No. 22-___

In the Supreme Court of the United States

ANNA ST. JOHN,

Petitioner,

v.

LISA JONES, *et al.*,

Respondents.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

The Eighth Circuit affirmed Rule 23(e)(2) approval of a class-action settlement that distributed roughly $16 million to uninjured nonprofits as so-called *cy pres*, $12 million to class members (with about 98% of the class—about ten million members—receiving no cash), and $10 million to attorneys. The Eighth Circuit rejected First Amendment and fairness challenges to the settlement subsidizing left-leaning organizations without consent of class members because absent class members had no property interest in the settlement funds, breaking with decisions of the Fifth and Seventh Circuits that such settlement funds belong to the class, rather than the attorneys.

The question presented is:

> Whether, or in what circumstances, a court may approve a settlement as "fair, reasonable, and adequate" under Rule 23(e)(2) when it pays a substantial *cy pres* award to third parties from the settlement fund.

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

Petitioner Anna St. John is a member of the plaintiff class and was an objector in the district court proceedings and the appellant in the court of appeals proceedings.

Respondents Lisa Jones, Horacio Torres Bonilla, and Kristopher Yee were the named plaintiffs in the district court proceedings and appellees in the court of appeals proceedings.

Respondent Monsanto Company was the defendant in the district court proceedings and appellee in the court of appeals proceedings.

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

STATEMENT OF RELATED PROCEEDINGS

Jones v. Monsanto Co., No. 21-2292 (8th Cir.) (opinion issued June 29, 2022; order denying rehearing and rehearing *en banc* entered Aug. 16, 2022)

Jones v. Monsanto Co., No. 19-0102-CV-W-BP (W.D. Mo.) (order and opinion granting motion for final approval of class settlement entered May 13, 2021; order of dismissal entered May 27, 2021).

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

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PETITION FOR WRIT OF CERTIORARI

The Eighth Circuit upheld approval of a nationwide consumer class-action settlement that created a $39.5 million settlement fund. Such a result seems generous, but the parties structured the settlement so that class members would receive less than a third of it, and over 97% of the class would receive no cash. Much more, roughly $16 million, would instead go to left-leaning non-party organizations such as the Center for Consumer Law & Economic Justice at the University of California, Berkeley as so-called *cy pres*.

If an attorney diverted $16 million of a client's funds to nonprofits because he felt the nonprofits could make better use of the money, he'd be disbarred and prosecuted for the embezzlement—even if the client were an odious billionaire like Jeffrey Epstein. The clients of class counsel here were innocent class members; worse yet, many would disagree with the nonprofits' political goals. But the Eighth Circuit signed off on this diversion, known as *cy pres*, holding that the class members had no property interest in the settlement fund. In so doing, it exacerbated an existing circuit split started by the Ninth Circuit, conflicting with decisions of the Fifth and Seventh Circuits. *E.g.*, *Klier v. Elf Atochem N. Am., Inc.*, 658 F.3d 468 (5th Cir. 2011) (settlement money belongs to the class); *Pearson v. NBTY, Inc.*, 772 F.3d 778 (7th Cir. 2014) (rejecting settlement that permitted $1.13 million residual *cy pres* to politically neutral charity). *See generally* Jeremy Kidd & Chas Whitehead, *Saving Class Members from Counsel*, 58 SAN DIEGO L. REV. 579, 600 (2021) (noting circuit split). The Second Circuit has since joined in on the side of permissive *cy pres*. *Hyland v. Navient Corp.*, 48 F.4th

110 (2d Cir. 2022), *cert. pending sub nom. Yeatman v. Hyland*, No. 22-___.

Many courts recognize that *cy pres* awards require special scrutiny because they can facilitate tacit or explicit collusion between defendants, who are eager to settle at the lowest price and with a minimum of fuss, and class counsel, who are seeking to maximize their fees and may be willing to accommodate defendants' interests in exchange for illusory relief. They recognize that, in this way, *cy pres* awards present a heightened risk of conflict between class counsel and their putative clients, the members of the class. They recognize that *cy pres* awards may provide little or no benefit to class members. And above all else, they recognize that *cy pres* awards to third parties are not appropriate when any reasonable opportunity exists to compensate class members directly for their injuries—always the first-best use of settlement funds that, after all, are the property of the class. Judges in lower courts, including circuits that have signed off on *cy pres*, have repeatedly criticized or expressed skepticism about the legitimacy of *cy pres*. *E.g.*, *Joffe v. Google, Inc.*, 21 F.4th 1102, 1122 (9th Cir. 2021) (Bade, J., concurring); *Keepseagle v. Perdue*, 856 F.3d 1039, 1060 (D.C. Cir. 2017) (Brown, J., dissenting); *Lane v. Facebook, Inc.*, 696 F.3d 811, 826, 834 (9th Cir. 2012) (Kleinfeld, J., dissenting); *Klier*, 658 F.3d at 481 (Jones, J., concurring); *In re Pet Food Prods. Liab. Litig.*, 629 F.3d 333, 363 (3d Cir. 2010) (Weis, J., concurring in part and dissenting in part).

By contrast, the Eighth Circuit's opinion here paves the way to divert that class property to third parties in just about every instance, so long as settling parties say the

right magic words, no matter how facially absurd, about the difficulty of paying class members instead of third parties. And the Ninth Circuit's standard is even more permissive, not even requiring district courts to make the inquiry. *E.g.*, *In re EasySaver Rewards Litig.*, 906 F.3d 747 (9th Cir. 2018); *cf.* D. Brooks Smith, *Class Action and Aggregate Litigation: A Comparative International Analysis*, 124 Penn St. L. Rev. 303, 337 (2020) (former Chief Judge of Third Circuit criticizing Ninth Circuit *cy pres* jurisprudence).

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

In this way, the decision below deepened a circuit split that already created an enormous incentive for forum-shopping by plaintiffs' attorneys seeking to bring and settle nationwide class actions like this one. Bringing suit within the footprint of the right circuit guarantees that

minor things like compensating class members for their injuries, holding defendants liable to the extent that the law allows, and preventing defendants from injuring class members in the same manner will not impede reaching a quick settlement to the mutual benefit of defendants and class counsel, at the expense of class counsel's putative clients. This permissiveness has not gone unnoticed among the plaintiffs' bar, judging by the explosion in consumer class-action settlements featuring *cy pres* awards within the Ninth Circuit, and we can expect the same in the Second and Eighth Circuits now.

The Chief Justice correctly observed that the need for the Court to address the "fundamental concerns" raised by *cy pres* relief, including "when, if ever, such relief should be considered" and "how to assess its fairness as a general matter." *Marek v. Lane*, 571 U.S. 1003, 1006 (2013) (Roberts, C.J., respecting denial of cert.). He suggested that "[i]n a suitable case, this Court may need to clarify the limits on the use of such remedies." *Id.* The Court granted review on these issues in 2018 but did not reach the merits because of Article III standing concerns. Justice Thomas dissented, and would have struck the use of all-*cy pres* settlements under Rule 23. *Frank v. Gaos*, 139 S. Ct. 1041, 1047–48 (2019) (Thomas, J., dissenting). This case has no Article III standing vehicle problems, and the need for clarification is greater than ever.

The Court should grant *certiorari* to resolve the circuit conflict, provide guidance to the lower courts on when (if ever) *cy pres* remedies are permissible, and correct a serious abuse of the class-action mechanism that puts the

interests of those it is intended to protect, class members, dead last.

OPINIONS BELOW

The Eighth Circuit's decision is reported at 38 F.4th 693, and is reproduced at App.1a. The district court's decision approving the class-action settlement under Rule 23 is reported at 2021 U.S. Dist. LEXIS 91260, 2021 WL 2426126, and is reproduced at App.13a.

JURISDICTION

The judgment below was entered June 29, 2022. The Eighth Circuit denied rehearing *en banc* (by a 6-to-5 vote) on August 16, 2022. On November 7, 2022, Justice Kavanaugh extended the time for this petition to December 14, 2022. *See* No. 22A395.

This Court has jurisdiction under 28 U.S.C. §1254(1).

RULES INVOLVED

Rule 23(e) is reproduced at App.44a.

STATEMENT OF THE CASE

A. Plaintiffs sue Monsanto over labeling of its Roundup-brand weedkiller products, seeking full refunds, and the parties settle.

A consumer class action alleged that certain Roundup Weed & Grass Killer products contained false or misleading representations on their labels. On behalf of themselves and putative class members, Plaintiffs sought, among other things, compensation equal to the amount they paid for the Roundup products "that they would not have purchased had they known the truth." App.102a.

The case settled for $39.55 million in exchange for a nationwide class releasing all of their consumer claims. Most of the class received only publication notice. Class members received nothing unless they participated in a claims process, and less than 3% of the class did so. As a result, the settlement would distribute roughly $16 million to uninjured nonprofits as *cy pres*, $12 million to class members, and $10 million to the class's attorneys. App.5a. Though the parties augmented payments to class members to ameliorate what was an even worse ratio originally, the payments remained a compromise of the complaint's demand for a full refund. The uninjured third-party organizations receiving settlement funds are the National Consumer Law Center; the National Advertising Division of the Better Business Bureau; and the Center for Consumer Law & Economic Justice at the University of California, Berkeley. App.3a–4a.

B. St. John objects to the *cy pres*.

Class member Anna St. John objected, challenging the fairness of the proposed settlement on Rule 23 and First Amendment grounds, and class counsel's fee request. App.85a.

St. John objected that the settlement improperly favored a third party chosen by conflicted representatives over class members through its *cy pres* provision. Citing Rule 23(e)(2)(C)(ii), which after 2018 amendments requires courts to consider the "effectiveness" of distribution before approving a settlement, St. John objected to the resort to *cy pres* before such mechanisms as direct notice and further augmenting distribution to class members. St. John provided unrebutted evidence demonstrating that settling parties could reach out to big-box retailers–and, if necessary, subpoena them–to obtain class-member purchase information, and then make direct distributions to class members. St. John detailed many consumer class actions that used this process to identify and provide direct relief to class members. App.103a.

Further, by providing settlement funds to be paid to organizations that engage in contentious advocacy, the *cy pres* violated class members' First Amendment rights to refrain from supporting or associating with a third party's agenda and activities without explicit consent. App.105a. St. John also objected that class counsel's $10 million fee represented at a minimum a 4.85 multiplier of its arguably exaggerated lodestar, and was excessive relative to the class's actual recovery.

C. The district court approves the settlement.

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. R. Doc. 74 at 16.

The district 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. App.21a.

First, it concluded that "further efforts to identify class members or increase the claims rate is not feasible." App.23a. 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." App.23a.

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. App.26a. 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. App.27a–28a. According to the court, "the class members' recovery was never going to be 100% of the purchase price" despite the refund relief sought in a complaint that no one contended was frivolous. App.28a. 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," taking it outside the First Amendment's ambit. App.31a. Two, "it cannot fairly be said that the remainder [of the fund] belongs to any one member" and so a single class member cannot use *Janus* to "exercise veto power over its disposition." App.32a.

Its decision did not mention Rule 23(e)(2)(C)(ii).

The district court approved the attorneys' fees in full, crediting the *cy pres* as part of the settlement benefit, while acknowledging that the Seventh Circuit holds otherwise. App.33a–35a & n.18.

St. John appealed.

D. The Eighth Circuit affirms, and denies *en banc* review by a 6-5 vote.

On St. John's appeal, the Eighth Circuit affirmed.

As for the feasibility of distributing the remaining funds to class members by identifying them through customer data held by retailers, the panel "d[id] not doubt that there are circumstances in which pursuing records from retailers is a reasonable and effective way to get relief to class members, especially because it might allow for direct payments to affected customers without a cumbersome claims process." App.7a. It still held that the district

court did not abuse its discretion, though the only evidence in the record about the feasibility of this approach was a few sentences spoken by plaintiffs' counsel at the hearing noting that the data was "imperfect" and did not include purchasers who paid with cash or bought from smaller retailers, where the notice plan had been targeted and "revised twice in an effort to reach more consumers." *Id.* The panel did not mention Rule 23(e)(2)(C)(ii) or its standard requiring evaluation of objective effectiveness, rather than subjective efforts.

The panel also rejected St. John's argument that because class members' damages are unliquidated, they should be able to recover up to the full damages demanded by the complaint before a compromise distributes funds as *cy pres* to third parties. Instead, the district court must "make its own assessment of the damages 'that would be recoverable' by class members" before *cy pres* distribution. App.9a. Here, however, the panel found, the district court had conducted such an analysis, and it did not abuse its discretion in concluding that a payment to claiming class members of 50% of the average weighted retail price for the products "fully compensated" the class members. *Id.*

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

claim or opt out of the settlement. App.10a. It did not reconcile this conclusion with *Klier*'s holding that settlement funds are the property of the class, or with the Eighth Circuit's earlier endorsement of that holding. *In re BankAmerica Corp. Sec. Litig.*, 775 F.3d 1060, 1064, 1065 (8th Cir. 2015) (quoting *Klier*, 658 F.3d at 475).

St. John petitioned for *en banc* review, which the Eighth Circuit denied in a vote of 6-5 without opinion. App.42a.

REASONS FOR GRANTING THE PETITION

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

Below, the Eighth Circuit held that diversion to *cy pres* of residual settlement funds greater than what the class will receive is acceptable even when distribution of the funds to *some* of the class is feasible; and even when the recipient engages in advocacy work that many class members oppose.

The lower courts are fractured. The Eighth's Circuit's approach to *cy pres* differs materially from that taken in the First, Second, Third, Fifth, Seventh, and Ninth Circuits. The issue of how courts should analyze class-action settlements that provide for *cy pres* relief, and when to

approve such settlements, is a recurring question of law and policy that the lower courts confront repeatedly. Yet none seems to have found a solution on which they can agree.

Without this Court's intervention, *cy pres* settlements will continue to direct millions of dollars in class-member damages to third parties selected by class counsels and defendants rather than provide direct relief to the injured class members. The Court recognizes that this is a problem. Along with Chief Justice's comment in *Marek*, the Court granted *certiorari* in *Frank v. Gaos*, 139 S. Ct. 1041 (2019), to review whether *cy pres* settlements satisfy Rule 23's standard, but remanded for the Ninth Circuit to address standing, with only Justice Thomas reaching the issue. Notwithstanding Justice Thomas's clarification that "*cy pres* payments are not a form of relief to the absent class members and should not be treated as such," *id.* at 1047 (Thomas, J., dissenting), this case is just one of many class-action settlements that have abused *cy pres* since *Gaos*. *See, e.g.*, *Hyland*, 48 F.4th 110 (2d Cir. 2022) (*cert.* pending *sub nom. Yeatman v. Hyland*, No. 22-___); *Joffe,* 21 F.4th 1102 (9th Cir. 2021) (Google settlement); *see also In re Google Inc. Cookie Placement Consumer Priv. Litig.*, 934 F.3d 316 (3d Cir. 2019) (vacating approval of all-*cy pres* settlement that Google has since resubmitted to the district court on remand).

This case is an ideal vehicle for addressing *cy pres*. The class of Roundup purchasers seeking economic damages indisputably have Article III standing, avoiding the issues that hamstrung review in *Gaos* and that respondents raised in successfully opposing review in *Lowery v. Joffe*,

No. 21-1535. St. John fully raised the Rule 23 and First Amendment *cy pres* issues below.

I. The circuits are fractured over several dimensions of *cy pres*.

The Eighth Circuit joins the Second and Ninth Circuits in rejecting the holding of the Fifth and Seventh Circuits that settlement funds belong to the class. But it also requires more scrutiny that the Second and Ninth Circuits do, while less scrutiny than the Third Circuit has provided.

The fracture is across many dimensions.

First, do class members have a property interest in the settlement proceeds resulting from the aggregation of their claims? *Cf.* American Law Institute, *Principles of the Law of Aggregate Litig.* § 3.07 cmt. b ("presumptively" yes).

The decision below gives lip service to the idea that settlement proceeds are the property of the class, but then makes this unenforceable and inapplicable to residual funds (App.10a), splitting with the Fifth and Seventh Circuits. *Klier* rejected *cy pres* of unclaimed funds from a class-action settlement, holding that such awards are impermissible if it is "logistically feasible and economically viable to make additional pro rata distributions to class members" so long as it is not a windfall. 658 F.3d at 475. (As discussed below, the circuits also split on the definition of a windfall.) Under this test, a *cy pres* award may be made "only if it is not possible to put those funds to their very best use: benefitting the class members directly." *Id.* As the court stressed, "[t]he settlement-fund

proceeds, having been generated by the value of the class members' claims, belong solely to the class members" and "*[c]y pres* comes on stage only to rescue the objectives of the settlement when the agreement fails to do so." *Id.* at 475–76. The Seventh Circuit similarly holds that settlement funds belong to class members, "the intended beneficiaries." *Pearson*, 772 F.3d at 784.

In contrast, the Second Circuit holds that a "settlement fund never belonged to class members as damages" even when the consideration includes impeding class members' damages claims. *Hyland*, 48 F.4th at 122. *Hyland* affirmed the diversion of an entire settlement fund to a nonprofit established to work hand in hand in advocacy with the teachers' union that funded class counsel's litigation.

The Third Circuit suggested in dicta that a *cy-pres* only settlement can be acceptable for a Rule 23(b)(2) settlement class, because in that scenario the settlement funds "'belong' to the class *as a whole*, and not to individual class members as monetary compensation." *Google Cookie*, 934 F.3d at 328. The Third Circuit nevertheless cautioned that where a settlement's "*only* monetary distributions are to class counsel, class representatives, and *cy pres* recipients, as in this case," there is a risk of "a greater misalignment of interests: the settlement clearly benefits the defendant (who obtains peace at a potentially reduced cost), class counsel (who are guaranteed payment in the settlement), and the named representatives (who are given an incentive award in the settlement)." *Id.* at 327. Meanwhile, "any benefit to other class members is indirect and inconsequential monetarily." *Id.* The Third Circuit vacated and remanded because, despite seeking

(b)(2) certification, the parties obtained a release of claims for money damages and attorneys' fees calculated as a percentage of the settlement fund without the protections provided by (b)(3). *Id.* at 329-30.

The Third Circuit is not so kind to Rule 23(b)(3) *cy pres* distributions like the one here. It has rejected the Second and Ninth Circuit's permissive approach to *cy pres* relief in settlements of damages claims. In *In re Baby Products Antitrust Litigation,* the court vacated district court approval of a Rule 23(b)(3) class-action settlement that, because of a low claims rate, would have distributed the bulk of the settlement fund to *cy pres* recipients. 708 F.3d 163 (3d Cir. 2013). "*Cy pres* distributions," the court emphasized, "are inferior to direct distributions to the class because they only imperfectly serve the purpose of the underlying causes of action—to compensate class members." *Id.* at 169. "Barring sufficient justification," the court held, "*cy pres* awards should generally represent a small percentage of total settlement funds." *Id.* at 174. By contrast, the Eighth Circuit now broadly condones settlements where 40% of the proceeds go to *cy pres*—and the Second and Ninth Circuits have affirmed all-*cy pres* settlement approvals.

"[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). When courts deny that class members have any rights in the settlement funds, they are quick to permit diversions that would normally be a breach of fiduciary duty and a violation of *Janus*'s requirement of affirmative consent

(and not just failure to object) before individuals can be compelled to subsidize speech they disagree with.

Second, while many of these courts use a "feasibility" standard, they differ wildly on what "feasibility" means. The Eighth Circuit now joins the Ninth Circuit in holding that a court can consider distribution infeasible if it cannot be made to *every* class member, rather than some class members. This exception swallows the rule, because no modern consumer or shareholder class-action settlement distributes recovery to every class member; claims rates are usually well below 10%, and often below even a fraction of a percent. *Pearson*, 772 F.3d at 782.

But in the Eighth Circuit's view, all a district court need do is accept settling parties' self-serving representations, no matter how empirically baseless they are. App.7a. A court therefore need not require direct distribution. *Id.* Class counsel and a defendant can thus grease the skids for a quick and easy *cy pres* deal that sells class members "down the river." *Mirfasihi v. Fleet Mortg. Corp.*, 356 F.3d 781, 785 (7th Cir. 2004).

The Ninth Circuit in a series of cases reached its rule that courts may consider settlement funds eligible for *cy pres* distribution whenever a settlement fund cannot be spread among *every* member of the class. First, in *Lane v. Facebook, Inc.*, the Ninth Circuit affirmed approval of a *cy pres*-only arrangement because it would result in only "*de minimis*" payments if the fund was distributed to the entire class. 696 F.3d 811, 821 (9th Cir. 2012), *cert. denied sub nom. Marek v. Lane*, 571 U.S. 1003 (2013). The Ninth Circuit reaffirmed this holding in *In re Google Referrer Header Privacy Litig.*, 869 F.3d 737, 742 (9th Cir.

2017), *vacated and remanded on other grounds sub nom. Frank v. Gaos*, 139 S. Ct. 1041 (2019). Then, in *EasySaver*, the Ninth Circuit held that even when it is "technically feasible" to distribute funds to every class member, a court can decide that millions of dollars was "*de minimis*" and approve *cy pres* to local schools in a judge's home district establishing chairs in the defendant's name. 906 F.3d at 761–62. Most recently, the Ninth Circuit reaffirmed its vacated *Google Referrer* analysis and held *cy pres* permissible when a defendant chose to insist on a burdensome proof of claim process. In such cases, a *cy pres* award need only bear "a direct and substantial nexus to the interests of absent class members." *Joffe*, 21 F.4th at 1112 (quoting *Lane*, 696 F.3d at 821), *cert. denied sub nom. Lowery v. Joffe.*

In comparison, the Seventh Circuit rejected a settlement that allocated $1.13 million of unclaimed funds from a $2 million fund to *cy pres*, even though there were 12 million class members. *Pearson,* 772 F.3d at 780, 784. This holding necessarily implicitly condones distribution to some class members being better than distribution to no class members. And it recognizes that "[t]here is no indirect benefit to the class from the defendant's giving the money to someone else." *Mirfasihi*, 356 F.3d at 784.

Third, the decision below holds that a district court must "make its own assessment of the damages 'that would be recoverable' by class members" before *cy pres* can be awarded from a residual settlement fund. App.9a. If the court concludes that class members have not been fully compensated, and further distribution to class members is feasible, then *cy pres* is not permissible. App.8a;

In re BankAmerica Corp. Secs. Litig., 775 F.3d 1060, 1064-66 (8th Cir. 2015); *accord In re Lupron Mktg. Litig.*, 677 F.3d 21, 34 (1st Cir. 2012). This holding is questionable. It tasks the district court with a vague analysis—in particular, the requirement that district courts conduct a damages assessment rather than to require further distributions to the class when feasible and when damages sought in a complaint are unliquidated. Settling parties will, as they did here, have a perverse incentive to tell the court to shortchange the litigation value of the class's causes of action to maximize *cy pres* contributions—but the defendant still gets the benefit of the release of supposedly valueless causes of action.

In contrast, the Fifth Circuit's "windfall" analysis holds it only a windfall on the face of the complaint's allegations where liquidated-damages claims are "100 percent satisfied by the initial distribution." *Klier*, 658 F.3d at 475. This makes the most sense: in no other instance does a settling defendant get to relitigate causes of action it settled to try to prove that it overpaid. *E.g.*, *Eberhard v. Verizon Wireless*, 609 F.3d 590 (3d Cir. 2010). Perhaps Jones's claims against Monsanto are entirely meritless, and a single peppercorn would fully compensate the class and anything above that is a "windfall." But having agreed to pay $39.5 million to settle the class's claims, Monsanto has no right of remorse to complain that class members are getting too much—and courts should not allow class counsel to breach its fiduciary duty to argue for less class recovery. Furthermore, any "windfall" to class members is less inequitable than a windfall to a *cy pres*

beneficiary with billions of dollars who didn't even allege injury.

Meanwhile, the Second Circuit's (*Hyland*) and Ninth Circuit's (*Google Referrer*) approach doesn't require *any* consideration of the relative compensation recovered by the class.

Fourth, though not at issue in this particular case, the circuits split on the scrutiny required to avoid conflicts of interest in *cy pres*. The Second and Ninth Circuits reject the Third Circuit's and *ALI Principles* § 3.07's standard making *cy pres* a disfavored remedy that should not be ordered if there is "a significant prior affiliation with any party, counsel, or the court." *Compare Google Cookie*, 934 F.3d at 331 *with Joffe*, 21 F.4th at 1120 (rejecting "significant prior affiliation" test citing egregious conflicts in *Lane*) *and Hyland*, 48 F.4th at 123 (asserting lack of independent evidence of actual bad faith beyond the face of the settlement dispositive).

Conflicts of interest are inherent in *cy pres* at the settlement stage. It is thus unsurprising that multiple settlements have involved *cy pres* recipients who were intertwined with the defendants' and class counsel's interests. *See, e.g.*, *Google Cookie*, 934 F.3d at 330; *Google Referrer*, 869 F.3d at 744 (*cy pres* recipients included class counsel's *alma maters* and had previously received funding from defendant); *Joffe*, 21 F.4th at 1119 (*cy pres* recipients had previously received funding from the defendant, one had a preexisting relationship with class counsel, and another supported plaintiffs in an earlier appeal in the case and threatened to object). Unlike the Second and Ninth, the

Third Circuit would not permit approval of a *cy pres* remedy without investigation of "the nature of the relationships between the *cy pres* recipients and [the defendant] or class counsel." *Google Cookie*, 934 F.3d at 330.

Finally, the Eighth Circuit's position ignores Rule 23(e)(2)(C)(ii)'s requirement that district courts consider "the effectiveness of any proposed method of distributing relief to the class, including the method of processing class-member claims." The district court treated a settlement that diverted $16 million to *cy pres* as equivalent to one that paid 100% of a $39.5 million settlement fund to the class. So too *Joffe*. If courts permit settling parties to dispense with class claims on their own say-so, it erases Rule 23(e)(2)(C)(ii) from the books by making it automatic to clear the "effectiveness" bar. A settlement that leaves over 97% of the class uncompensated while paying 40% of the settlement fund to unrelated third parties on its face flunks "effectiveness" when other consumer cases have successfully distributed smaller amounts without resorting to *cy pres*, demonstrating that individual distributions were "economically viable." *Baby Prods.*, 708 F.3d at 173 (quoting *ALI Principles* § 3.07(b)); *see also* Section II.D below (listing some examples).

Settling parties continue to include *cy pres* as settlement relief to their own advantage but to the detriment of class members, who recover less than they could and are even harmed further when settlement funds meant to compensate them are sent to third parties selected by often conflicted counsel and who engage in work that many class members oppose.

II. The questions presented are important and recurring.

The Rule 23 questions presented here are important and recurring. As *cy pres* festers in class-action jurisprudence without clear rules, the fundamental concerns about its use that many courts and the Chief Justice's *Marek* opinion voiced show that courts should sharply curtail if not flatly prohibit application of the *cy pres* doctrine to class-action settlements.

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

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

But *cy pres* is a poor fit for class actions when courts permit settlements to be gamed to divert material amounts of money away from the class. There are no "changed circumstances" in these class-action settlements. There is no original "benefactor" whose wishes must be accommodated "as near as possible," once the

true beneficiary purpose ceased to exist. Even more fundamentally, there is no "charitable" objective in a Rule 23 class action. *Pet Food Prods.*, 629 F.3d at 363 (Weis, J., concurring and dissenting in part). Rather, a class action is a procedural device to aggregate private claims for compensation to class members—not to create a charitable trust. *Cf. Shady Grove Orthopedic Assocs., P.A., v. Allstate Ins. Co.*, 559 U.S. 393, 408 (2010). In short, application of *cy pres* to Rule 23 class settlements unquestionably extends the doctrine far beyond its original roots and rationale into an area where the doctrine's premises are not only absent but *contrary* to the purposes of Rule 23.

The settlement here epitomizes this. The purchasers of weed-killer products are largely suburban homeowners, and surely very few endorse the extreme positions of Berkeley's clinic's zero-carbon advocacy, even if class counsel finds such advocacy appealing.

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

Cy pres creates two types of improper incentives for class counsel. First, *cy pres* is one way to create the illusion of relief that class counsel then can use to justify an excessive attorneys' fee. When courts award attorneys' fees based on the size of the *cy pres* fund rather than on the amount the class directly received, *cy pres* will "increase the likelihood and absolute amount of attorneys' fees awarded without directly, or even indirectly, benefiting the plaintiff." Martin H. Redish *et al.*, *Cy Pres Relief and the Pathologies of the Modern Class Action: A Normative and Empirical Analysis*, 62 Fla. L. Rev. 617, 661

(2010). As a result, class attorneys are financially indifferent over whether a settlement is structured to compensate their clients or to funnel settlement proceeds to third parties.

Second is lawyers' use of *cy pres* to promote their own personal, financial, political, or charitable preferences. It is not uncommon to see publicity photographs of attorneys handing oversized checks to their selected *cy pres* recipients or to see recipients issue public statements of gratitude to the class attorneys. *E.g.*, Chris J. Chasin, *Modernizing Class Action Cy Pres Through Democratic Inputs*, 163 U. Penn. L. Rev. 1463, 1484 & n.114 (2015); Staff, *Empowering Law School Antitrust Scholarship Through Unique Philanthropic Support*, U. Chi. L. Alumni Mag. (Dec. 2021) (celebrating alumnus class counsel whose settlement made his *alma mater* a *cy pres* beneficiary).

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

Cy pres similarly creates the appearance of impropriety for district court judges. It tempts judges to play benefactor with someone else's money. Adam Liptak, *Doling Out Other People's Money*, N.Y. TIMES (Nov. 26, 2007); *see, e.g.*, *EasySaver*, 906 F.3d at 761–62; *cf. also* Kidd

at 613–14 (case of *cy pres* to nonprofit where judge's spouse sat on board); *In re Google Buzz Privacy Litig.*, No. C 10-00672, 2011 WL 7460099, at *3 (N.D. Cal. June 2, 2011) (district court without notice to class *sua sponte* redirected proposed *cy pres* to local university where judge taught as visiting law professor).

These apparent conflicts of interest undermine broader confidence in our judicial system and have no place in it. St. John's arguments below focused on application of Rule 23(e)(2)(C)(ii), *BankAmerica*, and *Janus* and admittedly did not raise issues of similar conflicts in this case. But these potential conflicts in future *cy pres* cases (and in the soon-to-be-pending *Yeatman* petition) demonstrate the public-policy need for bright-line rules restricting *cy pres*.

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

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

But that is exactly what the Eighth Circuit did. It presumed that over 97% of the class consented to the *cy pres* diversion by failing to file a claim or opt out from the class.

App.10a. *Contrast also Oxford Health Plans LLC v. Sutter*, 569 U.S. 564, 574 (2013) (Alito J., concurring) (failure to respond to "opt-out notices" is not consent). "Ascribing any meaning to silence in response to publication notice is untenable." Debra Lyn Bassett, *Class Action Silence*, 94 B.U. L. Rev. 1781, 1799 (2014); *accord Redman v. RadioShack Corp.*, 768 F.3d 622, 628 (7th Cir. 2014).

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

Class counsel did not obtain the "affirmative consent" of each class member for to this *cy pres* award. Instead, the Eighth Circuit allowed a class action brought for the benefit of petitioner St. John to fund an organization that works against her policy preferences. App.106a. Even beyond the First Amendment implications, the selection of politicized beneficiaries implicates the fairness of *cy pres* settlements. Smith, *supra*, at 337 (*cy pres* "especially troubling" when it goes to "powerful interest group" that

"conducts political activity in many fields wholly unrelated" to the facts of the litigation).

The district court also held that the First Amendment was not implicated because its order approving the settlement was not state action. App.31a. But class-action settlements approved and enforced by courts, and constitutional due process rights underlie many provisions of Rule 23, including notice and opt-out rights. *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 846 (1999) (mandatory class actions aggregating damages claims implicate due process); *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 811 (1985). Class-action procedures must protect class members' First Amendment rights just as they must protect other constitutional guarantees.

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

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

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

- While *Baby Products* left open the possibility of approving *cy pres*, it reversed a settlement approval

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

- After objection to a claims-made settlement of a consumer class action over aspirin labeling where nearly all funds would have gone to *cy pres*, the parties used subpoenaed third-party retailer data to identify over a million class members and paid another $5.84 million to the class, increasing class compensation from the less than $100,000 the original settlement provided. Order 4, *In re Bayer Corp. Litig.*, No. 09-md-2023, Dkt. 254 (E.D.N.Y. Nov. 8, 2013); *id.* Dkt. 218-1.
- A similar successful objection to residual *cy pres* in an antitrust settlement increased class recovery from $2.2 million to $13.7 million. *Pecover v. Electronic Arts, Inc.*, No. 08-cv-2820, 2013 WL 12121865 (N.D. Cal. May 30, 2013); *id.* Dkt. 466.
- After this Court decided *Gaos*, Google broke its streak of four consecutive *cy pres*-only privacy class settlements with a successful direct electronic distribution of funds and a claims process for a class of tens of millions of members, though only $7.5 million was in the settlement fund. *In re Google Plus Profile Litig.*, No. 5:18-cv-06164-EJD, 2021 WL 242887

(N.D. Cal. Jan. 25, 2021). (Google has since reverted to its old ways in the *Google Cookie* remand.)

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

In short, as *Pearson* reasoned, if courts make lawyers direct money to clients to get paid, that is *exactly* what happens. Alison Frankel, *By Restricting Charity Deals, Appeals Courts Improve Class Actions*, Reuters (Jan. 12, 2015). And as discussed in the next section, the difference in recovery compared to a world where the Court fails to check this abuse will not be trivial.

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

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

While the effects of the Second Circuit's decision are still developing, the experience of other circuits after loosening restrictions on *cy pres* offers a guidepost. After the Ninth Circuit began analyzing the feasibility of direst distribution to the class by reference to the number of class members, a district court issued an order permitting class counsel to divert *$76.1 million* of a Volkswagen-owner class's settlement fund to *cy pres* with no penalty to their previously awarded fee. The Ninth Circuit's permissive approach meant that there was no effort to provide direct distribution to the vast majority of class members (who received direct notice but failed to jump through the hoops of making a claim); no new notice to the class of the 55 newly identified *cy pres* recipients; no disclosure of potential conflicts of interest; no press coverage; and thus no objections before the court's rubber stamp of a short proposed order. *In re Volkswagen "Clean Diesel" Litig.*, No. 3:15-md-02672-CRB, Dkt. 7961 (N.D. Cal. May 16, 2022).

In another district, the court approved a settlement that paid $142 million to *cy pres*; $5 million to the class; and $50 million to the class attorneys. *Krueger v. Wyeth, Inc.*, No. 3-cv-2496, 2020 WL 6688838 (S.D. Cal. Nov. 12, 2020). The examples go on. Other recent decisions in the Ninth Circuit have too readily accepted contentions that *cy pres* is appropriate because distributing $28/class member is too "burdensome and inefficient" or because $9.71 checks are "*de minimis*." *See respectively Beaver v. Tarsadia Hotels*, No. 11-cv-01842, 2020 U.S. Dist. LEXIS 40415, at *5, *7 (S.D. Cal. Mar. 9, 2020), *and Knell v. FIA Card Servs, N.A.*, No. 3:12-cv-00426, 2020 U.S. Dist.

LEXIS 217452, at *4 (S.D. Cal. Nov. 19, 2020); *see also Norcia v. Samsung Telcoms. Am., LLC,* No. 14-cv-00582, 2021 U.S. Dist. LEXIS 135256, *6 (N.D. Cal. Jul. 20, 2021) ($74,680 to class; over $2 million *cy pres* to Berkeley law school clinic); *cf. also Keepseagle*, 856 F.3d 1039 (affirming judgment of $380 million of *cy pres* in settlement with federal government because of appellants' lower-court waiver).

Courts in other parts of the country have suggested "un-certainty as to the legitimacy of *cy pres* distributions in class action settlements" in the wake of *Gaos*. *Ward v. Flagship Credit Acceptance LLC*, No. 17-cv-2069, 2020 U.S. Dist. LEXIS 25612, at *66 n.31 (E.D. Pa. Feb. 13, 2020); *see also Poblano v. Russell Cellular Inc*., 543 F. Supp. 3d 1293, 1296 (M.D. Fla. 2021). Simply put, "[t]he U.S. class action system has yet to fully come to grips with the misuse of cy pres." Smith, *supra*, at 339. And, in three circuits now, the doctrine has unfortunately "run wild." *Id*.

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

CONCLUSION

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

Respectfully submitted,

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December 14, 2022

APPENDIX

TABLE OF APPENDICES

Appendix A

United States Court of Appeals
For the Eighth Circuit

No. 21-2292

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

v.

Monsanto Company
Defendant-Appellee

Anna St. John
Objector–Appellant

State of Montana; State of Arkansas; State of Indiana; State of Louisiana; State of Mississippi; State of Nevada; State of North Dakota; State of South Carolina; State of Texas; State of Utah

Amici on Behalf of Appellant(s)

Appeal from United States District Court for the Western District of Missouri - Kansas City

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Submitted: February 17, 2022
Filed: June 29, 2022

Before SMITH, Chief Judge, BENTON and KELLY, Circuit Judges.

KELLY, Circuit Judge.

Anna St. John objected to a class action settlement between Defendant Monsanto and Plaintiffs Lisa Jones, Horacio Torres Bonilla, and Kristoffer Yee, on behalf of a class of consumers. The district court[1] overruled St. John's objections, approved the settlement, and awarded Plaintiffs attorney's fees. St. John appeals, and we affirm.

I. Background

Plaintiffs filed suit in February 2019, pleading multiple claims arising out of the allegedly deceptive labelling of Roundup products manufactured by Monsanto. Specifically, Roundup products bore a label indicating that the active ingredient, glyphosate, "targets an enzyme found in plants but not in people or pets." Plaintiffs alleged, however, that Monsanto knew that glyphosate is in fact present in gut bacteria in both humans and animals, so the label was false.

In August, the parties attended a formal mediation. Throughout the fall and winter, they continued to exchange discovery and negotiate the details of a settlement. As part of this process, both parties commissioned experts

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[1] The Honorable Beth Phillips, Chief Judge, United States District Court for the Western District of Missouri.

to quantify the measure of damages. The experts surveyed consumers to determine how much less they might expect to pay for the Roundup product without the misleading label. Plaintiffs' expert estimated that the misleading label constituted 7.9% to 15.9% value. Plaintiffs concluded, therefore, that 15.9% of the value of the products purchased was the best-case damages after victory at trial. Monsanto's expert found no significant difference in the value of a product with and without the challenged label and estimated no more than 2.5% of the value as damages.

An initial proposed settlement agreement was presented to the district court for preliminary approval in March 2020. The parties agreed to a total Common Fund of $39.55 million. They agreed that Monsanto would not object to Plaintiffs' counsel seeking 25% of that amount as an attorney's fee. Class members who filed claims were to receive 10% of the average retail price for the product(s) they bought, and any remaining funds after the costs of administration would be distributed *cy pres*.

Before the district court ruled on that motion, the parties executed a Second Corrected Class Action Settlement Agreement that made four changes to the initial agreement: (1) narrowed the scope of the class members' release of claims; (2) added Plaintiffs' intent, unopposed by Monsanto, to seek an incentive payment of $2,500 for each named plaintiff; (3) proposed two *cy pres* recipients—the National Consumer Law Center and the National Advertising Division of the Better Business Bureau—and clarified the *cy pres* selection process; and (4) extended the notice period and opt-out deadline. The notice documents were updated to reflect these changes, though they did not identify the *cy pres* organizations specifically. The district court granted preliminary approval, certified a national

settlement class, and approved notice to putative class members.

The 90-day notice period began on May 28 and ended on August 28, 2020. The initial forms of notice included: publication in an issue of Better Homes & Gardens; banner notices on Google, Yahoo!, Facebook, Instagram, and YouTube targeting individuals with an interest in lawn and garden maintenance; radio and banner notices on Pandora streaming radio targeted to lawn and garden enthusiasts; sponsored search advertising on Google Ads for key words related to the litigation; nationwide news release; and creation of a settlement website and hotline. In July, midway through the notice period, the parties directed the claims administrator to initiate a supplemental notice program to augment the notice obtained by the methods described above. This supplemental notice included: more targeted digital banners; email distribution to a purchased, curated list of individuals; advertisements in four digital newsletters on relevant topics; and notices on two class action aggregation websites. The claims administrator calculated that these combined notice efforts reached 82% of class members with an average frequency of 2.51 contacts.

In October 2020, the parties sought approval from the district court for another updated settlement and notice. First, the parties proposed amending the settlement to allow for a possible upward adjustment of payments to claimants of up to 50% of product value rather than the 10% figure previously agreed to. They also added a third proposed *cy pres* recipient, the Berkeley Center for Consumer Law & Economic Justice. The parties proposed an additional notice period of 90 days for the updated notice, which would include the original forms of notice and the supplemental forms of notice initiated in July, plus new

television and radio advertising. The revised notice would inform class members of the possible pro rata increase in payments to claimants. The district court approved this proposal.

The supplemental notice and claim period ended on February 16, 2021. The following week, the claims administrator reported that it had received 285,399 total claims accounting for slightly more than 1 million products, though it anticipated rejecting approximately 43,000 of those as duplicative or deficient. This represented a 2–3% estimated claims rate based on total sales of almost 89 million units during the relevant period. The validity of some claims had not been verified at the time of briefing, but the parties indicate that the value of the valid claims will range between $11.72 million and $13.34 million. The 25% award to the attorneys is $9.89 million, and the administrator's fees amounted to $1.8 million. This leaves approximately $14 to $16 million to be distributed *cy pres*, depending on the final value of the valid claims.

St. John made three objections to the settlement, all of which she renews on appeal. First, St. John argues that there are further steps the parties could take to identify and encourage the participation of more class members. At the very least, St. John argues, the payment to class members who have made claims should be increased to 100% of the price of the products purchased before donating proceeds *cy pres*. Second, St. John argues that the district court's order allowing funds to be donated to the *cy pres* organizations constitutes compelled speech in violation of her First Amendment rights. Finally, St. John argues that the *cy pres* should be excluded from the total value of the Common Fund for purposes of calculating the attorney's fee and that time spent on related litigation in

another district court should be excluded from the compensable time considered in the lodestar analysis.

II. Legal Standard

"We review a district court's order approving a class action settlement for an abuse of discretion." Rawa v. Monsanto Co., 934 F.3d 862, 868 (8th Cir. 2019). "In doing so, 'we ask whether the district court considered all relevant factors, whether it was significantly influenced by an irrelevant factor, and whether in weighing the factors it committed a clear error of judgment.'" Id. (quoting Marshall v. Nat'l Football League, 787 F.3d 502, 508 (8th Cir. 2015)).

III. Discussion

A. Size of the *Cy Pres*

St. John's first objection is to the size of the *cy pres* distribution. St. John argues that the district court should have (1) required the parties to take additional steps to identify additional class members and (2) increased the pro rata portion of the Common Fund up to 100% of the weighted average retail price.

The district court did not abuse its discretion in concluding that notice to the class was sufficient in light of the comprehensive notice plan and the estimated results from the claims administrator. This court has noted that "a claim rate as low as 3 percent is hardly unusual in consumer class actions and does not suggest unfairness." Keil v. Lopez, 862 F.3d 685, 697 (8th Cir. 2017) (affirming the district court's conclusion that a settlement was fair, reasonable, and adequate where the potential class covered 3.5 million households, an estimated 87% of those received notice, and 105,173 claims were submitted against a settlement fund of $32 million). St. John points to cases in

which the parties subpoenaed consumer data from retailers and were able to make direct payments to consumers based on those records, including to consumers who did not opt in to the class. The district court engaged the parties about that possibility during a hearing, asking, "So in light of the objector's objection, have you done any additional investigation as to whether – whether additional notice is possible, the cost of additional notice, the reference that the objector makes to subpoenaing records from big-box retail locations, actions or steps of that sort?" Plaintiffs' counsel responded that after conferring with the claims administrator, they concluded that the notice plan already in place

> was actually more effective than seeking subpoenas from retailers who have increasingly imperfect data. Especially with ongoing privacy concerns, retailers – major retailers are now getting rid of a lot of that data, they're not holding on to it in the way that they used to. They, of course, aren't tracking people who make purchases with cash and, of course, it would not include people who purchased from smaller retail outlets. So it was our conclusion that that would not have been a most effective form of updating notice and that the steps that we already took were, in fact, more effective.

There is no further discussion in the record of the feasibility of St. John's proposed approach. We do not doubt that there are circumstances in which pursuing records from retailers is a reasonable and effective way to get relief to class members, especially because it might allow for direct payments to affected consumers without a cumbersome claims process. Based on this record, however, the district

court did not abuse its discretion by not requiring the parties to pursue this approach in addition to the notice plan that had already been implemented, which advertised the settlement in a targeted way across numerous platforms and was revised twice in an effort to reach more consumers.

The second issue St. John raises is whether the class members who have been identified are entitled to a larger proportion of the price of the product, up to 100%, before the residual funds are allocated *cy pres*. Relying on In re BankAmerica Corp. Securities Litigation, 775 F.3d 1060 (8th Cir. 2015), St. John argues that because class members' damages are unliquidated, they should be able to recover up to the full purchase price before the district court may order *cy pres* distribution. Concerns about a windfall to class members, St. John asserts, are not relevant in the context of unliquidated damages.

This argument overstates BankAmerica's holding. In BankAmerica, we held that unclaimed funds may only be distributed *cy pres* where existing class-member claimants have been fully compensated and further distribution to remaining class members is not feasible. Id. at 1064. Where class members have claims for liquidated damages, they are fully compensated when those claims are "100 percent satisfied by the initial distribution." Id. (quoting Klier v. Elf Atochem N. Am., Inc., 658 F.3d 468, 475 (5th Cir. 2011)). When damages are unliquidated, class members are not necessarily "'fully compensated' by payment of the amounts allocated to their claims in the settlement." Id. at 1065. If the settlement provides "only a percentage of the damages" sought by the plaintiffs and "the settling parties disagree as to both liability and damages, and do not agree on the average amount of damages per share that would be recoverable by any of the Classes," then

"the notion that class members were fully compensated by the settlement is speculative, at best." Id. at 1066. Contrary to St. John's assertion, however, this does not require that class member claimants receive the full amount of unliquidated damages claimed in the complaint before *cy pres* distribution. Rather, it requires the district court to make its own assessment of the damages "that would be recoverable" by class members before approving distribution of the residual funds *cy pres*. The reversible error in BankAmerica was not that plaintiffs had not received the full change in stock value but that the district court had not determined the measure of class members' damages and whether they had been fully compensated before granting a *cy pres* distribution.

In this case, the district court conducted such an analysis, and we find no abuse of discretion in its conclusion that a payment to class members of 50% of the average weighted retail price for the items they purchased "fully compensated" the class members and that they had no equitable claim to the remaining funds, which were appropriately distributed *cy pres*. The district court reasoned that even if class members claimed they would not have purchased Roundup if it had not borne the allegedly misleading label, their damages would still have to be reduced from 100% to account for the value they received from using Roundup. The conclusions of both parties' experts also support this finding—Monsanto's expert's survey found a 2.5% differential and plaintiffs' expert's survey found a differential of 7.9% to 15.9%. We see no clear error of judgment in the district court's conclusion.

B. First Amendment

St. John's next argument is that the district court ordering a *cy pres* distribution to particular charitable organizations is a form of compelled speech of the class members

in violation of the First Amendment. We disagree. The First Amendment prevents the government from "compel[ling] the endorsement of ideas that it approves." Knox v. Serv. Emps. Int'l Union, Local 1000, 567 U.S. 298, 309 (2012). "Compelling a person to *subsidize* the speech of other private speakers raises similar First Amendment concerns." Janus v. AFSCME, Council 31, 138 S. Ct. 2448, 2464 (2018). But class members have not been compelled to subsidize speech when residual funds are distributed *cy pres*. As discussed above, residual funds may only be distributed *cy pres* after class members who have filed claims are "fully compensated" and no further allocation of funds to other, remaining class members is feasible or appropriate. See BankAmerica, 775 F.3d at 1064–66. So while settlement funds "are the property of the class," id. at 1064 (quoting Klier, 658 F.3d at 475), residual funds do not belong to any individual class member who has received his or her portion of the settlement fund. Nor are the class members who fail to claim their portion of the settlement fund compelled to subsidize speech; they could have filed a claim to collect the funds themselves or opted out of the settlement and preserved their right to pursue their claims individually, but they have no claim to residual funds. And neither of these situations is analogous to the facts considered by the Supreme Court in Janus. The compelled speech in Janus involved automatic deductions taken from employees' paychecks. A *cy pres* distribution, in contrast, "involves funds that, regardless of the cy pres provisions, could not feasibly be paid to class members," In re Google Inc. St. View Elec. Commc'ns Litig., 21 F.4th 1102, 1118–19 (9th Cir. 2021), and so cannot be money "taken" from any member of the class, cf. Janus, 138 S. Ct. at 2486 (First Amendment requires that "employees clearly and affirmatively consent before any money is *taken* from them" (emphasis added)). *Cy pres* distribution

of residual funds pursuant to the settlement agreement neither constitutes speech by any individual class member nor infringes on their First Amendment rights.

C. Attorney's Fee

Finally, St. John challenges the attorney's fee of 25% of the Common Fund to be paid to class counsel. St. John urges the court to exclude the *cy pres* from the value of the lawsuit in calculating the attorney's fee because the *cy pres* is not a benefit to the class. But the funds that are ultimately allocated *cy pres* were available for class members to claim. If the court affirms the adequacy of the notice to the class, then the court cannot fault plaintiffs' counsel for the fact that class members, for myriad possible reasons, did not submit enough claims to exhaust the Common Fund. Furthermore, by its very name, a *cy pres* distribution "*must* be for the next best use," that is, "for indirect class benefit," and "for uses consistent with the nature of the underlying action." BankAmerica, 775 F.3d at 1067 (quotation omitted). Because the *cy pres* is "distributed for a purpose as near as possible to the legitimate objectives underlying the lawsuit [and] the interests of class members," id. (quotation omitted), the district court did not abuse its discretion in including the amount allocated *cy pres* in calculating the attorney's fee.

St. John also argues that the district court erred in assigning any value to the parties' agreement that Monsanto will change the Roundup label since the settlement does not give Plaintiffs any say in the wording of the new label, and in fact, Monsanto had already begun the regulatory process to change the label before the settlement agreement was reached. Again, we disagree. Because the prior label had been approved by the EPA, it was presumptively legal, and Plaintiffs could not have obtained an injunction against the label from the court. The district court did not

abuse its discretion in determining that Monsanto agreeing to change its label was an element of the class's overall success. The fact that the settlement does not control the text of any new labeling Monsanto may adopt does not persuade us otherwise.

St. John's final argument is that the district court erred in including work that was done in prior litigation, Blitz v. Monsanto Co., No. 17-473 (W.D. Wis.), in the fee award. In Miller v. Dugan, this court acknowledged the general principle that a fee award could include time spent on separate litigation "if the effort resulted in work product that was actually used in the instant case, the time spent was inextricably linked to issues raised in the instant case, and the plaintiff was not otherwise compensated for counsel's work in the ancillary proceeding." 764 F.3d 826, 832 (8th Cir. 2014). We are satisfied that the district court did not abuse its discretion in concluding that the close relationship between Blitz and this case permitted time spent on Blitz to be included in the lodestar analysis. Blitz also raised state-specific and nationwide class claims based on the allegedly false Roundup label. Monsanto and the Plaintiffs here stipulated to the use of discovery from Blitz, including depositions, and avoided duplicating in this litigation work that had already been done. And the settlement agreement that resolves this case also resolves Blitz, so the attorneys will not be compensated separately for their related work on that case. It was therefore not a clear error in judgment for the district court to include Plaintiffs' counsel's work on Blitz in its assessment of a reasonable attorney's fee.

For these reasons, we affirm the order of the district court approving the class action settlement in this matter.

Appendix B

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI WESTERN DIVISION

LISA JONES, *et al.*, Plaintiffs, v. MONSANTO COMPANY, Defendant.	)	No. 19-0102-CV-W-BP

ORDER GRANTING MOTION FOR FINAL APPROVAL OF CLASS SETTLEMENT AND AWARD OF ATTORNEYS' FEES

On February 25, 2021, Plaintiffs filed a Motion for Final Approval of Class Settlement and Award of Attorneys' Fees, (Doc. 64). Objections were filed by one objector, Ms. Anna St. John, ("the Objector"). In accordance with the Court's Order and the Notice sent to class members, the Court conducted a hearing on March 11, 2021; counsel for the parties and the Objector were present, but no other objectors appeared. After considering the parties' and the Objector's arguments, the Court GRANTS Plaintiffs' motion to approve the settlement.

I. BACKGROUND

Defendant manufactures various weed and grass killers under the name "Roundup." The active ingredient in these

Roundup products is glyphosate, and the products contain a label, ("the Label"), stating that "[g]lyphosate targets an enzyme found in plants but not in people or pets." Beginning in 2015 several lawsuits were filed around the country alleging that the Label is false or misleading because, while the enzyme targeted by glyphosate is not used by vertebrates, it is used by helpful bacteria in the digestive system of vertebrates. Counsel for Plaintiffs in this case brought some of those suits, including in particular a case in the Western District of Wisconsin captioned *Blitz v. Monsanto Co.,* Case No. 3:17-cv-00473.[1] That case involved consumers from six states, and initially sought to certify a nationwide class and subclasses for each of the six states where the plaintiffs resided. All the plaintiffs except for the Wisconsin consumer dismissed their claims without prejudice four months after *Blitz* was filed in light of the Supreme Court's intervening decision in *Bristol-Myers Squibb Co. v. Superior Court of California*, 137 S. Ct. 1773 (2017), which established that personal jurisdiction was lacking over the non-residents' claims. After significant discovery and work on pretrial motions, a motion was filed to certify a class of Wisconsin consumers; that motion was denied in January 2019 and the Seventh Circuit denied the plaintiff's request for interlocutory appeal.

Meanwhile, this case was filed in February 2019 by three plaintiffs asserting various claims arising from the Label's allegedly false or misleading representation. The suit was filed on behalf of the three plaintiffs and on behalf of (1) a putative nationwide class and (2) three putative

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[1] The Court takes judicial notice of the filings in *Blitz*.

subclasses for each of the states where the plaintiffs purchased Roundup.[2] Defendant filed a Motion to Dismiss, which included a request to dismiss the class certification allegations. Some of the issues raised were similar to those Defendant raised in *Blitz*, others were specifically related to New York and California law and had not been raised in *Blitz*. The motion was denied in its entirety in June 2019. (Doc. 41.)

In March 2020, Plaintiffs filed a Consent Motion seeking preliminary approval of a class action settlement. (Doc. 49.) The Court communicated some concerns to the parties, and, in response, the parties revised the settlement to provide:

1. Greater clarity with respect to the fact that personal injury claims were not released,
2. Specification of the amount of the incentive awards for the named Plaintiffs,
3. Specification of the *cy pres* recipients, and
4. Extensions to the deadlines for class members to submit claims and to opt out.

(Doc. 52.)

In May 2020, the Court preliminarily approved the settlement, ("the Original Settlement"). (Doc. 53.) The Original Settlement, (Doc. 52-1), proposed a class of all consumers in the country who purchased Roundup for

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[2] The named plaintiffs were citizens of Kansas, New York, and California, but the Kansas plaintiff purchased Roundup in Missouri, so the claims were based on Missouri, New York, and California law. There was no issue regarding personal jurisdiction because Defendant's headquarters are in Missouri.

personal use, with the statute of limitations varying from state to state. A settlement fund of $39.55 million was created, and class members would receive 10% of the average retail price for each product (with a cap of one purchase per year if proof of purchase was lacking). Fees for the claims administrator were predicted to range from $760,000 to $1.3 million, and a motion seeking attorney fees of up to 25% of the fund would be filed when final approval was sought. Each class representative would receive $2,500 as an incentive award. Any remaining funds would be distributed through a *cy pres* to the National Consumer Law Center and the National Advertising Division of the Better Business Bureau. The Original Settlement also required Defendant to change the Label. (Doc. 52-1, pp. 9-10.) Finally, the Original Settlement contemplated a notice plan employing a variety of communication avenues that was anticipated to reach at least 80% of the class members. (Doc. 50-5, ¶ 13.)[3]

Between May and September 2020, the parties employed additional notice measures not required by the Original Settlement. Most notably, they purchased email lists that enabled notices to be emailed to potential class members. Still, by September 2020, the total number of claims was approximately 150,000, which left a substantial amount of the settlement fund unclaimed. The parties expressed an interest in altering the settlement, and they

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[3] The notice plan utilized (1) print media, (2) digital banners on social media sites (*e.g.*, Facebook and Instagram), (3) streaming radio (*e.g.*, Pandora), (4) online video on YouTube, (5) search engine advertising, (6) press releases, (7) a settlement website, (8) a toll-free hotline, and (9) online displays/advertising on other websites. (Doc. 50-5, ¶¶ 12, 14-30.)

eventually agreed to (1) increase the amounts paid to class members to 50% of the average retail price for each product, (2) extend the claims period, and (3) and pursue additional notice methods.[4] The parties also agreed to add the Center for Consumer Law & Economic Justice as an additional recipient of any *cy pres* distribution. (Doc. 58-1.) The Court approved the settlement as amended, ("the Updated Settlement"). (Doc. 59.)

On February 25, 2021 – and in advance of the final approval hearing set for March 11 – Plaintiffs filed a consent motion for final approval of the settlement. The parties reported that there have been approximately 240,000 valid claims, although the process for evaluating claims is ongoing. (Doc. 65-2, ¶¶ 21-22.) It is estimated that this constitutes between two to three percent of the potential class members, (Doc. 74, p. 6),[5] and it is estimated that more than 80% of the class members saw information about the settlement an average of more than two times each. (Doc. 65- 2, ¶ 27; Doc. 74, p. 5.)

The total amount to be paid to the class will range (depending on the final count of valid claims) between $11.727 and $13.348 million. (Doc. 65-2, ¶¶ 21, 23.) The Class Administrator has incurred fees totaling $1,836,111. Class counsel seeks fees and costs in the amount of 25% of the settlement fund, or $9,887,500. And, the incentive awards

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[4] The additional notice methods are detailed and extensive and in light of the issues before the Court need not be summarized here. The important point is that they represented a substantial enhancement to the notification process contemplated by the Original Agreement. (*See* Doc. 58-2, ¶¶ 27-47.)

[5] All page numbers are those generated by the Court's CM/ECF system and may not correspond to the document's pagination.

for the three class representatives will total $7,500. This leaves (assuming the high end of the range for the amount paid to class members) more than $14.4 million to be distributed through the *cy pres.*

The Court has considered the parties' arguments (including the Objector's, most of which were already of concern to the Court).[6] And, pursuant to its role as a guardian for the absent class members, *see In re Wireless Tel. Fed. Cost Recovery Fees Litig.*, 396 F.3d 922, 932 (8th Cir. 2005), the Court has considered other issues that have not been raised. As discussed more fully below, the Court believes the settlement should be approved; during that discussion additional facts may be presented.

II. DISCUSSION

A. Requirements for Certification

A class can be certified if (1) the prerequisites in Rule 23(a) of the Federal Rules of Civil Procedure are satisfied and (2) the class qualifies under one of the provisions in Rule 23(b). There is no dispute between the parties and the Objector – and little doubt in the Court's mind – that these requirements are satisfied, so only a brief discussion is necessary.

Rule 23(a)'s prerequisites are (1) the class is so numerous that joinder of all members is impracticable; (2) there are questions of law or fact common to the class; (3) the claims of the parties are typical of the claims of the class, and (4) the class representatives (and their attorneys) will fairly and adequately represent the class. There is no

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[6] Therefore, there is no need to consider Defendant's suggestion that the Objector may lack standing. (*See* Doc. 72, p. 2 & n.2.)

question that the first condition is satisfied. The Label's contents and the scientific truth behind the representations are common questions of fact for all class members. The fact that the Label is the same for all class members demonstrates that the class representatives' claims are typical of the claims of all class members. And, there is no question that the class representatives and class counsel can adequately represent the class.

The parties proposed certification under Rule 23(b)(3), which requires that "the questions of law or fact common to class members predominate over any questions affecting only individual members and that a class action is superior to other available methods" for resolving the dispute. Most individual issues (*e.g.*, any issues related to reliance on the Label's representations) are rendered nonfactors by the settlement's terms. The remaining significant individual issue – the amount of product bearing the Label each class member purchased – is resolved through the claims process and the Court finds that common issues predominate over the remaining individual issues. The Court also finds that this class action is superior to other methods of resolving the dispute, particularly given the small amounts of damage suffered by each consumer.

The Court also must consider the provisions of Rule 23(e)(2), which provides that a settlement binding absent class members can be approved only upon finding that the settlement is "fair, reasonable, and adequate" after considering several factors. Not all the factors are relevant in this case; those that are include whether the class has been adequately represented, whether the settlement was negotiated at arm's length, the costs, risks and delay of trial, the effectiveness of the claims process, and the attorney fees requested. The Court finds that these factors favor approval of the settlement. The settlement was achieved

at arms-length after several sessions with a mediator, Professor Eric Green of Resolutions, LLC. (Doc. 50-1, ¶¶ 4-5; 58-1, p. 3.) The amount paid to class members is a reasonable settlement given the difficulties and risks of litigating the case to conclusion. The Court also notes that there has been only one objection filed, and even the Objector has not suggested that the amount of the settlement is inadequate or that the notice or the method of disseminating the notice was inadequate to satisfy the requirements of the Due Process Clause or was otherwise infirm. The Objector argues that more should be done to identify class members and more should be paid to them, but she presents this argument as part of her larger arguments about the *cy pres* and the Court will discuss those issues when it discusses the *cy pres*. However, with respect to the Rule 23(e) factors, the Court finds that the process used to identify and pay class members and the amount paid to class members are fair and reasonable for settlement purposes.

B. Fairness of the Settlement

When reviewing a class action settlement, the Court must ensure that it is not the product of fraud or collusion and that it is fair, adequate, and reasonable. *Keil v. Lopez*, 862 F.3d 685, 693 (8th Cir. 2017). This requires the Court to consider (1) the merits of the plaintiff's case, weighed against the settlement's terms, (2) the defendant's financial condition, (3) the complexity and expense of further litigation, and (4) the amount of opposition to the settlement. *Id.* These factors favor approval.

With respect to the first and third factors: Plaintiffs' claims survived a Motion to Dismiss, (*see* Doc. 41). However, as is typical with claims of this sort, there would have been difficulties in establishing consumers relied on the Label or that Plaintiffs (or class members) would have paid less for Roundup or refused to buy it at all if the Label

had been "more accurate." Further, the damages at stake for any Plaintiff or class member are relatively small, making extensive litigation a risky proposition. Finally, there is a unique obstacle in this case: the Label was approved by the Environmental Protection Agency, ("the EPA"), and by operation of law that approval is prima facie evidence that the Label complies with the disclosure requirements of the Federal Insecticide, Fungicide, and Rodenticide Act, ("FIFRA"). (*See* Doc. 41, p. 9-11 (discussing the effect of EPA approval generally and 7 U.S.C. § 136a(f)(2) specifically).) Given these facts, the opportunity provided by the settlement for class members to recover 50% of the price they paid was more than reasonable. In addition, the settlement provides prospective/injunctive relief in that it requires Defendant to change the Label. The value and significance of this component of the settlement will be discussed in greater detail in Part II.D of this Order; for present, it is enough to observe that the Court finds it to be worthy of consideration when evaluating the settlement's benefits.

There is no question regarding Defendant's ability to fund the settlement. Similarly, there has been only one objection – and even the Objector does not contend that the settlement's terms are unfair, inadequate, or should not be approved based on the factors identified in *Keil*. Therefore, the Court finds that the settlement is fair, adequate, and reasonable.

C. The *Cy Pres* Award

The *cy pres* award in this case is large, not only in magnitude but in terms of the percentage of the settlement fund. However, after reviewing the law governing *cy pres* awards, the Court exercises it discretion to approve it in this case. In so doing, the Court overrules the Objector's

arguments regarding the propriety of a *cy pres* and its more specific challenges to the recipients of the funds.

1. Propriety of a Cy Pres

> The *cy pres* doctrine takes its name from the Norman French expression, *cy pres comme possible*, which means "as near as possible." The doctrine originated to save testamentary charitable gifts that would otherwise fail. Under *cy pres*, if the testator had a general charitable intent, the court will look for an alternate recipient that will best serve the gift's original purpose. In the class action context, it may be appropriate for a court to use *cy pres* principles to distribute unclaimed funds. In such a case, the unclaimed funds should be distributed for a purpose as near as possible to the legitimate objectives underlying the lawsuit, the interests of class members, and the interests of those similarly situated.

In re Airline Ticket Comm'n Antitrust Litig., 307 F.3d 679, 682-83 (8th Cir. 2002) (quotations and citations omitted). However, in the class action context, "[b]ecause the settlement funds are the property of the class, 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." *In re BankAmerica Corp. Sec. Litig.*, 775 F.3d 1060, 1064 (8th Cir. 2015) (cleaned up; emphasis in original) (hereafter "*BankAmer-*

ica"). This raises two consideration: (1) whether it is feasible or appropriate to employ more efforts to identify class members or increase the claims rate, and (2) whether more money should be distributed to the class members who have submitted valid claims.

The Court finds that further efforts to identify class members or increase the claims rate is not feasible. As noted, more than 80% of the class members have been notified of the settlement, and the Court has not been presented with reason to think there are feasible or cost-effective means of increasing the efficacy of notice or of increasing the response rate. The Objector suggested the possibility of subpoenaing "the records of big-box retailers for the purpose of remitting direct distributions to class members," (Doc. 71, p. 15), but Class Counsel explained 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. (Doc. 74, pp. 7-8, 15-16.) The Court further reiterates that the Objector is not contending that the notice plan was inadequate or violated Due Process but is merely suggesting subpoenaing large retailers as a means of increasing the "amount of notice" further. (Doc. 74, p. 13.) However, the Objector has presented nothing to counter Class Counsel's explanation or to otherwise demonstrate that the efforts she proposed would increase the percentage of class

members aware of the settlement or otherwise increase the claims rate.[7]

The Objector's primary argument is that more money should be distributed to the class members, and if the parties are unwilling to distribute more money the settlement should not be approved.[8] While the class members received 50% of the amount they paid for Roundup, she contends they must receive 100% of the amount they paid before any money can be distributed through the *cy pres*. For support, she points to the Eighth Circuit's statement in *In re BankAmerica Corp.* that an additional distribution need not be made if doing so "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 (8th Cir. 2015) (quotation omitted; emphasis in original). She relies on this passage

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[7] The Court further notes that the Objector's anecdotal examples of additional notice measures appear distinguishable. (*See* Doc. 71, pp. 15-16.) Moreover, in two of those instances the third-party subpoena was issued (to Amazon) as part of the initial process of identifying class members. Here, issuing third-party subpoenas is suggested as a method to augment the measures already employed; undoubtedly, any information obtained from big box retailers would be substantially duplicative of the information already obtained. The Objector has not established that the effort would provide contact information for substantially more class members or be worth the resources necessary to complete the effort. Similarly, the Objector's third example (which involved obtaining information regarding Target's and Safeway's loyalty card members) provides no indication quantifying the benefit of that endeavor.

[8] The Court cannot rewrite the settlement to require that more funds be distributed. *See Rawa v. Monsanto Co.*, 934 F.3d 862, 871 (8th Cir. 2019). The Court's only choices are to approve or reject the settlement.

to argue that additional payments to class members are a windfall only when the class is recovering liquidated damages and the class members have received 100% of those liquidated damages.

The Court does not agree. First, *BankAmerica* does not limit use of a *cy pres* to cases in which the damages are unliquidated. The holdings of the case are that if funds can be feasibly distributed to claimants, (1) a *cy pres* distribution is not permissible unless the claimants have been given full compensation and (2) when damages are liquidated, full compensation is necessarily 100% of those damages. *BankAmerica* discussed a rule for liquidated damages because the damages in that case were liquidated: the damages were the $5.87 drop in stock price and a settlement paying less than that amount was not 100% payment. *BankAmerica*, 775 F.3d at 1066. Because the case before it involved liquidated damages, the Eighth Circuit had no reason to address cases where damages are unliquidated, or to specify what constitutes "full compensation" in cases where the damages are unliquidated. Thus, interpreting *BankAmerica* as effectively limiting use of a *cy pres* to instances where damages are liquidated seems unduly restrictive and contrary to the Eighth Circuit's intent. Second, the Fifth Circuit case relied on in *BankAmerica* made the point that "[a] party whose liquidated-damages claim has been fully satisfied cannot make a persuasive equitable claim to any residual settlement funds." *Klier v. Elf Atochem N. Am.*, 658 F.3d 468, 475 n. 17 (5th Cir. 2011). This does not mean that a party who has received payment on an unliquidated claim cannot also lack a persuasive equitable claim to residual settlement funds. Finally, following *BankAmerica* the Eighth Circuit has approved *cy pres* distributions in cases where the claimants' damages were unliquidated without requiring

additional distributions to the class members. *E.g., Rawa v. Monsanto Co.*, 934 F.3d 862, 871 (8th Cir. 2019).[9]

Thus, the question before the Court is: have the claimants been fully compensated, such that they do not have an equitable claim to the remaining funds? If they have not, the Court must decline to approve the settlement; if they have, then a *cy pres* is appropriate. The Court concludes that 50% of the purchase price constituted at least full (if not more) compensation for the class members' damages. In reaching this conclusion the Court does not consider or rely on the fact that the claimants received the amount agreed to in the Updated Settlement. *BankAmerica*, 775 F.3d at 1065-66. Instead, the Court reaches this conclusion after considering the claims at issue and the evidence and arguments presented.

The Complaint asserts claims for violations of consumer protection laws regarding fraud and misrepresentation, breach of express warranty, and unjust enrichment. The measure of damages for all these claims requires consideration of the fact that the consumers received and used

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[9] The Objector contends that *Rawa* is not relevant because in that case the Eighth Circuit characterized the objector as asking the court to "redraft" the agreement to pay more to claimants and did not ask that the settlement be rejected. (*E.g.*, Doc. 74, p. 25.) However, even if the objector in *Rawa* did not seek the correct remedy, the argument was still presented that the excess funds should not be distributed to the *cy pres* – and the Eighth Circuit apparently did not agree with this argument. The Court further takes judicial notice that *BankAmerica* was discussed in the briefs filed in *Rawa* and the propriety of approving the *cy pres* was discussed at oral argument.

Roundup; that is, they received some value from their purchase. Thus, even if they were to contend they would not have purchased Roundup absent the label's representations, the class members' damages would not be 100% of the purchase price because the value they received from using Roundup would have to be accounted for in the damage calculation. For instance:[10]

- In *Myers-Amstrong v. Actavis Totowa, LLC*, 2009 WL 1082026, at *4 (N.D. Cal. April 22, 2009), the plaintiff purchased and used an allegedly adulterated drug but suffered no ill effects from its use and did not allege that the product did not work. The district court held the plaintiff could not establish claims under California law for breach of warranty, fraud, unjust enrichment, and section 17200 of the California Business & Professional Code – the same claims asserted by one of the class representatives in this case – because the plaintiff obtained a product that performed as expected and the fact that she would not have purchased it had she known the drug was adulterated did not support a claim.
- In *In re Bisphenol-A (BPA) Polycarbonate Plastic Products Liability Litigation*, 2011 WL 6740338, * 4 (W.D. Mo. Dec. 22, 2011), the district court held that a consumer who fully used the defendant's product without suffering adverse results could not

[10] The Court has limited its survey to Missouri, California and New York because those are the states whose laws govern the class representatives' claims. The Court is not aware of any jurisdiction where the law would be different.

assert claims under the Missouri Merchandising Practices Act or for breach of warranty.

- Under Missouri law, the measure of damages for unjust enrichment is not simply the enrichment enjoyed by the defendant, but the amount of the enrichment that – as between the parties – it is unjust for the defendant to keep. *E.g.*, *Pitman v. City of Columbia*, 309 S.W.3d 395, 403 (Mo. Ct. App. 2010). Thus, the benefit enjoyed by the class members – the use of Roundup – becomes a factor to be considered. California and New York law are more explicit on this point. *E.g.*, *Meister v. Mensinger*, 203 Cal. App. 4th 381, 389 (2014); *Metal Cladding, Inc. v. Brassey*, 553 N.Y.S. 2d 255 (N.Y. App. Div. 1990).

In short: the class members' recovery was never going to be 100% of the purchase price. And, the Objector provides no compelling argument otherwise. She points to the relief sought in the Complaint, which included a request for full refunds, (*e.g.*, Doc. 74, p. 14), but the fact that Plaintiffs sought full refunds does not change the fact that the

proper measure of damages did not permit full refunds.[11] Therefore, full refunds would constitute a windfall and the Court is not required to reject the settlement for failing to give the claimants a windfall.

Given that class members realized some use/value from Roundup, the appropriate measure for their damage would be the difference between what they bargained for and what they received. The parties commissioned experts to analyze the issue. Class Counsel's analysis suggested that the difference in value was approximately 8% to 16% of the purchase price. (*E.g.*, Doc. 50-1, ¶¶ 7-8; Doc. 74, p. 10.) Defendant's analysis suggested that the difference in value was approximately 2.5%. (*E.g.*, Doc. 50-4; Doc. 74, pp. 9-10.) And in response to the Court's question,

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[11] At argument, the Objector also referred to a case from the Southern District of California decided in the last year and described it as holding that a plaintiff need not "claim that the product is valueless, just that you wouldn't have purchased it." (Doc. 74, p. 14.) However, no citation was provided, the Objector's written objections do not cite a case from the Southern District of California, and the Court is unable to ascertain the case to which she referred. If she was referring to *Kreger v. Wyeth, Inc.*, 396 F. Supp. 3d 931, 945 (S.D. Cal. 2019) or *Brannon v. Barlean's Organic Oils, LLC*, 2019 WL 4393653 *3 (S.D. Cal. Sep. 12, 2019), the issue addressed in those cases was whether an injury sufficient to demonstrate standing had been alleged; the issue was not the measure of damages. If she is referring to *Robinson v. OnStar, LLC*, 2020 WL 364221, *23 (S.D. Cal. 2020), the court there observed that "the full refund model depends on the assumption that not a single consumer received a single benefit from Defendant's" goods, (cleaned up), and is thus consistent with what the Court has discussed in the text.

the Objector did not profess to having any evidence on this issue. (Doc. 74, pp. 14-15.)[12]

Thus, based on the legal measure of damages, the Court concludes that claimants have already been compensated for more than they could have recovered. The Court does not reach this conclusion simply because the parties agreed that claimants would receive 50% of the purchase price (because, as stated, that would violate *BankAmerica*), but reaches this conclusion based on the claims and evidence presented. And, because the claimants have been fully (or more than fully) compensated, further distributions would constitute a windfall. Therefore, the use of a *cy pres to* distribute the unclaimed funds is permissible.

2. The Cy Pres Recipients

The Eighth Circuit has "emphasize[d] the importance of tailoring a *cy pres* distribution to the nature of the underlying lawsuit." *In re Airline Ticket Comm'n Antitrust Litig.*, 307 F.3d 679, 683 (8th Cir. 2002). The "distribution must be for the next best use for indirect class benefit and for uses consistent with the nature of the underlying action and with the judicial function." *BankAmerica*, 775

[12] The Court concedes the possibility that there may have been class members who (1) purchased Roundup, then (2) learned the truth regarding the Label's representations, then (3) based on that truth elected not to use any of the product they purchased, and that any such members may be able to argue that their damages exceed 50% of the purchase price. There is no suggestion that any, much less many, such class members exist, and the Court does not believe that this speculative possibility should be a factor in the analysis.

F.3d at 1067. The Objector does not contend that the recipients in this case fail to satisfy these standards.[13] Instead, she argues that the distribution constitutes compelled speech in violation of her First Amendment rights. She reasons that because the settlement funds belong to the class members, and contributions to charities constitute speech, distributing the money through a *cy pres* to a charity infringes on each and every class member's rights unless each of them consents to the recipient. (Doc. 71, pp. 17-18.) The Court rejects this argument and overrules the objection.

First, in this context, the fact that the *cy pres* is created by the private agreement of the parties is significant, because it is that agreement – and not government compulsion – that effectuates the *cy pres*. Therefore, the First Amendment is not implicated. *In re Motor Fuel Temperature Sales Practices Litig.*, 872 F.3d 1094, 1113-14 (10th Cir. 2017), *cert. denied*, 138 S. Ct. 1299 (2018).[14] The Objector cites cases observing that the settlement approval process implicates the class members' rights, (Doc. 71, p. 19 n.4), but while this observation is true in a general sense it does not further the First Amendment argument the

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[13] *BankAmerica* discussed the need to allow class members to suggest alternative *cy pres* recipients. *BankAmerica*, 775 F.3d at 1066. However, (1) *BankAmerica* involved a *cy pres* that was court-mandated, not settlement-mandated, and as previously discussed the Court cannot rewrite the settlement, (2) class members were told who the recipients would be, and (3) no class member – including the Objector – proposed alternative recipients.

[14] This should not imply anything about the Court's views regarding a court-imposed *cy pres* because that is not the issue before the Court.

Objector presents. In fact, she cites no authority (other than cases about compelled speech in other contexts) to support her novel argument.

Second, while the settlement fund belongs to the class as a whole, it cannot fairly be said that the remainder belongs to any one member. Having concluded that each member has been fully compensated from the fund, it is not clear that any member has a valid "claim" to the remainder such that any portion of it is the property of any single class member. While it may be said to belong to the class collectively, this does not mean that a single class member can exercise veto power over its disposition. And, here, only the Objector has asserted qualms about the *cy pres* recipients (although, as noted in footnote 14 above, the Objector does not suggest an alternative that she prefers).

Certainly, if there were a significant number of objections the Court would be obligated to consider them. But here, there is just one objection. The Court does not believe the Objector (or any single class member) has a First Amendment right that permits them to compel rejection of the settlement.

D. Attorney Fees

When considering a fee request in a class action settlement, the Court may utilize either a lodestar approach or a percentage of the benefit approach. The former approach considers the reasonable amount of hours billed by Class Counsel and the reasonable hourly rate; the latter approach "permits an award of fees that is equal to some fraction of the common fund that the attorneys were successful in gathering during the course of the litigation." *Keil*, 862 F.3d at 701 (quotation omitted). The choice of

which to use is discretionary. *Id.* The Court can also consider the relevant factors from the Fifth Circuit's decision in *Johnson v. Georgia Highway Express*, 488 F.2d 714 (5th Cir. 1974). *See, e.g., Rawa*, 934 F.3d at 870; *Keil*, 862 F.3d at 701. Some of those factors are largely subsumed within the lodestar analysis (such as the time and labor required and the experience, reputation and ability of the attorneys). However, some of the factors relevant to this case include (1) the novelty and difficulty of the questions, (2) the amount of money involved, and (3) the results obtained,

Here, Class Counsel seeks an award of 25% of the settlement fund for fees and costs, which equates to $9,887,500. This percentage is comfortably below the range frequently approved in class action settlements. *See Vogt v. State Farm Life Ins. Co.*, 2021 WL 247958, *2 (W.D. Mo. Jan. 25, 2021 (citing cases to establish that fees in the range of 33.3% and 36% are common); *see also Huyer v. Buckley*, 849 F.3d 395, 399 (8th Cir. 2017) (describing an award of 38% as "on the high end of the typical range."). Notwithstanding the Objector's arguments, the Court approves the request for attorney fees and costs totaling $9,887,500.

The Objector first suggests that the Court should not consider the amount distributed through the *cy pres* to be part of the common fund because that amount is not benefitting the class. If the *cy pres* is disregarded, the amount requested by Class Counsel is between 39% and 42% of

the fund.[15] But there is no authority requiring that the cy pres amount be disregarded in the attorney fee calculation.[16] As the Third Circuit said (in one of the cases the Objector relies on):

> We think it unwise to impose . . . a rule requiring district courts to discount attorneys' fees when a portion of an award will be distributed *cy pres*. There are a variety of reasons that settlement funds may remain even after an exhaustive claims process—including if the class members' individual damages are simply too small to motivate them to submit claims. Class counsel should not be penalized for these or other legitimate reasons unrelated to the quality of representation they provided. Nor do we want to discourage counsel from filing class actions in cases where few claims are likely to be made but the deterrent effect of the class action is equally valuable.

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[15] The percentage is a range because the claims administration process is not quite finished, so the final amount paid to all claimants is not yet known. The Court's calculations include the administrative costs as part of the benefit to the class, as permitted by *In re Life Time Fitness, Inc., Telephone Consumer Protection Act Litigation*, 847 F.3d 619, 623 (8th Cir. 2017).

[16] The Objector cites to several cases holding that fees can be adjusted based on the degree of success, such as *Galloway v. Kansas City Landsmen, LLC*, 833 F.3d 969, 975 (8th Cir. 2016), but (1) those cases do not address what role a *cy pres* has in considering "success" and (2) as discussed previously, the claimants in this case received as much if not more than they could have expected to receive.

In re Baby Prod. Antitrust Litig., 708 F.3d 163, 178 (3d Cir. 2013).[17]

Relatedly, it is not correct that the *cy pres* is of no benefit to the class; it is not a direct benefit in that it does not put money in the class members' pockets, but the very notion of a *cy pres* is that it is "as near as possible" to a direct benefit as can be achieved.[18] Even if the "lack of directness" justifies a 50% reduction in the "valuation" of the funds distributed through the *cy pres* (as suggested in *In re Heartland Payment Systems, Inc. Customer Data Security Breach Litigation*, 851 F. Supp. 2d 1040, 1077 (S.D. Tex. 2012) – another case cited by the Objector), the settlement fund's "adjusted value" would be, at the lowest, $32,315,000. The requested amount of $9,887,500 for fees

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[17] The Third Circuit also declared that "[w]here a district court has reason to believe that 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." *In re Baby Prod. Antitrust Litig.*, 708 F.3d at 178. But the Court does not have that belief in this case.

[18] The Court acknowledges that the Seventh Circuit has held otherwise. *See Pearson v. NBTY, Inc.*, 772 F.3d 778, 781-82 (7th Cir. 2014). But the Seventh Circuit takes a stricter view on the subject overall than does the Eighth Circuit, as demonstrated by the fact that the Seventh Circuit does not allow consideration of the costs when determining the reasonableness of the fee award. *Compare Redman v. RadioShack Corp.*, 768 F.3d 622, 630 (7th Cir. 2014) *with In re Life Time Fitness, Inc., Telephone Consumer Protection Act Litigation*, 847 F.3d 619, 623 (8th Cir. 2017); *see also Caligiuri v. Symantec Corp.*, 855 F.3d 860, 865 (8th Cir. 2017) (noting differences between the two Circuits' views).

and costs would be 30.6% of that adjusted value – which is within the acceptable range.[19]

The Court has also considered the injunctive relief. Contrary to the Objector's argument, the injunctive relief is not "illusory, unenforceable, and [of] no settlement value." (Doc. 71, p. 23 n.8.) This is not a case in which Defendant is simply ordered to follow the law. *See Galloway v. Kansas City Landsmen, LLC*, 833 F.3d 969, 974 n.3 (8th Cir. 2016) (addressing, and attaching no value to, an injunction stating "Defendants are hereby ordered to comply with the Fair and Accurate Credit Transaction Act . . . at all their currently owned locations."). Defendant must stop using the Label (after it obtains approval from the EPA to change the Label, as required by FIFRA). (Doc. 58-1, p. 10.) This means that Defendant must stop using a label that has already gone through the regulatory process and obtained EPA approval (and which therefore presumptively complies with the law). This also means that Defendant must incur the expense of going through the regulatory process again to obtain EPA approval for a new label. This is not illusory, unenforceable, or lacking in value. This is also relief that was not obtainable at trial, because injunctive relief requiring a change in the label would have been barred by FIFRA. That said, the Court does not endeavor to attach a monetary value to the injunctive relief so that it can be "added to" the settlement fund to evaluate the fee request; however, "[t]he fact that counsel obtained injunctive relief in addition to monetary

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[19] The Court has not calculated 25% of the "adjusted value" and instead kept the amount requested constant because this is what was disclosed to class members – that Class Counsel would seek up to 25% of the $39.55 million settlement fund.

relief for their clients is . . . a relevant circumstance to consider in determining what percentage of the fund is reasonable as fees." *Staton v. Boeing Co.*, 327 F.3d 938, 946 (9th Cir. 2003).[20]

Finally, the Court has opted to consider the attorneys' billing records. *See Keil*, 862 F.3d at 701 (A District Court may, but is not required to, "verif[y] the reasonableness of its award by cross-checking it against the lodestar method."). The Court has done so not to determine with precision what the lodestar would be, but rather as check to further evaluate the reasonableness of amount requested. Those records reflect that in this case more than 1,265 hours were billed at rates that would generate nearly $782,000 in fees. In addition, the Court believes it appropriate to consider the billing records from *Blitz*, because (as will be discussed further below) a significant amount of work developing the factual and legal arguments in that case carried over to this one, thereby decreasing the amount of attorney time that had to be expended. In *Blitz*, more than nearly 1,900 hours were billed for a total of nearly $1.2 million.

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[20] The Objector cites *Staton* to support its contention that the injunctive relief has no settlement value. (Doc. 71, p. 23 n.8.) The Ninth Circuit held that undifferentiated equitable relief "should generally be excluded from the value of a common fund when calculating the appropriate attorneys' fees award, as the benefit of that relief to the class members is most often not sufficiently measurable." *Staton*, 327 F.3d at 945-46. But as the quote in the text demonstrates, *Staton* did not hold that such injunctive relief is completely irrelevant to the analysis; it only held that the Court should not attempt to attach a monetary value to undifferentiated equitable relief.

Combined, more than 3,100 hours of work was devoted to this matter, which generated fees of slightly more than $1.97 million. The percentage of the fund Class Counsel requests is approximately five times this amount. However, there need not be an absolute correspondence between the percentage of the fund and the lodestar because the Court can adjust the lodestar based on the "individual characteristics of a given action." *Caligiuri v. Symantec Corp.*, 855 F.3d 860, 865 (8th Cir. 2017) (quotation omitted). The Court finds this multiple of the lodestar is reasonable for several reasons: courts in this Circuit have approved fees as high as 5.6 times the lodestar, *see id.* at 866; the complexity of the legal issues justifies a higher award; the results for claimants were excellent and very likely more than they could have achieved had the case gone to trial; the percentage of the fund sought, 25%, is in the low range of percentages typically sought; and the award is meant not just to compensate for the attorneys' fees but also to reimburse them for their costs – a factor not included in the lodestar.

The Objector argues that the lodestar confirms the *un*reasonableness of the amount sought by Plaintiffs' counsel. Many of her arguments would be relevant if the Court was attempting to calculate the lodestar with precision – which, as stated above, is not the Court's objective. The Court will not address all the points raised by the Objector, but it has considered them all and nonetheless finds the guidance provided by the lodestar supports the fee award.

First, some of the attorneys in this case billed at an hourly rate of $750/hour or $800/hour, and the Court rejects the Objector's suggestion that the lodestar had to utilize hourly rates that were no greater than approxi-

mately $450/hour. (Doc. 81, p. 12.) In terms of subject matter and scope, this was not a routine or typical class action, and the Court is not persuaded by the Objector's authorities that attorneys in Kansas City with the skill and experience to litigate this particular case would have charged $450/hour, primarily because the Objector's materials are very general. Moreover, the Court can rely on its own experience and knowledge of prevailing market rates to determine a reasonable hourly rate, *e.g., Brewington v. Keener,* 902 F.3d 796, 805 (8th Cir. 2018), and the Court has approved hourly rates exceeding $500/hour for more routine, non-class cases. If the Court opted to award fees based on the lodestar it would not limit the hourly rate in the manner the Objector suggests.

The Objector also contends the Court should not consider the work expended in *Blitz* but in the unique circumstances of this case the Court believes it is appropriate. The Objector cites several cases for the proposition that work performed in completely separate litigation usually is not compensable in subsequent case. But this is not the usual case, *Blitz* was not completely separate litigation, and unlike the judges in the cases the Objector cites the Court is persuaded by the facts in *this* litigation that consideration of Class Counsel's work in *Blitz* is appropriate. *Blitz* was intended to be a nationwide class just as this case, so at the outset the "parties" were the same. The plaintiffs who remained in *Blitz* (including those in the putative Wisconsin-only class) are members of the class in this case. The parties agreed that the discovery in *Blitz* would be used in this case, which is important because there were many depositions and significant exchanges of documents that did not have to be (and were not) repeated in this case. There were also significant legal issues briefed in *Blitz* (notably including the effect of FIFRA on Plaintiff's claims and the sufficiency of the allegations of

falsity and deception) that did not have to be explored as deeply when Defendant raised the arguments again in this case. Ignoring these facts essentially allows the class in this case to reap the benefits of the work done in *Blitz* free of charge. In reality this case is a continuation of *Blitz*.

For these reasons, the Court finds an award of fees and costs totaling $9,887,500 is reasonable.

III. CONCLUSION

The Motion for Final Approval of Class Settlement, (Doc. 65), is **GRANTED**. The Class is finally **CERTIFIED**, and this Court finally **APPROVES** the Updated Settlement and Plaintiffs' requested attorneys' fees award, expenses, and class representative awards.

It is further **ORDERED** that the Parties and the Claims Administrator shall implement the Updated Settlement in accordance with its terms.

IT IS SO ORDERED.

/s/ Beth Phillips
BETH PHILLIPS, CHIEF JUDGE
UNITED STATES DISTRICT COURT

DATE: May 13, 2021

Appendix C

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI WESTERN DIVISION

LISA JONES, *et al.*, Plaintiffs, v. MONSANTO COMPANY, Defendant.	)	No. 19-0102-CV-W-BP

ORDER OF DISMISSAL

In light of the Court's Order Granting Motion for Final Approval of Class Settlement and Award of Attorney Fees, (Doc. 83), this case is hereby **DISMISSED**.

IT IS SO ORDERED.

/s/ Beth Phillips
BETH PHILLIPS, CHIEF JUDGE
UNITED STATES DISTRICT COURT

DATE: May 27, 2021

Appendix D

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No.: 21-2292

Lisa Jones, et al.

Appellees

v.

Monsanto Company,

Appellee

Anna St. John

Appellant

State of Montana, et al.

Amici on Behalf of Appellant(s)

Appeal from U.S. District Court for the Western District of Missouri - Kansas City (4:19-cv-00102-BP)

ORDER

The petition for rehearing en banc is denied. The petition for panel rehearing is also denied.

Judges Loken, Erickson, Grasz, Stras and Kobes would grant the petition for rehearing en banc.

August 16, 2022

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit.

_____

/s/ Michael E. Gans

Appendix E

Fed. R. Civ. P. 23

Rule 23. Class Actions

…

(e) SETTLEMENT, VOLUNTARY DISMISSAL, OR COMPROMISE. The claims, issues or defenses of a certified class—or a class proposed to be certified for purposes of settlement—may be settled, voluntarily dismissed, or compromised only with the court's approval. The following procedures apply to a proposed settlement, voluntary dismissal, or compromise:

…

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

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

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

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

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

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

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

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

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

…

(h) ATTORNEY'S FEES AND NONTAXABLE COSTS. In a certified class action, the court may award reasonable attorney's fees and nontaxable costs that are authorized by law or by the parties' agreement. The following procedures apply:

(1) A claim for an award must be made by motion under Rule 54(d)(2), subject to the provisions of this subdivision (h), at a time the court sets. Notice of the motion must be served on all parties and, for motions by class counsel, directed to class members in a reasonable manner.

(2) A class member, or a party from whom payment is sought, may object to the motion.

(3) The court may hold a hearing and must find the facts and state its legal conclusions under Rule 52(a).

…

Appendix F

UPDATED SETTLEMENT AGREEMENT

This Settlement Agreement and Release (the "Agreement"), effective upon the date of the signatories below, is made by and between Monsanto Company and the Class (defined below) (collectively, the "Parties"), in the matter *Lisa Jones et al. v. Monsanto Company*, case No. 4:19- cv-00102-BP (W.D. Mo.) ("the Action").

WHEREAS, Class Representatives Lisa Jones, Horacio Torres Bonilla, and Kristoffer Yee commenced the Action for breach of warranty, unjust enrichment, and violations of Missouri, New York, and California laws of unfair competition and false advertising against Monsanto and Scotts Miracle-Gro Products, Inc. in the United States District Court for the Western District of Missouri on February 13, 2019;

WHEREAS, the Parties disagree on the merits and viability of the claims set forth in the Action's complaint, Monsanto denies any and all liability or wrongdoing, and Plaintiffs believe that all claims are viable and subject to class certification;

WHEREAS, the Parties have engaged in discovery but have not yet briefed class certification;

WHEREAS, while discovery has continued, the Parties engaged in a mediation session before Professor Eric D. Green to determine whether a settlement of the Action could be reached, and at the end of the mediation session, the Parties reached an agreement in principle;

WHEREAS, Plaintiffs have concluded that it is in the best interest of the Class to settle the Action on the terms

set forth in this Agreement in order to avoid further expense, inconvenience, and delay, and based on other factors bearing on the merits of settlement;

WHEREAS, Monsanto enters into this Agreement in order to avoid further expense, inconvenience, delay, and interference with business operations, and to dispose of the Action and to put to rest all controversy concerning the claims that have been or could have been asserted;

WHEREAS, the Class (as defined below) and Monsanto wish to resolve, on a nationwide basis, any and all past, present, and future claims the Class has or may have against the Released Persons of any nature whatsoever, as they relate to the allegations in the Action, and to that end, the Class and Monsanto intend that the United States District Court for the Western District of Missouri conditionally certify a Class for settlement, and that this Agreement will encompass and end all related pending, threatened, or possible litigation and/or claims by any Party against the Released Persons;

WHEREAS, this Agreement amends and supersedes those certain Settlement Agreements and Releases signed by the Parties on March 23, 2020, March 31, 2020, and May 12, 2020.

NOW, THEREFORE, the Parties, for good and valuable consideration, the sufficiency of which is hereby acknowledged, understand and agree to the following terms and conditions:

A. Definitions

As used in this Agreement, the following terms enclosed within quotation marks have the meanings specified below:

1. "Action" means the matter *Lisa Jones et al. v. Monsanto Company*, case No. 4:19- cv-00102-BP (W.D. Mo.).

2. "Agreement" means this Settlement Agreement and Release.

3. "Approved Claim" means a claim approved by the Claims Administrator, according to the terms of this Agreement.

4. "Authorized Claimant" means any Claimant who has timely and completely submitted a Claim Form that has been reviewed and validated by the Claims Administrator.

5. "Claim" means a request for relief submitted by or on behalf of a Class Member on a Claim Form filed with the Claims Administrator in accordance with the terms of this Agreement.

6. "Claimant" means any Class Member who submits a Claim for benefits as described in Section J of this Agreement.

7. "Claims Deadline" means the date by which all Claim Forms must be postmarked or received by the Claims Administrator to be considered timely. The Claims Deadline shall end 120 days after the Preliminary Approval Date.

8. "Claim Form" means the document to be submitted by Claimants seeking benefits pursuant to this Agreement.

9. "Claims Administrator" means the independent company agreed by the Parties and approved by the Court to provide the Class Notice and to administer the claims process.

10. "Claims Administration Expenses" means the fees charged and expenses incurred by the Claims Administrator in completing the claims administration process set forth in this Agreement.

11. "Class" or "Class Member(s)" means all Persons in the United States, who, during the Class Period, 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.

12. "Class Counsel" means the following attorneys of record in the Action:

Kim Richman
Richman Law Group
8 W. 126th Street New York, NY 10027
Telephone: (718) 705-4579
Facsimile: (212) 687-8292
krichman@richmanlawgroup.com

Michael L. Baum
Baum, Hedlund, Aristei & Goldman, P.C.
10940 Wilshire Blvd., 17th Floor
Los Angeles, CA 90024
Telephone: (310) 207-3233
mbaum@baumhedlundlaw.com

and any attorneys at those firms assisting in the representation of the Class in this Action.

13. "Class Counsel's Fees" means the amount awarded as attorneys' fees to Class Counsel by the Court for prosecuting the Action and implementing this Agreement.

14. "Class Notice" means collectively, the "Notice of Class Action Settlement" and the "Publication Notice," substantially in the forms to be agreed upon by the Parties, including both the Class Notice run prior to the date of this Agreement as previously preliminarily approved by the Court on May 14, 2020, and all additional forms of notice agreed to by the Parties that will be submitted to the Court in connection with the Motion for Preliminary Approval of Updated Class Action Settlement and Approval of Updated Form and Manner of Notice.

15. "Class Period" shall mean and refer to a time period not to exceed the applicable statute of limitations for false advertising/consumer protection or breach of warranty claims (whichever is longer) in the state where each Class Member purchased the Products, triggered by the date the Complaint was filed in the Action (February 13, 2019). A full list of the applicable periods for each state, district, or territory included in this Agreement is appended hereto as Exhibit B.

16. "Class Released Claims" means the claims released by the Class Members via this Agreement.

17. "Class Representatives" means named plaintiffs in the Action, Lisa Jones, Horacio Torres Bonilla, and Kristoffer Yee, and any other individuals who may be added as plaintiffs to any amended pleading.

18. "Common Fund" means the 39.55 million dollars ($39,550,000) set aside as part of the Settlement Consideration.

19. "Court" means the United States District Court for the Western District of Missouri.

20. "Effective Date" means the date on which the judgment approving this Agreement becomes final. For purposes of this definition, the Final Settlement Approval Order and Judgment shall become final at the latest date of the following options: (i) if no appeal from the Final Settlement Approval Order and Judgment is filed, the date of expiration of the time for filing or noticing any appeal from the Final Settlement Approval Order and Judgment; or (ii) if an appeal from the Final Settlement Approval Order and Judgment is filed, and the Final Settlement Approval Order and Judgment is affirmed or the appeal dismissed, and the deadline to file a petition for certiorari has passed, the date of such affirmance or dismissal; or (iii) if a petition for certiorari seeking review of the appellate judgment is filed and denied, the date the petition is denied; or (iv) if a petition for writ of certiorari is filed and granted, the date of final affirmance or final dismissal of the review proceeding initiated by the petition for a writ of certiorari.

21. "Final Settlement Hearing" or "Final Approval Hearing" means the hearing to be conducted by the Court to determine whether to enter the Final Settlement Approval Order and Judgment.

22. "Jones" means the plaintiff in the Action, Lisa Jones.

23. "Final Settlement Approval Order and Judgment" or "Judgment" means the Court's final order approving the Agreement; entering judgment; dismissing the Action with prejudice; discharging the Released Persons of and from all further liability for the Released Claims; and permanently barring and enjoining the Releasing Persons

from instituting, filing, commencing, prosecuting, maintaining, continuing to prosecute, directly or indirectly, as an individual or collectively, representatively, derivatively, or on behalf of them, or in any other capacity of any kind whatsoever, any action in any state court, any federal court, before any regulatory body or authority, or in any other tribunal, forum, or proceeding of any kind, against the Released Persons that asserts any Released Claims.

24. "Labeling" means the display of written, printed, or graphic matter upon the Products' packaging or at the point of sale, as well as written, printed, or graphic matter for use in the distribution, marketing, manufacturing, or sale of the Products, including information found on Monsanto's, Scotts's, or any other Released Person's websites supplementing, describing, explaining, and/or promoting the Products.

25. "Monsanto" means Monsanto Company and its current or future parent companies (including intermediate parents and ultimate parents) and subsidiaries, affiliates, predecessors, successors, and assigns, and each of their respective officers, directors, employees, agents, attorneys, insurers, stockholders, representatives, heirs, administrators, executors, successors and assigns, and any other Person acting on their behalf.

26. "Notice Period" means the notice period to potential Class Members. Class Notice shall run for a period of 90 days, and shall commence within 14 days after the Preliminary Approval Date.

27. "Notice Plan" means the plan for dissemination of the Class Notice to be agreed upon by the Parties, including both the Notice Plan run prior to the date of this Agreement as previously preliminary approved by the

Court on May 14, 2020, and all additional plans for dissemination of the Class Notice to be agreed to by the Parties that will be submitted to the Court in connection with the Motion for Preliminary Approval of Updated Class Action Settlement and Approval of Updated Form and Manner of Notice.

28. "Objection Deadline" means the first business day on or after ten (10) calendar days from the filing of the Motion for Final Approval of the Settlement and Application for Fees, or such other date as the Court may order in its Preliminary Approval Order. It is the date by which the Class Members must file with the Court and serve on all Parties (i) a written statement objecting to any terms of the Settlement or to Class Counsel's Fees, and (ii) a written notice of intention to appear if they expect to present in person at the Final Approval Hearing objections to any terms of the Settlement or to Class Counsel's Fees.

29. "Opt-Out Deadline" means 120 days after the Preliminary Approval Date (to be concurrent with the Claims Deadline), or such other date as the Court may order in its Preliminary Approval Order.

30. "Other Counsel" means any other attorney(s), representing any Class Member, who is not Class Counsel.

31. "Party" or "Parties" means Plaintiffs, to include the Class Members, and Monsanto.

32. "Person" means any individual, corporation, partnership, association, or any other type of legal entity.

33. "Plaintiffs" means Lisa Jones, Horacio Torres Bonilla, Kristoffer Yee, and the other Class Members.

34. "Preliminary Approval Date" means the date of entry of the Court's order granting preliminary approval of

the Agreement substantially in the form of the Preliminary Approval Order that will be submitted in connection with the Motion for Preliminary Approval of Updated Class Action Settlement and Approval of Updated Form and Manner of Notice.

35. "Products" means Roundup® Weed & Grass Killer products that include the statement "targets an enzyme found in plants but not in people or pets" or a substantially similar statement. A full list of Products is appended hereto as Exhibit A.

36. "Related Actions" include the following cases:

a. *Thomas Blitz v. Monsanto Company*, Case No. 3:17-cv-00473 (W.D. Wis.) (the "*Blitz* Action");

b. *Beyond Pesticides and Organic Consumers Association v. Monsanto Company*, Case No. 1:17-cv-00941 (D.D.C.).

The term "Related Actions" is meant only as a shorthand to refer to these cases in the course of this Agreement and is not intended, and shall not be construed, to limit in any way the scope of the releases provided by the Agreement or the effect of this Agreement in actions other than the Related Actions.

37. "Released Claims" means all individual, class, representative, group or collective claims, demands, rights, suits, liabilities, damages, losses, injunctive and/or declaratory relief, and causes of action released pursuant to this Agreement.

38. "Released Persons" mean, respectively, Monsanto; Scotts; any distributors and/or retailers of the Products; any Persons that are currently, or have in the past been, marketing, advertising, distributing, selling, or reselling

the Products and any current or future parent companies (including intermediate parents and ultimate parents) and subsidiaries, affiliates, predecessors, successors, and assigns, and each of their respective officers, directors, employees, agents, attorneys, insurers, stockholders, representatives, heirs, administrators, executors, successors and assigns; and any other Person acting on behalf of Monsanto, Scotts, or any other Released Person.

39. "Releasing Persons" means Jones, Torres Bonilla, Yee, and each Class Member and any Person claiming by or through each Class member, including but not limited to spouses, children, wards, heirs, devisees, legatees, invitees, employees, associates, co-owners, attorneys, agents, administrators, predecessors, successors, assignees, representatives of any kind, shareholders, partners, directors, or affiliates.

40. "Scotts" means The Scotts Company LLC, Monsanto's exclusive marketing and distribution agent for Roundup consumer products, and its current or future parent companies (including intermediate parents and ultimate parents) and subsidiaries, affiliates, predecessors, successors, and assigns, and each of their respective officers, directors, employees, agents, attorneys, insurers, stockholders, representatives, heirs, administrators, executors, successors and assigns, and any other Person acting on their behalf.

41. "Settlement Payment" means the amount to be paid to Authorized Claimants as described in Section F.

42. "Settlement Website" means a website maintained by the Claims Administrator to provide the Class with information relating to the Settlement.

43. "Torres Bonilla" means the plaintiff in the Action, Horacio Torres Bonilla.

44. "Yee" means the plaintiff in the Action, Kristoffer Yee.

B. Conditional Class Certification for Settlement Purposes Only

1. This Agreement is for settlement purposes only, and neither the fact of, nor any provision contained in this Agreement, nor any action taken hereunder, shall constitute, be construed as, or be admissible in evidence as an admission of (1) the validity of any claim or allegation by Jones, Torres Bonilla, Yee, the plaintiff(s) in any Related Action, or any Class Member, or of any defense asserted by Monsanto in these or any other actions or proceedings; (2) any wrongdoing, fault, violation of law, or liability of any kind on the part of any Party, Released Person, Class Member or their respective counsel; or (3) the propriety of class certification in the Action, Related Actions, or any other action or proceeding.

2. For the sole and limited purpose of settlement only, the Parties stipulate to and request that the Court conditionally certify the Class under Rule 23(b)(3), which stipulation is contingent upon the occurrence of the Effective Date. Should the Effective Date not occur, this Agreement shall be void and will not constitute, be construed as, or be admissible in evidence as, an admission of any kind or be used for any purpose in the Action, Related Actions, or in any other pending or future action. In the event that the Agreement is terminated pursuant to its terms or the Final Settlement Hearing does not occur for any reason, the certification of the Class shall be vacated, and the Action shall proceed as it existed prior to execution of this Agreement.

3. The Court's certification of the Class shall not be deemed to be an adjudication of any fact or issue for any

purpose other than the accomplishment of the provisions of this Agreement, and shall not be considered the law of the case, res judicata, or collateral estoppel in the Action, Related Actions, or any other proceeding unless and until the Court enters a Judgment. Regardless of whether the Effective Date occurs, the Parties' agreement to class certification for settlement purposes only (and any statements or submissions made by the Parties in connection with seeking the Court's approval of this Agreement) shall not be deemed to be a stipulation as to the propriety of class certification, or any admission of fact or law regarding any request for class certification, in any other action or proceeding, whether or not involving the same or similar claims.

4. In the event the Court does not enter a Judgment, or the Effective Date does not occur, or the Agreement is otherwise terminated or rendered null and void, the Parties' agreement to certification of the Class for settlement purposes shall be null and void and the Court's certification order (if any is ordered) shall be vacated, and thereafter no new class or classes will remain certified.

5. Nothing in this Agreement shall be argued as support for, or admissible in, an effort to certify any new class in this Court or any other court if the Court does not enter a Judgment, or the Effective Date does not occur, nor shall anything herein be admissible in any proceeding to certify this or any other classes in any other court under any circumstances.

6. Subject to the Court's approval, and for settlement purposes only, Monsanto consents to the appointment of Jones, Torres Bonilla, and Yee as Class Representatives of the Class, and the appointment of Kim Richman, Michael L. Baum, and any attorneys at their firms assisting

in the representation of the Class in this Action as Class Counsel.

7. The Preliminary Approval Order shall contain a provision enjoining Class Members who have not opted-out of the Agreement from proceeding with any competing claims against the Released Persons related or similar to those claims that are asserted in this Action.

8. Upon final approval of the Agreement by the Court, a Judgment substantially in the form agreed by the Parties, and conforming with the definition of Final Settlement Approval Order and Judgment above, will be entered by the Court.

C. Benefits of the Agreement

Class Counsel and Class Representatives believe the Agreement confers substantial benefits upon the Class, particularly as weighed against the risk associated with the inherent uncertain nature of a litigated outcome; the complex nature of the Action, and Related Actions, in which the Parties have produced large amounts of discovery, taken and defended depositions, served and pursued third-party subpoenas for documents, and disclosed and produced expert reports, including in the *Blitz* Action as set forth *infra*; and the length and expense of continued proceedings through fact depositions, expert depositions, third-party document productions and depositions, class certification briefing, summary judgment briefing, trial, and appeals. Based on their evaluation of such factors, Class Counsel and Class Representatives have determined that the Settlement, based on the following terms, is in the best interests of the Class.

D. Changes to the Label

1. Monsanto will undertake to remove the representation that glyphosate "targets an enzyme found in plants but not in people or pets" on the label of the Products, in favor of a statement to be selected by Monsanto akin to "Glyphosate works by targeting an enzyme that is essential for plant growth." The final statement is subject to Monsanto's exclusive discretion and approval by the Environmental Protection Agency.

2. After the label change, Monsanto will have a reasonable period of time, consistent with EPA guidance and requirements, to exhaust existing inventories and remove Products with the current representation that glyphosate "targets an enzyme found in plants but not in people or pets" on the label from the marketplace. Any Products sold from Monsanto's inventory with the representation that glyphosate "targets an enzyme found in plants but not in people or pets" on the label, through the date Notice is first effected, are included in the Full Release described in this Agreement, and any consumer who purchases such products during the inventory removal period and prior to the date Class Notice is first effected shall be entitled to make a Claim under the structure set forth herein.

E. Common Fund

1. Within seven (7) calendar days following the Court's Final Approval Order, Monsanto shall pay $39.55 million into a "Qualified Settlement Fund" created and maintained by the Claims Administrator, with a separate tax identification number for purposes of this Agreement only (the "Common Fund").

2. The Common Fund shall cover all expenses associated with the Agreement as approved by the Court, including without limitation, Class Notice, Claims

Administration Expenses, Class Member Claims, the Settlement Payment, Class Representative incentive awards, and Class Counsel's Fees. Interest on the Settlement Fund shall inure to the benefit of the Class.

3. All taxes on the income of the Settlement Fund, and any costs or expenses incurred in connection with the taxation of the Settlement Fund, shall be paid out of the Settlement Fund, shall be considered to be a cost of administration, and shall be timely paid by the Claims Administrator without prior order of the Court. The Parties shall have no liability or responsibility for the payment of any such taxes.

4. In the event that the total value of claims submitted exceeds or falls short of the amounts available in the Common Fund after deducting all other expenses, incentive awards, and attorney's fees, then the payment per unit (as set forth herein) shall be reduced or increased on a pro rata basis. In no instance shall the payment per unit exceed 50% of the weighted average retail price as set forth in Section F below.

5. In no case shall Monsanto be required to contribute or pay additional funds to the Common Fund and/or the Settlement set forth herein, beyond the payments agreed hereto, including but not limited to any payments for attorneys' fees or fees associated with notice and/or administration.

F. Class Member Claims

1. If the Common Fund is sufficient to allow such payments (and subject to the further limitations and requirements set forth below), considering the number of Claims made, for each unit of the Products purchased during the Class Period, Authorized Claimants will receive a standardized payment of 10% the weighted average retail price

(after rounding). The weighted average retail price per unit and the payment per unit are set forth below:

Roundup® Product	Weighted Average Retail price	Payment Per unit	Potential Maximum Payment Per Unit After Pro Rata Adjustment
24 oz. Roundup® Ready-to-Use Weed and Grass Killer	$5.01	$0.50	$2.51
30 oz. Roundup® Ready-to-Use Weed and Grass Killer	$3.73	$0.37	$1.87
0.5 gal. Roundup® Ready-to-Use Weed and Grass Killer	$5.29	$0.53	$2.65
1 gal. Roundup® Ready-to-Use Weed and Grass Killer (all non-refill varieties)	$10.17	$1.02	$5.09

1 gal. Roundup® Ready-to-Use Weed and Grass Killer Refill	$5.78	$0.58	$2.89
1.1 gal. Roundup® Ready-to-Use Weed and Grass Killer	$15.96	$1.60	$7.98
1.25 gal. Roundup® Ready- to-Use Weed and Grass Killer Refill	$12.15	$1.22	$6.08
1.33 gal. Roundup® Ready- to-Use Weed and Grass Killer	$18.78	$1.88	$9.39
16 oz. Roundup® Weed and Grass Killer Concentrate Plus	$13.24	$1.32	$6.62

32 oz. Roundup® Weed and Grass Killer Concentrate Plus	$19.54	$1.95	$9.77
35.2 oz. Roundup® Weed and Grass Killer Concentrate Plus	$20.54	$2.05	$10.27
36.8 oz. Roundup® Weed and Grass Killer Concentrate Plus	$18.38	$1.84	$9.19
40 oz. Roundup® Weed and Grass Killer Concentrate Plus	$18.83	$1.88	$9.42
64 oz. Roundup® Weed and Grass Killer Concentrate Plus	$38.52	$3.85	$19.26

80 oz. Roundup® Weed and Grass Killer Concentrate Plus	$46.34	$4.63	$23.17
3-pack 6 oz. Roundup® Weed and Grass Killer Concentrate Plus	$19.51	$1.95	$9.76
32 oz. Roundup® Weed and Grass Killer Super Concentrate	$22.44	$2.24	$11.22
35.2 oz. Roundup® Weed and Grass Killer Super Concentrate	$43.03	$4.30	$21.52
0.42 gal. Roundup® Weed and Grass Killer Super Concentrate	$46.73	$4.67	$23.37

0.5 gal. Roundup® Weed and Grass Killer Super Concentrate	$74.15	$7.42	$37.08
1 gal. Roundup® Weed and Grass Killer Super Concentrate	$106.29	$10.63	$53.15
Combination Pack - 1 gal. Roundup® Ready-to-Use Weed and Grass Killer with 22 oz. Roundup® Weed & Grass Killer Sure Shot Foam Spray	$10.36	$1.04	$5.18

Combination Pack - 1.33 gal. Roundup® Ready- to-Use Weed and Grass Killer Plus with Pump 'N Go Sprayer and two 6.5 oz. Roundup® Weed and Grass Killer Super Concen-trate	$39.53	$3.95	$19.77
Combination Pack – 1.33 gal. Roundup® Ready- to-Use Weed and Grass Killer and two 7 oz. Roundup® Weed and Grass Killer Concentrate Plus	$36.84	$3.68	$18.42

2. Any Person who received a refund directly from Monsanto and/or Scotts with respect to purchases of units of Products shall not be eligible for a payment as to those units.

G. Attorneys' Fees, Expenses, and Costs

1. Class Counsel and Class Representatives shall request attorneys' fees and costs, including Class Counsel's Fees, and incentive awards, to be paid from the Common Fund. Monsanto will not contest a request for Class Counsel's Fees that does not exceed 25% of the full amount available to the class. Monsanto will not oppose reasonable incentive payments of $2,500 for each of the Class Representatives.

2. The Parties recognize that Class Counsel's Fees reflect the novel and complex nature of this matter, as well as the risk assumed by Class Counsel in investing months of labor into gaining relief for the Class without guarantee of return. The Parties recognize also that litigation pursued in the *Blitz* Action contributed significantly to bringing about the mediation in this matter and this Agreement and is appropriately considered by the Court in assessing the reasonableness of Class Counsel's Fees.

3. The Claims Administrator shall pay to Class Counsel from the Common Fund the amount of Class Counsel's Fees and costs awarded by the Court within seven (7) calendar days after the Effective Date.

4. Costs for settlement, notice, claims administration, incentive awards, and any other fees, including attorneys' fees, will be paid from the Common Fund.

H. Retention of Claims Administrator

The Parties agree to retain Postlethwaite & Netterville as Claims Administrator to effect Class Notice and administration. The Claims Administrator shall assist with various administrative tasks, including, without limitation:

a. Arranging for the dissemination of the Class Notice pursuant to the Notice Plan

agreed to by the Parties and approved by the Court;

b. Answering written inquiries from Class Members and/or forwarding such inquires to Class Counsel;

c. Receiving and maintaining forms of Class Members who wish to opt out of and be excluded from the Agreement;

d. Establishing a Settlement Website;

e. Establishing and staffing a toll-free informational telephone number for Class Members;

f. Receiving and processing Claims and distributing payments to Authorized Claimants; and

g. Otherwise assisting with administration of the Agreement.

I. Timing

All Claim Forms must be postmarked or received by the Claims Administrator by the Claims Deadline to be considered timely. The Claims Deadline shall be clearly set forth in the Preliminary Approval Order, the Class Notice, on the Settlement Website, and on the front of the Claim Form.

J. Procedure

1. Class Notice will include print and nationwide digital publication.

2. All Claims must be submitted with a Claim Form and received by the Claims Administrator.

3. The Claim Form will be available on the Settlement Website. The Claim Form will be available to fill out and submit online, for download, or will be mailed to Class Members upon request by calling or writing to the Claims Administrator. Class Members may submit their completed and signed Claim Forms to the Claims Administrator by mail or online, postmarked or submitted online, on or before the Claims Deadline.

4. The Claim Form must include a reasonable proof of purchase, or must include a declaration, under penalty of perjury, of the identity and quantity of the type of Products that were purchased. All Claim Forms must include:

a. Class Member name, address, and telephone number;

b. Identification of the quantity and type of Product(s) that were purchased;

c. The retailer and location (city and state) of the retailer from which the Products were purchased; and

d. The approximate date(s) or date ranges on or during which the Products were purchased.

5. The Claims Administrator shall retain sole discretion in accepting or rejecting the Claim Form.

6. Claims that are based only upon a declaration signed under penalty of perjury (*i.e.*, do not include reasonable proof of purchase) shall be limited to a Maximum Allowance of one (1) Product for each year of the Class Period (the number of years for each Class Member being determined by that state of that Class Member's purchases as set forth in the definition of Class Period above) with the exception of Claims for 1 Gal. Roundup® Weed

and Grass Killer Super Concentrate. For 1 Gal. Roundup® Weed and Grass Killer Super Concentrate, Claims that are based only upon a declaration signed under penalty of perjury shall be limited to a Maximum Allowance of one (1) for every two (2) years of the Class Period. For example, if the applicable Class Period for a Class Member is five (5) years, that Class Member may make a Claim based upon a declaration for any one of the following combinations of products: up to five (5) Products other than 1 Gal. Roundup® Weed and Grass Killer Super Concentrate;

i. up to three (3) 1 Gal. Roundup® Weed and Grass Killer Super Concentrates;

ii. up to two (2) 1 Gal. Roundup® Weed and Grass Killer Super Concentrates and one (1) Product other than a 1 Gal. Roundup® Weed and Grass Killer Super Concentrate; or

iii. one (1) 1 Gal. Roundup® Weed and Grass Killer Super Concentrate and up to three (3) Products other than 1 Gal. Roundup® Ready-to-Use Weed and Grass Killer Super Concentrate).

7. Claims based on a reasonable proof of purchase are not subject to the Maximum Allowance, but for such Claims, the Claims Administrator may at its discretion require a declaration signed under penalty of perjury that provides additional information, including that the purchases were for personal use at a specific location.

8. The Claims Administrator shall pay out Approved Claims in accordance with the terms of this Agreement commencing ten (10) days after the Effective Date or as otherwise ordered by the Court.

9. Class Members who do not submit a Claim or opt out (*i.e.*, do nothing) will be subject to this Agreement and all of its terms, including but not limited to the releases, and will receive no payment from the Common Fund.

K. Opt-Out Procedure

1. Class Members who wish to opt out of and be excluded from the Agreement must download from the Settlement Website an Opt-Out Form, to be created by the Claims Administrator, and Class Members must print, complete, and mail the form to the Claims Administrator, at the mailing address stated on the Opt-Out Form, postmarked no later than ten (10) days after the filing of the Motion for Final Approval of the Settlement and the Application For Fees or as otherwise ordered by the Court in its Preliminary Approval Order (the "Opt-Out Deadline").

2. The Opt-Out Form must be personally completed and submitted by the Class Member, and multiple-Class-Member "mass" or "class" opt-outs shall not be permitted.

3. The Claims Administrator shall be responsible for processing opt-outs and objections, if any, including to promptly provide Class Counsel and counsel for Monsanto with copies of same.

L. Procedures for Objecting to the Settlement

Class Members have the right to appear and show cause why the Agreement should not be granted final approval, subject to each of the provisions of this paragraph:

1. *Written Objection Required.* Any objection to the Agreement must be in writing, filed with the Court, with a copy served on Class Counsel and counsel for Monsanto at the addresses set forth in the Class Notice and in Miscellaneous Provision ¶ 2 below, by the Objection Deadline.

2. *Form of Written Objection.* Any objection regarding or related to the Agreement shall contain (i) a caption or title that clearly identifies the Action and that the document is an objection, (ii) information sufficient to identify and contact the objecting Class Member or his or her attorney, and (iii) a clear and concise statement of the Class Member's objection, as well as any facts and law supporting the objection (the "Objection").

3. *Authorization of Objections Filed by Attorneys Representing Objectors.* Class Members may object either on their own or through an attorney hired at their own expense, but a Class Member represented by an attorney must sign either the Objection itself or execute a separate declaration stating that the Class Member authorizes the filing of the Objection.

4. *Effect of Both Opt-Out and Objection.* If a Class Member submits an Opt-Out Form, the Class Member will be deemed to have opted out of the Agreement, and thus to be ineligible to object. However, any objecting Class Member who has not timely submitted a completed Opt-Out Form for exclusion from the Agreement will be bound by the terms of the Agreement upon the Court's final approval of the Agreement.

M. Failure to Exhaust Funds

After payments have been made to Authorized Claimants, to Class Counsel for Class Counsel Fees, to Class Representatives for incentive awards, and all other costs associated with the administration of this settlement have been paid or placed in appropriate escrow, any remaining funds will be exhausted through a *cy pres* distribution to the National Consumer Law Center, the National Advertising Division of the Better Business Bureau (including the possibility of a custom-designed *cy pres* program), and

the Center for Consumer Law & Economic Justice at the University of California, Berkeley.

Approval by the Court, both of the designation of the National Consumer Law Center, the National Advertising Division, and the Center for Consumer Law & Economic Justice as the *cy pres* beneficiaries, and of the distribution(s) to be made to the National Consumer Law Center, the National Advertising Division, and the Center for Consumer Law & Economic Justice in accordance with this Agreement, will be required before any distribution shall be made. If required by the Court, the Parties agree that any distribution(s) may be announced publicly before they occur. If and to the extent required by the Court, and notwithstanding any other provision of this Agreement, the Parties further agree that they may allow for additional or different *cy pres* beneficiaries via a written addendum to this Agreement.

N. Release of Monsanto, Scotts, and Related Persons

Upon the Effective Date, each of the Class Members will be deemed to have, and by operation of the Judgment will have, fully, finally, and forever released, relinquished, and discharged the Released Persons from any and all individual, class, representative, group or collective claims, demands, rights, suits, liabilities, damages, losses, injunctive and/or declaratory relief, and causes of action of every nature and description whatsoever (with the exception of personal injury claims), including costs, expenses, penalties, and attorneys' fees, whether known or unknown, matured or unmatured, asserted or unasserted, latent or patent, at law or in equity, existing under federal or state law, regardless of legal theory or relief claimed, that any Class Member has or may in the future have against the Released Persons arising out of or related in any way to:

a. Labeling, sales, marketing, advertising, or any other communications, regardless of medium, of or regarding glyphosate or any of the Products using the statement "targets an enzyme found in plants but not in people or pets";

b. Labeling, sales, marketing, or advertising, or any other communications, regardless of medium, of or regarding glyphosate or any of the Products using any variations of the statement at issue in the Action, including but not limited to:

- ". . . stopping the function of an essential enzyme found in plants"
- " . . . stopping the function of an essential enzyme found in plants, but not in humans or animals"
- ". . . stopping the production of an essential enzyme found in plants (but not in humans or animals)"
- ". . . stopping the function of a substance found in plants (but not humans or animals)"

c. Any allegedly false or misleading statement or omission in or on the Labeling of glyphosate or any of the Products regarding the alleged impact of the Products or glyphosate on bacteria, or other microorganisms in or around humans and/or animals;

which have been, or which could in the past or future have been, asserted in the Action, and in connection with the conduct of the Action, that have been brought, could in the past or future have been brought, or are currently pending in any forum in the United States. This release does not release any alleged personal injury claims. To be clear, to the extent that any action or proceeding includes both claims for personal injury and claims that would otherwise fall within the scope of this release, the personal injury claims will not be deemed released, but the other claims will be released. Similarly, to the extent that any Class member asserts a cause of action or other claim that would otherwise fall within the scope of this release but asserts the right to recover both damages caused by personal injury and some other type of damages (for example, but not limited to, economic or statutory damages), that cause of action or claim will survive this release only to the extent of damages caused by personal injury.

O. Release of Plaintiffs

Upon the Effective Date, Monsanto will be deemed to have, and by operation of the Judgment will have, fully, finally, and forever released, relinquished, and discharged Plaintiffs, the Class, and Class Counsel from any and all claims, demands, rights, suits, liabilities, and causes of action of every nature and description whatsoever, whether known or unknown, matured or unmatured, at law or in equity, existing under federal or state law, that Monsanto has or may have against any of them arising out of or related in any way to the transactions, occurrences, events, behaviors, conduct, practices, and policies alleged in the Action, and in connection with the filing and conduct of the Action, that have been brought, could have been brought, or are currently pending in any forum in the United States.

P. Section 1542 Waiver

ALL PARTIES ACKNOWLEDGE SECTION 1542 OF THE CALIFORNIA CIVIL CODE. YEE AND CALIFORNIA MEMBERS OF THE CLASS EXPRESSLY WAIVE AND RELINQUISH ANY RIGHTS OR BENEFITS AVAILABLE TO THEM UNDER THIS STATUTE. CAL. CIV. CODE § 1542 PROVIDES: "A GENERAL RELEASE DOES NOT EXTEND TO CLAIMS WHICH THE CREDITOR DOES NOT KNOW OR SUSPECT TO EXIST IN HIS OR HER FAVOR AT THE TIME OF EXECUTING THE RELEASE, WHICH IF KNOWN BY HIM OR HER MUST HAVE MATERIALLY AFFECTED HIS OR HER SETTLEMENT WITH THE DEBTOR." NOTWITHSTANDING CAL. CIV. CODE § 1542 OR ANY OTHER FEDERAL OR STATE STATUTE OR RULE OF LAW OF SIMILAR EFFECT, THIS AGREEMENT SHALL BE GIVEN FULL FORCE AND EFFECT ACCORDING TO EACH AND ALL OF ITS EXPRESSED TERMS AND PROVISIONS, INCLUDING THOSE RELATED TO ANY UNKNOWN OR UNSUSPECTED CLAIMS, LIABILITIES, DEMANDS, OR CAUSES OF ACTION WHICH ARE BASED ON, ARISE FROM, OR ARE IN ANY WAY CONNECTED WITH THE ACTION.

Q. Class Action Fairness Act

1. The Class Action Fairness Act of 2005 ("CAFA") requires Monsanto to inform certain federal and state officials about this Agreement. See 28 U.S.C. § 1715.

2. Under the provisions of CAFA, the Claims Administrator, on behalf of Monsanto, will serve notice upon the appropriate officials within ten (10) calendar days after

the Parties file the proposed Agreement with the Court. See 28 U.S.C. § 1715(b).

3. The Parties agree that either the Claims Administrator or Monsanto is permitted to provide CAFA notice as required by law and that any such notice shall be done to effectuate the Agreement and shall not be considered a breach of this Agreement or any other agreement of the Parties.

4. If any of the notified federal or state officials takes any action adversely affecting the validity or enforceability of the Agreement or seek to impose additional terms or liability on Monsanto for the matters resolved by the Class Released Claims, Monsanto may, at its option, suspend the implementation of the Agreement pending the outcome of the action initiated by the notified federal or state official, or provided that the Court has not yet entered the Final Settlement Approval Order and Judgment, may elect to void the Agreement by written notice to Class Counsel.

R. Court Approval

1. Promptly after executing this Agreement, the Parties will submit to the Court the Agreement, together with its exhibits, and will request that the Court grant preliminary approval of the proposed Agreement, issue a Preliminary Approval Order, and schedule a Final Approval Hearing to determine whether the Agreement should be granted final approval, whether an application for attorneys' fees and costs should be granted, and whether an application for incentive awards should be granted. As part of the preliminary approval motion, the Parties will request the Court to certify the Class provisionally for settlement purposes, and formally to appoint Class Counsel. The Parties intend and acknowledge that any such certification and appointment would be for purposes of the Agreement only, and not effective in continuing litigation between the Parties, if any.

2. A Final Settlement Hearing to determine final approval of the Agreement shall be scheduled as soon as practicable, subject to the calendar of the Court, but no sooner than 120 days after the Preliminary Approval Date. Upon final approval of the Agreement by the Court at or after the Final Settlement Hearing, the Parties shall seek and obtain from the Court the Final Settlement Approval Order and Judgment.

3. Objecting Class Members may appear at the Final Approval Hearing and be heard. The Parties shall have the right, but not the obligation, either jointly or individually, to respond to any objection.

4. If this Agreement is not given final approval by the Court, the Parties will seek in good faith to revise the Agreement as needed to obtain Court approval. Failing this, the Parties will be restored to their respective places

in the litigation. In such event, the terms and provisions of this Agreement will have no further force and effect with respect to the Parties and will not be used in this or in any other proceeding for any purposes, and any judgment or order entered by the Court in accordance with the terms of this Agreement will be treated as vacated.

S. No Public Statements and Media or Public Inquiry Plan

1. The Parties will refrain (directly, or through counsel or third parties) from making any affirmative public statements regarding the fact of or the terms of this Agreement, except for statements by Monsanto substantially the same in substance to those public statements approved by Plaintiffs' counsel on April 21, 2020, absent written agreement by both Parties.

2. The Parties and their counsel agree that, absent written agreement by both Parties, in responding to any inquiries, stories, or potential stories from the public media concerning the Agreement, the Parties and their counsel will limit their comments to the effect that "the matter has been settled to the satisfaction of all Parties subject to Court approval," except for (1) statements by Monsanto substantially the same in substance to those public statements approved by Plaintiffs' counsel on April 21, 2020 and (2) accurate statements regarding the nature of the changes between this Agreement and prior versions of this Agreement submitted to the Court. Nothing in this paragraph shall limit Class Counsel's ability to communicate privately with a Class Member concerning this Action or the Agreement. Monsanto or the Claims Administrator may make such public disclosures about the Action and Agreement as any applicable laws require.

T. Miscellaneous Provision

1. *Entire Agreement.* This Agreement shall constitute the entire Agreement among the Parties with regard to the subject matter of this Agreement and shall supersede any previous agreements, representations, communications, and understandings among the Parties with respect to the subject matter of this Agreement. The Parties acknowledge, stipulate, and agree that no covenant, obligation, condition, representation, warranty, inducement, negotiation, or undertaking concerning any part or all of the subject matter of the Agreement has been made or relied upon except as expressly set forth herein. This Agreement supersedes any prior agreement between the parties, including the Term Sheet executed by the Parties.

2. *Notices Under This Agreement.* All notices or mailings required by this Agreement to be provided to or approved by Class Counsel and Monsanto, or otherwise made pursuant to this agreement, shall be provided as follows:

Class Counsel	Monsanto
Kim Richman Richman Law Group 8 W. 126th Street New York, NY 10027 Telephone: (718) 705-4579 Facsimile: (212) 687-8292 krichman@richmanlaw-group.com Michael L. Baum Baum, Hedlund, Aristei &	John J. Rosenthal Winston & Strawn LLP 1901 L St. N.W. Washington, D.C. 20036 Telephone: (202) 282-5785 jrosenthal@winston.com Jeff Wilkerson Winston & Strawn LLP 300 S. Tryon St., 16th Floor

Goldman, P.C. 12100 Wilshire Blvd., Suite 950 Los Angeles, CA 90025 Telephone: (310) 207-3233 mbaum@baumhed-lund.com	Charlotte, NC 28202 Telephone: (704) 350-7714 jwilkerson@winston.com

3. *Good Faith.* The Parties acknowledge that each intends to implement the Agreement. The Parties have at all times acted in good faith and shall continue to, in good faith, cooperate and assist with and undertake all reasonable actions and steps in order to accomplish all required events on the schedule set by the Court, and shall use reasonable efforts to implement all terms and conditions of this Agreement.

4. *Binding on Successors.* This Agreement shall be binding upon and inure to the benefit of the heirs, successors, assigns, executors, and legal representatives of the Parties to the Agreement and the Released Persons.

5. *Arms-Length Negotiations.* The Agreement compromises claims that are contested, and the Parties agree that the consideration provided to the Class and other terms of the Agreement were negotiated in good faith and at arms' length by the Parties, and reflect an Agreement that was reached voluntarily, after consultation with competent legal counsel, and guided in part by the Parties' earlier private mediation session with Professor Eric D. Green, an experienced mediator. The determination of the terms of, and the drafting of, this Agreement, has been by mutual agreement after negotiation, with consideration by and participation of all Parties hereto and their counsel. Accordingly, the rule of construction that any ambiguities

are to be construed against the drafter shall have no application. All Parties agree that this Agreement was drafted by Class Counsel and Monsanto's Counsel at arms' length, and that no parol or other evidence may be offered to explain, construe, contradict, or clarify its terms, the intent of the Parties or their attorneys, or the circumstances under which the Agreement was negotiated, made, or executed.

6. *Waiver.* The waiver by one Party of any provision or breach of this Agreement shall not be deemed a waiver of any other provision or breach of this Agreement.

7. *Modification in Writing Only.* This Agreement and any and all parts of it may be amended, modified, changed, or waived only by an express instrument in writing signed by the Parties.

8. *Headings.* The descriptive headings of any paragraph or sections of this Agreement are inserted for convenience of reference only and do not constitute a part of this Agreement.

9. *Governing Law.* This Agreement shall be interpreted, construed, and enforced according to the laws of the State of Missouri, without regard to conflicts of law.

10. *Continuing Jurisdiction.* After entry of the Judgment, the Court shall have continuing jurisdiction over the Action solely for purposes of (i) enforcing this Agreement, (ii) addressing settlement administration matters, and (iii) addressing such post-Judgment matters as may be appropriate under court rules or applicable law, including under the All Writs Act.

11. *Agreement Constitutes a Complete Defense.* To the extent permitted by law, this Agreement may be pleaded as a full and complete defense to, and may be used

as the basis for an injunction against, any action, suit, or other proceeding that may be instituted, prosecuted, or attempted in breach of or contrary to this Agreement.

12. *Execution.* This Agreement may be executed in one or more counterparts. All executed counterparts and each of them will be deemed to be one and the same instrument. Photocopies and electronic copies (*e.g.*, PDF copies) shall be given the same force and effect as original signed documents.

IN WITNESS WHEREOF, each of the undersigned, being duly authorized, have caused this Agreement to be executed on the dates shown below and agree that it shall take effect on that date upon which it has been executed by all of the undersigned.

ON BEHALF OF Lisa Jones, Horacio Torres Bonilla, Kristoffer Yee, and the Proposed Settlement Class:

/s/ Kim E. Richman Date: October 14, 2020

ON BEHALF OF Monsanto Company:

/s/ John J. Rosenthal Date: October 14, 2020 John J. Rosenthal

Appendix G

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

LISA JONES, *et al.*, Plaintiffs, v. MONSANTO COMPANY, Defendant, *and* ANNA ST. JOHN, Objector.	Case No. 19-CV-102-BP Hon. Beth Phillips

OBJECTION OF ANNA ST. JOHN TO MOTION FOR FINAL SETTLEMENT APPROVAL AND AWARD OF ATTORNEYS' FEES

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INTRODUCTION

The settling parties propose to resolve this case with a $39.55 million dollar settlement, roughly divided as follows: 30% to class members, 25% to class counsel, 5% to the administrator, and ***40%*** to non-class third-party organizations. This submitted allocation is decidedly unfair and, as a result, the settlement cannot be approved as is.

Under controlling Eighth Circuit case law, class settlements may not distribute funds to third parties when distributions to class members are feasible, absent a satisfied liquidated damages claim. *In re BankAmerica Corp. Secs. Litig.*, 775 F.3d 1060 (8th Cir. 2015) ("*BankAmerica*"). In other words, the parties must prefer class relief to *cy pres* relief. This settlement violates that cardinal principle. *See* Section III.A, below. The approximately $16 million *cy pres* component also violates the First Amendment by donating the money of absent class members without their affirmative election. An order approving the settlement would unconstitutionally compel them to subsidize the private speech and advocacy of the three *cy pres* organizations. *See* Section III.B., below.

Plaintiffs' $9.88 million fee request should not be granted because it is disproportionate to the direct benefit conferred upon the class (*see* Section IV.A, below), and because it is not backed by evidence of counsel's lodestar (*see* Section IV.B, below).

I. Anna St. John is a member of the class and intends to appear through counsel at the fairness hearing.

Objector St. John is a U.S. resident who purchased, for personal use and not resale, a bottle of Roundup Ready-To-Use Weed & Grass Killer III containing the challenged statement from Walmart on June 3, 2020 in Mississippi. *See* Declaration of Anna St. John, ¶¶ 2-3. Her full name is

Anna Elizabeth Wagner St. John, her business address is Hamilton Lincoln Law Institute, 1629 K St. NW, Suite 300, Washington, DC 20006, and her telephone number is (917) 327-2392. *Id.* ¶ 2. She did not receive a refund nor has she opted-out of the class. *Id.* ¶ 3. She has submitted a claim through the settlement website. *Id.* ¶ 4. Thus, St. John has standing to object. Fed. R. Civ. P. 23(e)(5)(A).

Hamilton Lincoln Law Institute's Center for Class Action Fairness ("CCAF") represents St. John pro bono. St. John Decl. ¶ 6. CCAF represents class members pro bono where class counsel employs unfair procedures to benefit themselves at the expense of the class. For example, by combatting unnecessary use of *cy pres*, CCAF has conferred tens of millions of dollars of benefit upon consumer and shareholder class members. *See, e.g.*, *BankAmerica*, 775 F.3d 1060 (repudiating unnecessary *cy pres* diversion of $2.7 million of common fund residue);[1] *McDonough v. Toys "R" Us, Inc.*, 80 F. Supp. 3d 626, 660 (E.D. Pa. 2015) (amended settlement augmented class recovery by $15 million after the Third Circuit vacated a *cy pres*-heavy settlement structure in *In re Baby Prods. Antitrust Litig.*, 708 F.3d 163 (3d Cir. 2013) ("*Baby Prods.*")); *see also* Declaration of Theodore H. Frank. St. John brings this objection through CCAF in good faith to protect the interests of the class. St. John Decl. ¶ 8. Her objection applies to the whole class; she adopts any objections not inconsistent with this one.

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[1] This money was returned to the fund for distribution to the class. *In re Green Jacobson, P.C.*, 911 F.3d 924, 929 (8th Cir. 2018).

II. The Court's owes a fiduciary duty to absent class members to guard against recognized incentive problems of 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). Unlike ordinary settlements, "class-action settlements affect not only the interests of the parties and counsel who negotiate them, but also the interests of unnamed class members who by definition are not present during the negotiations…. [T]hus, there is always the danger that the parties and counsel will bargain away the interests of unnamed class members in order to maximize their own." *Id.*

To guard against this danger, a district court must itself assume a "fiduciary" obligation to "serv[e] as a guardian of the rights of absent class members." *In re Wireless Tel. Fed. Cost Recovery Fees Litig.*, 396 F.3d 922, 932 (8th Cir. 2005). "In reviewing a proposed settlement, a court should not apply any presumption that the settlement is fair and reasonable." American Law Institute, *Principles of the Law of Aggregate Litigation* § 3.05(c) (2010). The burden of proving settlement fairness rests with the moving party. *Id.*; *Stewart v. USA Tank Sales & Erection Co.*, 2014 WL 836212, 2014 U.S. Dist. LEXIS 27560, at *8 (W.D. Mo. Mar. 4, 2014). Further, settlements, as here, negotiated prior to formal class certification "are subject to an even higher showing of fairness." *Martin v. Cargill, Inc.*, 295 F.R.D. 380, 385 (D. Minn. 2013) (internal quotation omitted).

An arm's length negotiation between the parties can likely assure the Court that the $39.55 million gross fund is adequate, but it cannot vouchsafe that "the manner in

which that amount is allocated" is fair. *Dry Max*, 724 F.3d at 717; *see also Johnston v. Comerica Mortgage Corp.*, 83 F.3d 241, 246 (8th Cir. 1996) (fees and class recovery are a "package deal"). That allocation matters: "class members are not indifferent to whether funds are distributed to them or to *cy pres* recipients, and class counsel should not be either." *Baby Prods.*, 708 F.3d at 178. Here, the class is allotted too small a share of the fund—likely less than $12 million (30% of the fund). Meanwhile, as explained below in sections III and IV respectively both the non-party *cy pres* recipients and class counsel are allotted too large a share of the fund. The *cy pres* itself will likely amount to about $16 million (40% of the fund). And the nearly $10 million for attorneys' fees (25% of the fund) is distended given the lodestar multiplier that the plaintiffs are concealing from the class and the Court. Because the settlement deprives the Court of the authority to reallocate excess fees and *cy pres* to class members, as class fiduciary, the only option is to reject the proposal.

III. The settlement improperly favors third-party charities over class members through its *cy pres* provision.

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 (internal quotation omitted).

Thus, following section 3.07 of the American Law Institute's Principles of Aggregate Litigation, the Eighth Circuit only permits a *cy pres* distribution "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). "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). 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, 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). Put simply, no class complaint includes a request for *cy pres* in its prayer for relief; it is "not a form of relief to the absent class members and should not be treated as such." *Frank v. Gaos*, 139 S. Ct. 1041, 1047 (2019) (Thomas, J., dissenting).

Preferring non-compensatory *cy pres* recovery abdicates the duty the 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). Those duties work hand in glove with the proper role of the judiciary—namely, "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, J., concurring) (internal quotation omitted).

"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.*

A. The settlement resorts to *cy pres* prematurely

Under Rule 23(e), *cy pres* is only permissible as a last resort. *See BankAmerica*, 775 F.3d at 1064; *Pearson v. NBTY, Inc.*, 772 F.3d 778, 784 (7th Cir. 2014). This rule follows from the precept that "[t]he settlement-fund proceeds, generated by the value of the class members' claims, belong solely to the class members." *Klier v. Elf Atochem N. Am., Inc.*, 658 F.3d 468, 474 (5th Cir. 2011) (citing ALI Principles §3.07 cmt. (b)). The 2018 Amendments to Rule 23 have reinforced this rule by requiring the Court to assess "the effectiveness of any proposed method of distributing relief to the class…" Fed. R. Civ. P. 23(e)(2)(C)(ii).

Plaintiffs contend using about 40% of the common fund for *cy pres* is appropriate here because they have "made extraordinary efforts to notify potential claimants" and current claimants "are receiving an amount more than three times the high-end of Plaintiffs' counsel's damages

estimates." Dkt. 65, Memorandum in Support of Motion for Final Approval ("MFA") at 32. To justify their settlement's *cy pres* provision, ***both rationales*** must succeed. Yet, under Circuit law, neither does.[2]

The latter justification implies that further augmentation of existing claimants' payments would be a windfall. But *BankAmerica* rejects this in unequivocal terms: "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. "[A] *cy pres* distribution is not authorized by declaring…that 'all class members submitting claims have been satisfied in full.'" *Id.* at 1065 (internal citation omitted). "It

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[2] Plaintiffs cite *Rawa v. Monsanto Co.*, 2018 WL 2389040, 2018 U.S. Dist. LEXIS 88401 (E.D. Mo. May 25, 2018), but that decision violates *BankAmerica*. *Rawa* erroneously relies on the fairness of a previous "identification and distribution process." 2018 U.S. Dist. LEXIS 88401, at *32. Were that a factor that justified *cy pres*, *BankAmerica* would have affirmed. Even if *Rawa* were correct, the claims rate here does not approach the 13% there, which was calculated by the share of the total retail sales for which claims were submitted. Indeed, the settlement here covers $1.49 billion in total sales (Dkt. 50-1 ¶15), yet the value of the valid product claims submissions is between $23.44 million and $26.69 million (after doubling to account for the settlement's 50% claim value). Dkt. 65-2 ¶22. This equates to an effective take rate of 1.5% to 1.8%.

Nor does *BankAmerica* permit courts to declare, as *Rawa* did, that further class distributions would be a windfall when the class possesses unliquidated damages claims. It seems likely that the *Rawa* decision was spurred by the fact that "no class member objected to the concept of a *cy pres* award." *Id.* at *34.

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.*

Class members' claims here are not liquidated damages claims—they have not been determined or fixed by express contract or law; they are disputed. 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." Complaint, Dkt. 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…" *Id.* at 26.

"[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). Even ignoring punitive damages, a restitutionary full refund theory would countenance a doubling of the roughly $12 million in class members' claims. Such an amendment would reduce the exorbitant *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 proposal cannot satisfy *BankAmerica*.

Nor does plaintiffs' protestation about their "extraordinary efforts" to notify class members suffice under *BankAmerica* to justify funneling $16 million to *cy pres*. *BankAmerica*, in fact, rejected the notion that *cy pres* can be permitted just because further distributions would be "costly and difficult." 775 F.3d at 1065. While the plaintiffs

extended the claims period and engaged in supplemental notice to stimulate claims, they neglected to subpoena the records of big-box retailers for the purpose of remitting direct distributions to class members. This isn't an untried hypothetical; similar information-gathering processes occur regularly in the context of consumer class litigation. *See, e.g*; *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).

Where there is a will, there is a way. When courts demand more of settling parties on behalf of class members, they get more. For example, after *Baby Products* rejected a settlement that would pay class counsel $14 million, charities about $15 million, and class members under $3 million, class counsel on remand was appropriately incentivized to avoid a fee reduction. They 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. 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). In another case before Judge Kays, after he rejected a claims-made settlement that would have compensated only 6% of the class, the settling parties proposed a revised direct payment settlement that ensured 87% of the class would participate in the settlement. *Casey v. Coventry Health Care of Kansas, Inc.*, 2012 U.S. Dist. LEXIS 33397, 2012 WL 860395 (W.D. Mo. Mar. 13, 2012). These cases show that the efforts of plaintiffs and their counsel to date have not been extraordinary.

St. John does not demand that the settling parties revise the settlement by adopting one specific solution. Rather, consistent with Eighth Circuit law, she only demands that class recovery be prioritized ahead of *cy pres* relief.[3] The

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[3] One aspect of the settlement that unduly prioritizes *cy pres* is the reversion of unawarded fees to the *cy pres* fund. Because there's "no apparent reason the class should not benefit from the excess allotted for fees," a reasonable settlement would channel such reductions to augment class relief. *In re Bluetooth Headset Prods. Liab. Litig.*, 654 F.3d 935, 949 (9th Cir. 2011). But here, if the Court reduces the fee as is warranted (*see* Section IV, below), the already bloated *cy pres* award will grow even larger. The Court lacks the authority to unilaterally alter this structure; it requires an amendment from the settling parties. *Rawa v. Monsanto*, 934 F.3d 862, 871 (8th Cir. 2019).

settling parties might solve this by augmenting claims caps for existing claimants, or engaging in supplemental efforts to remit payments to non-claiming class members, or use some other mechanism that reallocates the common fund to class members.

B. Without class members' affirmative election, *cy pres* constitutes compelled speech in violation of the First Amendment.

"[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. *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). "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). "[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 (internal quotation omitted). 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.*

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. *See* St. John Decl. ¶ 7. 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*, contradicting principles that St. John advocates. *Id.*

"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 would violate the First Amendment. [4]

IV. If the Court approves the settlement, it should decline to grant the $9.88 million attorneys' award request.

If the Court disagrees that the settlement is unfair (see Section III, above), it should still consider unreasonable the $9.88 million attorneys' fee request by plaintiffs. "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. The Court has 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).

A. Class counsel's fee request is not sufficiently documented to comply with Rule 23(h).

Class counsel fails to "establish a factual basis to support" their fee request as is necessary. *Johnston*, 83 F.3d

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[4] The Tenth Circuit mistakenly found no state action when a federal court approves a class action settlement. *In re Motor Fuel Temp. Sales Practices Litig.*, 872 F.3d 1094, 1113-14 (10th Cir. 2017). To the contrary, 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). "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.).

at 246. As for the a central *Johnson* factor—the time and labor expended—all they say is that "the time and labor invested by attorneys and legal staff totals multiple thousands of hours." MFA at 25. Is that two thousand hours? Ten thousand? At what billing rate? But class counsel provide neither billing records, nor even lodestar summaries for the Court or the class to inspect.

Their excuse for failing to do so is that the Court need not crosscheck a percentage-based award using the lodestar. MFA at 25 n.12 (citing dicta in *Keil v. Lopez*, 862 F.3d 685, 701 (8th Cir. 2017), where the district *did* conduct a lodestar-crosscheck.). St. John does not believe that dicta is accurate; the lodestar crosscheck is an indispensable mechanism to prevent windfall fees. *Farrell v. Bank of Am. Corp., N.A.*, 827 Fed. Appx. 628, 636 (9th Cir. 2020) (Kleinfeld, J., dissenting) (citing Justice Gorsuch and former judge Vaughn Walker's support for a mandatory crosscheck). But even if this Court has the discretion to eschew a crosscheck, that does not mean that class counsel has the discretion not to submit lodestar information for the Court and class to review. Class counsel may not elect the court's fee methodology. *Galloway v. Kan. City Landsmen, LLC*, 833 F.3d 969, 973-74 (8th Cir. 2016). Nor may they stymie class members' Rule 23 right of objection.

Keil itself refers to the necessity of allowing class members to "provide the court with critiques of specific work done by counsel" and furnishing them with "information of what that work was, how much time it consumed, and how it contributed to the benefit of the class." 862 F.3d at 705 (quoting *In re Mercury Interactive Corp. Secs. Litig.*,618 F.3d 988, 994 (9th Cir. 2010)); *accord Redman v. RadioShack Corp.*, 768 F.3d 622, 638 (7th Cir. 2014) (objectors were "handicapped" by being deprived of opportunity to object to "the details of class counsel's hours and

expenses"). A leading treatise agrees: "Knowing the level of the fee alone is a weak substitute for reviewing the full fee petition ***as the latter ought to provide more detail about counsel's time and efforts***, precisely the detail that would make the opportunity to object meaningful." William B. Rubenstein, 3 NEWBERG ON CLASS ACTIONS § 8:24 (5th ed. 2014) (emphasis added).

Repeatedly, the Eighth Circuit has encouraged using the lodestar to "double-check" the percentage result. *Petrovic v. Amoco Oil Co.*, 200 F.3d 1140, 1157 (8th Cir. 2000). "Without 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." *Grunin v. Int'l House of Pancakes*, 513 F.2d 114, 128 (8th Cir. 1975). District courts follow suit. *Hashw v. Dep't Stores Nat'l Bank*, 182 F. Supp. 3d 935, 950 (D. Minn. 2016) (reducing percentage request that yielded oversized multiplier); *Sanderson v. Unilever Supply Chain, Inc.*, 2011 WL 5822413 (W.D. Mo. Nov. 16, 2011) (ordering plaintiffs to provide detailed billing records).

Depriving the class and Court of this information is prejudicial. It is likely that the hours and rates proffered would yield an excessive multiplier. For example, if class counsel claims to have spent 2000 hours at a blended market rate of $450/hr,[5] the lodestar would be $900,000 and the resulting multiplier would be over ten. At 3000 hours,

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[5] *See Thornburg v. Open Dealer Exch., LLC*, 2019 U.S. Dist. LEXIS 121204, 2019 WL 3291569 (W.D. Mo. Jul. 22, 2019) (rebuffing claimed rate of $550/hr; reducing to $450/hr).

the multiplier is still over seven. And, given plaintiffs' cursory description, they might even be seeking compensation for duplicative and non-compensable time on related actions. *See generally Martin*, 295 F.R.D. at 395 (observing problems of dueling class actions).

No fee can reasonably be awarded until class counsel present some accounting of their time and labor for the Court and the class to inspect.

B. *Cy pres* is not a compensable benefit to the class, and so a reasonable fee award may not be tethered to that portion of the common fund.

Independently, 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 where anything more "would be unreasonable in light of class counsel's limited success in obtaining value for the class."); *Eastwood v. S. Farm Bureau Cas. Ins. Co.*, 2014 WL 4987421, 2014 U.S. Dist. LEXIS 142652 (W.D. Ark. Oct. 7, 2014) ("the 'benefit' in those common-fund cases refers to that which *the class* receives a result of the settlement"). If the class ultimately receives $12 million, the $9.88 million fee request constitutes an excessive 45.1% of that "relevant

ratio." *See Pearson*, 772 F.3d at 781 ("the ratio that is relevant is the ratio of (1) the fee to (2) the fee plus what the class members received.") (cleaned up).[6]

In the ordinary common fund case, a proportionate attorney award lies in the "range of 20 to 25%" of the fund, and decreases as the size of the fund increases above $10 million. *See e.g.*, *Petrovic*, 200 F.3d at 1157; *Hashw*, 182 F. Supp. 3d at 950 (awarding 20% of $12.5 million fund). A fee of 45% would be significantly higher than the highest percentage (38%) the Eighth Circuit has approved "on the high end." *Huyer v. Buckley*, 849 F.3d 395, 399 (8th Cir. 2017). A fee of $4 million appropriately compensates counsel for the $12 million cash recovery for the class and amounts to 25% of that net recovery.

If the Court awards $4 million for the direct benefit, the question becomes whether more fees should be awarded from the then $21.7 million *cy pres* remainder.[7] When counsel "has not met its responsibility to seek an award that adequately prioritizes the direct benefit to the class," it is "appropriate for the court to decrease the fee award." *BankAmerica*, 775 F.3d at 1068 (quoting *Baby Prods.*, 708 F.3d at 178); *accord* Wasserman, *Cy Pres in Class Action Settlements*, 88 U.S.C. L. REV. at 135-46 (advocating for

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[6] Despite *Pearson*, the Eighth Circuit permits, but does not require, district courts to include justifiable administrative costs in the denominator to calculate a percentage fee. *In re Life Time Fitness, Inc., Tel. Consumer Prot. Act Litig.*, 847 F.3d 619, 623 (8th Cir. 2017). If the Court includes the $1.84 million administrative costs in the denominator here, the fees still amount to an excessive 41.6% (9.88/(12+9.88+1.84)).

[7] $39.55m-$12m-$4m-$1.84m=$21.7m.

"presumptive reduction of attorneys' fees" where settlement includes significant *cy pres* component). 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).

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. Thus, courts awarding fees recognize that a *cy pres* dollar is not worth a direct benefit dollar. *E.g.*, *In re Heartland Payment Sys., Inc.*, 851 F. Supp. 2d 1040, 1077 (S.D. Tex. 2012) (discounting *cy pres* by 50% when awarding fees); *Perry v. FleetBoston Fin. Corp.*, 229 F.R.D. 105, 123 n.9 (E.D. Pa. 2005) (excluding *cy pres* entirely). If the court is inclined to approve the settlement, it would be appropriate to cut fees attributable to the *cy pres* portion to zero, because *cy pres* is not a benefit to the class. *Pearson*, 772 F.3d at 784; *Frank*, 139 S. Ct. at 1047 (Thomas, J., dissenting).[8] In the alternative, a steep discount is warranted for any fees attributable to the *cy pres* portion of the fund.

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[8] The settlement's injunctive labeling component (Settlement § D.1) vests "exclusive discretion" with Monsanto. It is illusory, unenforceable, and constitutes no settlement value. Cf. Galloway, 833 F.3d at 974 n.3. Plaintiffs correctly do not rely on it in seeking fees. Accord Staton v. Boeing Co., 327 F.3d 938, 974 (9th Cir. 2003).

CONCLUSION

For these reasons, the Court should reject the proposed settlement. If it approves the settlement, it should refuse to grant the requested attorneys' fees.

Dated: March 8, 2021

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CERTIFICATE OF SERVICE

I hereby certify that on this 8th day of March, 2021, a true and correct copy of the foregoing was electronically filed with the Clerk of the Court using CM/ECF system, which will send notifications of such filing to the CM/ECF participants registered to receive service in this matter.

/s/ Jonathan Whitehead