No. 21-2292

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

Lisa Jones, et al. v. Monsanto Co.

APPEAL OF: Anna St. John, Objector-Appellant

On Appeal from the United States District Court
for the Western District of Missouri
Case No. 19-cv-00102
District Chief Judge Beth Phillips

Appellant Anna St. John's
Petition for Panel Rehearing and Rehearing *En Banc*

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FRAP 35(b)(1) Statement

The panel's decision affirming approval of a class-action settlement with a $16 million *cy pres* distribution conflicts with *In re BankAmerica Corporation Securities Litigation*, 775 F.3d 1060 (8th Cir. 2015), by adopting tests that *BankAmerica* expressly rejected. Consideration by the full court is necessary to secure and maintain uniformity of Circuit law.

Introduction

The consumer class-action settlement here (over Roundup Weed & Grass Killer herbicide labeling) distributed roughly $16 million as *cy pres* to uninjured third-party non-profits; $12 million to class members (with over 97% of the class—about ten million members—receiving no cash); and $10 million to attorneys. *BankAmerica*, which rejected a much smaller *cy pres* distribution in a much larger settlement, expressly forbids this upside-down ratio of *cy pres*. Settlements that anticipate extensive *cy pres* at the discretion of the district judge are "void *ab initio*." *BankAmerica*, 775 F.3d at 1066. A "*cy pres* distribution to a third party of unclaimed settlement funds is permissible '***only*** when it is not feasible to make further distributions to class members' … except where an additional distribution would provide a windfall to class members with ***liquidated***-damages claims that were 100 percent satisfied by the initial distribution." *Id.* at 1064 (quoting *Klier v. Elf Atochem N. Am., Inc.*, 658 F.3d 468, 475 (5th Cir. 2011), and adding emphasis).

Here, the panel affirmed the district court's approval of $16 million in *cy pres* by reading *BankAmerica* to mean something else. Instead of following the *BankAmerica* bright-line rule—*cy pres* is permissible "*only*" when further distributions are not feasible "*except*" where *liquidated* damages claims are 100% satisfied—the panel here asserts that what the longstanding *BankAmerica* precedent *really meant* is that the district court is to make its "own" independent "assessment of the damages recoverable," and is free to distribute to *cy pres*, because *BankAmerica* actually does "not *require* that class-member claimants receive the full amount of unliquidated damages claimed in the complaint before *cy pres* distribution." *Compare* slip op. 7 *with BankAmerica*, 775 F.3d at 1064. "Only" no longer means "only." In other words, so long as the district court believes—based on unspecified criteria—that the small fraction of the class who have made claims have recovered sufficient damages, then the settlement can distribute to third parties the remainder of the settlement funds that otherwise belong to the class. But if that were true, *BankAmerica* would have affirmed indistinguishable factual findings by the district court there—or at least remanded for more findings rather than require distribution.

A finding that further distributions would be "costly and difficult" cannot justify turning to *cy pres*: what matters is whether more class payments are "economically viable." *BankAmerica*, 775 F.3d at 1065. But the panel did not use *BankAmerica*'s bright-line standard, relying on the same sort of subjective

district-court discretionary assessment that *BankAmerica* rejected. *Cf. id.* at 1068-72 (Murphy, J., dissenting) (calling for deference to district court *cy pres* decision). This result also contradicts without mentioning Rule 23(e)(2)(C)(ii), created by 2018 amendments to the Federal Rules, which requires a district court to consider "the effectiveness of any proposed method of distributing relief to the class." The question of "effectiveness" is not one of good-faith "effort" (slip op. 6), but concrete results: did the money get to the class? The panel defers instead: the district court in its discretion subjectively decided the parties tried hard and thus the proposed method of distributing relief can't be blamed for poor effectiveness despite not using direct-distribution techniques empirically demonstrated to be economically viable in other cases. *Id.*

The panel rejected First Amendment challenges to the settlement subsidizing left-leaning organizations without consent because absent class members who had not filed claims had no property interest in the residual funds. Slip op. 8. But *BankAmerica* agreed with *Klier* that *cy pres* is inappropriate because settlement funds *do* belong to the class. 775 F.3d at 1065.

If allowed to stand, the panel's decision changes Circuit law under the guise of explaining what the Court meant in *BankAmerica*, even though the panel's interpretation strays from the text, reasoning, and result of *BankAmerica*. This Court denied *en banc* rehearing of Judge Loken's *BankAmerica* majority opinion. *See* No. 13-1620 (Mar. 18, 2015) (Murphy,

Smith, and Kelly JJ., dissenting from the denial of rehearing). Now the panel here effectively overrules BankAmerica *sub silentio* without *en banc* review.

En banc consideration is necessary to secure consistency and uniformity of Circuit law on *cy pres* distributions in class actions. Section I. In addition, panel rehearing is necessary because the panel failed to address the "effectiveness" standard of Rule 23(e)(2)(C)(ii). *See* Section II.

Background

A consumer class action alleged that certain Roundup Weed & Grass Killer herbicides contained false or misleading representations on their labels. On behalf of themselves and the putative class members, Plaintiffs sought, among other things, a full refund for the Roundup products "that they would not have purchased had they known the truth." A15; *see also* A38.

Out of a $39.55 million fund, the settlement distributed roughly $16 million to uninjured third-party organizations as *cy pres*, $12 million to class members, and $10 million to the class's attorneys. A73; A186. The *cy pres* recipients are the National Consumer Law Center, the National Advertising Division of the Better Business Bureau, and the Center for Consumer Law & Economic Justice at the University of California, Berkeley. A58. The nationwide class of those who purchased Roudup within their state's statute of limitations released their consumer claims. A44-A45; A58-A59.

Class member Anna St. John timely objected. She argued, among other things, that the settlement improperly favored the third-party organizations

over class members through its *cy pres* structure. A76-A98. She also objected to the politicized nature of the *cy pres* recipients, who take positions she, and likely millions of other class members, disagree with. A93-A94; A103.

The district court approved the settlement and rejected St. John's objections. A183. Though the court observed that the "*cy pres* award in this case is large, not only in magnitude but in terms of the percentage of the settlement fund," it determined that it still may approve the settlement. A190. St. John timely appealed. A206.

The panel opinion affirmed. As for the feasibility of distributing the remaining funds to unpaid class members, the panel "d[id] not doubt that there are circumstances in which pursuing records from retailers is a reasonable and effective way to get relief to class members, especially because it might allow for direct payments to affected customers without a cumbersome claims process." Slip op. 6. It still held that the district court did not abuse its discretion, though the only evidence in the record about the feasibility of this approach was a few sentences spoken by plaintiffs' counsel at the hearing noting that the data was "imperfect" and did not include purchasers who paid with cash or purchased from smaller retailers, where the notice plan had been targeted and "revised twice in an effort to reach more consumers." *Id.* The panel did not mention Rule 23(e)(2)(C)(ii) or its objective "effectiveness" standard, or *BankAmerica*'s "economically viable" test for feasibility.

The panel also rejected St. John's argument that because class members' damages are unliquidated, they should be able to recover up to the full purchase price before a settlement distributes funds as *cy pres* to third parties, asserting that it "overstates *BankAmerica*'s holding." Slip op. 7. The panel at first recited *BankAmerica*'s restrictive test. *Id.* (quoting 775 F.3d at 1064-66). But the panel concluded *BankAmerica* "does not *require* that class-member claimants receive the full amount of unliquidated damages claimed in the complaint before *cy pres* distribution." *Id.* Instead, the district court must "make its own assessment of the damages 'that would be recoverable' by class members" before *cy pres* distribution. *Id.* "The reversible error in *BankAmerica* was not that plaintiffs had not received the full change in stock value but that the district court had not determined the measure of class members' damages and whether they had been fully compensated before granting a *cy pres* distribution." *Id.* Here, however, the panel found, the district court had conducted such an analysis and did not abuse its discretion in concluding that a payment to class members of 50% of the average weighted retail price for one product per year "fully compensated" the class members. *Id.*

Finally, the panel rejected St. John's argument that the *cy pres* distribution violated class members' First Amendment rights by compelling them to subsidize speech of organizations they might find objectionable. The panel held that the residual funds did not belong to any individual class member who had received his or her portion of the settlement fund, or to those class

members who had not received their portion, because they had failed to file a claim or opt out of the settlement. It did not reconcile this holding with *BankAmerica*'s statement to the contrary.

Argument

I. The panel's decision contradicts *BankAmerica* in several respects.

In *BankAmerica*, this Court added itself to the growing list of courts of appeals that have "criticized and severely restricted" the controversial practice of distributing settlement funds to third-party organizations as *cy pres*. *BankAmerica*, 775 F.3d at 1063 (citing cases); *see also Marek v. Lane*, 571 U.S. 1003, 1006 (2013) (Roberts, C.J., respecting the denial of certiorari) (noting "fundamental concerns surrounding the use of such remedies in class action litigation"); *Frank v. Gaos*, 139 S. Ct. 1041, 1047 (2019) (Thomas, J., dissenting) ("*cy pres* payments are not a form of relief to the absent class members and should not be treated as such").

The panel decision conflicts with and misinterprets *BankAmerica*'s tests for when settlements may use *cy pres*. *Cy pres* must remain a last resort, with a presumption in favor of distributing class funds to class members as the default. Settlements—like the one here—that flout this principle are "void *ab initio*." 775 F.3d at 1066. Following section 3.07 of the American Law Institute's *Principles of Aggregate Litigation*, *BankAmerica* permits *cy pres* distribution "*only* when it is not feasible to make further distributions to class

members except where an additional distribution would provide a windfall to class members with *liquidated*-damages claims that were 100 percent satisfied by the initial distribution." *Id.* at 1064 (cleaned up; emphasis kept). In other words, if there are any feasible ways to distribute funds to class members and those payments do not exceed 100 percent of liquidated-damages claims, *cy pres* is "judicially impermissible appropriation." *Id.* at 1065. If it is "speculative" whether class members that have been fully compensated, or if it is "difficult and costly" to make additional distributions, the settling parties have not borne their burden to prove that resorting to *cy pres* is necessary. *BankAmerica* found *cy pres* so offensive that it asked the district court to consider whether to reduce fees because "counsel has not met its responsibility to seek an award that adequately prioritizes direct benefit to the class." *Id.* at 1068.

Although the panel purports to apply *BankAmerica*, the opinion flouts the limitations *BankAmerica* stated and instead rewrites its tests to affirm *cy pres* distribution of as much as $16 million (40% of the $39.55 million fund) to non-party non-profits.

First, the panel unduly narrows *BankAmerica*'s test for feasibility of further distributions to non-claiming class members. The district court determined that there were no "feasible or cost-effective" means of providing recovery to the more than 97% of the class that will receive no recovery, A191, based on an oral representation from plaintiffs' counsel at the fairness hearing

that the available data was "imperfect" and less effective than the notice campaign.

But this falls short of *BankAmerica*, which established bright-line rules to determine when further payments to class members are infeasible:

- A finding that further distributions to the class would be "costly or difficult" does not justify *cy pres*. 775 F.3d at 1065.
- Rather, the inquiry "***must*** be based primarily on whether the amounts are too small to make individual distributions economically viable." *Id.* (quotation omitted; emphasis kept).

Neither the district court nor the panel applied this feasibility test. The panel ignored it entirely—failing to examine whether the amounts remaining after the expense of obtaining additional customer data would be "too small to make individual distributions economically viable." *Id.* Yet the record evidence establishes that the cost of gathering information would have allowed plenty of remaining funds for distribution to class members. At the fairness hearing Monsanto relayed a cost estimate of between $300,000 and $600,000 for supplemental outreach to retailers. A143. That is only 2-4% of the $16 million residual; individual distributions would not be uneconomic.

Furthermore, St. John presented unrebutted evidence demonstrating that the settling parties could reach out to big-box retailers—and, if necessary, subpoena them—to obtain class-member purchase information, and then make direct distributions to class members. St. John detailed how many consumer

class actions use this process to identify and provide relief to class members. *See* A91 (citing, *e.g.*, Declaration of Scott A. Kamber, *In re McCormick & Co., Inc. Pepper Prods. Mktg. & Sales Pracs. Litig.*, No. 15-mc-01825, Dkt. 237-1 at 4 (D.D.C. May 20, 2020) (subpoenaing Target and Safeway "yielded extensive customer data that appears likely to yield electronic cash distributions to a substantial number of Class Members who did not file claims")); *see also* Opening Br. 29-30 (citing other cases).

Certainly, a supplemental outreach program will rarely capture all the millions of class members who did not submit a claim. But *BankAmerica* doesn't require a 100% effective process: the Eighth-Circuit-ordered secondary distribution did not pay the entire *BankAmerica* class. 775 F.3d at 1065. Rather, it's better to pay some class members instead of none—thus *BankAmerica*'s focus on the economic viability of further distributions rather than on whether it's possible to track down every class member.

By failing to consider the empirical precedent and instead affirming a *cy pres* solution despite a lack of "further discussion in the record of St. John's proposed approach," the panel's decision conflicts with *BankAmerica*'s feasible-means-feasible approach. Slip op. 6.

Second, the panel rewrote *BankAmerica*'s "windfall" test. The district court held that any additional recovery for existing claimants would constitute a legal windfall. A192-A195. But under *BankAmerica*, there would be no windfall from additional distributions because the settlement does not pay

claimants the full measure of alleged, *unliquidated* damages. *BankAmerica* stated its rule unequivocally:

- "A *cy pres* distribution to a third party of unclaimed settlement funds is permissible ***only*** when it is not feasible to make further distributions to class members except where an additional distribution would provide a windfall to class members with ***liquidated***-damages claims that were 100 percent satisfied by the initial distribution." 775 F.3d at 1064 (cleaned up; emphasis kept).
- "A *cy pres* distribution is not authorized by declaring that all class members submitting claims have been satisfied in full." *Id.* at 1065 (cleaned up).
- "It is not true that class members with unliquidated damage claims in the underlying litigation are 'fully compensated' by payment of the amounts allocated to their claims in the settlement." *Id.*

The panel's opinion conflicts with each of *BankAmerica*'s commands. Yet, as the chart on the next page shows, the only material differences in the underlying cases cut against *cy pres* here:

	BankAmerica	*Jones*
Amount of *cy pres*	~$2.4 million	$14.4 to $16 million
Settlement fund size	$490 million	$39.55 million
Amount distributed to class	Almost $400 million	$11.7 to $13.3 million
Type of damages	Unliquidated (Exchange Act)	Unliquidated (State consumer laws)
Damages sought in complaint	$5.87/share drop	Full purchase price
Amount paid in claims process	$0.49/share	Half of average retail price, capped at one product per year if without receipt
Number of class members	not in record	~10 million
Number of claimants	not in record	~242,000
Percentage of class unpaid	not in record	over 97%

To begin with, both here and in *BankAmerica*, class members' claims are not liquidated-damages claims, as they are disputed, rather than determined or fixed by express contract or law. They are thus by definition "unliquidated." *Brink's, Inc. v. Hoyt*, 179 F.2d 355, 359 (8th Cir. 1950); "Unliquidated Damages," *Black's Law Dictionary* (11th ed. 2019).

The measure of damages plaintiffs' complaint sought establishes this: "compensation… equal to *the amount of money they paid for Roundup Products that they would not have purchased had they known the truth*, or in the alternative, the amount of money they paid based on the false statement." A15 (emphasis added). They sought, among other remedies, "a constructive trust upon all monies received by Defendants" and "[a]n order awarding

restitution, disgorgement, punitive damages, and/or monetary damages in an amount to be determined at trial." A38.

The panel silently overruled *BankAmerica*'s instruction that a *cy pres* distribution is not authorized simply "by declaring" that class members submitting claims have been satisfied in full through payment of their allocated settlement amount. The panel decided that *BankAmerica* "does not *require*" that class member claimants receive the full amount of their claimed unliquidated damages; instead, the district court must "make its own assessment" of the recoverable damages. But this holding contradicts *BankAmerica*'s admonition that courts should not simply "declar[e]" that claiming class members have been satisfied in full.

That the parties presented expert damages calculations to the court does not establish that those class members were "fully compensated" when the complaint sought materially higher recovery. Slip. op. 7. As settlement nears, there is a joint incentive for the settling parties to undersell the quantum of the potential claim, and make the settlement appear more favorable than it is. A non-frivolous adversarial complaint is the proper yardstick for use in determining whether there is full compensation. *See In re Bluetooth Headset Prods. Liab. Litig.*, 654 F.3d 935, 945 n.8 (9th Cir. 2011); *In re GMC Pick-Up Truck Litig.*, 55 F.3d 768, 810 (3d Cir. 1995).

In *BankAmerica*, for example, the damages depended on figuring out the "causal connection between defendants' alleged misdeeds and the $5.87 per

share drop." *In re BankAmerica Corp. Sec. Litig.*, 210 F.R.D. 694, 701 (E.D. Mo. 2002). Yet it was that *maximum* that *BankAmerica* pegged, emphasizing that recovery was "only a percentage of the damages that [plaintiffs] sought." 775 F.3d at 1066. There is no legal difference between *BankAmerica* and this case where the plaintiffs sought full refunds of the purchase price and obtained only half of that for claiming class members (and nothing for 97% of the class).

Not just the complaint, but aspects of the settlement itself recognize that full refund is a legitimate measure of relief. The settlement class definition and claims matrix exclude "any person who received a full refund" from Monsanto; there is no such exclusion for partial refunds, and no evidence that Monsanto tried to haggle with dissatisfied customers whom it gave refunds. A44; A54. As in *BankAmerica*, the settlement does not purport to resolve liability questions, much less the proper measure of damages. A43. The district court's conclusion is what *BankAmerica* called a "speculative" "notion" of full compensation. 775 F.3d at 1066.

The panel's approach conflicts with *BankAmerica*'s emphatic holding limiting the windfall exception to cases involving liquidated damages or amounts greater than alleged in the complaint. Perhaps the Roundup consumer-fraud complaint is platonically meritless (on June 21, the Supreme Court denied *certiorari* in *Monsanto Co. v. Hardeman*, No. 21-241, where Monsanto sought federal preemption of Roundup labeling claims) and a peppercorn would provide "complete relief" to the class. But if Monsanto

overpaid to compromise the case and settle, why should that overage go to unrelated third parties instead of the class? The panel's rule would allow settling parties to collude to assert claims are worthless, and then funnel an entire settlement to *cy pres*.[1]

Third, one reason *cy pres* is problematic is because it creates incentives for class attorneys to prefer their favorite causes over their fiduciary duty to maximize recovery to anonymous absent class members. Jeremy Kidd & Chas Whitehead, *Saving Class Members from Counsel*, 58 San Diego L. Rev. 579, 610 (2021). A non-profit will hold a ceremony with an oversized seven-digit check celebrating the attorneys; a class member receiving a few dollars probably won't send as much as a Christmas card. This conflict is exacerbated here, where the *cy pres* recipients were left-leaning activist groups who advocate for political positions that St. John—and likely millions of other class members—find objectionable. A93-A94; A103. In rejecting St. John's objection that the settlement approval order violated the First Amendment by compelling class members to subsidize third-party advocacy groups, the panel focused on the residual nature of the *cy pres*. The funds, it said, "do not belong to any individual class member who has received his or her portion of the

[1] And the claim for a full refund was not meritless. For example, a full refund measure of damages is available in California not only where the product is worthless, but also where the plaintiff alleges "she would not have purchased [the product], despite its benefits, had it been marketed accurately." *Krueger v. Wyeth, Inc.*, 396 F. Supp. 3d 931, 952 (S.D. Cal. 2019).

settlement fund." Slip op. 8. Leave aside that those millions do not belong to University of California, Berkeley (and its nearly-$3 billion endowment) either. The panel's analysis contradicts the spirit and text of *BankAmerica*, which, quoting *Klier*, holds that "settlement funds are the property of the class." 775 F.3d at 1064. Upholding a settlement that favors beneficiaries who work against class members' interests over the unpaid absent class members themselves on grounds that those class members have no rights to the fund not just contradicts *BankAmerica*, but adds insult to financial injury.

Rehearing *en banc* is necessary to reconcile this Court's precedent given the several conflicts between the panel's decision and *BankAmerica*.

II. Panel rehearing is necessary because the panel failed to address Rule 23(e)(2)(C)(ii).

Rehearing is also necessary because the panel opinion ignored St. John's arguments about Rule 23(e)(2)(C)(ii). Even if *BankAmerica* somehow permitted *cy pres* in a case like this one, the new Rule 23(e)(2)(C)(ii) limits a court's authority to approve a settlement with *cy pres*. The 2018 amendments to Rule 23 added, among other things, a requirement that courts consider "the effectiveness of any proposed method of distributing relief to the class." Fed. R. Civ. P. 23(e)(2)(C)(ii). St. John raised the settlement's failure to meet this objective standard.

Rule 23(e)(2)(C)(ii) means that a class-action settlement must favor class recovery ahead of *cy pres* relief. Additional class recovery was feasible by either

increasing the claims rate by allowing additional discovery about the class members' identities. Even if, as the district court complained, such discovery and direct distribution wouldn't have compensated *every* class member, a settlement that exhausts the settlement fund by distributing to 7% of the class is by definition more effective than one with a sub-3% claims rate. It was legal error for the district court not to consider the effectiveness of distributing relief to the class and instead to affirm the distribution of absent class members' funds to controversial third-party organizations. The panel opinion, without mentioning Rule 23(e)(2)(C)(ii), makes it a nullity. A settlement that leaves over 97% of the class uncompensated while paying 40% of the settlement fund to unrelated third parties flunks "effectiveness" when other settlements have successfully directly distributed smaller amounts without resorting to *cy pres*.

Rehearing is necessary for the panel to consider these issues.

Conclusion

The Court should grant rehearing *en banc* or panel rehearing.

Dated: July 13, 2022

Respectfully submitted,

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Dated: July 13, 2022

Respectfully submitted,

/s/ Theodore H. Frank
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Certificate of Service

I hereby certify that on July 13, 2022, I electronically filed this brief with the Clerk of the Court for the United States Court of Appeals for the Eighth Circuit by using the CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the CM/ECF system.

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