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

Opening Brief of Anna St. John

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Summary of the Case

This is an appeal of a class-action settlement approval and award of attorneys' fees in a consumer case involving the purchase of Roundup Weed & Grass Killer. Under the parties' proposed distribution, uninjured charities will obtain roughly $16 million, class members will obtain roughly $12 million, and the class's attorneys will obtain nearly $10 million. Appellant Anna St. John objected that the settlement unlawfully favored recovery for non-class third-party *cy pres* recipients ahead of class members. St. John also objected that the attorneys' fee request was unreasonable given both the class's actual benefit and the attorneys' work on the case. But the district court overruled both objections, approving the deal and granting the fee request in full. On appeal, St. John challenges both the district court's error in approving the settlement under Fed. R. Civ. P. 23(e) and in awarding attorneys' fees under Rule 23(h).

St. John requests twenty minutes of oral argument for each side. St. John is represented by her colleagues at the non-profit Center for Class Action Fairness ("CCAF"), an experienced authority in class-action fairness issues that successfully litigated this Circuit's seminal decision on *cy pres*. *In re BankAmerica Corp. Sec. Litig.*, 775 F.3d 1060 (8th Cir. 2015). *See also Frank v. Gaos*, 139 S. Ct. 1041 (2019) (granting CCAF's petition for certiorari to consider circuit split, but vacating settlement on jurisdictional grounds). Oral argument would significantly aid the decisional process.

Corporate Disclosure Statement

Appellant Anna St. John is an individual.

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Jurisdictional Statement

The district court had jurisdiction under 28 U.S.C. § 1332(d)(2) because plaintiffs' class-action complaint alleges claims that exceed $5,000,000 exclusive of interest and costs, there are millions of class members, most of which are citizens of states other than a defendant's state of citizenship. For example, named plaintiff Lisa Jones is a citizen of Kansas, while defendant Monsanto Company is a Delaware corporation with its principal place of business in Missouri. A15-17; R. Doc. 1, at 3-5.[1]

The district court issued an Order Granting Motion for Final Approval of Class Settlement and Award of Attorneys' Fees on May 13, 2021. A183; R. Doc. 83. On May 27, 2021, the court entered an Order of Dismissal. A205; R. Doc. 84. The dismissal order likely constitutes the separate final judgment that Fed. R. Civ. P. 58 requires. *Jeffries v. United States*, 721 F.3d 1008, 1013 (8th Cir. 2013). Even if the dismissal order does not constitute a final judgment, the approval order is a final decision for purposes of 28 U.S.C. § 1291, and St. John may appeal even without a Rule 58 separate judgment. Fed. R. App. P. 4(a)(7)(A)(ii); *Sanders v. Clemco Indus.*, 862 F.2d 161, 166 (8th Cir. 1988); *see also Bankers Trust Co. v. Mallis*, 435 U.S. 381, 384 (1978).

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[1] "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.

St. John filed her Notice of Appeal on June 9, 2021, timely under Fed. R. App. P. 4(a)(1)(A). A206; R. Doc. 85. As a class member who objected at the fairness hearing, St. John has standing to appeal without the need to intervene. *Devlin v. Scardelletti*, 536 U.S. 1 (2002).

Statement of the Issues

1. *BankAmerica* holds that "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 (quoting Fifth Circuit decision and adding emphasis). "A *cy pres* distribution is not authorized by declaring…that all class members submitting claims have been satisfied in full." *Id.* at 1065 (quotation omitted). "It is not true that class members with unliquidated damages claims in the underlying litigation are 'fully compensated' by payment of the amounts allocated to their claims in the settlement." *Id.* at 1065. A finding that further distributions would be "costly and difficult" cannot justify turning to *cy pres*. *Id.*

a. Did the district court err in holding that *BankAmerica* did not speak to cases involving unliquidated damages, and thus approving a settlement that resorted to *cy pres* payments before compensating class member claimants to the full extent of damages pleaded and requested in the class complaint?

b. Did the district court err in approving a settlement that will send about $16 million to third-party organizations while over 97% of class members, who did not file a claim, receive nothing?

In re BankAmerica Corp. Secs. Litig., 775 F.3d 1060 (8th Cir. 2015)

Pearson v. NBTY, Inc., 772 F.3d 778 (7th Cir. 2014)

In re Baby Prods. Antitrust Litig., 708 F.3d 163 (3d Cir. 2013)

Klier v. Elf Atochem, N.A., Inc., 658 F.3d 468 (5th Cir. 2011)

Fed. R. Civ. P. 23(e)(2)(C)(ii)

2. "[E]xcept 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). Under the First Amendment, may a class action settlement, without the consent of the class members, donate class funds to self-described advocacy groups that advance controversial public policy positions?

Janus v. AFSCME, Council 31, 138 S. Ct. 2448 (2018)

Knox v. SEIU, Local 1000, 567 U.S. 298 (2012)

Ortiz v. Fibreboard Corp., 527 U.S. 815 (1999)

U.S. CONST. AMEND. I

3. Courts have an "affirmative duty to assure that the award of attorneys' fees is fair and proper" and tethered to class counsel's "success in obtaining value for the class." *In re Green Jacobson, P.C.*, 911 F.3d 924, 930

(8th Cir. 2018); *Galloway v. Kan. City Landsmen, LLC*, 833 F.3d 969, 975 (8th Cir. 2016).

a. Did the district court err in treating the *cy pres* portion of the fund as equivalent to cash recovery when calculating a 25% fee?

b. When conducting a lodestar crosscheck, did the district court err by allowing plaintiffs to include all time from an unsuccessful litigation in Wisconsin federal district court on behalf of a separate class? If so, is the $9.88 million fee award reasonable when it equates to more than twelve times class counsel's compensable lodestar?

In re BankAmerica Corp. Secs. Litig., 775 F.3d 1060 (8th Cir. 2015)

Pearson v. NBTY, Inc., 772 F.3d 778 (7th Cir. 2014)

ACLU v. Barnes, 168 F.3d 423 (11th Cir. 1999)

In re Cendant Corp. PRIDES Litig., 243 F.3d 722 (3d Cir. 2001)

Statement of the Case

A. Consumers sue Monsanto over representations on label of Roundup Weed & Grass Killer products.

In February 2019, three plaintiffs commenced the action below, alleging that certain Roundup weed killing products contained a false or misleading representation on the label. A13-40; R. Doc. 1, at 1-28. Monsanto represented on the back of the products that "Glyphosate [(the active ingredient in Roundup)] targets an enzyme found in plants but not people or pets." A19; R. Doc. 1, at 7. Though vertebrates do not use that enzyme, helpful bacteria in

the digestive system of vertebrates do. A18; R. Doc. 1, at 6. Thus, one finds the enzyme in people's and pets' digestive tracts.

On behalf of a putative nationwide class, plaintiffs brought claims for breach of express warranty and unjust enrichment. A36-37; R. Doc. 1, at 24-25. On behalf of Missouri, New York, and California subclasses, they brought consumer protection claims under those respective states' laws. A27-36; R. Doc. 1, at 15-24. On behalf of themselves and the putative class members they sought, among other things, "compensation…equal to the amount of money they paid for Roundup Products that they would not have purchased had they known the truth." A15; R. Doc. 1, at 3; *see also* A38; R. Doc. 1, at 26.

This was not their counsel's first attempt at pursuing similar claims. Among these earlier cases was one filed in June 2017 in the Western District of Wisconsin, captioned *Blitz v. Monsanto*, No. 3:17-cv-0043. *Blitz* alleged consumer protection claims on behalf of a nationwide putative class and six-state subclasses. Within ten months, the *Blitz* court dismissed all claims brought on behalf of the putative nationwide class. *Blitz*, Dkt. 65. The court denied class certification on the sole surviving state claims in January 2019. *Blitz*, Dkt. 117. After the Seventh Circuit denied plaintiffs' interlocutory appeal, class counsel filed the present *Jones* action on behalf of three new plaintiffs and a putative nationwide class.

Monsanto moved to dismiss the *Jones* complaint. R. Doc. 22. This time, all claims survived the motion to dismiss. R. Doc. 41. The parties immediately

entered mediation. R. Doc. 50, at 7-8. As part of this mediation, both settling parties commissioned surveys that attempt to approximate the price premium created by the allegedly false representation on the label. *Id.* at 7-8. Monsanto's survey concluded potential damages would be a maximum of 2.5% of the purchase price, and plaintiffs' concluded a maximum of 15.9%. *Id.* at 8.

B. The parties settle the claims of a nationwide class, but more money goes to *cy pres* than to class members.

In August 2019, at mediation the parties agreed in principle on a global settlement. R. Doc. 50-1, at 3. In March 2020, before any class certification, the parties moved for preliminary approval of a class-action settlement of the consumer cases. R. Docs. 49-50.

The Settlement defines the class as:

> All Persons in the United States, who, during the Class Period [(a variable period depending on the relevant state's statute of limitations, defined at A65-68)], purchased in the United States, for personal or household use and not for resale or distribution, Roundup Products in packaging with a label that contained the statement "targets an enzyme found in plants but not in people or pets" or a substantially similar statement. Any Person who received a full refund is excluded from the Class definition.

R. Doc. 50-1, at 9; A44; R. Doc. 58-1, at 4.[2]

[2] The latter citation references the updated and now operative settlement, which did not alter the class definition from the initial settlement.

Under the Settlement, Monsanto would create a fund of $39.55 million from which class members could claim a recovery. R. Doc. 50-1, at 10, 15-16; A45; R. Doc. 58-1, at 5; A50-51; R. Doc. 58-1, at 10-11. Though the precise number of class members was not known, the settlement covers about 88,925,680 units, representing $1.49 billion in retail sales of the Roundup products. R. Doc. 50-1, at 3.

With documentation class members could submit claims for a maximum standardized payment of 10% of the weighted average retail price of each product. R. Doc. 50-1, at 15-18, 21. Without documentation, class members could submit claims with a declaration but the settlement capped their claims at one unit for each year for the class period (or, for the largest products, one unit for each two years of the class period). R. Doc. 50-1, at 13-14; A56; R. Doc. 58-1, at 16. Monsanto also agreed to replace the allegedly false representation with a statement "subject to Monsanto's exclusive discretion and approval by the Environmental Protection Agency." R. Doc. 50-1, at 14; A50; R. Doc. 58-1, at 10.

Meanwhile, the settlement permitted class counsel to move, without Monsanto's opposition, for attorneys' fees and costs of 25% of the full $39.55 million fund and for class representative incentive awards of $2,500 each. R. Doc. 50-1, at 19; A54-55; R. Doc. 58-1, at 14-15. The notice and claims administrator would be paid from the fund. R. Doc. 50-1, at 19; A55; R. Doc. 58-1, at 15. And the settlement would distribute any residual unclaimed amounts

among non-class organizations as *cy pres*. R. Doc. 50-1, at 22. The settling parties later identified these third-party organizations as 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; R. Doc. 58-1, at 18. Monsanto would obtain a global release, aside from personal injury claims, from all class members. R. Doc. 50-1, at 22-23; A58-59; R. Doc. 58-1, at 18-19.

After clarifying filings (R. Doc. 52; A184-85; R. Doc. 83, at 2-3), the court granted the motion for preliminary approval and began the notice and claims process. ADD31; R. Doc. 53. At first, there were only 150,000 claims received; the settling parties agreed to employ additional notice methods, augment per/unit claims to 50% of the weighted retail average of each product, and extend the claims deadline. A186; R. Doc. 83, at 4. The district court granted preliminary approval of this updated settlement. ADD27; R. Doc. 59. Ultimately though, only 242,312 to 244,643 valid claims were filed, accounting for a value between $11.72 million and $13.34 million. A73; R. Doc. 65-2, at 5; A186; R. Doc. 83, at 4. Class counsel estimated this to be a 2-3% claims rate; however, based on the $1.49 billion estimated in sales, the effective take rate appears to be 1.5-1.8%. *Compare* A133; R. Doc. 74, at 6, *with* A89 n.2; R. Doc. 71, at 14 n.2.

After the costs of claims administration and attorneys' fees, more than 1/3 of the settlement fund (between $14 million and $16 million) would remain for distribution to the three designated charities. A187; R. Doc. 83, at 5.

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

Appellant Anna St. John is a class member who periodically purchased Roundup products covered by the settlement during the class period, and submitted a settlement claim. A102; R. Doc. 71-1, at 2. She disagrees with at least portions of the advocacy of the *cy pres* recipients and does not wish to fund or subsidize those organizations or their views. A103; R. Doc. 71-1, at 3.

St. John filed a timely objection that the settlement improperly favored the third-party organizations over class members through its *cy pres* structure and that class counsel's attorneys' fee request was excessive and not sufficiently documented. A76-98; R. Doc. 71, at 1-23. St. John explained that under established law, resorting to *cy pres* is impermissible where it is possible to provide more money to class members. St. John suggested two obvious possible methods of increasing class relief: (1) augmenting existing claimants' recovery by altering the payment ceilings; or (2) reaching out to retailers to learn class members' identities and directly distribute money to them. A88-92; R. Doc. 71, at 13-17. St. John objected that unconsented-to *cy pres* awards to groups that engage in contentious advocacy violate the First Amendment's prohibition on compelled speech. A92-94; R. Doc. 71, at 17-19.

Finally, St. John objected to the request for attorneys' fees on two grounds. Class counsel had failed to document the factual predicate (i.e., the time and labor expended on the litigation) for their fee request. A94-96; R. Doc. 71, at 19-21. And the request itself was excessive relative to the actual benefit conferred upon the class. A96-98; R. Doc. 71, at 21-23. As one aspect of this latter objection, St. John maintained that no value should be attributed to the prospective labeling change, because Monsanto retained exclusive discretion over the change and plaintiffs did not rely on it in seeking fees. A98 n.8; R. Doc. 71, at 23 n.8.

D. The court ultimately approves the settlement and fee request in full.

St. John appeared through counsel at the March 11 fairness hearing. A128-55; R. Doc. 74. At the hearing, counsel for Monsanto represented that the administrator estimated that a supplemental outreach process to retailers would cost between $300,000 and $600,000. A143; R. Doc. 74, at 16. He also represented that the labeling change stemmed from a "parallel process" that Monsanto was undergoing with and was ultimately "controlled by" the EPA. A138-39; R. Doc. 74, at 11-12.

The court, addressing St. John's objection to insufficient fee documentation, ordered class counsel to submit their billing records *in camera* and permitted St. John to move for the right to review those lodestar records within seven days. A150-51; R. Doc. 74, at 23-24. The court took the motion for final approval under advisement. A154; R. Doc. 74, at 27.

In accordance with the court's invitation, St. John then moved for leave to review and respond to class counsel's lodestar billing records. R. Docs. 75-76. After plaintiffs opposed, the court granted the motion in part, declining to grant St. John access to the actual billing records, but ordering class counsel to file summary lodestar information that St. John could review and respond to. ADD24-26; R. Doc. 79. Class counsel did so. A157-162; R. Docs. 80, 80-1.

As permitted, St. John filed a supplemental objection after reviewing the lodestar summary. A163; R. Doc. 81. She objected to the calculation including nearly 2000 hours class counsel purported to expend on the independent *Blitz* litigation. A170-73; R. Doc. 81, at 8-11. She also contended that the hourly rates exceeded reasonable rates for the litigation venues. A173-77; R. Doc. 81, at 11-15. Finally, she explained that with or without those alterations to the base lodestar, the proposed multiplier would be excessive: 18.8 if both excluding the *Blitz* hours and reducing the proposed hourly rates; 12.6 if merely deducting the *Blitz* hours; or 4.85 if crediting both the *Blitz* hours and the proposed rates. A169-170; R. Doc. 81, at 7-8; A177-180; R. Doc. 81, at 15-18.

The court issued a written opinion on May 13, 2021, certifying the class, granting final approval of the settlement, granting plaintiffs' full request for attorneys' fees, expenses, and class representative awards. A183; ADD1; R. Doc. 83.

The court rejected St. John's objections. 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 had discretion to approve the settlement. A190; R. Doc. 83, at 8.

First, it concluded that "further efforts to identify class members or increase the claims rate is not feasible" A191; R. Doc. 83, at 9. Relying on oral representations from class counsel, it found that "pursuing information from retailers was unlikely to be effective (much less cost-effective) given (1) privacy restrictions placed on retailers, (2) the inability to track customers who paid with cash, and (3) the numerous 'smaller retail outlets' that sold products bearing the label." A191; R. Doc. 83, at 9.

Second, it held that distributing more settlement funds to existing claimants would be a windfall as claimants had already received full compensation under the settlement. A193; R. Doc. 83, at 11. It read this Circuit's *BankAmerica* decision to address only *cy pres* awards in settlements involving claims of liquidated damages. *Id.* Based on its assessment of Missouri, California, and New York law, it held that the full measure of class damages was the price premium generated by the allegedly false labeling. A194-95; R. Doc. 83, at 12-13. According to the court, "the class members' recovery was never going to be 100% of the purchase price" despite the refund relief sought in the complaint. A195; R. Doc. 83, at 13. The court did not address the fact that the class definition contemplates a purchase price refund as the measure of complete recovery.

Third, the court overruled St. John's First Amendment objection to the compelled subsidy of advocacy groups for two reasons. One, "the *cy pres* is created by the private agreement of the parties" rather than through "government compulsion." A197; R. Doc. 83, at 15. "Therefore, the First Amendment is not implicated." *Id.* Two, "it cannot fairly be said that the remainder [of the fund] belongs to any one member" and so a single class member cannot "exercise veto power over its disposition." *Id.*

Lastly, the court denied St. John's objection to the attorneys' fees request. Employing the percentage-of-recovery methodology, it credited the entire $14-$16 million in *cy pres* as part of the class's recovery from which to award fees. A199; R. Doc. 83, at 17. It acknowledged that the Seventh Circuit has held otherwise. A199 n.18; R. Doc. 83, at 17 n.18. Though it did not attach any particular monetary value to the injunctive labeling change, it held that the injunction did have some value. A200; R. Doc. 83, at 18.

The district court then conducted a lodestar crosscheck, concluding that class counsel's lodestar reflects $782,000 in this case, and nearly $1.2 million in the *Blitz* litigation. A201; R. Doc. 83, at 19. It thought that this multiplier of nearly 5 was reasonable because of the complexity of the legal issues, the excellence of the results, the fact that 25% is in the low range of percentages typically sought, and the fact that the award covered attorney expenses. A201-02; R. Doc. 83, at 19-20. Because it was not "attempting to calculate the lodestar with precision," the court found St. John's objections unpersuasive. A202; R.

Doc. 83, at 20. In its own experience, the hourly billing rates were reasonable for Kansas City. *Id.* And it was proper to include the work from the *Blitz* litigation in the lodestar here because *Blitz* was "intended to be a nationwide class," "the plaintiffs who remained in *Blitz*…are members of the class in this case," and there was a discovery sharing order that carried over to *Blitz* as well as overlapping legal issues. A203; R. Doc. 83, at 21. The court did not address St. John's objection to duplication of effort.

Two weeks later, the court filed an order dismissing the case. A205; ADD23; R. Doc. 84. St. John timely appealed the decision. A206; R. Doc. 85.

Preliminary Statement

St. John, a practicing attorney, is represented in this appeal through her employer, the non-profit Hamilton Lincoln Law Institute ("HLLI"). The Center for Class Action Fairness ("CCAF"), a program housed within HLLI, litigates on behalf of class members against unfair class-action procedures and settlements, and it has won hundreds of millions of dollars for class members. *See, e.g., McDonough v. Toys "R" Us.*, 80 F. Supp. 3d 626 (E.D. Pa. 2015) (approving renegotiated settlement that increased class recovery from $3 million to $17.5 million after the Third Circuit sustained CCAF's client's objection to a *cy-pres* heavy arrangement); *see also, e.g.*, Adam Liptak, *When Lawyers Cut Their Clients Out of the Deal*, N.Y. TIMES (Aug. 13, 2013) (calling CCAF attorney Theodore H. Frank "the leading critic of abusive class action settlements"); Editorial Board, *The Class-Action Con*, WALL ST. J (Feb. 11,

2018). As legal scholars and courts recognize, CCAF has "develop[ed] the expertise to spot problematic settlement provisions and attorneys' fees." Elizabeth Chamblee Burch, *Publicly Funded Objectors*, 19 THEORETICAL INQUIRIES IN LAW 47, 55-57 & n.37 (2018); *see also Pearson v. NBTY, Inc.*, 772 F.3d 778, 787 (7th Cir. 2014) (praising CCAF's work; rejecting settlement with *cy pres* component); *In re Dry Max Pampers Litig.*, 724 F.3d 713, 716-17 (6th Cir. 2013) (same). St. John brings this appeal in good faith to protect class members in this and future class actions against unfair class settlements and unreasonable fee awards.

Summary of Argument

The potential of *cy pres* to create conflicts of interest and ethical dilemmas has garnered increasing attention from the judiciary and from commentators alike. *See, e.g.*, *In re BankAmerica Corp. Sec. Litig.*, 775 F.3d 1060 (8th Cir. 2015); 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 (2010) ("*Cy Pres Pathologies*"). In *BankAmerica*, this Court positioned itself at the vanguard of circuits "criticiz[ing] and severely restrict[ing] the practice." 775 F.3d at 1063. *BankAmerica* instructs courts to adhere to the appropriate "standards governing *cy pres* awards regardless of whether the award [is] fashioned by the settling parties or the trial court." *Id.* at 1066.

But the district court has enfeebled *BankAmerica*, approving a settlement that will deliver about $16 million of the class's $39.55 million fund to non-class member third-party organizations. It did so even though at least 97% of class members will recover nothing under the proposed agreement. It did so even though the 240,000 class members who did submit claims under the settlement are not being fully compensated for their alleged losses. *BankAmerica* does not permit such an arrangement. When it is feasible to distribute settlement funds to class members, the settling parties must do so. Attempts to do otherwise are "void *ab initio*" and constitute "impermissible misappropriation of monies gathered to settle complex disputes among private parties." *Id.* at 1065-66; *accord Pearson*, 772 F.3d at 784; *Klier v. Elf Atochem N.A., Inc.*, 658 F.3d 468, 475 (5th Cir. 2011). The settlement cannot pass muster under Rule 23(e)(2).

Independently, the Supreme Court has recently made clear that "compelled subsidization of private speech seriously impinges on First Amendment rights" and "cannot be casually allowed." *Janus v. AFSCME, Council 31*, 138 S. Ct. 2448, 2464 (2018). Because the settlement approval order donates the money of class members to third-party advocacy groups without class members' "clear[] and affirmative[] consent," it does not comply with the First Amendment. *Id.* at 2486.

Finally, even if the court had discretion to approve the settlement under Rule 23(e) and the First Amendment, awarding class counsel nearly $10 million

exceeded the bounds of reasonableness under Rule 23(h). When properly calculated as a percentage of the benefit conferred on class members, the 41.6% award surpasses the largest percentage this Court has ever approved. So too with the lodestar crosscheck multiplier. When properly calculated with only time expended on this litigation, the 12.6 multiplier surpasses the largest multiplier this Court has ever endorsed. From any vantage point, the fee award falls short of the standards of Rule 23(h).

Argument

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

Standard of Review: A district court's ruling approving a class action settlement is generally reviewed for abuse of discretion. *Caligiuri v. Symantec Corp.*, 855 F.3d 860, 863 (8th Cir. 2017). Many circuits apply more stringent review when a proposed settlement precedes class certification "because the imperatives of the settlement process" "can influence the definition of the classes and the allocation of relief." *In re Payment Card Interchange Fee & Merch. Disc. Antitrust Litig.*, 827 F.3d 223, 235-236 (2d Cir. 2016); *see also, e.g., In re Google Inc. Cookie Placement Consumer Privacy Litig.*, 934 F.3d 316, 322 (3d Cir. 2019); *Roes v. SFBSC Mgmt., LLC*, 944 F.3d 1035, 1043 (9th Cir. 2019).

An error of law is an abuse of discretion. *E.g.*, *Luiken v. Domino's Pizza, LLC*, 705 F.3d 370, 372 (8th Cir. 2013). This Court "review[s] *de novo* the district court's interpretation of the law and the Federal Rules of Civil Procedure." *In re Baycol Prods. Litig.*, 616 F.3d 778, 782 (8th Cir. 2010). More specifically, any settlement provisions that contradict this Circuit's legal standard for the permissible use of *cy pres* in Rule 23 class actions are "void *ab initio*." *BankAmerica*, 775 F.3d at 1066.

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The legal construct of *cy pres* (from the French "cy pres comme possible"—"as near as possible") 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). Importing this doctrine "from trust law to the entirely unrelated context of a class action settlement" is "inherently dubious." *BankAmerica*, 775 F.3d at 1065 (quoting *Klier*, 658 F.3d at 480 (Jones, J., concurring)). Although the Supreme Court itself has not yet spoken to the practice, Justice Thomas has concluded that "*cy pres* payments are not a form of relief to the absent class members and should not be treated as such." *Frank v. Gaos*, 139 S. Ct. 1041, 1047 (2019) (Thomas, J., dissenting). And Chief Justice Roberts has recognized the "fundamental concerns surrounding the use of such remedies in class action litigation." *Marek v. Lane*, 571 U.S. 1003, 1006 (2013) (Roberts, C.J., respecting the denial of certiorari). Squarely addressing the doctrine, many courts of
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appeals "have criticized and severely restricted the practice." *BankAmerica*, 775 F.3d at 1063 (citing cases).

This Circuit is no exception. Following section 3.07 of the American Law Institute's PRINCIPLES OF AGGREGATE LITIGATION, *BankAmerica* permits a *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). "A proposed *cy pres* distribution must meet these standards governing *cy pres* awards regardless of whether the award was fashioned by the settling parties or the trial court." *Id.* at 1066 (cleaned up). In other words, *cy pres* must remain a last resort. Settlements that flout this principle are "void *ab initio*." *Id.*

"*Cy pres* distributions also present a potential conflict of interest between class counsel and their clients because the inclusion of a *cy pres* distribution may increase a settlement fund, and with it attorneys' fees, without increasing the direct benefit to the class." *Baby Prods.*, 708 F.3d at 173. Commentators have observed these same defects. *See, e.g.*, Martin H. Redish, *et al.*, *Cy Pres Pathologies*. Put simply, no class complaint includes a request for *cy pres* in its prayer for relief; it is not a cognizable form of relief to the class. *Frank*, 139 S. Ct. at 1047 (Thomas, J., dissenting).

Preferring non-compensatory *cy pres* recovery abdicates the duty that class counsel owes to their clients: the class members. The class is not a free-floating entity; 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., P.A., v. Allstate Ins. Co.*, 559 U.S. 393, 408 (2010) (class action is a "species" of joinder). Class counsel's duties likewise run to "each individual member of the class even when negotiating a settlement." *Mandujano v. Basic Vegetable Prods., Inc.*, 541 F.2d 832, 834-35 (9th Cir. 1976).

"By disincentivizing class attorneys from vigorously pursuing individualized compensation for absent class members, *cy pres* threatens the due process rights of those class members." Redish, *Cy Pres Pathologies*, 62 FLA. L. REV. at 650. When courts treat a dollar of *cy pres* as equivalent to a dollar of direct class recovery, class attorneys are tempted to shirk their duties to adequately defend class members' legal rights because their personal fortune is no longer tied to that advocacy. Their all-too-human predilection will be to fund their favorite causes (or a defendant's favorite causes, to smooth a path to settlement) over thousands or millions of anonymous class members. The reaction of those class members to their few-dollar recovery is likely to be indifference rather than the effusive gratitude and public recognition that a million-dollar donation to a nonprofit organization might provide. It is common 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.*, Florida Bar Foundation tweet, (Jun. 8, 2018), *archived at* http://archive.li/h0YaV; *see also* Chris J. Chasin, *Modernizing Class Action Cy Pres Through Democratic Inputs*, 163 U. PENN. L. REV. 1463, 1484 (2015).

Another fundamental concern that manifests here is that *cy pres* awards typically fail to redress class members' alleged injuries for which they are waiving their rights. The Seventh Circuit announced the problem: "There is no indirect benefit to the class from the defendant's giving the money to someone else." *Mirfasihi v. Fleet Mortg. Corp.*, 356 F.3d 781, 784 (7th Cir. 2004); *accord Frank*, 139 S. Ct. at 1047 (Thomas, J., dissenting) (repudiating view that *cy pres* payments provide "indirect" benefit). "[S]ettlement-fund proceeds, having been generated by the value of the class members' claims, belong solely to the class members." *Klier*, 658 F.3d at 474 (citing *ALI Principles* § 3.07 comment (b)). Such funds "are the property of the class." *BankAmerica*, 775 F.3d at 1064 (quoting *Klier*, 658 F.3d at 475). No one would dispute this fact had plaintiffs pursued individual litigation. It's no different in class litigation; Rule 23 cannot operate to "abridge, enlarge or modify any substantive right." 28 U.S.C. § 2072(b).

Class counsel's duties work hand in glove with the proper role of the judiciary: "provid[ing] 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). Just as it is not the role of federal courts to order "relief to any uninjured plaintiff, class action or not,"[3] it is not the role of federal courts to direct relief to uninjured non-party organizations as part of a "trilateral process." *Klier*, 658 F.3d at 481 (Jones, J., concurring); *Keepseagle v. Perdue*, 856 F.3d 1039, 1071 (D.C. Cir. 2017) (Brown, J., dissenting).

Cy pres is part of a larger problem of conflicts of interest endemic to class-action settlements. "Class-action settlements are different from other settlements. The parties to an ordinary settlement bargain away only their own rights—which is why ordinary settlements do not require court approval." *In re Dry Max Pampers Litig.*, 724 F.3d 713, 715 (6th Cir. 2013). In class actions, however, courts face the "danger that the parties and counsel will bargain away the interests of the unnamed class members in order to maximize their own." *Id.* Arms'-length negotiation can ensure that defendant pays the right total amount, but it cannot vouchsafe "the manner in which that amount is *allocated*." *Id.* at 717 (emphasis in original). To combat this ever-present threat of misallocation, the district court must assume a "fiduciary" obligation, "serv[e] as a guardian of the rights of absent class members" and apply zealous scrutiny to proposed settlements. *In re Wireless Tel. Fed. Cost Recovery Fees Litig.*, 396 F.3d 922, 932 (8th Cir. 2005)

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[3] *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 210 L. Ed. 2d 568, 587 (2021) (cleaned up).

Cy pres presents exactly that danger of misallocation. *See also* Fed. R. Civ. P. 23(e)(2)(C)(ii) (requiring courts to consider "the effectiveness of any proposed method of distributing relief to the class"). "Barring sufficient justification, *cy pres* awards should generally represent a small percentage of total settlement funds." *Baby Prods.* 708 F.3d at 174. If *cy pres* is an excessive share of the total relative to direct class recovery, as it is here, a district court should "urge the parties to implement a settlement structure that attempts to maintain an appropriate balance between payments to the class and *cy pres* awards." *Id.*

Below, the district court accepted two justifications for distributing about $16 million (40% of the $39.55 million fund) to non-party charities. First, it held that there are no "feasible or cost-effective" means of providing recovery to the more than 97% of the class that will receive no recovery. A191; R. Doc. 83, at 9. Second, it held that any additional recovery for existing class claimants would constitute a legal windfall. A192-195; R. Doc. 83, at 10-13. To affirm approval of this settlement, ***both rationales*** must succeed. Yet, under *BankAmerica*, neither does.

A. Under *BankAmerica*, there would be no windfall from additional distributions because the settlement does not pay claimants the full measure of alleged damages.

BankAmerica stated its rule unequivocally, and it stated it repeatedly:

- "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 district court misread the first command (A192-93; R. Doc. 83, at 10-11), mentioned but did not adhere to the second holding (A193-94, A196; R. Doc. 83, at 11-12, 14), and ignored the third holding altogether.

Class members' claims here are not liquidated damages claims—they have not been determined or fixed by express contract or law; they are disputed. Because they are not fixed by operation of statute or contract, but instead must be established by a judge or jury, they are 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 sought in plaintiffs' complaint makes this clear: they sought "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; R. Doc. 1, at 3. They sought "a constructive trust upon all monies received by Defendants[,]…[a]n order awarding restitution, disgorgement, punitive damages, and/or monetary damages in an amount to be determined at trial…" A38; R. Doc. 1, at 26.

But instead of following the emphatic language of *BankAmerica* and limiting the windfall rationale to cases involving liquidated damages—when it is beyond cavil what constitutes "full compensation"—the court declared that reading "unduly restrictive and contrary to the Eighth Circuit's intent." A193; R. Doc. 83, at 11. Monsanto, too, thinks such a rule distinguishing between unliquidated and liquidated damages claims would not "make any sense." A154; R. Doc. 74, at 27. This is wrong. It makes perfect sense.

At settlement there is a joint incentive for the settling parties to undersell the quantum of the potential claim, and in so doing, make the settlement appear more favorable than it is. Courts should determine whether additional compensation is a windfall by comparing the relief obtained to the full measure of legal damages sought in the complaint, not to the measure agreed upon when the parties' interests have converged at settlement. A legitimate non-frivolous adversarial complaint is the proper yardstick for use in determining whether there is full compensation.[4] *See Bluetooth Headset Prods. Liab. Litig.*, 654 F.3d

[4] "Legitimate" is an important qualifier. Courts can reasonably exclude from the "full compensation" calculus claims in pleadings that cannot survive

935, 945 n.8 (9th Cir. 2011); *In re GMC Pick-Up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768, 810 (3d Cir. 1995); *cf. also Bais Yaakov of Spring Valley v. Act, Inc.*, 798 F.3d 46 (1st Cir. 2015) (full compensation determined by allegations of complaint, not merits decision as to the correct valuation of claims); *Beecher v. Able*, 575 F.2d 1010, 1016 (2d Cir. 1978) (no windfall or unjust enrichment to redistribute to class members when alleged damages are greater than the sum after redistribution). This is certainly not to say that a settlement need satisfy each demand of the complaint to be adequate; but it is to say that the parties' justification for resorting to *cy pres* doesn't hold water. "[T]he notion that class members were fully compensated by the settlement is speculative, at best." *BankAmerica*, 775 F.3d at 1066.

More importantly, *BankAmerica* adopted this rule. The district court believed *BankAmerica* itself "involved liquidated damages" and so "had no reason to address cases where damages are unliquidated." *Id.* The premise is mistaken because *BankAmerica* involved stock drop claims under the Exchange Act, and those section 10b-5 claims are unliquidated. *Ancona v. Paragon Int'l Wealth Mgmt.*, 2019 WL 2289626, 2019 U.S. Dist. LEXIS 90203, *1-2, (D. Md. May 28, 2019). In *BankAmerica*, for example, the damages depended on figuring out the "causal connection between defendants' alleged

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Fed. R. Civ. P. 11 scrutiny. *Cf. Steel Co v. Citizens for a Better Env't*, 523 U.S. 83, 89 (1998) (noting "wholly insubstantial and frivolous" claim exception to subject matter jurisdiction).

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 that $5.87 **maximum** was the figure *BankAmerica* pegged, and the settlement recovery constituted "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.

Although the district court recognized the refund relief requested in the complaint, it nonetheless found that the "recovery was never going to be 100% of the purchase price." A195; R. Doc. 83, at 13. This was far from certain. A price premium is a common measure of consumer damages, but not the only one. For example, under California law, a full refund measure of damages is available 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).[5] And the litigation had not determined the question.

Moreover, aspects of the settlement itself appear to recognize that full refund is a possible measure of relief. The settlement class definition excludes "any person who received a full refund," not any person who received a partial

[5] The district court misconstrued *Krueger* as a decision addressing only standing. A195 n.11 (citing 396 F. Supp. 3d at 945); R. Doc. 83, at 13 n.11. *Krueger* confirms that plaintiffs' full refund theory is cognizable. 396 F. Supp. 3d at 952-54.

refund attributable to the inflated price premium. A44; R. Doc. 58-1 at 4. It is odd for Monsanto to provide full refunds outside the litigation, and then claim that the same relief is a windfall inside the litigation. Similarly, the claims matrix excludes payments for units with respect to which Monsanto issued a refund. A54; R. Doc. 58-1, at 14. The settlement does not purport to resolve questions of liability, much less the proper measure of damages. A43; R. Doc. 58-1, at 3.

The district court alludes (A193; R. Doc. 83, at 11) to this Court's decision allowing premature *cy pres* in *Rawa v. Monsanto Co.*, 934 F.3d 862 (8th Cir. 2019). But *Rawa* did not rule on this issue of settlement fairness because the objector had mistakenly asked the district court to redirect the fee reduction to the class, relief that the unchallenged settlement terms did not permit. *Id.* at 871; *Rawa v. Monsanto Co.*, 2018 WL 2389040, 2018 U.S. Dist. LEXIS 88401, at *34 (E.D. Mo. May 25, 2018) ("no class member objected to the concept of a *cy pres* award").[6]

Other false advertising class settlements routinely employ *pro rata* enhancements to avoid large *cy pres* residuals. *Keil v. Lopez*, 862 F.3d 685, 702 (8th Cir. 2017); *Caligiuri v. Symantec Corp.*, 855 F.3d 860, 863 (8th Cir. 2017);

[6] Notably, the "speedy and efficient" *Rawa* settlement, with a 13% claims rate, was far more successful than the settlement here with its sub-3% claims rate. A179-180; R. Doc. 81, at 17-18. *Rawa* was also less lopsided: it distributed $10.7 million to class members, $6 million to class counsel (after a $1 million fee reduction), and roughly $4 million to *cy pres*. 934 F.3d at 866, 871.

Levy v. Dolgencorp, LLC, No. 20-cv-01037-TJC-MCR (M.D. Fla. 2021), *available at* https://www.dginfantacetaminophensettlement.com/; *Swetz v. GSK Consumer Health, Inc.*, No. 20-cv-04731-NSR (S.D.N.Y. 2021), *available at* https://www.nationalbenefibersettlement.com/. *Caligiuri* is a striking example. That settlement recovered $50 per claimant, "compared to the $4.99 to $16.99 purchase price." 855 F.3d at 864-65. It reserved *cy pres* distributions until the remaining funds could not pay at least $2 more to each claimant. *Id.* at 867.

"[V]ague anxiety over windfalls" cannot justify the *cy pres* provision. Rhonda Wasserman, *Cy Pres in Class Action Settlements*, 88 S. CAL. L. REV. 97, 160 (2014). Where settling parties propose to resort to *cy pres* prematurely, courts should decline settlement approval until the settlement reprioritizes class recovery to comport with Rule 23(e). *BankAmerica*; *Pearson*; *Baby Prods.* A restitutionary full-refund theory would countenance a doubling of the roughly $12 million in class members' claims. Such an amendment would reduce the excessive *cy pres* remainder from $16 million to $4 million. Even if Monsanto would not agree to such a modification, the existence of such a possibility is enough to show that the current settlement cannot satisfy *BankAmerica*.

B. Under *BankAmerica*, it is feasible to distribute money to a portion of the more than 97% of the class that did not submit a claim.

Again, *BankAmerica* announces clear 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 primary on whether the amounts are too small to make individual distributions economically viable." *Id.* (quotation omitted; emphasis kept).

St. John explained in her objection how the settling parties could reach out to big-box retailers—and, if necessary, subpoena them—to obtain class member purchase information. This would enable the administrator to remit direct distributions to class members. This isn't an untested hypothetical; similar information-gathering processes occur often in the context of consumer class litigation. *See, e.g., Pearson*, 772 F.3d at 784 (using "loyalty programs" to provide direct postcard notice to 4.72 million class members); *Wilson v. Playtika Ltd.*, No. 18-cv-05277-RSL, 2020 U.S. Dist. LEXIS 222843 (W.D. Wash. Nov. 30, 2020) (stipulated discovery protective order between class plaintiffs and Amazon "for the purpose of providing notice to and verifying and paying the recovery amount owed to each member of the Settlement class"); 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) (process of 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"); *Ostrowski v. Amazon*, 2016 WL 4992051, 2016 U.S. Dist. LEXIS 126532 (W.D. Wash. Sept. 16, 2016) (granting motion to compel Amazon to produce class member information so that the parties in *In re NVIDIA GTX 970 Graphics Chip Litigation*, No. 15-cv-00760 (N.D. Cal.), could provide direct notice of settlement to class members); *Mahoney v. Endo Health Solutions, Inc. et al.*, No. 1:15-cv-09841, Dkt. 90 at 10 (S.D.N.Y. Oct. 21, 2016) ("Plaintiff's counsel issued subpoenas to the nineteen largest providers of retail pharmacy services in the United States (e.g., Walmart, Walgreens, CVS) to obtain electronic files of the names and addresses of Class members that purchased the Tablets.").

The district court dismissed these as "anecdotal examples" that did not establish that it would be "worth the resources necessary to complete the effort" and also failed to "quantify[] the benefit of [the] endeavor." A192 n.10; R. Doc. 83, at 10 n.10. But under *BankAmerica*, the settling parties bear the burden of proof, not St. John. Anyhow, Monsanto at the fairness hearing relayed a cost estimate of between $300,000 and $600,000 for a supplemental outreach process to retailers. A143; R. Doc. 74, at 16. That amounts to just 2-4% of the $16 million residual; it is certainly worth the candle. And the *McCormick* efforts can be quantified. There, in a three-state consumer class settlement, the administrator received 39,041 valid claims. *In re McCormick & Co., Inc. Pepper Prods. Mktg. & Sales Pracs. Litig.*, No. 15-mc-01825,

Dkt. 246-1 at 2 (D.D.C. Jan. 22, 2021). By subpoenaing two retailors, the administrator identified 768,686 additional customers. *Id.* at 3. Not all of these customers were class members and not all class members could be matched with sufficient data to enable payment, but the administrator was able to use the data to pay 124,920 additional class members—more than tripling the claims rate. *Id.* The administrator's total fee was $350,000. *Id.* at 4. In a fifty-state class action like this, the yield would be even better.

Still, the court accepted three rationales for finding supplemental outreach to retailers infeasible: (1) privacy restrictions on retailers, (2) inability to track customers paying with cash, and (3) numerous smaller retail outlets that sold class products. A191; R. Doc. 83, at 9. At most, these hurdles show that a supplemental outreach program would not capture all the millions of class members that did not submit a claim. But the process doesn't have to be 100% effective to be worthwhile. The potential secondary distribution in *BankAmerica* did not encompass the entire class, yet that fact did not dissuade the Court. 775 F.3d at 1065. Some class member benefit from that money is preferable to none.

Where there is a will, there is a way. When courts demand more of settling parties on behalf of class members, the class gets more. For example, after *Baby Products* rejected a settlement tilted disproportionately in favor of *cy pres*, class counsel on remand appropriately restructured the settlement to eliminate superfluous *cy pres* in favor of direct class distributions. This

constituted an improvement of nearly $15 million to the class. *McDonough*, 80 F. Supp. 3d at 660. 1.1 million class members received direct distributions, up from the 40,000-50,000 claimants under the initial settlement. *Contrast id.*, *with* Transcript of Oral Argument at 53, *In re Baby Products Antitrust Litigation*, No. 12-1165 (3d Cir. Sept. 12, 2012).

In another case, after CCAF's client objected, the plaintiffs used subpoenaed customer data from four retail chains to remit payment to more than 500,000 class members who had not submitted claims. Declaration of Tricia M. Solorzano, *In re Bayer Corp. Combination Aspirin Prods. Mktg. & Sales Practices Litig.*, No. 09-md-2023, Dkt. 227-1 (E.D.N.Y. Mar. 22, 2013). Before the *Bayer* settling parties had converted the settlement from a pure claims-made arrangement into a hybrid claims-made/direct distribution one, fewer than 20,000 class members had submitted claims. See Declaration of Tricia M. Solorzano on Behalf of Settlement Administrator Regarding Notice and Administration, No. 09-md-2023, Dkt. 195 (E.D.N.Y. Jan. 22, 2013).

In *Pearson*, too, after the Seventh Circuit reversed a *cy-pres*-heavy settlement, the settling parties modified the settlement on remand to increase class recovery from $865,000 to about $5 million using increased claims caps. *Compare* 772 F.3d 778 (7th Cir. 2014), *with* Settlement ¶¶7–8, No. 11-cv-07972, Dkt. 213-1 (N.D. Ill. May 14, 2015).

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St. John does not demand that the settling parties revise the settlement by adopting any one specific solution. Rather, consistent with Eighth Circuit law and Rule 23(e)(2)(C)(ii), she only asks that settlements prioritize class recovery ahead of *cy pres* relief. Because the one at issue doesn't, she asks this Court to reverse its approval. On remand, the settling parties might resolve the legal deficiencies by augmenting claims caps for existing claimants, or by engaging in supplemental efforts to remit payments to non-claiming class members, or by using some other mechanism that reallocates the common fund to class members.

II. By compelling class members to subsidize third-party advocacy groups, the settlement approval order violates the First Amendment.

Standard of Review: Conclusions of law are reviewed *de novo*. *Lowry v. Watson Chapel Sch. Dist.* 540 F.3d 752, 759 (8th Cir. 2008) (cleaned up). In the context of a First Amendment issue, the Court also must "make an independent examination of the whole record to assure that the judgment does not constitute a forbidden intrusion on the field of free expression." *Id.* (cleaned up).

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"[E]xcept 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). Making a charitable contribution is First Amendment-protected expressive and associational activity. *Americans for Prosperity Found. v. Bonta*, 141 S. Ct.
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2373 (2021); *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 460 (1958). Reciprocally, individuals 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); *Knox v. Service Employees Int'l Union, Local 1000*, 567 U.S. 298, 309 (2012); *Coral Ridge Ministries Media, Inc. v. Amazon.com, Inc.*, __F.4th__, No. 19-14125 (11th Cir. Jul. 28, 2021). "First Amendment values are at serious risk if the government can compel a particular citizen, or a discrete group of citizens, to pay special subsidies for speech on the side that it favors." *United States v. United Foods, Inc.*, 533 U.S. 405, 411 (2001). In articulating this right, the Supreme Court has acknowledged Thomas Jefferson's view that "to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves[] is sinful and tyrannical." *Janus*, 138 S. Ct. at 2464 (quoting A Bill for Establishing Religious Freedom, in 2 PAPERS OF THOMAS JEFFERSON 545 (J. Boyd ed., 1950)). These principles render unconsented-to class action *cy pres* awards unconstitutional.

Three premises support this conclusion:

First, the settlement funds "belong solely to the class members." *Klier*, 658 F.3d at 474; *accord BankAmerica*, 775 F.3d at 1064. Though each class members' share of the settlement 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). Second, 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); *Coral Ridge Ministries Media*, No. 19-14125, slip op. at 11. "[C]ompelled funding of the speech of other private speakers or groups presents the same dangers as compelled speech." *Harris*, 573 U.S. at 647 (cleaned up). Third, absent class members are being compelled into participating in the donations under the Court's order disbursing the funds to the *cy pres* recipients. It is not enough that class members may exclude themselves from the class; silence is not consent and a waiver of First Amendment rights "cannot be presumed." *Janus*, 138 S. Ct. at 2486. "Unless [individuals] clearly and affirmatively consent before any money is taken from them, this standard cannot be met." *Id.*; *Knox*, 567 U.S. at 312-22.

Worse still, two of the proposed recipients (NCLC and Berkeley Center for Consumer Law and Economic Justice) are advocacy groups that advance contentious public policy positions with which some class members, including St. John, disagree. A103; R. Doc. 71-1, at 3. For example, they have filed amicus briefs espousing narrow conceptions of First Amendment and separation of powers principles and expansive conceptions of class action *cy pres*. These views contradict the principles that St. John advocates. *Id.* And NCLC has supported oversized fee requests in other class litigation. *See* Kelly House, *How much should lawyers make in the Flint water crisis settlement?*, BRIDGE MICHIGAN (Jul. 15, 2021), https://www.bridgemi.com/michigan-environment-

watch/how-much-should-lawyers-make-flint-water-crisis-settlement (quoting NCLC's director of litigation supporting a 31.6% attorneys' fee request in a $641 million settlement). It's understandable why class counsel would favor that advocacy. But many class members would not. *See, e.g.,* Third Circuit Task Force Report, SELECTION OF CLASS COUNSEL, 208 F.R.D. 340, 343-44 (2002) ("[T]here is a perception among a significant part of the non-lawyer population . . . that class action plaintiffs' lawyers are overcompensated for the work that they do"); *Report on Contingent Fees in Class Action Litigation*, 25 REV. LITIG. 459, 466 (2006) ("The most frequent complaint surrounding class action fees is that they are artificially high, with the result (among others) that plaintiffs' lawyers receive too much of the funds set aside to compensate victims.").

"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. Approving the settlement's *cy pres* provision violated the First Amendment.

The district court resisted this conclusion on two grounds. First, it held that the compulsion was the result of the private agreement, not state action. A197 (citing *In re Motor Fuel Temperature Sales Practices Litig.*, 872 F.3d 1094 (10th Cir. 2017)); R. Doc. 83, at 15. This is legal error: "The process by which a class action settlement is approved has the effect of turning the private

settlement into . . . a judgment," which is preclusive for res judicata purposes. William B. Rubenstein, 6 NEWBERG ON CLASS ACTIONS § 18:19 (5th ed. 2020). But for the district court's ratification, there would have been no class donations. The Supreme Court regularly observes that class-action settlement approvals threaten the constitutional rights of absent class members. *E.g.*, *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 846-48 (1999). Indeed, this principle has been established for eighty years since *Hansberry v. Lee*, 311 U.S. 32, 42-43, 45 (1940).

It is no less state action when the First Amendment rights of class members are at stake rather than Due Process rights. Imagine a settlement agreement that gags absent class members by stipulating that no class member may talk to the media about any aspect of the case, with violations punished by the contempt power. (This scenario is not as farfetched it may seem. *Cf.* Ahmed v. McDonald's, PUBLIC CITIZEN, https://www.citizen.org/litigation/ahmed-v-mcdonalds-3/). Under the district court's reasoning, because such a gag is merely the product of a voluntary settlement between the named plaintiffs and the defendant, the court's approval of the agreement does not infringe constitutional rights of absent class members. No appellate court has ever endorsed such an absurd conclusion. There is a qualitative difference between enforcing a voluntary bilateral nondisclosure agreement and imposing that agreement upon non-consenting absent class members. The Tenth Circuit's ruling to the contrary depended on

a finding that the appellants there had waived the argument. *Motor Fuel*, 872 F.3d at 1114 n.7.

Second, the court disputed the premise that "a single class member can exercise veto power" over the disposition of the fund. A197; R. Doc. 83, at 15. Respectfully, that misses St. John's point and misconstrues her argument. St. John acknowledges that the class members collectively own the settlement funds *pro rata*. The problem is that the settlement fails to obtain consent from any absent class members before disbursing their equitable shares of the fund to non-party charities that advocate for controversial causes and points of view. "Ascribing consent to class members' silence is untenable." Debra Lyn Bassett, *Class Action Silence*, 94 BOSTON U. L. REV. 1781, 1799 (2014); *accord* Christopher R. Leslie, *The Significance of Silence: Collective Action Problems and Class Action Settlements*, 59 FLA. L. REV. 71 (2007). Class members' right not to speak encompasses more than the right to dissociate by objection or opt out.[7]

[7] Moreover, contrary to the framework of *Hudson*, the settlement doesn't provide a personal deduction to any class member objecting to the *cy pres* nor even reduce the class's contribution by his or her equitable share of the fund. *Chicago Teachers Union, Local 1, AFT, AFL-CIO v. Hudson*, 475 U.S. 292 (1986); *compare Fleck v. Wetch*, 938 F.3d 1112, 1117 (8th Cir. 2019) (describing North Dakota bar association's deduction process).

No one has suggested that using *cy pres* can satisfy either strict or exacting scrutiny. This First Amendment violation is independent reason to reverse settlement approval.

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.

Standard of Review: This Court reviews orders awarding attorneys' fees for abuse of discretion. *Keil*, 862 F.3d at 700. That said, it reviews *de novo* any legal issues related to that award of fees. *Sturgill v. United Parcel Service, Inc.*, 512 F.3d 1024, 1036 (8th Cir. 2008).

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District courts presiding over a class action have an "affirmative duty to assure that the award of attorneys' fees is fair and proper." *In re Green Jacobson, P.C.*, 911 F.3d 924, 930 (8th Cir. 2018). This duty reaches its zenith when class counsel seeks fees from the settlement fund, because at that zero-sum point, "the "relationship between plaintiffs and their attorneys turns adversarial." *In re Mercury Interactive Corp. Secs. Litig.*, 618 F.3d 988, 994 (9th Cir. 2010). "[F]ixing a reasonable fee becomes even more difficult because the adversary system is typically diluted—indeed, suspended—during fee proceedings." *Goldberger v. Integrated Res.*, 209 F.3d 43, 52 (2d Cir. 2000). Class members "have no real incentive to mount a challenge that would result in only in a miniscule *pro rata* gain from a fee reduction." *Id.* at 53. In fact, a fee reduction here would only mean an increase in the *cy pres* residual fund—
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an objectionable structure itself. A92 n.3; R. Doc. 71, at 17 n.3 (objecting to the unfairness of this quasi fee reversion). Public-interest watchdogs like St. John and CCAF cannot be everywhere all the time.

For its part, the defendant generally has little interest in how the fund is partitioned. *Id.* Here, Monsanto even agreed to a "clear sailing provision" under which they formally agreed not to oppose class counsel's fee request. A54; R. Doc. 58-1, at 14. Clear sailing provisions "deprive[] the court of the advantages of the adversarial process," "heighten the potential for class action settlement abuse," and "should put a court on its guard, not lull it into aloofness." *Galloway v. Kan. City Landsmen, LLC*, 833 F.3d 969, 971 n.1 (8th Cir. 2016). Indeed, "where a settlement agreement contains a 'clear-sailing' agreement, any doubts regarding hourly rates and billed hours shall be resolved against class counsel." *In re Samsung Top-Load Washing Machine Mktg., Sales Practices & Prods. Liab. Litig.*, 997 F.3d 1077, 1094 (10th Cir. 2021). "In this sense, where class counsel bargains for a defendant's agreement not to challenge a request for fees and costs, class counsel assumes a heightened burden for establishing the propriety of the records supporting its fees and costs award." *Id.*

"Active judicial involvement in measuring fee awards is singularly important to the proper operation of the class action process." Advisory Committee Notes on 2003 Amendments to Rule 23. But rather than apply heightened scrutiny to counsel's clear-sailing fee request, the district court

treated the request with undue deference and approved the request in full. A198-203; R. Doc. 83, at 16-21. It committed two significant errors of law that this Court should correct:

(1) It awarded 25% of the full $39.55 million gross common fund, even though around $16 million of that fund will only enrich the *cy pres* recipients. When one properly excludes *cy pres* from the fee denominator,[8] the award becomes 41.6%, higher than the highest percentage (38%) that this Court has affirmed "on the high end." *Huyer v. Buckley*, 849 F.3d 395, 399 (8th Cir. 2017); *see also Dennis v. Kellogg Co.*, 697 F.3d 858, 868 (9th Cir. 2012) (38.9% "clearly excessive" under the percentage benchmark approach).

(2) In calculating a lodestar crosscheck, the district court allowed class counsel to include the entirety of their proclaimed work in the separate *Blitz* litigation—unsuccessful litigation pursued against Monsanto on behalf of a Wisconsin-state class. A203; R. Doc. 83, at 21. When one properly excludes the *Blitz* time from the crosscheck, the lodestar crosscheck multiplier becomes 12.6, which again would be higher than the highest multiplier that this Court has affirmed on the high end. *Rawa*, 934 F.3d at 870 (concluding that "while a 5.3 lodestar multiplier is high, it does not exceed the bounds of reasonableness").

[8] *E.g.*, *Frank*, 139 S. Ct. at 1047 (Thomas, J., dissenting); *Pearson*, 772 F.3d at 781.

As a result, the fee award is unreasonable, both from the perspective of the benefit conferred on the class, and from the perspective of the time expended on the litigation.

A. The court erred by treating *cy pres* recovery as cash recovery.

Fee awards should not exceed a reasonable proportion of actual class recovery. *Galloway*, 833 F.3d at 975 (affirming court's fee reduction from nearly $150,000 request to less than $20,000 and observing that anything more "would be unreasonable in light of class counsel's limited success in obtaining value for the class."). "[T]he ratio that is relevant is the ratio of (1) the fee to (2) the fee plus what the class members received." *Pearson*, 772 F.3d at 781.[9] "*[C]y pres* payments are not a form of relief to the absent class members and should not should be treated as such (*including when calculating attorney's fees*)." *Frank*, 139 S. Ct. at 1047 (Thomas, J., dissenting) (emphasis added).

Although the district court "acknowledge[d]" the Seventh Circuit's rule, it rejected the rule because this Circuit had declined to adopt it for administrative costs. A199 n.18; R. Doc. 83, at 17 n.18. But this Court has never rejected *Pearson*'s rule for accounting *cy pres* monies. Rather, it has said, though only in dicta, that "[w]here a district court has reason to believe that

[9] This Circuit has modified the Seventh Circuit's approach by allowing the inclusion of justifiable administrative costs when calculating the class benefit. *Keil*, 862 F.3d at 703. St. John does not challenge the district court's decision to include the $1.84 million in administrative costs as part of the benefit here. A199 n.15; R. Doc. 83, at 17 n.15; A97 n.6; R. Doc. 71, at 22 n.6.

class counsel has not met its responsibility to seek an award that adequately prioritizes direct benefit to the class, we therefore think it appropriate for the court to decrease the fee award." *BankAmerica*, 775 F.3d at 1068.[10]

The Seventh Circuit's "reasoned decision" in *Pearson* "deserves great weight and precedential value." *Cowden v. BNSF Ry. Co.*, 690 F.3d 884, 892 (8th Cir. 2012). Disallowing fees on *cy pres* payments not only aligns the interests of class counsel with those of their clients, it prevents class counsel from double-dipping by donating class members' funds to charities like NCLC that will then advocate for higher class action attorneys' fees. Although obligating Monsanto to donate to third parties may impose a cost on Monsanto (if those donations are not merely a change in accounting entries), compensable settlement value is not the cost to the defendant but the benefit to the class. *In re Bluetooth Headset Prods. Liab. Litig.*, 654 F.3d 935, 944 (9th Cir. 2011).

Although it correctly forbore from attributing a dollar value to the settlement's injunctive label-change provision, the district court erred in concluding that that component had some value. A200-01; R. Doc. 83, at 18-19. That provision vests "exclusive discretion" with Monsanto over the ultimate label. A50; R. Doc. 58-1, at 10. That constitutes no settlement value. *Cf. Galloway*, 833 F.3d at 974 n.3. It's not enough to know that the old label will be

[10] The district court disclaimed this belief (A199 n.17; R. Doc. 83, at 17 n.17), but as discussed in Section I above, there was reason to believe class counsel had not met its responsibility.

replaced, without knowing what the new label will be. *Cf. In re Pre-Filled Propane Tank Antitrust Litig.*, 893 F.3d 1047, 1057 (8th Cir. 2018) ("mandating an increase in the amount of propane in the tanks without a mandate regarding price would not decrease the price per pound of propane tanks."). Moreover, at the fairness hearing Monsanto revealed that the settlement was not even the prime impetus for the labeling change. Instead, the change resulted from a "parallel process" that Monsanto was undergoing with and was ultimately "controlled by" the EPA. A138-39; R. Doc. 74, at 11-12. Injunctions that "do[] not obligate [defendant] to do anything it was not already doing" are "of no real value." *Koby v. ARS Nat'l Servs., Inc.*, 846 F.3d 1071, 1080 (9th Cir. 2017).

Ultimately, "courts need to consider the level of direct benefit provided to the class in calculating attorneys' fees." *Baby Prods.*, 708 F.3d at 170; *accord* Wasserman, *Cy Pres in Class Action Settlements*, 88 U.S.C. L. REV. at 135-46 (advocating for "presumptive reduction of attorneys' fees" where settlement includes significant *cy pres* component). But the fee award in this case, even crediting the administrative costs as class benefit, amounts to roughly 41.6% of that benefit. This greatly exceeds the typical "range of 20 to 25%" of the fund. *See, e.g., Petrovic v. AMOCO Oil Co.*, 200 F.3d 1140, 1157 (8th Cir. 1999). In fact, it would be higher than the highest percentage (38%) this Circuit has approved "on the high end." *Huyer*, 849 F.3d at 399. The 41.6% award would even approach the "outer bounds of reasonableness" for consensual contingency fees in individual non-class litigation. *International Travel*

Arrangers, Inc. v. Western Airlines, Inc., 623 F.2d 1255, 1278 (8th Cir. 1980) (45% is ethical cap).

Rationalizing that 41.6% is only a few points higher than the previous high would create a one-way ratchet. St. John instead requests that this Court draw a stopping line; there is nothing here that would justify affirming the highest percentage award in this Court's history. *See* Section III.B. below.

B. The fee award is out of step with the attorneys' time and labor on the litigation.

Long ago, this Court declared that "the valuation of an attorney's services must begin with the consideration of hours and rates." *Grunin v. International House of Pancakes*, 513 F.2d 114, 128 (8th Cir. 1975). For, "[w]ithout such an inquiry there is a grave danger that the bar and bench will be brought into disrepute, and there will be prejudice to those whose substantive interests are at stake and who are unrepresented except by the very lawyers who are seeking compensation." *Id.* (internal quotation omitted). Although more recently this Court has suggested that lodestar crosscheck review is optional,[11] it has never granted district courts discretion to misapply principles of lodestar methodology while conducting a crosscheck. And that's what happened here.

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[11] *See Keil*, 862 F.3d at 701 (stating, in dicta, that lodestar crosscheck is "not required" where the district court had employed it). This is an issue that divides the circuits and is presented by CCAF's pending certiorari petition in *Threatt v. Farrell*, No. 20-1349.

Specifically, class counsel billed the class for nearly 2000 hours spent on behalf of a separate class in the independent (and unsuccessful) *Blitz* litigation. A161-62; R. Doc. 80-1, at 3-4. That amounts to nearly two-thirds of the total hours they submitted. A169; R. Doc. 81, at 7. As a matter of law, the district court should have disallowed these hours. But instead, without eliminating a single duplicative minute, it credited these hours because of the "unique circumstances of this case." A203; R. Doc. 83, at 21.

"An attorney is not entitled to be paid in [an action] for the work he or another attorney did in some other case." *ACLU v. Barnes*, 168 F.3d 423, 430 (11th Cir. 1999); *accord Hess v. Volkswagen*, 341 P.3d 662, 667-68 (Okla. 2014). There is good reason to treat each litigation as its own unit. While classes may overlap across cases, they are not coextensive. There is "no persuasive basis for rewarding class counsel in this case for their unsuccessful work, on a contingent basis, in [*Blitz*]." *Sloop v. Ameritech Corp.*, 2003 U.S. Dist. LEXIS 14554, 2003 WL 21989997, at *8 (S.D. Ind. Aug. 14, 2003) (Hamilton, J.). The June 2017 *Blitz* complaint was brought on behalf of a putative nationwide class as well has several statewide classes. *Blitz*, No. 3:17-cv-0043, Dkt. 1 at 13 (W.D. Wis.). But within ten months, the presiding court eliminated the only two claims of the nationwide class. *Blitz*, Dkt. 65 at 17-20. After that, class counsel only pursued the claims of the Wisconsin-state class. *Blitz*, Dkt. 73 at 2 (bringing claims "on behalf of thousands of consumers across Wisconsin" and moving only for statewide class certification).

Moreover, even the national class initially pled in the *Blitz* complaint was not coextensive with the settlement class in this case. The *Blitz* class period encompassed the relevant state-by-state statutes of limitations looking backward from June 20, 2017; here, the settlement class period here runs backward only from February 13, 2019. A45; R. Doc. 58-1, at 5. Because the applicable statute of limitations is ordinarily 4 to 6 years (A65-68; R. Doc. 58-1, at 25-28), many members of the *Blitz* putative national class are not members of the settlement class here (*i.e.*, individuals who bought Roundup products in certain states in 2011-2015). And conversely, settlement class members who first bought Roundup products outside Wisconsin and after April 13, 2018, were not part of the putative class in *Blitz*.

These aren't technicalities. Class counsel should simply not charge class members in this case for earlier work on behalf of other persons. "Whatever benefit the 'background information' gained from the [Blitz] case may have been to the class members in the instant case, plaintiff[s] ha[ve] not convincingly shown that the class members in this case ought to pay for the loss in [Blitz]." *Cooley v. Indian River Transp. Co.*, 2019 U.S. Dist. LEXIS 11694, 2019 WL 316634, at *10 (E.D. Cal. Jan. 24, 2019); *see also Liebman v. J. W. Petersen Coal & Oil Co.*, 63 F.R.D. 684, 697 (N.D. Ill. 1974) ("We have considerable doubt about the justice of charging members of one class higher fees to compensate counsel for failing to recover for another class.").

Paying class counsel for unsuccessful outside work also undermines their fundamental argument for a lodestar multiplier: that the risk of this litigation requires a multiplier to make them whole. Thus, the court should have eliminated the total 1970.56 hours spent litigating *Blitz* from the lodestar accounting. *Home Placement Serv., Inc. v. Providence Journal Co.*, 739 F.2d 671, 677 (1st Cir. 1984) ("emphatically" rejecting compensation for time spent on "a prior case that defendant won" even when discovery from that case was used in the subsequent case). The experience that class counsel accrues in the earlier litigation might increase their hourly rate in the latter litigation, but that is "entirely different from adding directly on to the fees in one case a charge for time spent in a prior case." *Id.* at 677.[12]

Though this Circuit has not yet adopted a bright-line approach, it has previously affirmed a decision to exclude time spent on outside litigation, even where the allegations and defendants overlapped. *See Miller v. Dugan*, 764 F.3d 826, 832 (8th Cir. 2014). Even if the rule against compensating separate litigation were not categorical, certain portions of the *Blitz* time did not conceivably benefit the nationwide settlement class. It was error to include those non-beneficial pursuits in class counsel's lodestar. *Hensley v. Eckerhart*, 461 U.S. 424, 440 (1983). Again, shortly into the *Blitz* litigation, the court

[12] Indeed, the district court approved class counsel's weighty blended hourly rate of $669/hr over St. John's objection. *Compare* A173-77; R. Doc. 81, at 11-15, *with* A202-03; R. Doc. 83, at 20-21. St. John does not renew that challenge on appeal.

dismissed the only two claims brought on behalf of a nationwide class. *Blitz*, Dkt. 65. After that time, class counsel pursued claims only on behalf of a Wisconsin-only purchaser class. *See, e.g.*, Memorandum of Law in Support of Motion for Class Certification, *Blitz*, Dkt. 73 (W.D. Wis. Jun. 22, 2018). For example, one member of class counsel's team (Clark Binkley) first appeared *pro hac vice* in *Blitz* on May 9, 2018, after all nationwide class claims had been dismissed, yet plaintiffs now ask for class members here to pay for nearly 300 hours of his *Blitz* time. *Compare Blitz* Dkt. 69 *with* A161; R. Doc. 80-1, at 3.

Sure, "the plaintiffs who remained in *Blitz*…are members of the class in this case." A203; R. Doc. 83, at 21.[13] But it is inequitable and unreasonable to charge the whole nationwide class here for Blitz's unsuccessful pursuit of Wisconsin state class claims. See *Miller*, 764 F.3d at 832 (affirming decision to exclude time spent on motions that were "resolved largely in favor of the defendants"); *Home Placement Serv.*, 739 F.2d at 677. At the very least, this is inappropriate when it is only a tiny fraction[14] of the *Jones* class whose claims were pursued in the *Blitz* litigation.

Because the district court denied St. John access to class counsel's discrete and detailed billing records (ADD24; R. Doc. 79), St. John was limited

[13] Even this statement is not entirely correct because the putative *Blitz* class included purchasers dating back to 2011, whereas this class dates back only to 2013.

[14] Wisconsin's population only comprises 1.77% of the United States population as of the 2020 census.

in the service she could provide to the court and class. She could not, for example, "provide the court with critiques of specific work done by counsel" as Rule 23(h) contemplates. *Keil*, 862 F.3d at 705 (*quoting In re Mercury Interactive Sec. Litig.*, 618 F.3d 988, 994 (9th Cir. 2010)). Still, she requested that the court, at the very minimum, eliminate time spent here duplicating work done in *Blitz*. A173; R. Doc. 81, at 11. Courts "must be mindful of both 'redundant' and 'excessive' hours." *Orduno v. Pietrzak*, 932 F.3d 710, 720 (8th Cir. 2019). St. John explained that the complaint here contains several sections that are copy-and-paste replications of the complaint in *Blitz*. *Compare Blitz*, Dkt. 1, *with* A13; R. Doc. 1. While there is nothing untoward with using boilerplate, the class cannot be billed as if the *Jones* complaint were generated out of whole cloth. As a fiduciary for the class, courts must recapture the efficiency from class counsel's previous effort. But, not only did the district court neglect to do this, it did not even address the possibility, let alone provide a "reasoned response" to St. John's objection. *Johnson v. NPAS Sols., LLC*, 975 F.3d 1244, 1262 (11th Cir. 2020).

If all the *Blitz* and *Jones* time were properly compensable, the lodestar multiplier would be 4.85. A169; R. Doc. 81, at 7. St. John acknowledges that *Rawa* would countenance this multiplier. Other circuits would not. *See In re Cendant Corp PRIDES Litig.*, 243 F.3d 722, 742 (3d Cir. 2001) (multiplier of three is an "appropriate ceiling for a fee award"); *Florin v. Nationsbank, N.A.*, 34 F.3d 560, 565 (7th Cir. 1994) (multiplier of two might be "sensible ceiling" to

avoid unwarranted attorney windfalls); *Rosenbaum v. MacAllister*, 64 F.3d 1439, 1447-48 (10th Cir. 1995) (3.16 multiplier too high); *Fujiwara v. Sushi Yasuda Ltd.*, 58 F. Supp. 3d 424, 438 (S.D.N.Y. 2014) (courts in the Second Circuit "have generally refused multipliers as high as 2.03" after *Goldberger*). CCAF has asked the Supreme Court to resolve this circuit split. *See* Petition for Writ of Certiorari, *Threatt v. Farrell*, No. 20-1349. St. John preserves the question of an appropriate lodestar crosscheck multiplier for further review.

At base, the district court failed to resolve "any doubts regarding hourly rates and billed hours" "against class counsel." *Samsung*, 997 F.3d at 1094. The lodestar "serves little purpose as a cross-check if it is accepted at face value." *In re Citigroup Inc. Secs. Litig.*, 965 F. Supp. 2d 369, 389 (S.D.N.Y. 2013). Thus, though the district reckoned that the multiplier was approximately five, the real multiplier was over twelve. And that "strayed from all responsible discretionary parameters." *Cendant PRIDES*, 243 F.3d at 742 (multiplier of 7 to 10); William B. Rubenstein, NEWBERG ON CLASS ACTIONS § 15:87 (5th ed. 2020) (recommending a "presumptive ceiling of 4" for crosscheck multipliers).

Conclusion

This Court should reverse settlement approval. At a minimum, it should vacate and remand for recalculating of a proper fee award.

Dated: July 30, 2021

Respectfully submitted,

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Dated: July 30, 2021

Respectfully submitted,

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I hereby certify that on July 30, 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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