UNITED STATE DISTRICT COURT
WESTERN DISTRICT OF MISSOURI
WESTERN DIVSION

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.

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

[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).

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 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.*

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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.

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 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,

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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).

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 at 246. As for the a central *Johnson* factor—the time and labor

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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.).

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, 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

[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).

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

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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.

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.

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.

[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).

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 R. Whitehead