No. 21-2292

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

Lisa Jones; Horacio Torres Bonilla; Kristoffer Yee
Plaintiffs-Appellees

v.

Monsanto Co.
Defendant-Appellee

Anna St. John
Objector-Appellant

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

Reply Brief of Anna St. John

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Table of Contents

Table of Authorities

Cases

Constitutional Provisions

Rules and Statutes

Other Authorities

Introduction

Sixteen million dollars to *cy pres*; more than 97% of the class with no cash. In over 25,000 words of briefing, appellees omit both that *cy pres* amount and the lack of effectiveness of their method of distribution. Appellees do so because the two figures together are dispositive here. With millions of class members receiving nothing when it's viable to make payments, the Eighth Circuit simply forbids a settlement that funnels over a third of the fund to *cy pres*. *In re BankAmerica Corp. Secs. Litig.*, 775 F.3d 1060 (8th Cir. 2015). *BankAmerica* looks at the objective *results*, not the subjective motivations: did the parties distribute to *cy pres* or to the class? When it is viable to distribute to the class, *cy pres* is then "impermissible." *Id.* at 1065-66. Thus, it did not matter that the *BankAmerica* settlement had already distributed nearly all of a $490 million fund in several distributions, and that class counsel wanted to divert a $2.4 million remainder to an admirable charity. It did not matter that the *BankAmerica* district court found that "further identification of members for additional distribution would be difficult and costly." *Id.* at 1064. What mattered was that more class recovery from the settlement fund was possible.

"At least you tried" is not the rule in this Circuit. What counts in this Circuit are objective results, and this settlement flunks that test. It is thus little wonder that appellees spend dozens of pages on the red herring of whether their subjective motivations were proper. Appellees' arguments that they subjectively tried hard because of, for instance, "hundreds of millions of notice

'impressions'" (DB20)[1] are simply irrelevant. (The *BankAmerica* attorneys made several distributions before attempting *cy pres*, too. *Compare* 775 F.3d at 1062 *with* PB11; DB20.) What counts is whether more distribution was "feasible" as *BankAmerica* defines it. *Id.* at 1065. It is, and the district court here committed the same "error of law" (*id.*) that the *BankAmerica* district court did in holding that it was too difficult for the settlement administrator to do supplemental outreach to retailers so that the administrator could make direct distribution to some of the 97%+ of the class that received nothing. OB30-33. (How could a direct distribution be "duplicative" (DB36) when it never happened?) Monsanto hides the ball with subjective discussions about the value of the notice, rather than the relevant objective subpar manifestation of the distribution.

Not just the bright-line rule of *BankAmerica* is dispositive here, but also the 2018 amendments to the Federal Rules of Civil Procedure. St. John argued that Rule 23(e)(2)(C)(ii) forbids the *cy pres* here. OB17-23; OB34. Allowing settling parties to *choose* to distribute $16 million to *cy pres* rather than take the extra steps to give cash directly to class members renders the rule toothless. Plaintiffs provide no alternative interpretation of Rule 23(e)(2)(C)(ii);

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[1] OB, PB, DB, and AB refer to the opening brief, plaintiffs' brief, defendants' brief, and the attorneys' general brief respectively. "Axyz" refers to page xyz of the Appendix. "ADDxyx" refers to page xyz of the Addendum. "R. Doc." refers to docket entries in Case No. 19-cv-0102-CV-W-BP (W.D. Mo.) below.

they do not even *mention* the rule. Defendants' implicit interpretation—that only the minimum notice of Rule 23(e)(1)(B) matters—makes Rule 23(e)(2)(C)(ii) surplusage. It also directly contradicts *BankAmerica*'s holding, as well as those of other circuits, with no dispute that the notice was legally sufficient under Rule 23, but the actual results were what mattered when it came to *cy pres*.

St. John simply asks that this Court apply its precedent. *BankAmerica* requires reversal of settlement approval. On remand, the appellees have several options to get settlement money to class members. With a clear legal rule requiring appellees to do so, they will, just as happened on remand in *Pearson*, *Baby Products*, and *BankAmerica*. OB32-33; *In re Green Jacobson, P.C.*, 911 F.3d 924, 929 (8th Cir. 2018).

Argument

I. The settlement violates Rule 23(e) by favoring third-party charities over class members through its *cy pres* provision.

"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." *BankAmerica*, 775 F.3d at 1064 (cleaned up; emphasis kept). The *cy pres* distribution is not "permissible" here.

Monsanto complains of "broad-brush attacks" (DB14, DB18-21) on *cy pres*, but St. John simply provided background why courts should narrowly cabin *cy pres*—as *BankAmerica* has done. *See also BankAmerica*, 775 F.3d at 1063 (approvingly citing many cases restricting and criticizing *cy pres*). The public-policy problems and perverse incentives that *cy pres* creates shows why *cy pres* should be a last resort used only for small sums, and then only to charities that don't actively advocate ideologically charged positions opposed by class members. The demographics and political preferences of Monsanto weed-killer users are unlikely to overlap heavily (or even proportionally) with donors to UC-Berkeley's $2 billion endowment, and class counsel's *cy pres* choices suggest something other than the best interests of the class, and demonstrate why courts correctly disfavor *cy pres*. OB18-23. The result here—*$16 million* going to third parties with no adverse financial consequences to the class counsel that failed to do a direct distribution to the identifiable members of the 97+% of the class that had been paid nothing—is exactly the manifestation of the "theoretical danger[]" St. John complains of. *Of course* Monsanto is wrong that "Class Counsel's only incentive" (DB14) was to maximize cash to the settlement class. Class counsel demonstrated a revealed preference, even after St. John objected, to refuse to attempt direct distributions.[2] *Something* pushed class counsel to fight fervently for *cy pres*

[2] Monsanto complains (DB37 n.23) that direct payment to class members "would fundamentally change the nature of the Settlement Agreement." So

instead of class members, even in the face of adverse precedent and likely appeal. *Cf.* OB36-37. Even if there was not the very worst conflict of interest possible here, appellees simply ignore that they are proposing rules of decision that will ensure that courts reward such conflicts of interest in the future. A faithful application of *BankAmerica* provides bright-line rules precluding that result, and requires reversal here.

A. The district court's windfall determination contradicts *BankAmerica*.

No one disputes that this is a case of unliquidated damages. *E.g.*, PB15.

Thus, as St. John demonstrated in her opening brief, there should be no dispute that the district court erred in applying *BankAmerica*. OB23-29. The district court believed that *BankAmerica*'s fundamental precepts do not apply here because "the Eighth Circuit had no reason to address cases of unliquidated damages." A193; R. Doc. 83, at 11; *accord* PB13 n.4. But *BankAmerica* was expressly a case about "unliquidated damage claims." 775 F.3d at 1065. The district court's refusal to apply *BankAmerica* was based on an erroneous premise, and thus reversible error. The *BankAmerica* instruction

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perhaps it would prefer to continue litigating rather than negotiate to have the settlement fund go to their customers. If so, this complaint serves to refute their argument about class counsel's incentives. If Monsanto would prefer to pay $16 million in *cy pres* to (for example) another $8 million in cash payments to class members, that alone creates a perverse incentive for class counsel to prefer *cy pres*, because the larger number putatively justifies a higher fee request.

emphasized the word "liquidated" precisely because it was holding there was not an exception for unliquidated damages. The appellees suggest no alternative reasoning for *BankAmerica*'s use of emphasis.

The short *cy pres* analysis in *Rawa v. Monsanto Co.* (PB14-15; DB28) never mentions *BankAmerica* or Rule 23(e). 934 F.3d 862, 871 (8th Cir. 2019). One thus cannot think *Rawa* to have interpreted the case or the rule. An issue not "squarely addressed" "is not binding precedent." *United States v. Norris*, 486 F.3d 1045, 1054 (8th Cir. 2007) (*en banc*) (Colloton, J., concurring) (quoting cases).[3] *Rawa* certainly doesn't supersede *BankAmerica*: when two panel opinions conflict, the earlier controls. *Mader v. United States*, 654 F.3d 794, 800

[3] The Eighth Circuit cases Monsanto cites (DB27) are similarly inapplicable. *Powell v. Georgia-Pac. Corp.*, 119 F.3d 703, 706 (8th Cir. 1997), had nothing to do with windfalls, but the feasibility of distributions a decade after the initial distribution. *In re Airline Ticket Commission Antitrust Litigation* reversed a *cy pres* proposal, and instructed the parties to distribute residual funds to other travel agencies affected by the wrongful conduct but not geographically part of the travel agency class. 307 F.3d 679 (8th Cir. 2002). It did not consider the possibility of additional class payments or the concept of windfall.

Plaintiffs cite (PB15-16) various district-court interpretations of *BankAmerica*, but even those generally don't support the settlement here. For example, in *Hashw v. Dep't Stores Nat'l Bank*, the parties structured the settlement to provide *pro rata* distributions of the $12.5 million fund, and then to repeatedly redistribute the residual from uncashed checks again *pro rata*, until individual payments would drop below three dollars. 182 F. Supp. 3d 935, 941, 948 (D. Minn. 2016).

(8th Cir. 2011) (*en banc*). *Rawa* does appellees no good—and it is unseemly for class counsel to be arguing that their clients should receive less.

But even if *BankAmerica* does not mean what it says and there is a "windfall" rule for unliquidated damages cases, other *BankAmerica* holdings demonstrate that there is no windfall here. "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." 775 F.3d at 1065 (cleaned up). Rather, *BankAmerica*, like St. John here (OB24-26), looked to the allegations of the complaint to determine whether the settlement fully compensated claiming class members. *Id.* at 1066. Here, all claims survived a motion to dismiss (R. Doc. 41), and no one intimates that plaintiffs' pleadings were frivolous. Thus, *BankAmerica* forbids approving a settlement that privileges *cy pres* over additional class recovery short of the complaint's demands.

A settlement is a compromise. So Monsanto is wrong when it argues for rejecting looking to the amount demanded the complaint because "Losses are established through discovery and litigation; courts do not presume they are correctly quantified in the initial complaint." DB33. Yet Monsanto "denies any and all liability" and is not even conceding that a single plaintiff is entitled to a single penny of damages. A43, 49; R. Doc. 58-1, at 3, 9. For purposes of *cy pres*, the parties' agreement cannot control. As Monsanto recognizes, *BankAmerica* spoke of the class recovering "only a percentage of the damages *that they*

sought." DB29 (quoting 775 F.3d at 1066) (adding emphasis). Where do plaintiffs "seek" damages? In a complaint.

Appellees fruitlessly rely on out-of-circuit cases that contradict *BankAmerica* and predate the 2018 amendments. *E.g.*, PB17-18; DB24. For example, *In re Lupron Marketing & Sales Practices Litigation* relies on an after-the-fact "reasonable estimate" of full damages, rather than the complaint. 677 F.3d 21, 34 (1st Cir. 2012). *Compare also id.* at 32 (time and expense sufficient justification to cease distributions) *with BankAmerica*, 775 F.3d at 1065 (rejecting this argument). (In any event, the *Lupron* appellants had waived any Rule 23(e) challenge. 677 F.3d at 31.) Yes: the First and Ninth Circuits have looser *cy pres* rules than this Circuit and the Third, Fifth, and Seventh Circuits. Appellees are welcome to seek *certiorari* to resolve the circuit split (*en banc* review could not do so) but *BankAmerica* is binding here today.

Contrary to Monsanto's assertion (DB33-34), St. John is not contending that courts can only use a complaint to determine "claim value." For example, experts can help a court adjudicate the adequacy of a settlement fund's total size, and a court should consider litigation risk in that Rule 23(e)(2)(C)(i) analysis. But, per *BankAmerica*, the complaint resolves the determination of *windfall threshold* for purposes of resorting to *cy pres*. Perhaps plaintiffs' claims are entirely meritless once fully litigated, and a single peppercorn divided a million ways would overcompensate the class. *Compare, cf.*, DB7 n.5

(asserting non-record "money-back satisfaction guarantee") *with In re Aqua Dots Prod. Liab. Litig.*, 654 F.3d 748, 752 (7th Cir. 2011) (Easterbrook, J.) (class certification inappropriate when plaintiffs sue "to obtain a refund that is already on offer" for concededly harmful product). That would not make the settlement money paid to class members a "windfall." Settlements are compromises, and Monsanto chose to compromise the claims here for a $39 million class settlement fund.

If Monsanto has remorse now that class members might be paid more than it thinks they should be, *BankAmerica* does not permit it to ask this Court for an adjudication of how much each claim is truly worth had the parties fully litigated the matter. Indeed, under Monsanto's argument, it is an "unfair" (DB24) windfall if class members receive more in a settlement than what they could in a platonically-ideal litigation. If that were the rule, other class members in future settlements would be able to object that claiming class members unfairly received a "windfall" and more should instead go to *cy pres*.[4] Courts correctly reject the invitation to nullify the efficiency of settlements by requiring full litigation over the amounts paid to class members as a result of

[4] This is also the natural conclusion of the Rubenstein argument Monsanto quotes. DB31 n.16. It is wrong. The difference between "another class member" and a *cy pres* beneficiary is that class counsel owes a fiduciary duty to the former and not the latter. Class counsel may not litigate "contrary to the interests" of those class members. *BankAmerica*, 775 F.3d at 1068; *accord Frank v. Gaos*, 139 S. Ct. 1041, 1047 (2019) (Thomas, J., dissenting).

compromise. Settlement approvals do not require "the type of detailed investigation that trying the case would involve." *Van Horn v. Trickey*, 840 F.2d 604, 607 (8th Cir. 1988). St. John thus declines Monsanto's invitation to litigate the irrelevant question of the platonically correct valuation of a class member's claim.[5]

If Monsanto was overgenerous, there is no reason that class members, rather than unrelated third parties, should not receive the putative excess, so long as it is not more than liquidated damages or what plaintiffs requested in a colorable complaint. So *BankAmerica* holds, requiring a clear bright-line rule rather than a subjective after-the-fact "speculati[on]" that invites a rationalization of *cy pres* and its perverse incentives. 775 F.3d at 1066. Thus, the district court erred: *BankAmerica* requires additional distributions here to claiming class members before the last resort of *cy pres*.

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[5] But to belt-and-suspender this, St. John noted that *Krueger v. Wyeth, Inc.*, 396 F. Supp. 3d 931, 952-54 (S.D. Cal. 2019), demonstrated that a full-refund theory of damages was cognizable and non-frivolous here. OB27 & n.5. *Cf. also Martin v. Cargill, Inc.*, 295 F.R.D. 380, 384 (D. Minn. 2013) (noting class plaintiffs pleaded both price premium and full refund measures of damages on their false advertising claims). Sure, there's other precedent in both directions, but neither appellee mentions *Krueger*, and have thus forfeited any argument that there isn't a colorable full-refund claim here subject to litigation risk and compromise in a settlement. And that's all that matters under *BankAmerica*, where class members seeking another distribution did not have to litigate over whether they could recover the entire $5.71/share stock loss their complaint alleged.

B. There is no record evidence that individual distributions were not economically viable. The district court's finding that further distribution to absent class members is not "feasible" is thus "error of law" under *BankAmerica*.

When it is feasible to distribute settlement funds to class members, the settling parties must do so. The district court erred as a matter of law with a stunted concept of "feasibility." OB31-32. The inquiry "***must*** be based primarily on whether the amounts are too small to make individual distributions economically viable." *BankAmerica*, 775 F.3d at 1065 (quotation omitted; emphasis kept). That further distributions to the class would be "costly or difficult" does not justify *cy pres*. *Id.* That was not the analysis the district court performed when it made its finding. A191; R. Doc. 83, at 9. This legal error alone would require remand, but the record demonstrates as a matter of law that additional payments to class members were "feasible." OB30-31.

For example, it is both feasible and common to subpoena third-party retailers for the identity of some class members, and then do a ***direct distribution*** to *identifiable* class members. Several cases have used this process, including two on remand from appellate decisions reversing settlement approvals of smaller amounts of reversionary *cy pres* than here. OB30-32.[6] The idea that *directly* distributing money to some of the more than

[6] Monsanto's claim (DB37) that parties used customer records in St. John's cited cases solely "to effect notice" is wrong. Cases like *McCormick* (OB30), *Bayer* (OB33), and *McDonough* used them for direct payments. "The

97% of class members who had not received money would be "duplicative" (DB36-39) is a *non sequitur*. Little wonder that Monsanto's brief emphasizes "notice" (which went to "likely" class members) and elides "distribution" (which went only to the tiny percentage of class members who jumped through the hoops of making a claim). A subpoena producing names and addresses of *actual* class members wouldn't be "duplicative" of a spammed email list of *likely* class members on the relevant data field: the former permits direct distribution (as happened on remand in *Baby Products*), while the latter does not.

Monsanto quibbles (DB38 n.24) with the calculation of the costs of doing a distribution as a few hundred thousand dollars, but their argument effectively concedes that the settling parties failed to meet their burden to show infeasibility. Plaintiffs' conclusory assertion (PB19) that subpoenaing retailers for customer data about purchases of black pepper tins (or glucosamine or aspirin) is "entirely different" from subpoenaing retailers for customer data about weed-killer identifies no materially relevant distinction. OB30-32.[7]

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class members identified in BRU records were not required to go through the claims process or submit any proof of purchase" but instead received checks. *McDonough v. Toys "R" Us, Inc.*, 80 F. Supp. 3d 626, 636 (E.D. Pa. 2015).

[7] St. John did not cite pending settlements for "legal analysis" (PB18), but as concrete examples of feasible—indeed, run-of-the-mill—*pro rata* distribution. OB28-29. *See also Yamagata v. Reckitt Benckiser LLC,* No. 3:16-cv-03529-VC (N.D. Cal.), *terms of settlement available* at https://www.movefreeadvancedsettlement.com/ (directing supplemental notice if fund is not exhausted after tripling, and then full *pro rata* if still not

Rule 23(e)(2)(C)(ii) also requires additional distribution. OB17-23; OB34. Like *BankAmerica*, Rule 23(e)(2)(C)(ii) is an *objective* standard, requiring a Court to look at the "effectiveness" of the method of distributing relief, not the *subjective* "fairness" of the parties' notice effort. *Contra* DB37 n.23. Neither appellee pretends that the claims process was "effective." Allowing settling parties to *choose* to distribute $16 million to *cy pres* rather than take the extra steps to give cash directly to class members renders the rule toothless.

Plaintiffs provide no alternative interpretation of Rule 23(e)(2)(C)(ii); they do not even mention the rule. Defendants' implicit interpretation—that only the minimum "reasonable" notice of Rule 23(e)(1)(B) matters (DB15-16, DB36-39)—certainly contradicts the last-resort rule of *BankAmerica*: courts simply do not have the "power to confiscate the settlement proceeds." 775 F.3d at 1065. Rather, the inquiry "*must* be based primarily on whether the amounts involved are too small to make individual distributions viable," not on whether further distributions are merely "costly and difficult." *Id.* (internal quotations omitted). The "costly and difficult" language in *BankAmerica* demonstrates

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exhausted); *Clark v. S.C. Johnson & Son, Inc.*, Case No. RG 20067897 (Cal. Sup. Ct. Alameda Cty), *terms of settlement available at* https://www.clarkclasssettlement.com/ (full *pro rata* enhancement of consumer fraud claims); *Hawkins v. The Kroger Company,* Case No. 3:15-cv-02320-JM-AHG (S.D. Cal.), *terms of settlement available at* https://kbclawsuit.com/ (same). Such examples also belie Monsanto's claim (DB 21) that "disallowing *cy pres* would meaningfully increase the difficulty of settling" "large volume" low-value consumer claims.

that the Eighth Circuit requires more than the minimal amount of effort that satisfies the Due Process Clause.

Monsanto expresses disbelief: how can Eighth Circuit law possibly expect settling parties to do *everything* that's "worthwhile" to distribute money to the class? DB39. Monsanto's argument, without saying so, is that *BankAmerica* is wrong, because that is what *BankAmerica* requires. The settling parties *must* make any viable individual distribution. 775 F.3d at 1065.

Fear of "fraud" (DB20) is no reason to favor third parties over the class or artificially cap recovery. *Baby Prods.*, 708 F.3d at 175. If Monsanto is aware of class-action fraud, it should use audit procedures and refer fraudsters for prosecution. The only class-action-settlement fraud criminal prosecution this century that St. John's counsel is aware of involved a settlement administrator employee that stole $5.87 million from a fund. *Cf. Oetting v. Norton*, 795 F.3d 886, 888 (8th Cir. 2015) (collateral civil litigation). (In contrast, there have been multiple criminal prosecutions and judicial disciplinary investigations over *cy pres*-related abuse. *E.g., United States v. Cunningham*, 679 F.3d 355, 367-69 (6th Cir. 2012); *Ky. Bar Ass'n v. Bamberger*, 354 S.W.3d 576, 579 & n.6 (Ky. 2011); Chuck Williams & Jim Mustian, *Judge Doug Pullen announces retirement after meeting with JQC director, investigator*, COLUMBUS LEDGER-ENQUIRER (Aug. 22, 2011).) If Monsanto were concerned about fraud, it would have insisted on direct distribution to class members verified by subpoena, rather than relying solely on a claims process.

C. The Eighth Circuit requires *cy pres* to reflect the interests of *all* class members, so St. John has standing to challenge its distribution and the identity of the recipients.

BankAmerica has already rejected the standing argument appellees make: "non-named class members who have timely objected may appeal a district court's order of a *cy pres* distribution of settlement funds." 775 F.3d at 1062 n.1. Moreover, under Eighth Circuit precedent, *cy pres* must reflect "the interests of class members." *Airline Ticket*, 307 F.3d at 682. Appellees cannot assert (PB22; DB48-49) that they have gerrymandered the *cy pres* so that only non-claiming class members have an interest in it. That does not stand up to scrutiny under Eighth Circuit law or common sense. Surely St. John could object if a settlement provides her financial compensation but requires injunctive relief of the defendant that would harm her. St. John has the same equitable interest in the *cy pres* as every other class member, and thus has an interest that it not go to an organization that takes political stances she opposes. *Cf. also* Section II below.

There is also no legitimate question that St. John has standing to assert that she has not been "fully compensated" under *BankAmerica*: the contrary argument confuses merits with standing. (But St. John is correct on the merits, too, *see* Section I.A above.) As in *Rawa*, St. John's challenge to the settlement's *cy pres* provision and fee award, "if successful would yield a higher recovery for class members." 934 F.3d at 868.

This ends the inquiry. But St. John also has standing for another independent reason. Rule 23(e)(5)(A), established in the 2018 amendments postdating *Huyer v. Van de Voorde*, 847 F.3d 983 (8th Cir. 2017), permits class members to object on behalf of "the entire class." *Cf. Pearson v. Target Corp.*, 968 F.3d 827, 834 (7th Cir. 2020) (objector "temporarily takes control of the common rights of all the class members" (cleaned up)); *cf. also Campbell-Ewald Co. v. Gomez*, 577 U.S. 153 (2016) (unaccepted offer to fully compensate lead plaintiff does not moot claims on behalf of class as a whole). Settling parties cannot evade Rule 23(e) scrutiny by offering to compensate a single objector objecting on behalf of the entire class.[8]

[8] *Huyer* reads *Devlin*'s express statement that absent-class-member appeals do "not implicate the jurisdiction of the courts under Article III" only to mean that the Supreme Court did not address standing. 847 F.3d at 986 (quoting *Devlin v. Scardelletti*, 536 U.S. 1, 6 (2002)). The very next sentence of *Devlin* belies this reasoning; the Supreme Court consciously addressed standing: "As a member of the … class, petitioner has an interest in the settlement that creates a 'case or controversy' sufficient to satisfy the constitutional requirements of injury, causation and redressability." *Devlin*, 536 U.S. at 6-7. Justice Alito, writing in a case respecting denial of *certiorari*, notes that Article III is satisfied by the underlying controversy between the plaintiff class and the defendant. *Martin v. Blessing*, 134 S. Ct. 402, 404 (2013). Under *Rawa* and *Airline Ticket*, *Huyer* does not preclude standing here, but given the contradiction between *Huyer* and *Devlin*, the Court may wish to view the 2018 amendment as an opportunity to cabin *Huyer* to the scenario of an objection to class certification subclassing.

BankAmerica holds that St. John has standing. 775 F.3d at 1062 n.1. No appellate court has applied Article III standing grounds to forbid a class-member objector to challenge a *cy pres* distribution—even in circuits that are unduly permissive of *cy pres*. Appellees' logic would mean that a class member who timely and informedly objected would never have standing to object to the class notice. But that is not the law in this Circuit, or any other. *E.g.*, *In re Uponor, Inc.*, 716 F.3d 1057, 1065 (8th Cir. 2013) (entertaining notice objection on appeal); *Petrovic v. AMOCO Oil Co.*, 200 F.3d 1140, 1152-1153 (8th Cir. 1999) (same). There is no reason to disregard *BankAmerica* or *Rawa* on this question, and the Court should reject the invitation to invent a circuit split that would make $16 million *cy pres* awards unreviewable. *Cf. also In re Subway Footlong Sandwich Mktg. Litig.*, 869 F.3d 551, 555 (7th Cir. 2017); *Cobell v. Salazar*, 679 F.3d 909, 919 (D.C. Cir. 2012); *Union Asset Mgmt. v. Dell, Inc.*, 669 F.3d 632, 638 (5th Cir. 2012).

Permitting an objector to raise appellate issues about the broader interests of the class in the hopes of reversing a class-action judgment is not unique to settlement objectors. For example, *Phillips Petroleum v. Shutts* permitted a defendant to raise the due-process rights of absent class members even though it "d[id] not possess standing *jus tertii*" and was "assert[ing] the rights of its adversary, the plaintiff class." 472 U.S. 797, 803-06 (1985). The defendant's interest in vacating the judgment was sufficient grounds to accord it prudential standing to assert the interests of the absent class members.

St. John has standing under each of *BankAmerica*, *Huyer*, *Rawa*, *Devlin*, and Rule 23(e)(5)(A).

II. The settlement approval order violates the First Amendment.

St. John explained why the district court erred in holding there was no state action. OB37-38; *accord* AB11-13. There is a qualitative difference between enforcing a voluntary bilateral agreement (as in the cases appellees cite) and imposing that agreement through court action upon non-consenting absent class members. A court's approval of a class settlement is not an "enforcement of terms" (DB42-43) of a private agreement. Yes, for purposes of review, a settlement agreement is treated like a private contract, but unlike a bilateral contract, it has no force at all on absent class members until the Court ratifies it. That judicial approval imposes the settlement terms upon absent class members and effects changes in legal relationships, implicating constitutional rights.[9]

State action doesn't require a government establishing the agreement's terms or putting its "imprimatur" (DB44) on the agreement. It only requires

[9] *In re Motor Fuel Temperature Sales Practices Litig.*, 872 F.3d 1094 (10th Cir. 2017), rejected an objector's argument that *Shelly v. Kraemer* demonstrated state action; St. John does not make that argument here. *Motor Fuel* did not reach or rule upon the argument St. John raises here about the difference between bilateral agreements and court orders affecting absent class members. *Compare* 872 F.3d at 1114 n.7 *and* OB38-39 *with* DB41 n.28.

"conduct" "fairly attributable to the state." *Wickersham v. City of Columbia*, 481 F.3d 591, 597 (8th Cir. 2007) (quoting *Montano v. Hedgepeth*, 120 F.3d 844, 848-49 (8th Cir. 1997)). It is only the district court's certification of the class and approval of the settlement that can deprive absentees of constitutional rights. Before that time, the parties' settlement agreement does not affect absentees.

The settlement funds "belong solely to the class members." *Klier v. Elf Atochem N. Am., Inc.*, 658 F.3d 468, 474 (5th Cir. 2011). Thus, Monsanto's sleight-of-hand (DB45-46) that it, not the class, is paying the objectionable political activists is unavailing.

Shutts's endorsement of opt-out procedures satisfying due process (DB47-48) does not apply to the First Amendment issue St. John raises. Collective bargaining laws similarly satisfy due process when they allow union representatives to negotiate contract rights on behalf of the membership, just as class representatives and class attorneys may represent class members' litigation interests. But that does not give union representatives the power to compel speech, even if there is an opt-out procedure available. *Janus v. AFSCME, Council 31*, 138 S. Ct. 2448, 2464 (2018).

Monsanto's argument about "Rule 23(b)(3)'s basic premise" proves too much. Class representatives, for example, cannot consent to class members receiving unwanted medical treatment (or being enjoined from wanted medical treatment) or to a restriction on gun ownership or a bar on interracial marriages. *Contra* DB47. Such limits on class representative authority on

constitutional rights apply to the First Amendment implications of assuming consent to class-member donation of funds to third-party advocacy groups. Plaintiffs condemn (PB26) this argument as "novel." Novel just means this is a question of first impression about applying recent Supreme Court precedent to seldom litigated Rule 23 issues, not that St. John is wrong. She isn't.

Monsanto complains (DB47) that seeking the consent that the First Amendment requires would make Rule 23 *cy pres* settlements difficult. But that cuts in a different direction than it thinks. That *cy pres* settlements have dramatic implications for the First Amendment rights of absentees and require absentees' consent signals exactly how irregular the terms are of a settlement that sends money to an advocacy group. But, of course, this Court can apply the canon of constitutional avoidance and sidestep the novel constitutional question simply by following *BankAmerica* and by interpreting Rule 23(e)(2)(C)(ii) to forbid a settlement that refuses to distribute $16 million of *cy pres* to millions of uncompensated class members.

III. The $9.88 million fee award is excessive given the actual benefit conferred on the class and the attorneys' time spent on the litigation.

Is a typical class member who purchases Roundup weed-killer indifferent between $16 million going to class members and $16 million going to a left-leaning activist group and UC-Berkeley? We think the answer to that is obvious, as do other courts that address the issue. OB43-45 (citing cases). (Monsanto implies the same conclusion. *See* p.5 n.2 above.) The legal rule this

Court establishes should appropriately encourage class counsels to favor their class clients rather than perversely incentivize class counsels to prefer the self-serving path of class settlements that pay activists like NCLC that will later litigate for class counsels' self-interest. *Pearson* and Justice Thomas's *Frank v. Gaos* opinion have the correct rule: any *cy pres* is not a class benefit. OB42-44. Even valuing *cy pres* at a 50% discount, as the district court suggested in the alternative (ADD18; R. Doc. 83, at 18), is not enough to create the appropriate incentives. The ratio of $10 million in fees to $12 million cash benefit to the class is unreasonable, and even more so when the $16 million going to the *cy pres* recipients provides at least as much a benefit to the class counsel as the class.

Class counsel in *Pearson* made the same argument about *Boeing v. Van Gemert* that plaintiffs do here (PB33), and *Pearson* correctly rejected it. 772 F.3d at 782. *Boeing* was a case about a *litigated judgment* fund, and never applied to a compromised *settlement*. *Id.* Paying counsel on the amount made available pushes class counsel to agree to throttle the claims process and actual recovery. *Id.* Plaintiffs pooh-pooh this as "a single 2014 decision" (PB33), but, aside from the fact plaintiffs provide no *reasoning* why *Pearson* misread *Boeing*, other courts have adopted the same principle: in the settlement context. It is the actual payment to class members that matters, not the hypothetical illusory amount "made available," especially after Rule 23(e)(2)(C) made this explicit. *E.g.*, *Briseño v. Henderson*, 998 F.3d 1014, 1023-26 (9th Cir. 2021).

Plaintiffs assert (PB42) that *Rawa* affirmed approval of "fees that included work" on a predecessor case, but *Rawa* pronounces no judgment on that issue. "[C]ases cannot be read as foreclosing an argument that they never dealt with." *Waters v. Churchill*, 511 U.S. 661, 678 (1994).

It is telling that plaintiffs' defense of their fees resorts to citing a 2010 district-court case to accuse St. John of being "long on ideology and short on law." PB35. CCAF has since won *BankAmerica*, and landmark cases like *Pearson* and *Briseño* adopting the argument that *Lonardo* sneered at. CCAF's "ideology"—the common-sense principle that the primary beneficiary of Rule 23 settlements should be class members rather than attorneys or third parties—may have been novel in 2010, but it's enshrined in Rule 23(e)(2)(C) and this Court's precedent now.[10] St. John asks the Court to apply that law here.

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[10] Civility is a "bedrock principle" in this Court. *Wescott Agri-Prods., Inc. v. Sterling State Bank, Inc.*, 682 F.3d 1091, 1096 (8th Cir. 2012). Unfortunately, the *Lonardo* quote plaintiffs use is not the only baseless *ad hominem* attack appellees make. Almost every court ignores *ad hominem* irrelevancies, and St. John would prefer to do so also and focus on the substantive issues here. Regrettably, these attacks instead force St. John to waste briefing space responding to some of them lest appellees succeed in poisoning the well and cause false characterizations to end up in the opinion.

Appellees insinuate it significant that St. John is the "sole objector." PB8-9; DB9. So what? A low number of objectors is legally meaningless. In *BankAmerica*, CCAF's client was the only objector challenging the *cy pres*. So too in *Google Cookie*. *In re Google Inc. Cookie Placement Consumer Privacy Litig.*, 934 F.3d 316 (3d Cir. 2019). It is "naïve" to assume that the lack of objections or opt-outs shows "approval" of the proposed settlement. *Redman*

v. RadioShack Corp., 768 F.3d 622, 628 (7th Cir. 2014). "[R]ather it shows oversight, indifference, rejection, or transaction costs." *Id.* at 628. No for-profit attorney could afford to prosecute a good-faith objection here—it required hiring a local counsel and submitting 92 pages of filings for St. John in the district court, and now an appeal. "At the end of the day, it is not the number of Objectors but the quality of their objections that should guide the court's review." *Jones v. Singing River Health Services Foundation*, 865 F.3d 285, 300 (5th Cir. 2017).

St. John's purchases' timing within the class period are legally irrelevant. There is one single class period, and the court certifying the class necessarily held that class members are similarly situated. But Plaintiffs incorrectly suggest that St. John only bought Roundup disreputably late. *E.g.*, PB4, PB25. The record is undisputed that St. John purchased qualifying products periodically throughout the entire class period. A102; R. Doc. 71-1, at 2.

Monsanto's personal attack (DB9 n.6) also misstates the facts about St. John and her employer; she is the President of HLLI and it does not have a "sole purpose" of class-action objections. *E.g.*, Federalist Soc., *Contributors: Anna St. John*, available at https://fedsoc.org/contributors/anna-st-john (speaking on panel about separation of powers); *CEI v. FCC*, 970 F.3d 372 (D.C. Cir. 2020); *Greenberg v. Haggerty*, 491 F. Supp. 3d 12 (E.D. Pa. 2020). And what would be wrong with St. John leading a public-interest firm litigating for consumers?

The smear extends to appellees' use of the phrase "professional objector" (PB8-9; DB9), a legal term of art falsely implying that CCAF engages in extortionate tactics to obtain fees for baseless objections. A119; R. Doc. 71-2, at 5 (citing authorities). CCAF does not receive fees for "pursuing" (DB9 n.6) objections. Its only fees are those a court awards for *winning* objections, a low-single-digit percentage of the hundreds of millions of dollars of augmented benefit class members have received. If CCAF does not create material pecuniary benefit for class members, it does not ask for or receive fees. There

Conclusion

This Court should reverse settlement approval. St. John also asks for a bright-line holding adopting the *Pearson*/Justice Thomas rule on *cy pres* and attorneys' fees to provide the proper incentive for future class counsels to avoid settlements like this one in the first place.

Dated: September 22, 2021

Respectfully submitted,

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is no possible financial motive to bring anything besides a meritorious objection that will help class members. A119; R. Doc. 71-2, at 5. Such false personal attacks are disappointing. Appellees' counsels are from reputable law firms and should be above such tactics.

Combined Certifications of Compliance

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Dated: September 22, 2021

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I hereby certify that on September 22, 2021, I electronically filed the foregoing 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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