and affirmative[] consent" required 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 term sheet states that PSP 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. Dkt. 98-6 at 2. The class includes individuals who, like Yeatman, may not wish to support additional, undefined government administration, regulations, subsidies, and spending—particularly when PSP is apparently endorsed by an organization whose views appear sharply ideological.[5] 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 handpicked class representatives and counsel. *See, e.g.*, St. John Decl. Exs. 7-9 (AFT resolutions "support[ing] a Green New Deal," "oppos[ing] privatization of public services," and supporting abortion access).

"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.

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[5] For example, AFT gave 97-99% of its political donations to Democrats in every election cycle since 1990. *See* St. John Decl. Ex. 6, *available at* https://www.opensecrets.org/orgs/totals?id=D000000083.

IV. Class certification is impermissible under Rule 23(b)(2).

District courts must conduct a "rigorous analysis" to ensure compliance with the Rule 23 certification prerequisites. *Wal-Mart*, 564 U.S. at 351. Certification under (b)(2) is proper only when the defendant "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." Fed. R. Civ. P. 23(b)(2). Heightened attention is necessary for the (b)(2) certification the parties request because class members are not permitted to opt out. See Dkt. 98-1 at 7, § IV.2. As the party seeking class certification, plaintiffs "bear[] the burden of establishing by a preponderance of the evidence that each of Rule 23's requirements have been met." *Johnson v. Nextel Comms. Inc.*, 780 F.3d 128, 137 (2d Cir. 2015).

Certification of the proposed settlement under Rule 23(b)(2) is improper 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 a class action. In short, (b)(2) certification is improper because the class members here are "victims of a completed harm" who "would be entitled to damages," but not every member has standing to seek injunctive relief. *Hecht*, 691 F.3d at 223-24.

A. Rule 23(b)(2) certification is improper for the retrospectively defined class.

The Second Circuit recently expounded upon the rule that "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. *Berni* recently held that "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). "Injunctive relief is only proper when a plaintiff, lacking an adequate remedy at law, is likely to suffer from injury at the hands of the defendant if the court does not act in equity." *Id.* (cleaned up). 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. *Id.*

Just as in *Berni*, the Court here "must determine if th[e] relief is proper for each and every member" of the class. 964 F.3d at 146. It is not. The settlement's injunctive relief relates exclusively to business practices and communications relating to PSLF as applied to borrowers whose loans are serviced by Navient. Meanwhile, the settlement defines the class as all individuals from October 2007 to the present who had FFEL or Direct Loans serviced by Navient, who are employed by a public service employer eligible for PSLF, and who spoke to a Navient customer service representative about PSLF eligibility. Dkt. 98-1 at 5. Yet class members such as objector Yeatman have had their loans transferred to other servicers, left the public service sector, and/or paid off their balance entirely in the 13-year class period. Yeatman Decl. ¶ 3. These class members will not interact with Navient regarding PSLF in the future and will realize no benefit from Navient's plans to improve communications and call center representatives' training. *See* Dkt. 98-1 at 8-10. Where a portion of the class no longer has the relationship with the defendant that led to the alleged claims, (b)(2) certification is improper. *See Wal-Mart*, 564 U.S. at 365. As such, class members also

lack the cohesiveness required for a certified (b)(2) class. They have no common interest in the proposed injunctive relief. All of the relief benefits borrowers whose loans will be serviced by Navient in the future, yet the class comprises borrowers whose loans were serviced by Navient in the past.

Berni did not break new legal ground, but rather followed the consensus among courts that (b)(2) certification is improper when there is a mismatch between prospective injunctive relief and a retrospectively defined class.[6] *See, e.g.*, *Wal-Mart*, 564 U.S. at 365; *Brown v. Kelly*, 609 F.3d 467, 482 (2d Cir. 2010); *Felix v. Northstar Location Servs.*, 290 F.R.D. 397, 406 (W.D.N.Y. 2013) (denying class certification where members had received telephonic messages in the past); *Charrons v. Pinnacle Group N.Y. LLC*, 269 F.R.D. 221, 229 (S.D.N.Y. 2010); *Crawford*, 201 F.3d at 882. In fact, plaintiffs recognized the inapplicability of injunctive relief to a retrospectively defined class in their complaint. They defined a proposed nationwide injunctive class as, *inter alia*, those who "intend to contact Navient in the future regarding their eligibility for PSLF." Dkt. 32 at 102. But that class did not allege the unjust enrichment claims that underpin the settlement; it was the broader nationwide class that brought that claim and sought monetary restitution and on whose behalf the settlement was reached. *Id.* at 114; Dkt. 98-1 at 5.

The parties' attempt to distinguish *Berni* letters submitted to this Court is not based in fact. First, while plaintiffs assert that borrowers have a "perpetual relationship" with Navient, the reality is that many borrowers—like

[6] Although *Wal-Mart* involved a litigation class certification rather than a settlement certification, *Berni* confirms that "that does not make its precedent any less applicable to this case." *Payment Card*, 827 F.3d at 241-42 (Leval, J., concurring).

Yeatman—in the course of the 13-year class period, have had their loans transferred to other servicers or paid off their loans, thus ending their relationship with Navient, or they have left the public service sector such that they have no interest in PLSF or how Navient communicates about the program. While plaintiffs do not provide the number of class members who fall into these categories, Yeatman's experience and the very nature of borrowing and modern career paths show that the relationship between class members and Navient, and the PSLF program, is not as permanent as the parties suggest. *See* Dkt. 111 at 1-2; *see also* Dkt. 110 at 2. The parties themselves do not argue that such class members will benefit from the injunctive relief; they claim only (incorrectly) that they will benefit from the *cy pres* relief. Dkt. 111 at 2; Dkt. 110 at 2. This concession is fatal to (b)(2) certification under *Berni* and *Wal-Mart*. Finally, the parties' reference to the more complex PSLF program terms compared to the fill line in *Berni* cannot overcome the lack of benefit to a large swath of the class that will never interact with the PSP. Moreover, "[g]iven the litigation risk, [the defendant] is not apt to employ [the unlawful communications] again no matter what the settlement provides." *Crawford*, 201 F.3d at 882.[7]

[7] Out-of-circuit *Fresco v. Auto Data Direct, Inc.* cited by plaintiffs, cannot overcome the contrary authority in this circuit and others. Just as in *Berry*, all class members necessarily had an ongoing relationship with the defendant in *Fresco* because they claimed misuse of their personal information, and the court found the released damages claims were merely "incidental to the injunctive relief." 03-civ-61063, 2007 U.S. Dist. LEXIS 37863, at *8 (S.D. Fla. May 14, 2007).

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

Rule 23(b)(2) certification is also improper because the class alleges economic harm, and those claims accrue on an individual basis. 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; id. at 362 ("[I]t [is] clear that individualized monetary claims belong in Rule 23(b)(3)."); *see also Kartman v. State Farm Mut. Auto. Ins. Co.*, 634 F.3d 883, 892 (7th Cir. 2011) ((b)(2) certification "necessarily improper" for such claims); *see also Petereit v. S.B. Thomas, Inc.*, 63 F.3d 1169, 1185 (2d Cir. 1995) ("Of course injunctive relief where an adequate remedy at law exists is inappropriate.").

Plaintiffs seek certification based on the unjust enrichment claims they alleged on behalf of a nationwide (non-injunctive relief) class in their complaint. Dkt. 97 at 20; Dkt. 120 at 21-22; *see* Dkt. 32 at 114. In a (b)(2) certification analysis, it is appropriate for a Court to analyze the complaint and remedy sought by the class. *Crawford*, 201 F.3d at 881. That analysis shows the monetary relief claim is far from incidental; rather, money damages are the predominant form of relief for the unjust enrichment claim due to Navient obtaining greater fees as a result of providing incorrect information to class members. Even if injunctive relief were available for unjust enrichment, "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 223-224 (cleaned up).

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." Dkt. 32 ¶¶ 453, 456. And, in fact, plaintiffs sought monetary relief and (b)(3) certification. Dkt. 32 at 127-128. Plaintiff's complaint defined a nationwide class and a nationwide injunctive relief class, and it was only the nationwide class that alleged an unjust enrichment claim to prevent Navient from retaining the loan servicing fees they paid. Dkt. 32 at 102, 114. 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 quantifiable and support money damages and are unsuited for injunctive relief. While plaintiffs may try to characterize restitution as a form of equitable relief rather than money damages, "[t]he Rule does not speak of 'equitable' remedies generally but injunctions and declaratory judgments." *Wal- Mart*, 564 U.S. at 365.

Because a monetary remedy is appropriate for the alleged unjust enrichment claims being settled, "[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 amount of restitution—or money damages—due to each class member "will necessarily vary" based on the length and extent of each class member's borrowing relationship with Navient. *Id.* at *16-*17. *See also Ackerman v. Coca-Cola Co.*, 2013 WL 7044866, 2013 U.S. Dist. LEXIS 184232, at *69 n.28 (E.D.N.Y. July 17, 2013) (amount of restitution due "require[s] individualized assessments of damages"). Recovery of any incidental damages in a (b)(2) certification must "be more in the nature of a group remedy," while the measure of damages here is "dependent in ... significant way[s] on the intangible, subjective differences of each class member's circumstances." *Allison v Citgo Petro. Corp.*, 151 F.3d 402, 415 (5th Cir. 1998) (cited by *Wal-Mart*, 564 U.S. at 365-66).

C. A class action waiver of monetary claims cannot be included as part of a mandatory (b)(2) class release.

Compounding these problems, the settlement releases class members' right to bring any claims for monetary damages as a class action, despite achieving no monetary relief for the class. In a (b)(2) settlement, the release should confine itself to future claims for injunctive relief, without encroaching on class members' right to bring claims for monetary relief in the future. *See Wal-Mart*, 564 U.S. at 362. Here, however, class counsel sought (b)(3) certification in their complaint, but then abandoned that effort and any monetary recovery for the class, while nevertheless agreeing to deny class members the right to recover money damages in a class action or other form of aggregate litigation. Dkt. 98-1 at 4, 16-17. Neither Rule 23(b)(2) nor the constitutional rule of *Phillips Petroleum v. Shutts* permit the waiver of a class member's ability to use the class action device to bring monetary claims when

there is no right to opt out. Instead, absent class members have a due process right to opt out of class actions seeking monetary damages that are not merely incidental to any injunctive relief sought. *See Shutts*, 472 U.S. 797, 811-812 (1985); *see also Hecht*, 691 F.3d at 224 (rejecting (b)(2) settlement because class members with damages claims "had a due process right under Shutts to notice and the opportunity to opt out").

In *Crawford*, the court recognized the Seventh Amendment and due process rights that 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 where plaintiffs seek an "indivisible injunction" that will benefit the entire class. 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 settlement is just as "substantively troubling." *Id.*

The settling parties have implemented what amounts to a limited carve-out scheme for certain claims when brought in an individual capacity. This scheme 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 bringing such suits.

A plaintiff whose lawsuit meets the requirements of Rule 23 has a "categorical" right "to pursue his claim as a class action." *Shady Grove*, 559 U.S. at 398. In attempting to end run *Wal-Mart*, the settling parties would deprive class members of that "categorical rule" with respect to monetary claims. That, a (b)(2) settlement may not do.

V. Class certification is separately impermissible due to inadequate representation of the class in violation of Rule 23(a)(4) and (g)(4).

Rule 23(a)(4) requires the parties to demonstrate that "the representative parties will 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 Prods. v. Windsor*, 521 U.S. 591, 620 (1997).

"Th[e] 'adequacy of representation' analysis encompasses two separate inquiries: (1) whether any substantial conflicts of interest exist between the representatives and the class; and (2) whether the representatives will adequately prosecute the action." *Valley Drug Co. v. Geneva Pharms.*, 350 F.3d 1181, 1189 (11th Cir. 2003); *Amchem*, 521 U.S. at 625. Class counsel must maximize class recovery; they cannot "agree[] to accept excessive fees and

costs to the detriment of class plaintiffs." *Lobatz v. U.S. W. Cellular of Cal.*, 222 F.3d 1142, 1147 (9th Cir. 2000).

The preexisting conflicts of interest discussed above with respect to the *cy pres* recipient, AFT, the named plaintiffs, and class counsel are alone disqualifying. *See, e.g. In re Southwest Voucher Litig.*, 799 F.3d 701, 715 (7th Cir. 2015) (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"). The settlement terms further reveal the possibility that the conflicts actually infected the class representation, resulting in subordinated class interests.

- The settlement funds a conflicted *cy pres* recipient when those funds instead could feasibly be distributed to class members.
- The only relief provided by the settlement is of no benefit to the many class members who are no longer working in the public interest sector, whose loans have been transferred to a different servicer, or who have paid off their loans.
- The settlement releases class members' right to bring monetary damages as a class action without providing any monetary compensation.
- AFT spent an untold amount funding the case, brought by the same attorneys representing it in multiple other cases, with representatives who are

> all members of AFT and who agreed to settlement terms creating a new organization to which other attorneys who represent AFT as co-counsel with class counsel will contribute.

Even without these indicia of conflict, the settlement terms alone evidence inadequate representation. The settlement pays to reimburse AFT $500,000, class representatives $15,000 each, and a third-party $1.75 million, while paying the class $0. And AFT's prepayment of class counsel's fees unmoors their fees from the class relief, raising concerns about the alignment of interests. Combined, these terms indicate inadequate representation. *E.g.*, *Gallego v. Northland Group*, 814 F.3d 123, 129 (2d Cir. 2016). The lack of any benefit for the class renders the settlement unfair and unreasonable. *Frank*, 139 S. Ct. at 1047 (Thomas, J., dissenting). Worse still, "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." *Id.*

In the light of the meagerness of the class relief, the class representatives' large payment for themselves and class counsel's recovery of fees demonstrates they have not adequately represented the class. *See Pampers*, 724 F.3d at 722. "A class settlement that results in fees for class counsel but yields no meaningful relief for the class is no better than a racket." *In re Subway Footlong Sandwich Mkt'g & Sales Practices Litig.*, 869 F.3d 551, 556 (7th Cir. 2017) (internal quotation omitted). In *Gallego*, 814 F.3d at 129, the Second Circuit noted that absentee class members' interests would not be best served by a settlement that released their claims for less than 17 cents. If a settlement that purports to release class claims for

pennies displays inadequate representation, then so does this settlement, where the benefit to class members is $0.

VI. Even if the class is certifiable, the settlement is unfair under Rule 23(e).

Certification arguments can bleed into the corollary Rule 23(e)(2) question of whether a settlement is "fair, reasonable, and adequate." For example, if final injunctive relief is not appropriate respecting the class as a whole, a settlement that offers only injunctive relief will be per se inadequate. Similarly, when the terms of a settlement manifest inadequate representation, it follows that the settlement is often itself unfair. *See, e.g.*, *Payment Card*, 827 F.3d at 236.

There remain independent reasons that this Court should reject the settlement under Rule 23(e) even if it accepts that class certification itself is viable and that the *cy pres* terms are fair, reasonable, and adequate: The combination of opaque attorneys' fees, hefty incentive awards, and lack of monetary relief signals an unfair, lawyer-driven settlement. While AFT has spent an undisclosed sum on the case, we don't know whether AFT would have accepted less than $500,000 such that the overage could have supplemented the class's relief.

Plaintiffs rely on the factors set forth in *City of Detroit v. Grinnell Corp.*, 495 F.2d 448 (2d Cir. 1974), to support settlement fairness, Dkt. 120 at 11, but satisfaction of the factors alone is not sufficient for approval. Second Circuit precedent requires courts to examine whether the class's "interests are somewhat encroached upon by the attorneys' interests." *Agent Orange*, 818 F.2d at 224; *e.g.*, *Plummer*, 668 F.2d at 660 (affirming settlement rejection where "preferential treatment" afforded named plaintiffs). Consistent with these principles, the Ninth Circuit's

warning signs of a settlement that inequitably allocates proceeds between the class and class representatives and counsel are relevant: (1) disproportionate fee allocation; (2) clear sailing; and (3) fee reversion. *In re Bluetooth Headset Prods. Liab. Litig.*, 654 F.3d 935, 947 (9th Cir. 2011).

These signs demonstrate the unfairness of the settlement. The class representatives negotiated a $15,000 payment for themselves while agreeing to $0 for the class. Class counsel appears to have recovered substantial fees from their "nonprofit partner" under an opaque fee arrangement. At the same time, they negotiated clear sailing for their requested fee "reimbursement," such that Navient will not object to the $500,000 request. Dkt. 98-1 at 15. And, if the Court were to reduce either such payment, the class will not recover the difference but instead the *cy pres* payment will simply increase. *See* Dkt. 98-1 at 12. These terms must be considered under Rule 23(e)(2)(c)(ii)-(iv) specifically and reveal the settlement's unfairness.

VII. AFT is not entitled to recover attorneys' fees from the settlement.

The attorneys' fee request should be rejected in its entirety because it violates the ethical rule against fee-splitting with non-attorneys. N.Y.S. R. Prof. Conduct 5.4(a). While some states permit fee-sharing for a non-profit that retained attorneys, *see* Model R. of Prof. Conduct 5.4(a)(4), New York has not adopted any such exception. Indeed, New York criminalizes the sharing of fees with a non-attorney in exchange for referring a client to the attorney. *See* N.Y. CLS Jud. § 491. To the extent the funding arrangement between class counsel and AFT is permissible, class counsel has the burden of submitting sufficient information to justify the award, and had a duty to disclose

its funding and fee-splitting arrangement with AFT at the time it was made. *See Agent Orange*, 818 F.3d at 226; Manual for Complex Litigation § 21.724 at 338. Even if undisclosed fee-splitting arrangements were permissible, the fee request fails because plaintiffs have not submitted any evidence that AFT accrued a single hour of legal work on the case, thus violating the principle that "the distribution of fees must bear some relationship to the services rendered." *Agent Orange*, 818 F.3d at 223.

Class counsel cites a single case in support of their argument that AFT is entitled to be reimbursed in part for its outlay of fees and costs via the Court's award of attorneys' fees. Dkt. 122 at 7. *Meredith Corp. v. SESAC, LLC*, 87 F. Supp. 3d 650, 667-71 (S.D.N.Y. 2015), however, is inapposite. There, Weil Gotshal submitted a lodestar calculation with its fee request that showed a 25% reduction in hourly rates, reflecting its actual billings to the nonprofit client. There was no suggestion that an outside group prepaid its fees and that Weil was transferring its fee award to partially reimburse that group. *Id.* at 670. This case would be comparable only if class counsel followed the traditional contingency path of fronting the litigation costs for their client and deferring any fees until a settlement was reached. Plaintiffs cite no authority for their apparent fee-splitting with AFT. And their claim that AFT's involvement "has been a matter of public record," Dkt. 122 at 2 n.2, does not suggest or demonstrate that such financial arrangement was disclosed to the Court as required by Rule 23(e)(3), L.R. 23.1, and *Agent Orange*.

In any event, even under a lodestar calculation, a fee award must be reasonable relative to the class benefit. *See* Section III. The settlement proponents have the burden of proving the quantum of benefit, and the relevant measure is the value to class members. *Pampers*, 724 F.3d at

719-20. The value to the class of the *cy pres* relief is $0. Plaintiffs provide no evidence of the value of the injunctive relief to the class members, though it too is of little value and certainly does not reach the nearly $1.4 million necessary to justify a $500,000 fee award.

CONCLUSION

For the foregoing reasons, the Court reject the proposed settlement and fee award.

Dated: September 11, 2020

/s/ Anna St. John
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Attorney for Objector William Yeatman

I, William Yeatman, am the objector. I sign this written objection drafted by my attorneys as required by the Class Notice ¶ 14.

/s/ William Yeatman
William Yeatman

Certificate of Service

The undersigned certifies she electronically filed the foregoing Objection and associated declarations and exhibits via the CM/ECF system for the Southern District of New York, thus sending the Objection and declarations and exhibits to the Clerk of the Court and also effecting service on all attorneys registered for electronic filing.

Additionally, she caused to be served via prepaid, first-class U.S. Mail a copy of this Notice of Intention to Appear upon the following:

Settlement Administrator
c/o Rust Consulting, Inc. – 6972
P.O. Box 44
Minneapolis, MN 55440-0044

Dated: September 11, 2020

/s/ Anna St. John
Anna St. John