16-2850

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

In re: CITIGROUP INC. SECURITIES LITIGATION

ATD GROUP,
Lead-Plaintiff-Appellee,

TILLIE SALTZMAN,
individually and on behalf of all others similarly situated, *et al.*,
Plaintiffs,
v.

THEODORE H. FRANK,
Objector-Appellant,

CITIGROUP INC., *et al.*,
Defendants.

On Appeal from the United States District Court
for the Southern District of New York, No. 07-cv-9901

Opening Brief of Appellant Theodore H. Frank

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Statement of Subject Matter and Appellate Jurisdiction

The district court had federal question jurisdiction under 28 U.S.C. § 1331, because the complaint alleged, *inter alia*, violations of Sections 10(b) and 20(a) of the Securities Exchange Act of 1934. A-102; Dkt. 69.[1]

This court has appellate jurisdiction under 28 U.S.C. § 1291. The court issued its final decision on the distribution of *cy pres* on August 9, 2016. SPA-15; SPA-1. Objector-Appellant Theodore H. Frank filed a notice of appeal on August 11, 2016. A-306. This notice is timely under Fed. R. App. Proc. 4(a)(1)(A). Frank, as a class member who timely objected to the Rule 23(h) request (Dkt. 181) and to the *cy pres* distribution below, has standing to appeal the *cy pres* award without the need to intervene formally in the case. *Devlin v. Scardelletti*, 536 U.S. 1 (2002); *e.g., Nachshin v. AOL, LLC*, 663 F.3d 1034 (9th Cir. 2011); *but cf. In re Baby Products Antitrust Litig.*, 708 F.3d 163, 181 (3d Cir. 2013) (reserving question of whether formal intervention necessary or whether *Devlin* applies). Though final judgment approving the settlement occurred on August 1, 2013 (A-204), this appeal is timely because any appeal of the *cy pres* provisions of the settlement would not have been ripe before the recipients' identity was disclosed. *In re BankAmerica Corp. Sec. Litig.*, 775 F.3d 1060, 1066 (8th Cir. 2015); *Baby Products*, 708 F.3d at 180.

[1] "A" stands for the joint appendix for this appeal. "SPA" stands for the Special Appendix. "Dkt." stands for docket numbers in the underlying district-court case. A-1.

Statement of the Issues

1. This Court has stated that the purpose of *cy pres* in class actions is to put the money to its "*next best* compensation use." *Masters v. Wilhelmina Model Agency, Inc.*, 473 F.3d 423, 436 (2d Cir. 2007) (emphasis in original). Did the district court err in holding that the standard for selecting *cy pres* recipients is whether they "reasonably approximate" the interests of the class, rather than whether they are the "next best" recipients after the class members themselves?

Standard of Review: Questions of law are reviewed *de novo*. *E.g.*, *United States v. Mejia*, 545 F.3d 179, 198-99 (2d Cir. 2008).

2. Appropriate *cy pres* recipients share a geographic continuity with the class and engage in pursuits that serve class interests. *E.g. In re BankAmerica Corp. Secs. Litig.*, 775 F.3d 1060, 1063 (8th Cir. 2015) (rejecting local legal aid society as appropriate *cy pres* recipient for nationwide class of shareholders); *Nachshin v. AOL, LLC*, 663 F.3d 1034, 1038 (9th Cir. 2011) (rejecting local legal aid society as appropriate *cy pres* recipient for nationwide class). Did the district court err in finding that the three proposed *cy pres* recipients—The South Brooklyn Legal Services' Foreclosure Prevention Project, National Consumers League, and Consumer Federation of America—reasonably approximated class interests where one of those organizations was a local legal-aid society that litigates against the company in which class members own shares and the other two take controversial stands on political issues that many class members disagree with?

Standard of Review: Mixed questions of law and fact are reviewed *de novo*. *E.g.*, *LoPresti v. Terwilliger*, 126 F.3d 34, 39 (2d Cir. 1997).

Statement of the Case

This is an appeal from a post-judgment decision of Judge Sidney H. Stein to award *cy pres* to The South Brooklyn Legal Services' Foreclosure Prevention Project, National Consumers League, and Consumer Federation of America over a class member's objection. SPA-1; SPA-15. The opinion is reported only online. *In re Citigroup Securities Litig.*, 2016 U.S. Dist. LEXIS 105106 (S.D.N.Y. Aug. 9, 2016).

A. Plaintiffs settle a securities class action.

The ATD Group and other plaintiffs brought a securities class action on behalf of a nationwide class of Citigroup shareholders against Citigroup and related officers and directors over losses related to Citigroup's investment in collateralized debt obligations based on residential mortgage backed securities. 753 F. Supp. 2d 206 (S.D.N.Y. 2010). Plaintiffs alleged that Citigroup had, from February through November 2007, given the false impression that it had minimal exposure to such controversial securities, and then continued to overstate the value of its holdings until a final corrective disclosure in April 2008. *Id.* at 235, 239-40. Plaintiffs alleged that the resulting artificial inflation in the securities was as much as $4.94/share. A-190.

The parties settled for $590 million. A-101. This fund, after fees and expenses, would pay approximately $0.19/share to shareholders, augmented *pro rata* to the extent shareholders failed to make claims on the settlement fund. A-184. Under the settlement, after all feasible distributions to the class and redistributions to claiming class members were made, "Lead Counsel shall donate the remaining funds, if any, to a non-sectarian charitable organization(s) certified under the United States Internal

Revenue Code § 501(c)(3), to be designated by Lead Counsel and approved by the Court." A-125-26.

Theodore H. Frank is a class member who purchased Citigroup shares during the class period. Dkt. 182. Frank timely objected *pro se* to class counsel's Rule 23(h) request. Dkt. 181. As a result of Frank's objection and discovery, the district court found substantial exaggeration of class counsel's claimed lodestar and reduced their fee award from a requested $97.5 million to $70.8 million. A-218; 965 F. Supp. 2d 369, 387-401 (S.D.N.Y. 2012). The court approved the settlement over other objections, and issued final judgment on August 1, 2013. A-204. Frank did not object to settlement approval or to the *cy pres* provision of the settlement. SPA-4.

The court found that "Frank's objections enhanced the adversarial process and played a not insignificant role in focusing the Court on instances of overbilling by plaintiffs' counsel, resulting in a reduction of the attorneys' fees awarded to lead counsel and therefore providing a tangible economic benefit to the class." Dkt. 286. Frank requested and the Court awarded him $19,987.50 reimbursement of costs, to be paid to the "Center for Class Action Fairness—a nonprofit organization founded by Frank for the purpose of representing the interests of consumers in class action settlements" deducted from the attorneys' fees awarded to lead counsel. *Id.*

B. Class counsel proposes *cy pres*.

After two rounds of distributions and all other obligations of the settlement fund were paid, there was approximately $374 thousand remaining. SPA-1. On February 5, 2016, class counsel made a motion to distribute this remainder to The

South Brooklyn Legal Services' Foreclosure Prevention Project, National Consumers League, and Consumer Federation of America. A-229-30. Class counsel's argument for each of the recipients was that:

> SBLS' Foreclosure Prevention Project addresses high rates of foreclosures against low-income, non-white homeowners and is one of the oldest and largest projects in New York City to offer legal assistance to homeowners at risk of foreclosure due to discriminatory lending and home sales practices. The Project engages in systemic investigations of predatory and discriminatory lending practices, files affirmative litigation relating to abusive loan servicing and foreclosure rescue scams, and represents homeowners in foreclosure actions. …
>
> The National Consumers League's mission is to protect and promote the interests of consumers in a variety of areas. In the area of mortgage and investment fraud, NCL has combatted elder fraud by launching a step-by-step guide to help older adults avoid falling victim to investment scams, collected and analyzed consumer complaints allowing NCL to spot emerging trends and warn consumers, and launched a consumer education website designed to help guide consumers through the complicated process of purchasing a home and avoid falling victim to foreclosure. …
>
> Additionally, for more than two decades, the Consumer Federation of America has been a consumer leader in advocating the interests of investors. For example, the CFA's work on investor protection issues has included significant contributions to the Sarbanes-Oxley Act, the Dodd-Frank Wall Street Reform Act, and most recently, to the U.S. Department of Labor's pro-investor rule seeking to ensure that investment advisors are held to a fiduciary standard under the Employee Retirement Income Security Act (ERISA).

A-230. Other than filing the motion, class counsel gave no notice to the class that a *cy pres* distribution was proposed. Class counsel's motion did not disclose its firm had a preexisting relationship as a donor with National Consumers League. A-275.

Under the S.D.N.Y. Loc. Civ. R. 6.1, any opposition to class counsel's motion was due within fourteen days, February 19. Nevertheless, the court granted class counsel's motion before that deadline on February 16. Dkt. 377. Frank immediately moved for reconsideration on February 19, based on Local Rule 6.1. Dkt. 379, 380. The same day Frank filed a formal opposition to class counsel's motion for *cy pres*. A-268.

C. Frank's opposition to the *cy pres* recipients.

Frank conceded that further distribution to the class was infeasible, but objected that the proposed *cy pres* recipients did not meet legal standards for *cy pres* distribution.

Frank objected that the SBLS had inappropriately narrow geographic scope (especially given the appearance of "home court" favoritism), and that SBLS, by definition, worked against the class of bank shareholders' interests by litigating against banks, and, in any event, litigation over foreclosure had nothing to do with shareholder fraud. A-271-74.

Frank noted that the NCL's stated interests had no nexus with that of the class; indeed, it had once expressly criticized a company for prioritizing the interests of "Wall Street investors." Furthermore, there seemed to be self-dealing because of class counsel's previous undisclosed relationship with NCL. A-274-77.

Finally, Frank objected that CFA largely engaged in lobbying for political positions that a large percentage of class members, including Frank, opposed. A-277-78. Frank did not ask the court to adjudicate whether these political positions helped or harmed the class, but merely argued that designating a *cy pres* recipient that took positions that many in the class opposed would make it inappropriate and would violate the First Amendment rights of class members. *Id.*; A-302.

Frank suggested several alternatives that had a much closer nexus to a class seeking damages for alleged shareholder fraud, including one singled out by the Eighth Circuit in similar circumstances: the SEC Fair Funds for Investors, which benefits shareholders injured by securities fraud. A-274. Class counsel argued that a Fair Fund contribution wouldn't directly benefit the class members because the SEC had already made a distribution to Citigroup shareholders, but would instead benefit other shareholders in other cases. A-294-95.

D. The district court renews its decision and stays its order.

The district court granted Frank's motion to reconsider, but "adhere[d] to its earlier determination approving lead plaintiffs' three *cy pres* designees." SPA-14. It held that it need not consider whether the designees were the "next best" recipients, establishing instead a test of whether the beneficiaries "reasonably approximate" the class's interests, claiming the Second Circuit had not yet ruled on the issue. SPA-5-10.

The district court held that there was no need to consider geographic scope in determining whether a recipient reasonably approximates the class's interests, and that

the SBLS's work "arguably creates value for bank investors by limiting the proliferation and deterring the issuance of substandard loans." SPA-11.

The district court rejected the argument that the nexus between NCL and the class is too remote because their efforts "target the underlying market damage that caused plaintiffs' injury." It found no conflict from the undisclosed donation by class counsel, and made no requirement of disclosure of other relationships. It further held that the NCL's support of Dodd-Frank benefits the class, implicitly rejecting Frank's argument that many in the class would have no interest in supporting organizations that lobbied for additional regulation. SPA-11-12. The district court did not reconcile this last holding with its own argument that courts should not be weighing in on political controversies in adjudicating the merits of *cy pres* recipients. SPA-9-10.

Similarly, the district court found no reason to reject CFA as a donor for its controversial positions because its "lobbying goals are consistent with the interests of the class as reflected in the litigation." SPA-12-13.

The district court refused to consider Frank's alternative designees because the settlement provided that the designees would be proposed by lead counsel and because the court had no obligation to determine the next best designee, only those that reasonably approximated the interests of the class. SPA-13.

The district court did not mention or consider Frank's argument that choosing designees that took political positions opposed by many in the class violated the class's First Amendment rights.

The court ordered *cy pres* distribution "as soon as is practicable" on August 9, 2016. SPA-15-16. Frank timely appealed on August 11. A-306. On Frank's motion, the district court stayed its August 9 order pending appeal. A-308-09.

Summary of Argument

The potential of *cy pres* to create conflicts of interest and ethical dilemmas for the judiciary has garnered increasing attention in recent years; many "courts have expressed skepticism about using the residue of class actions to make contributions to judges' favorite charities." *Ira Holtzman, C.P.A. & Assoc. v. Turza*, 728 F.3d 682, 689 (7th Cir. 2013) (Easterbrook, J.). *See generally* 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) ("Redish"); Adam Liptak, *When Lawyers Freeze Out Their Clients*, N.Y. TIMES (Aug. 13, 2013); Roger Parloff, *Google and Facebook's new tactic in the tech wars*, FORTUNE (Jul. 30, 2012); Pamela A. MacLean, *Competing for Leftovers*, CALIFORNIA LAWYER 15 (Sept. 2011); Nathan Koppel, *Proposed Facebook Settlement Comes Under Fire*, WALL ST. J. (Mar. 2, 2010); Amanda Bronstad, *Cy pres awards under scrutiny*, NAT'L L. J. (Aug. 11, 2008); Adam Liptak, *Doling Out Other People's Money*, N.Y. TIMES (Nov. 26, 2007); Rhonda Wasserman, *Cy Pres in Class Action Settlements*, 88 U.S.C. L. REV. 97 (2014); Sam Yospe, *Cy Pres Distributions in Class Action Settlements*, 2009 COLUM. BUS. L. REV. 1014.

The Second Circuit has been in the forefront in discouraging abusive unfettered *cy pres*. "Cy Pres means 'as near as possible.'" *Masters v. Wilhelmina Model Agency, Inc.*, 473 F.3d 423, 436 (2d Cir. 2007). *Masters* noted that "the purpose of Cy

Pres distribution is to put[] the unclaimed fund to its *next best* compensation use, *e.g.*, for the aggregate, indirect, prospective benefit of the class." *Id.* (quotation and citation omitted, emphasis supplied by court). Similarly, this Court favorably quoted the Eighth Circuit:

> 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 Holocaust Victim Assets Litig., 424 F.3d 132, 141 n.10 (2d Cir. 2005) (quoting *In re Airline Ticket Comm'n Antitrust Litig.*, 307 F.3d 679, 682-83 (8th Cir. 2002) ("*Airline Ticket Comm'n II*")). Unfortunately, the district court ignored the "as near as possible" command, instead choosing a "reasonably approximates" test that, as applied by the district court, permitted class counsel to designate charities that actively worked against shareholders' financial interests and political preferences.

No appellate court has rejected the "next best" test like the district court did. Even *Lupron*, which the district court relied upon, SPA-5, viewed its "reasonably approximation" test as identical to the "next best" test of other circuits and requiring much more skepticism than was applied here. *In re Lupron Marketing and Sales Practices Litig.*, 677 F.3d 21, 33-34 (1st Cir. 2012) (relying upon *In re Airline Ticket Commission Antitrust Litigation*, 268 F.3d 619 (8th Cir. 2001) ("*Airline Ticket Comm'n I*"), *Airline Ticket Comm'n II,* and *Nachshin v. AOL, LLC*, 663 F.3d 1034, 1040 (9th Cir. 2011)); *id.* at 33 & n.8 (treating "reasonably approximate" and "next best" as interchangeable).

Affirming the district court's decision would create a direct circuit split with *BankAmerica Corp.*, which firmly rejected the idea that a local legal-aid society was an appropriate *cy pres* recipient for a nationwide class of bank shareholders. 775 F.3d at 1067. All the more so for a local legal-aid society that focuses on suing banks.

Similarly, a *cy pres* recipient should never be one that advocates politically controversial positions in the absence of a class that homogenously agrees with those positions. Donating to left-wing or right-wing charities will work against "the interests of class members" who disagree with those positions. *Lupron* itself noted that varying from the "next best" rule in that way could create constitutional problems. 677 F.3d at 33 n.8. If courts give class counsel *carte blanche* to pick a politically-oriented charity with such a distant nexus to the litigation's purpose, the inevitable result will be that *cy pres* will be used to benefit class counsel's political preferences rather than the class's interests.

Congress has established the SEC Fair Fund for Investors to compensate shareholders in a similar position to those in the class. 15 U.S.C. §7246(b) (authorizing SEC to accept "accept, hold, administer, and utilize gifts, bequests and devises of property" for Fair Funds established by 15 U.S.C. §7246(a)); *cf. generally Official Cmte. of Unsecured Creditors of Worldcom, Inc. v. SEC*, 467 F.3d 73 (2d Cir. 2006) (Sotomayor, J.) (discussing discretion of SEC to distribute civil penalties under 15 U.S.C. §7246(a)). Given this institution, there is almost never any justification for *cy pres* in a shareholder litigation to go anywhere else. Claiming this litigation is really about "inappropriate mortgage practices" rather than "adequate disclosure to shareholders" twists the nexus test and even the "reasonably approximates" test into oblivion. *BankAmerica*

Corp., 775 F.3d at 1067; *cf. also Dennis v. Kellogg Co.*, 697 F.3d 858 (9th Cir. 2012) (rejecting argument that consumer fraud litigation was really about "nutrition" and thus rejecting *cy pres* to food bank).

The inappropriate selection of *cy pres* recipients here must be reversed.

Preliminary Statement

Attorneys with the non-profit Competitive Enterprise Institute' Center for Class Action Fairness, founded by appellant Frank, bring this objection and appeal. The Center's mission is to litigate on behalf of class members against unfair class-action procedures and settlements, and it has won millions of dollars for class members. *See, e.g.,* Adam Liptak, *When Lawyers Cut Their Clients Out of the Deal*, N.Y. TIMES, Aug. 13, 2013, at A12 (calling Frank "the leading critic of abusive class action settlements"); Ashby Jones, *A Litigator Fights Class-Action Suits*, WALL ST. J. (Oct. 31, 2011); *Pearson v. NBTY, Inc.,* 772 F.3d 778, 787 (7th Cir. 2014) (praising the Center's work) (Posner, J.); Dkt. 286 (same); *In re Classmates.com Consol. Litig.*, No. 09-cv-0045-RAJ, 2012 U.S. Dist. LEXIS 83480, at *29 (W.D. Wash. Jun. 15, 2012) (same). Frank has successfully argued some of the leading cases on policing *cy pres* abuse, and has testified before Congress about the issue. *BankAmerica*, 775 F.3d 1060; *Pearson*, 772 F.3d 778; *Baby Products,* 708 F.3d 163; *Nachshin*, 663 F.3d 1034; Theodore H. Frank, Statement before the House Judiciary Committee Subcommittee on the Constitution and Civil Justice, *Examination of Litigation Abuse* (Mar. 13, 2013) ("Frank Testimony").

This appeal is brought in good faith to protect class members in this and future settlements against abusive *cy pres*.

Argument

I. The district court committed reversible error by failing to consider whether the proposed *cy pres* recipients would serve the "next best" use for the benefit of the class.

The district court rejected the idea that *cy pres* recipients were required to serve the "next best" use, and instead adopted a "reasonably approximates" test that gave broad discretion to class counsel to put its own interests ahead of the class's. SPA-6-10. This is legal error. *First*, no appellate court has adopted the district court's arguments against the "next best" test, and it contradicts Second Circuit law that *cy pres* is to be as "near as possible" to directly benefiting the class. *Second*, the district court is the first court ever to hold that "reasonably approximates" means something different than "next best" in the class-action *cy pres* context.

A. *Cy pres* is rife with conflicts of interest and requires narrow cabining.

The *cy pres* doctrine arises from the Norman French expression *cy pres comme possible*, which means "as near as possible." *Nachshin*, 663 F.3d at 1038 (internal quotation marks omitted). Having originated in trust law to save testamentary charitable gifts that otherwise would default, "[t]he *cy pres* doctrine allows a court to modify a trust to best carry out the testator's intent—that is, to effectuate the 'next best' use of the gift." *Id.*; *see also BankAmerica*, 775 F.3d at 1063 n.2 (same). The doctrine thus does not give a court unfettered discretion to deploy the funds for any purpose it may deem worthwhile. Rather, a court's power is limited to making those modifications that are "consistent with the settlor's charitable purposes." UNIFORM TRUST CODE § 413(a). To illustrate, the classic example of *cy pres* is a 19th-century case

where a court repurposed a trust that had been created to abolish slavery in the United States to instead provide charity to poor African-Americans. *Jackson v. Phillips*, 96 Mass. 539 (1867).

With this history, and despite being a "misnomer," *Ira Holtzman, C.P.A. & Assoc. v. Turza*, 728 F.3d 682, 689 (7th Cir. 2013), *cy pres* has become increasingly common in class action settlements as a method of distributing a settlement fund to non-class third parties rather than to the harmed class members for whom the fund was created. This increase in non-compensatory *cy pres* distributions has been controversial and, as a result, *cy pres* generally is disfavored among both courts and commentators. *Marek v. Lane*, 134 S.Ct. 8, 9 (2013) (Roberts, C.J.) (respecting the denial of certiorari) (noting "fundamental concerns surrounding the use of such remedies in class action litigation"); Redish, 62 FLA. L. REV. at 661. *Cy pres* remains an inferior avenue of last resort, with strict limitations on its use. *See, e.g.*, *BankAmerica*, 775 F.3d at 1063 (observing that many courts have "criticized and severely restricted" class action *cy pres*); *Nachshin*, 663 F.3d at 1038 ("[A] growing number of scholars and courts have observed, the cy pres doctrine … poses many nascent dangers to the fairness of the distribution process.") (citing authorities); *Mirfasihi v. Fleet Mortg. Corp*, 356 F.3d at 784 ("There is no indirect benefit to the class from the defendant's giving the money to someone else.") (Posner, J.). *See also generally* Redish, 62 FLA. L. REV. at 628; Theodore H. Frank, *Cy Pres Settlements*, CLASS ACTION WATCH 1 (March 2008).

"[A] growing number of scholars and courts have observed, the cy pres doctrine…poses many nascent dangers to the fairness of the distribution process."

Nachshin, 663 F.3d at 1038 (citing authorities). When *cy pres* distributions are unmoored from class recovery or *ex ante* legislative or judicial standards,

> the selection process may answer to the whims and self interests of the parties, their counsel, or the court. Moreover, the specter of judges and outside entities dealing in the distribution and solicitation of settlement money may create the appearance of impropriety.

Id. at 1039 (citing authorities).

When the charitable distribution is related to the judge, or left entirely to the judge's discretion, the ethical problems and conflicts of interest multiply. Class action settlements require judicial approval: one can readily envision a scenario where a judge looks more favorably upon a settlement that provides money for a judge's preferred charity than one that does not. Even if a judge divorces herself from such considerations, the parties may still believe that it would increase the chances of settlement approval or a fee request to throw some money to a charity associated with a judge. Moreover, charities that know that a judge has discretionary funds to distribute can—and do—lobby judges to choose them, blurring the appropriate role of the judiciary. Concern that such a system "may create the appearance of impropriety" animated the Ninth Circuit's decision in *Nachshin*. 663 F.3d at 1039 (citing authorities); *see also* Liptak, *Doling Out, supra* ("allowing judges to choose how to spend other people's money 'is not a true judicial function and can lead to abuses'" (quoting former federal judge David F. Levi)); *see also id.* (quoting Judge Levi as saying "judges felt that there was something unseemly about this system" where "groups would solicit [judges] for consideration as recipients of *cy pres* awards"); *Turza,* 728

F.3d at 689 (citing cases). In one notorious case in the Ninth circuit, a district court judge *sua sponte* nominated the university at which he lectured as a *cy pres* recipient. Rhonda Wasserman, *Cy Pres in Class Action Settlements*, 88 U.S.C. L. REV. 97, 124-25 n. 119 (2014); Parloff, *supra*.

But the parties' unfettered selection of *cy pres* recipients causes its own problems. For example, a defendant could steer distributions to a favored charity with which it already does business, or use the *cy pres* distribution to achieve business ends. *Dennis*, 697 F.3d at 867-68 (ruminating on these issues); *SEC v. Bear, Stearns & Co. Inc.,* 626 F. Supp. 2d 402, 415 (S.D.N.Y. 2009); Parloff, *supra*; Pamela A. MacLean, *Competing for Leftovers*, CALIFORNIA LAWYER 15 (Sept. 2011). In one infamous example, Microsoft sought to donate numerous licenses for Windows software to schools as part of an antitrust class action settlement, essentially using the *cy pres* as a marketing tool that would have frozen out its competitors. *In re Microsoft Corp. Antitrust Litig.*, 185 F. Supp. 2d 519 (D. Md. 2002).

Conversely, if the *cy pres* distribution is related to plaintiffs' counsel, it would result in class counsel being double-compensated: the attorney indirectly benefits both from the *cy pres* distribution, and then makes a claim for attorneys' fees based upon the size of the *cy pres*. *Bear, Stearns,* 626 F. Supp. 2d at 415; *id.* (criticizing *Diamond Chemical Co. v. Akzo Nobel Chemicals BV*, 517 F. Supp. 2d 212 (D.D.C. 2007), where court failed to consider that sole recipient of large *cy pres* was class counsel's alma mater law school); Redish, 62 FLA. L. REV. at 661 (*cy pres* awards "can also increase the likelihood and absolute amount of attorneys' fees awarded without directly, or even indirectly, benefitting the plaintiff"); Liptak, *Doling Out, supra* ("Lawyers and judges have grown

used to controlling these pots of money, and they enjoy distributing them to favored charities, alma maters and the like."). In another settlement where class counsel was already scheduled to receive $27 million, *cy pres* was designated to a charity run by class counsel's ex-wife; the conflict was never disclosed to the district court, which approved the settlement. Frank Testimony 8 (*citing In re Chase Bank USA NA "Check Loan" Contract Litig.,* No. 09-md-02032 (N.D. Cal.)). Permitting class counsel to collect attorneys' fees based on unmoored *cy pres* awards "threatens to undermine the due process interests of absent class members by disincentivizing the class attorneys in their efforts to assure [classwide] compensation of victims of the defendant's unlawful behavior." Redish, 62 FLA. L. REV. at 666. Likewise, a distribution to a charity affiliated with the named plaintiff can result in a windfall for the class representative and potentially compromise adequacy of representation. *E.g., Nachshin*, 663 F.3d at 1038 (named plaintiff worked for charity that she selected as *cy pres* recipient).

The bare legitimacy of *cy pres* in the class-action context is controvertible with good reason. *See Turza,* 728 F.3d at 689-90; *Klier v. Elf Atochem N. Am., Inc.*, 658 F.3d 468, 480-82 (5th Cir. 2011) (Jones J., concurring); *In re Pet Foods Prod. Liab. Litig.*, 629 F.3d 333, 358 (3d Cir. 2010) (Weis, J., concurring and dissenting); Redish, *supra*; *In re Thornburg Mortg., Inc. Secs. Litig.*, 885 F. Supp. 2d 1097, 1105-12 (D.N.M. 2012) (collecting sources). It encroaches upon the basic principle that "[t]he Judiciary's role is limited to providing 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 and alteration omitted). Nonetheless, *cy pres* has been given a narrow berth in most circuits including

this one. But sound public policy, binding Second Circuit decisions, and persuasive authority from other circuits requires that this particular application be rejected.

B. Courts thus require *cy pres* to live up to its "as near as possible" meaning and require unclaimed settlement funds to be directed to the "next best compensation use." The district court erred in failing to do so.

One such limitation "implicit in the *cy pres* doctrine" is that any distribution of unclaimed settlement funds must be directed to the "'next best compensation use.'" *Nachshin*, 663 F.3d at 1038-39 (quoting *Masters*, 473 F.3d at 436); *BankAmerica*, 775 F.3d at 1067 (*cy pres* "distribution *must be* for the next best use" (emphasis in original) (internal quotation marks omitted)). The Second Circuit has voiced agreement with this standard. *See Masters*, 473 F.3d 423; *In re Holocaust Victim Assets Litig.*, 424 F.3d 132, 141 n.10 (2d Cir. 2005).

The district court committed legal error by failing to consider whether the *cy pres* funds were going to their "'*next best* compensation use, *e.g.*, for the aggregate, indirect, prospective benefit of the class.'" *Masters*, 473 F.3d at 436 (emphasis in original). Instead, it applied a less rigorous standard: that *cy pres* recipients "'reasonably approximate' the interests of the class." SPA-10. The reasons advanced by the district court for its rejection of the "next best" standard are deeply flawed.

First, it was legal error for the district court to decide that it could disregard the Second Circuit's rulings in *Masters* and *Holocaust Victim Assets* as dicta made "in passing." SPA-6 n.4. The district court failed to distinguish between "orbiter" and

"judicial" dictum, the latter of which is, as in *Masters*, when the appellate court intends dicta to "guide the future conduct of inferior courts." *United States v. Bell*, 524 F.2d 202, 206 (2d Cir. 1975). While not binding "it must be given considerable weight and can not be ignored." *Id.* The appellate courts to have addressed the issue decidedly favor the "next best" standard, and as this Court previously has suggested, there are sound policy reasons for doing so.

For example, the settlement funds are property of the class members, provided as compensation for their harm. *See Klier v. Elf Atochem N. Am., Inc.*, 658 F.3d 468, 474 (5th Cir. 2011) ("The settlement fund proceeds, generated by the value of the class members' claims, belong solely to the class members."). *Cy pres* distributions can be employed in lieu of compensating class members directly only if, as here, the amount remaining is too small to distribute to the class given the administrative expenses involved. *See Pearson v. NBTY, Inc.*, 772 F.3d 778, 784 (7th Cir. 2014). It follows, then, that the funds should be used for their "next-best" use (after paying class members directly) by providing for the "aggregate, indirect, prospective benefit of the class." *Masters*, 473 F.3d at 436.

The district court claimed that, unlike in the trust context, "by the time a *cy pres* distribution is appropriate in the context of a class action settlement, the necessity of honoring the original purpose of that fund has been diminished." SPA-7. This assertion is dangerously wrong. Even if an overwhelming percentage of the fund has been distributed to class members, that does not mean that compensating the plaintiffs' injuries "almost entirely had been achieved." *Id.* A class action settlement is exactly that: a *settlement*. Class members compromised from their full claim of damages

in exchange for a guaranteed payout without the risk of further litigation and a trial. There is no evidence that class members have been fully compensated. *See Klier*, 658 F.3d at 479-80 (rejecting similar argument and noting that "few settlements award 100 percent of a class member's losses" (internal quotation marks omitted)); *Masters*, 473 F.3d 423, 435-36 (finding abuse of discretion in district court's conclusion that class members were fully compensated even though they had not received treble damages); *see generally* Rhonda Wasserman, *Cy Pres In Class Action Settlements*, 88 S. CAL. L. REV. 97, 160 (2014) ("A vague anxiety over windfalls would not justify [preferring *cy pres* to class redistributions]."). Instead, as in *BankAmerica*, "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." 775 F.3d at 1066; A-184; *compare also* A-184 ($0.19 per share settlement recovery) *with* A-190 (alleging as much as $4.94 artificial inflation per share).

More importantly, the funds *belong to the absent class members* as compensation for their injuries. It is a breach of fiduciary duty for a fiduciary to direct those funds to any purpose that does not closely serve that compensatory purpose. *Cf. Pierce v. Visteon Corp.*, 791 F.3d 782, 787 (7th Cir. 2015) ("it is unfathomable that the class's lawyer would try to sabotage the recovery of some of his own clients"); *see also BankAmerica*, 775 F.3d at 1068.

The "next best" standard also guards against the risk of conflicts of interest among the attorneys, parties, and judges who may select the recipients of remaining settlement funds, by ensuring the possibility of acute appellate review. Indeed, unique conflicts of interest arise in the class-action settlement context due to the absence of

an adversarial process. *See In re Dry Max Pampers Litig.*, 724 F.3d 713, 718 (6th Cir. 2013) ("[I]n class action settlements the district court cannot rely on the adversarial process to protect the interests of the persons most affected by the litigation—namely, the class."). While class counsel and the defendant have an incentive to bargain over the *size* of the settlement, similar incentives do not govern their critical decisions about how to divvy it up—including to which organizations to direct remaining settlement funds. Just as in the attorneys' fee context, "[t]he concern is not necessarily in isolating instances of major abuse, but rather is for those situations, short of actual abuse, in which the client's interests are somewhat encroached upon by the attorney's interests." *In re "Agent Orange" Prod. Liab. Litig.*, 818 F.2d 216, 224 (2d Cir. 1987) (internal quotation marks omitted).

Such potential conflicts of interest, and the appearance thereof, cannot be addressed solely by the *timing* of the *cy pres* distribution. The district court relied on its purported belief that paying *cy pres* recipients only after further distributions are not feasible reduces the potential for recipients to be chosen based on factors other than the best interest of the class. SPA-8. But a late distribution of *cy pres* mitigates the harm only by degree.[2] Here, even after further distribution to the class is no longer feasible, the *cy pres* amount is still $374,820—a relatively large amount for most non-profit organizations and one that certainly would engender good will toward those

[2] Moreover, a late designation of the *cy pres* beneficiaries, as occurred here, affirmatively prejudices the class by hindering the ability of class members to object or opt-out and impeding meaningful review at the time of settlement approval. *See Dennis*, 697 F.3d at 867 (reversing settlement that failed to identify *cy pres* beneficiaries as "unacceptably vague").

responsible for the donation. A more certain way to minimize conflicts—whether the *cy pres* amount is $10,000 or $1,000,000—is to narrow the criteria to require a tighter fit with the interests and composition of the class. It is significantly more difficult to advance the interests of a particular party, attorney, or judge over those of the class when the threshold question is whether a recipient serves "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." *BankAmerica*, 775 F.3d at 1067 (internal quotation marks omitted).

By the time a class action settlement is approved, a district court often has overseen the litigation for years. It is fully acquainted with the interests of the harmed class members and the objectives of the lawsuit. The "next best" inquiry does not impose a heavy burden or manageability problems on the judiciary. The district court is tasked with the simple question of whether an organization, as evidenced by its annual report, website, and the like, serves the interests of the absent class members and the objectives of the underlying suit "as near as possible."

Seeking "next best" does not require the district court to conduct superhuman scouring of the globe for all possible *cy pres* recipients. But it does entail that the court consider the entire universe of options presented to it, unlike the lower court's decision declining to consider Frank's proposals. *Contrast* SPA-13, *with BankAmerica Corp.*, 775 F.3 at 1066 ("Unless the amount of funds to be distributed is de minimis, the district court should…allow class members to object or suggest alternative recipients before the court selects a *cy pres* recipient."); *In re Baby Prods. Antitrust Litig.*, 708 F.3d 163, 180 (3d Cir. 2013).

Furthermore, the court is not being asked to "judg[e] the comparative worth of our nation's public interest organizations." SPA-9.[3] An organization may be "unquestionably a worthy charity" and yet still not serve as a "next best" approximation of benefit to a class. *See BankAmerica*, 775 F.3d at 1067; *see also Turza*, 728 F.3d at 689 ("[f]oundation is a worthy organization," but "[m]oney not claimed by class members should be used for the class's benefit to the extent that is feasible"). In any event, surely any minimal additional burden is worth avoiding the appearance of impropriety created by "the specter of judges and outside entitles dealing in the distribution and solicitation of settlement money," where "the selection process may answer to the whims and self interests of the parties, their counsel, or the court." *Nachshin*, 663 F.3d at 1039. There is no evidence that district courts have had difficulty

[3] The district court's concerns that courts would have to make a political determination whether a non-profit's advocacy of controversial political positions was a benefit to the class (SPA-9-10) is a reason to preclude *cy pres* from going to any such organization in the first place, not a reason to abstain from cabining class counsel's discretion. *See* Section II.B below. For that principled reason, the Competitive Enterprise Institute, which takes policy stances many class members might disagree with (SPA-3), did not seek to be a *cy pres* recipient in this case, even though CEI has a closer nexus with the class's interests and this litigation than the named recipients since CEI's litigation on behalf of class members has won millions of dollars for shareholders in securities litigation, including $26.7 million for shareholders in *this case*. *See* Daniel Fisher, *Judge Cuts Fees In Citigroup Settlement, Citing "Waste And Inefficiency"*, FORBES.COM (Aug. 1, 2013); Allison Frankel, *Legal Activist Ted Frank Cries Conflict of Interest, Forces O'Melveny and Grant & Eisenhofer to Modify Apples Securities Class Action Deal*,
AMERICAN LAWYER LIT. DAILY (Nov. 30, 2010).

applying the "next best" test when they permit adversary presentation by class members.

This is especially true in the scenario of securities litigation, given the existence of a government entity specifically designed to compensate victims of securities fraud that should make the selection of a "next best" recipient a foregone conclusion. When Congress passed the Sarbanes-Oxley Act, it created the Securities and Exchange Commission "Fair Funds for Investors" to pay future victims of securities fraud. 15 U.S.C. §7246(b) (authorizing SEC to accept "accept, hold, administer, and utilize gifts, bequests and devises of property" for Fair Funds established by 15 U.S.C. §7246(a)); *cf. generally Official Cmte. of Unsecured Creditors of Worldcom, Inc. v. SEC*, 467 F.3d 73 (2d Cir. 2006) (Sotomayor, J.) (discussing discretion of SEC to distribute civil penalties under 15 U.S.C. §7246(a)). The degree to which this is a perfect fit for the class's interests in this case is demonstrated by class counsel's *own admission* that the Fair Fund paid Citigroup shareholders $75 million in this case. It's harder to imagine a cleaner *cy pres* "next best" in the class action context than between "shareholders in the United States injured by securities fraud by Citigroup" and "organization that directly pays shareholders in the United States injured by securities fraud." In no circumstance would an "organization that sues banks on behalf of Brooklyn homeowners that borrowed money" or "organization that prevents elder abuse" or "organization that lobbies for increased regulation of banks" be superior to an SEC Fair Fund, and this shows how thoroughly the district court erred in its decision.[4]

[4] Class counsel argues that a Fair Fund distribution would be inappropriate because the Fair Fund had made a $75 million distribution to Citigroup shareholders

The district court found it significant that Frank did not object to the provision of the settlement designating class counsel as the party to select the *cy pres* recipient. SPA-13. But holding class members must object early—before it becomes clear whether there will be any *cy pres* to argue about or whether class counsel will breach its fiduciary duty to the class—or not at all only ensures that class members must engage in wasteful litigation ex ante. *See Rodriguez v. West Pub'g Co.*, 563 F.3d 948, 966 (9th Cir. 2009) ("[Cy pres] issue becomes ripe only if the entire settlement fund is not distributed to class members."); *In re Carrier iQ, Inc., Consumer Privacy Litig.*, 2016 U.S. Dist. LEXIS 114235, at *29 n.3 (N.D. Cal. Aug. 25, 2016) (finding objection to *cy pres* moot when *cy pres* contingent provision was not triggered).

Are class members and courts really better off if distribution of a large settlement fund is delayed months or years while there is a dispute over the *cy pres* provisions of a settlement that will cover less than 1% of the settlement fund and may never come into effect—a dispute that in this case would have been entirely moot had class counsel adhered to its fiduciary duty and designated the SEC Fair Fund instead of its pet political projects? It guarantees wasteful litigation to require class members to object before any dispute is ripe to preserve their right to object in the

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already, and thus "may not share any overlap at all with class interests here as they will flow to entirely different investors harmed by a variety of entirely different frauds." A-294-95. But this proves Frank's point. SBLS's beneficiaries, "lower-income Brooklynites facing foreclosure," for example, surely share negligible overlap with Citigroup shareholders; that the class of investors who have already benefited from the Fair Fund and "may…share overlap" with future Fair Fund distributions shows that the Fair Fund much more closely reasonably approximates the class's interests.

happenstance that class counsel acts improperly later. For this reason, *BankAmerica* rejected the argument that "the district court and [the Eighth Circuit] are bound by language in the settlement agreement" giving *cy pres* distribution authority to the "court in its sole discretion." 775 F.3d at 1066. "A proposed *cy pres* distribution must meet [our standards governing *cy pres* awards] regardless of whether the award was fashioned by the settling parties or the trial court." *Id.* (quoting *Nachshin*, 663 F.3d at 1040).

C. *Lupron* does not support the district court's approach; there is no circuit split.

The district court relied upon *In re Lupron Marketing & Sales Practices Litigation*, 677 F.3d 21 (1st Cir. 2012) to support its application of the "reasonably approximate" standard and perhaps to suggest an extant circuit split. SPA-5. While *Lupron* indeed stated that the court was adopting the "reasonable approximation" test in name, the opinion shows that the First Circuit believed its test to be identical to the "next best" test. For example, the court noted that the district court "appropriately determined that the 'next best' relief would be a cy pres distribution which would benefit the potentially large number of absent class members" and observed that the issue was "whether the projects funded will provide 'next best' relief to the class." *Id.* at 34-35, 36. The court also cited *Nachshin*, *Airline Ticket Comm'n I*, and *Six Mexican Workers v. Ariz. Citrus Growers*, 904 F.2d 1301, 1311-12 (9th Cir. 1990) approvingly as having applied the "reasonable approximation test" when, in fact, all of these cases applied the "next best" test. *Id.* at 33-34.

At another point *Lupron* states, "Failure to meet the reasonable approximation test can lead to reversal" and footnotes that sentence citing Redish: "One commentary has suggested that abandonment of 'next best' relief intended to be an alternate means of indirectly compensating victims who could not feasibly be compensated directly would create issues of constitutional dimension." *Id.* at 33 & n.8. *Lupron* did not think it was creating a new test looser than the "next best" test, and the district court erred in doing so itself. *See also BankAmerica*, 775 F.3d at 1067 (equating "next best" and "reasonably approximate"); *Baby Products*, 708 F.3d at 169 (same).

Nor does *Lupron* declare that its "reasonably approximate" test means that it's acceptable for a district court to "decline[] to consider" (SPA-13) alternative proposals. *See* 677 F.3d at 27 (describing how the district court invited the public to comment on the proposals); AMERICAN LAW INSTITUTE, PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION § 3.07(c) (requiring identification of a beneficiary "after thorough investigation and analysis"); *cf. also* RESTATEMENT (THIRD) OF TRUSTS § 67 cmt. d (2003) (encouraging courts to elect "among purposes reasonably close to the original, one has a greater usefulness than the others that have been identified."). The district court relied on all three of these authorities, but did not follow their instructions.

* * *

The district court applied the wrong legal standard when it refused to apply the "next best" or "as near as possible" test required by this Circuit, when it applied the "reasonably approximates" test to mean something other than "next best," and when it failed to consider Frank's proposal that the *cy pres* go to the SEC Fair Fund. At a

minimum, remand is required to apply the correct legal standard, but this Court should go further and direct distribution to the SEC Fair Fund as the recipient as near as possible to the class's interests.

II. In the alternative, even if this Court takes the unprecedented step of abandoning the "as near as possible" test, the district court erred as a matter of both law and fact in holding that the recipients reasonably approximated the class's interests.

A. A local legal-aid society does not reasonably approximate the interests of a nationwide class of shareholders.

The class is a nationwide class of Citigroup share purchasers. A-211. SBLS, by its own account, addresses the "legal needs of Brooklyn's diverse low-income population." A-238. Its Foreclosure Prevention Project litigates foreclosure actions on behalf of homeowners, "litigat[ing] cases involving claims of discrimination, fraud, and deceptive practices." This is a *cy pres* mismatch on multiple grounds.

1. *Cy pres* for a nationwide class should have a nationwide scope.

A first dispositive deficiency of the *cy pres* award is its refusal to account for the nationwide scope of the class. A charity that acts locally simply is not a reasonable approximation of a benefit to a nationwide class. By preventing unjustifiable localizations of benefit, geographic restrictions on *cy pres* work in conjunction with the Class Action Fairness Act of 2005. *See* 28 U.S.C. § 1714 (proscribing favoritism toward segments of the class based on geographic proximity to the court).

The district court justified the disparity by arguing that "given the limited amount of money left to distribute, it is reasonable to conclude that the funds are

likely to be more immediately impactful when directed to a narrow geographic area than if they were directed to an organization with a national footprint." But if the amount of funds were not "limited," then it would be feasible to distribute those funds to the class, and there would be no *cy pres* at all. SPA-4 (citing cases). The district court's exception to the geographic-scope requirement effectively swallows the rule. The harm alleged in this case was not localized to Brooklyn; it occurred throughout the entire country, at every place where class members reside. No court should countenance disproportionate concentrations of *cy pres* proceeds to organizations within a single community when the class is nationwide. Such organizations exist to serve primarily (and sometimes solely) their local constituencies. Such localized distributions are especially problematic when there is a "home-court" advantage favoring the neighbors and community of the court (and local counsel) that happens to be adjudicating the nationwide dispute, something Congress has expressly condemned. 28 U.S.C. § 1714.

Other circuits agree about the need to match geographic scope of the class with geographic scope of the *cy pres* beneficiaries. *Airline Ticket Comm'n I* is directly on point. That case involved a nationwide class of travel agencies alleging antitrust violations. After distributing settlement proceeds to class members, a $600,000 residual balance remained in the fund. 268 F.3d at 621. Class counsel proposed a *cy pres* dispensation of those funds to three Minnesota law schools and several Minnesota charities, and the district court approved it. *Id.* at 622. The Eighth Circuit reversed and remanded, with instructions "to make a distribution or distributions more closely related to the origin of this nation-wide class action concerning caps on commissions

paid to travel agencies." *Airline Ticket Comm'n I,* 268 F.3d at 626. The district court had "failed to consider the full geographic scope of the case." *Airline Ticket Comm'n II*, 307 F.3d at 683; *accord BankAmerica Corp.*, 775 F.3d at 1067 (district court erred in finding that LSEM, a local legal-aid society, "sufficiently approximated the interests of the [nationwide shareholder] class because it serves victims of fraud").

Lupron, which the district court relied upon, named the *Airline Ticket Comm'n* cases as its first example of application of the "reasonable approximation test." 677 F.3d at 33.[5] In *Nachshin v. AOL, LLC*, the Ninth Circuit required geographic congruence between the class and the *cy pres* beneficiary. 663 F.3d at 1040 (citing *Airline Ticket Comm'n I*, 268 F.3d at 625-26). *Accord Houck v. Folding Carton Admin. Comm.*, 881 F.2d 494, 502 (7th Cir. 1989) (invalidating settlement agreement, in a national antitrust class action, that made a *cy pres* distribution to local law schools, and directing district court to "consider to some degree a broader nationwide use of its cy pres discretion").

The district court's reasoning simply is not reconcilable with *Airline Ticket Comm'n I*, *Nachshin*, or *Houck*. Those cases forcefully repudiate the position that a local charity is a reasonable approximation of a benefit to a nationwide class. This is not just good law, but sound public policy to avoid the sorts of abuses endemic to *cy pres*. *E.g.*, Redish, *supra*; Yospe, 2009 COLUMBIA BUS. L. REV. at 1030-31; Frank Testimony.

[5] While *Lupron* itself approved a distribution to Boston Hospital, it was because that organization did work that "will have benefits well beyond Boston," and therefore did not present problems of geographic scope. *Id.* at 36.

The court below gave short shrift to the geographic diffuseness of the class. This by itself was legal error and must be reversed. Any other result would create an "inadvisable" circuit split. *Janese v. Fay*, 692 F.3d 221, 227 (2d Cir. 2012).

2. There is an impermissible mismatch between SBLS purpose and the class and the litigation.

SBLS does not benefit bank shareholders directly or indirectly.

Recall that *Lupron* identified *Airline Ticket Comm'n I* and *II* as an example of application of the "reasonable approximation" test. On remand after the Eighth Circuit reversed the *cy pres* distribution in *Airline Ticket Comm'n I* and remanded for consideration of charities with a wider geographic scope, the *Airline Ticket* district court elected to distribute the funds to National Association for Public Interest Law ("NAPIL"). Once again, the Eighth Circuit reversed on appeal, because the award lacked the requisite "tailoring" "to the nature of the underlying lawsuit." *Airline Ticket Comm'n II*, 307 F.3d at 683. As a legal principle, "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." *Id.* at 682.

Other circuits agree. *See e.g., Turza*, 728 F.3d at 689 ("the Legal Assistance Foundation of Metropolitan Chicago does not directly or indirectly benefit certified public accountants"); *Dennis*, 697 F.3d at 866 (reversing where *cy pres* beneficiary had "little or nothing to do with the purposes of the underlying lawsuit or the class of plaintiffs involved"); *Klier*, 658 F.3d at 476 ("[T]he court's discretion remains tethered to the interest of the class, the entity that generated the funds.").

The district court justified its award by holding that this was a case about subprime mortgage lending practices (it wasn't: it was about portfolio and risk management and disclosure), and SBLS litigates about mortgages. SPA-11; *compare Dennis* (charity that feeds the indigent has no nexus to settlement of consumer fraud allegations against a cereal manufacturer notwithstanding claim that case was about nutrition); *Etter v. Thetford Corp.*, No. 13-cv-00081-JLS (RNBx) (C.D. Cal. Oct. 14, 2014) (fireman's union has no sufficient nexus to class of RV owners whose refrigerators caught fire). By the district court's argument, a charity that ran poker or blackjack tournaments for business schools would also "reasonably approximate" the class's interests because it would train future bank executives about probability theory and risk, and the case was about the bank mispricing risk. *BankAmerica* rejected such reasoning when it reversed a district court that held a legal-aid society "sufficiently approximated the interests of the class because it serves victims of fraud," calling the recipient "totally unrelated." 775 F.3d at 1067. A "totally unrelated" charity cannot "reasonably approximate" the class's interests. This is an independent reason to reject SBLS, and any other result would create a circuit split.

3. The district court clearly erred in holding that litigation against banks benefits bank shareholders.

SBLS sues banks for "discrimination" and litigates against foreclosures; moreover, by definition, they only do so in marginal cases where the plaintiff was unable to find a for-profit contingent-fee attorney that viewed the case as meritorious enough to be profitable. *Cf. Otis v. City of Chicago,* 29 F.3d 1159, 1169 (7th Cir. 1994) (Easterbrook, J.). Such litigation increases the transactions costs of foreclosures and is

designed to transfer wealth from banks to their debtors and to litigators; it works against the interest of bank shareholders with an interest in the bank's profits. Nevertheless, the district court supported its decision to name SBLS by saying its "work arguably creates value for bank investors by limiting the proliferation and deterring the issuance of substandard loans." SPA-11. This is clearly erroneous on its face. The record discloses no foreclosure litigation that has ever exposed a collateralized debt obligation that was incorrectly valued on a bank's financial statements. Banks seeking to avoid substandard loans hire actuaries and assessors to determine ways to better predict risk and real-estate value. No bank increases its profitability by hiring attorneys to represent their mortgagors in litigation and then paying additional attorneys to defend against that litigation. For this reason alone, if there are any limits at all on *cy pres*, there is no test that SBLS could satisfy to be named a *cy pres* beneficiary for bank shareholders.

B. Non-profits taking controversial policy positions opposed by a substantial portion of the class never "reasonably approximate" the interests of the class; any other rule incentivizes class counsel to pursue their political preferences rather than the interests of the class.

Frank protested that the remaining two recipients, NCL and CFA—to the extent their missions share a nexus with benefiting victims of shareholder fraud—took political positions that he, and many—perhaps even a majority of—bank shareholders opposed. A-274-78. This was not an argument that the district court should adjudicate the validity or efficacy of those political positions, and instead award *cy pres* to organizations who took the opposite position. Indeed, Frank did not

even argue that *cy pres* should go to his own organization, which actually litigates on behalf of shareholders and is much closer to a "next best" alternative than an organization focusing on elder abuse. It was an argument that class members would not view a *cy pres* beneficiary that lobbied against their political preferences to "reasonably approximate" their interests, and that *no* political organization advocating or lobbying for a controversial position should be a *cy pres* beneficiary, unless the class as a whole would also support that stance. There was no evidence of such support here, nor could there be, as the demographic of bank shareholders is more likely than average to oppose increased regulation, and about half of American voters opposes increased regulation. A-278 (citing Gallup polls). *Cf. In re Visa Check/MasterMoney Antitrust Litig.*, No. 96-CV-5238 (JG), 2011 U.S. Dist. LEXIS 122680, at *30-*31 (E.D.N.Y. Oct. 24, 2011) (eschewing recipient that served "narrowly tailored interests [that] would have the effect of inequitably concentrating its benefit on a subset of the class as opposed to the class as a whole.").

The district court went on at length about the dangers if courts made a political determination whether a non-profit's advocacy of controversial political positions would be a benefit to the class. SPA-9-10. True, Frank supports his colleagues who are litigating against the constitutionality of Dodd-Frank, and has even edited an academic volume demonstrating that the Sarbanes-Oxley Act, supported by CFA (A-247), has hurt investors on balance. HENRY N. BUTLER & LARRY E. RIBSTEIN, THE SARBANES-OXLEY DEBACLE: WHAT WE'VE LEARNED; HOW TO FIX IT (2006). That said, Frank agrees with the district court that a judicial hearing over *cy pres* is not the place to resolve these academic and political disputes; he is not seeking to litigate the

merits of CFA's support of Sarbanes-Oxley and future regulation here. But *because* a judicial hearing over *cy pres* is not the place to resolve these academic and political disputes, organizations whose purpose is to take positions on such controversies are inappropriate *cy pres* beneficiaries.

Remarkably, the district court, immediately after opining on the problems of adjudicating political disputes in *cy pres* determinations, then went on to hold that the beneficiaries reasonably approximated the class of bank shareholders' interests *because* NCL and CFA supported Dodd-Frank and made "efforts to regulate the financial industry" respectively. SPA-12-13. A finding that these political causes were in the class's interest is precisely the political determination that the court had said it should not make, and is an error of law for the reasons the district court stated in SPA-9-10. For example, a court facing the *cy pres* scenario of *Jackson v. Phillips* or in a civil-rights class action could choose to designate *cy pres* to an organization like the American Civil Rights Institute that fights affirmative action by finding that opposing affirmative action worked in minorities' best interests. Whether or not that's arguably true, many class members or intended beneficiaries would disagree. A court should not have the discretion to engage in that inquiry. The district court was right the first time, and its inconsistent error requires reversal by itself.

If, on the other hand, this Court creates an unprecedented legal rule permitting district courts to decide *cy pres* recipients by making a political determination that a political cause will benefit, rather than injure, the class's interests, it is unfair to the class to not have notice and a full and fair opportunity to litigate that question and demonstrate that the court's finding was clearly erroneous. *BankAmerica*, 775 F.3d at

1066-67; *Baby Products,* 708 F.3d at 180. The class received no notice of the *cy pres* recipients' identities here, and this is an alternative ground for reversal.

There is yet another independent reason to reject *cy pres* for politically controversial recipients. When class counsel uses its Rule 23(g) position as the representative of the class to spend the class's money on political positions class members disagree with, it violates the class's First Amendment rights against compelled speech unless they are given notice and an opportunity to opt out. *See generally Keller v. State Bar of Cal.*, 496 U.S. 1 (1990); *Harris v. Quinn*, 134 S. Ct. 2618, 2644 (2014) ("[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."). Frank acknowledges that complying with *Keller* and avoiding the First Amendment violation would tend to make *cy pres* to controversial political organizations infeasible because of the additional expense;[6] it is thus best to have a bright-line rule forbidding *cy pres* distributions to such controversial organizations—including organizations like the Competitive Enterprise Institute that unambiguously work to litigate on behalf of shareholders.

[6] True, parties could avoid this additional expense by identifying controversial *cy pres* recipients in the initial settlement or notice sent to the class, rather than waiting years after the opt-out deadline. But acting against class members' interests in a transparent manner like that would expose class counsel and the class representative to challenges under Rules 23(a)(4) and (g), which is perhaps why class counsel in this litigation and others like *BankAmerica* act in such an opaque manner to hide its steering the class's money to class counsel's preferred friends and political allies.

There are sound public-policy reasons to constrain class counsel from selecting politically controversial recipients. If the district court's loose scrutiny of such recipients becomes standard, then class counsel will always have the incentive to self-deal by selecting their preferred political allies as *cy pres* recipients over organizations that better advance the class's interests. Courts have warned against allowing *cy pres* to "answer to the whims and self interests" of class counsel. *Nachshin*, 663 F.3d at 1039 (citing authorities). And in general class counsel's interests in which public-policy positions to promote will not align well with the social good and will tend to be biased toward those that happen to benefit attorneys rather than class members. *Cf. generally* Dennis Jacobs, *The Secret Life of Judges,* 75 FORDHAM L. REV. 2855 (2007) (bemoaning tendency of judiciary and legal profession to promote rules and causes that "enrich" and "empower" lawyers "vis-à-vis other sources of power and wisdom").

The distribution to NCL and CFA is thus erroneous as a matter of law, and must be reversed.

Conclusion

This Court should reaffirm the "next best" test. Whether or not it does so, it should reverse the district court's legally erroneous *cy pres* distribution, and remand for proceedings consistent with its legal test or explicit instructions to distribute the remainder of the settlement fund to the SEC Fair Fund for Investors.

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Respectfully submitted,

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Executed on November 2, 2016.

/s/ Theodore H. Frank
Theodore H. Frank

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/s/ Theodore H. Frank
Theodore H. Frank

16-2850

In the

United States Court of Appeals

for the Second Circuit

ATD GROUP,
Lead-Plaintiff-Appellee,

TILLIE SALTZMAN,
individually and on behalf of all others similarly situated, *et al.*,
Plaintiffs,
v.

THEODORE H. FRANK,
Objector-Appellant,

CITIGROUP INC., *et al.*,
Defendants.

On Appeal from the United States District Court
for the Southern District of New York, No. 07-cv-9901

Special Appendix

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

IN RE CITIGROUP INC. SECURITIES LITIGATION

07-Cv-9901 (SHS)

OPINION

SIDNEY H. STEIN, U.S. District Judge.

This securities fraud class action arose out of last decade's great recession. The action was litigated vigorously over the course of several years by experienced and skilled counsel. The parties ultimately entered into a settlement agreement that provided principally for the class members to receive $590 million. Essentially all of that has already been distributed and the Court recently granted lead plaintiffs' motion for final distribution of the settlement fund, including $374,820 to three not-for-profit *cy pres* designees.

Class member Theodore H. Frank has now moved for reconsideration of this Court's order granting lead plaintiffs' motion for final distribution of the settlement funds and *cy pres* designation. The Court grants the motion to reconsider and upon reconsideration adheres to its earlier decision on the grounds that the three entities selected by lead counsel are appropriate *cy pres* designees.

I. BACKGROUND

Plaintiffs are current and former Citigroup shareholders who brought a number of securities fraud actions on behalf of a class of Citigroup investors against Citigroup and fourteen of its officials. *In re Citigroup Sec. Litig.*, 753 F. Supp. 2d 206, 212 (S.D.N.Y. 2010). The actions were consolidated and the consolidated class action complaint charged that defendants violated Sections 10(b) and 20(a) of the Securities Exchange Act of 1934. *Id.* In essence, plaintiffs claimed that Citigroup "knowingly understated the risks it faced and overstated the value of the assets it possessed" with regard to its exposure to various financial instruments

prevalent prior to the financial crisis. *Id.* Plaintiffs claimed they suffered serious damage "when the truth about Citigroup's assets was finally revealed." *Id.*

After several years of active litigation, the parties settled their claims, and the Court approved the settlement agreement in 2013. *In re Citigroup Inc. Sec. Litig.*, 965 F. Supp. 2d 369, 385 (S.D.N.Y. 2013). As part of the settlement, defendants agreed to create a fund of $590 million to compensate the class as well as to pay the costs and attorneys' fees incurred in maintaining the action. (Stip. & Agreement of Settlement, Ex. 1 to Decl. of Ira M. Press dated Aug. 29, 2012 at 12, Dkt. No. 155.) The settlement agreement established that a plan to distribute the $590 million to the class would be submitted to the Court at a later date. (*Id.* at 25.) The agreement also set forth what the parties were to do with any unclaimed funds:

> In the event that Lead Counsel determines that further redistribution of any balance remaining . . . is no longer feasible, thereafter Lead Counsel shall donate the remaining funds, if any, to a non-sectarian charitable organization(s) certified under the United States Internal Revenue Code § 501(c)(3), to be designated by Lead Counsel and approved by the Court.

(*Id.* at 26.) The parties thus agreed that, even when it was "no longer feasible" to distribute remaining funds to the class, no funds would revert to Citigroup but would rather be donated to one or more non-sectarian, not-for-profit organizations.

When the Court preliminarily approved the settlement agreement, it authorized lead counsel to retain Garden City Group, Inc., ("GCG") to administer the settlement fund. (Order dated Aug. 29, 2012 at 5, Dkt. No. 156.) GCG subsequently distributed $483,091,186.61 to 258,524 claimants. (Aff. of Stephen J. Cirami dated Jan. 20, 2016, ¶ 3, Dkt. No. 376.) *See In re Citigroup Inc. Sec. Litig.*, No. 07-cv-9901, 2014 WL 2445714 (S.D.N.Y. May 30, 2014). An additional $611,840.77 was distributed to 61 claimants in late 2014. (Cirami Aff. ¶ 5; Order Authorizing Distribution of the Reserve Fund dated Dec. 29, 2014, Dkt. No. 365.) After these distributions, GCG worked diligently, as the settlement agreement required, to ensure distribution checks would be cashed, including "implement[ing] a calling campaign to follow up with Authorized Claimants whose checks were initially

uncashed." (Cirami Aff. ¶ 6.) If needed, GCG reissued checks to ensure claimants would receive their due. (*Id.* at ¶ 7.)

As of July 2015, some $27 million remained in the settlement fund. (*Id.* ¶ 8.) Consequently, GCG made a second distribution of $26,779,189.30 to 55,345 claimants. (*Id.* ¶ 10.) Essentially all of those checks were cashed. (*Id.* at ¶ 12.) After this distribution, some $735,780 remained in the fund, though a large percentage of that remainder was designated for "estimated administrative fees and expenses." (*Id.* at ¶ 13.)

On February 5, 2016, class counsel notified the Court that $374,820 designated for the class remained undistributed in the settlement fund, that it was no longer feasible to make further distributions, and that further efforts to do so would not be effective. (Cirami Aff. ¶¶ 16-17; Decl. of Peter S. Linden dated Feb. 5, 2016, Dkt. No. 375.) The $374,820 constitutes 0.064 percent of the original $590 million fund. Lead plaintiffs designated three nonprofit organizations to receive the remaining funds: South Brooklyn Legal Services; the National Consumers League; and the Consumer Federation of America. (Linden Decl. ¶ 4.) In February 2016, the Court granted lead plaintiffs' motion. (Order dated Feb. 16, 2016, Dkt. No. 377.)

Three days later, Frank moved the Court to reconsider its determination. Frank is a Senior Attorney with the Competitive Enterprise Institute—an organization that states is "dedicated to advancing the principles of limited government, free enterprise, and individual liberty"[1]—and the Director of the Center for Class Action Fairness, which sets forth on its website that it "represents class members against unfair class action procedures and settlements."[2] *Ted Frank*, Competitive Enterprise Institute, https://cei.org/content/ted-frank (last visited Aug. 8, 2016). He is also a class member in this litigation, (Decl. of Theodore H. Frank dated Dec. 20, 2012 ¶ 3, Dkt. No. 182; Stip. & Agreement of Settlement, Ex. 1 to Press Decl. at 12), and participated in the settlement approval process, objecting vigorously to counsel's request for fees and expenses. *See In re Citigroup Inc.*

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[1] *Class Action Fairness*, Competitive Enterprise Institute, https://cei.org/issues/class-action-fairness (last visited Aug. 8, 2016).

[2] *About*, Competitive Enterprise Institute, https://cei.org/about-cei (last visited Aug. 8, 2016).

Sec. Litig., 965 F. Supp. 2d at 379. Neither Frank nor any other class member objected to the *cy pres* procedure set forth in the settlement agreement.

Shortly after receiving Frank's motion to reconsider, the Court stayed its February 16 order granting the *cy pres* distribution, (Order dated March 21, 2016, Dkt. No. 383), and, to the Court's knowledge, none of the residual funds have been distributed to the three proposed nonprofit donees. No one contests that it is no longer "feasible" to distribute the remaining settlement funds to class members nor does anyone dispute that the distribution of funds to one or more *cy pres* designees is now appropriate. The parties disagree solely as to whom those funds should be distributed.

II. Discussion

Pursuant to the parties' settlement agreement, lead plaintiffs seek to donate the remaining $374,820 of the $590,000,000 settlement fund to three nonprofit designees. The donation of residual settlement funds is often referred to as a "*cy pres*" designation, named after a doctrine originating in Roman and English trust law. Martin H. Redish et al., *Cy Pres Relief and the Pathologies of the Modern Class Action: A Normative & Empirical Analysis*, 62 Fla. L. Rev. 617, 625 (2010); *see generally Nachshin v. AOL, LLC*, 663 F.3d 1034, 1038 (9th Cir. 2011). In its original trust law habitat, the *cy pres* doctrine allows courts to take trust money previously designated for a defunct purpose and reallocate that money to some other purpose consonant with the purpose for which the trust was originally created. *See Matter of Hummel*, 30 A.D.3d 802, 804 (N.Y. App. Div. 3d Dep't 2006). The *cy pres* doctrine provides useful guidance in the class action context. *See Nachshin*, 663 F.3d at 1038; *but see Mirfasihi v. Fleet Mortg. Corp.*, 356 F.3d 781, 784 (7th Cir. 2004).

The analogy to trust law suggests that a class action *cy pres* designation is appropriate when two elements are met. First, *cy pres* designations should be made only when it is "'not feasible to make further distributions to class members.'" *In re BankAmerica Corp. Sec. Litig.*, 775 F.3d 1060, 1064 (8th Cir. 2015) (quoting *Klier v. Elf Atochem N. Am., Inc.*, 658 F.3d 468, 475 (5th Cir. 2011)); *see Masters v. Wilhelmina Model Agency, Inc.*, 473 F.3d 423, 436 (2d Cir. 2007). This element derives from the stringent trust law requirement that prohibits *cy pres* designations of trust funds unless the trust's original purpose "could not be carried out." *SEC v. Bear, Sterns & Co. Inc.*, 626 F. Supp. 2d 402, 414 (S.D.N.Y. 2009). Second, the *cy pres* designee must have

some relationship to the original class. *In re Lupron Mktg. & Sales Practice Litig.*, 677 F.3d 21, 33 (1st Cir. 2012) ("[T]he recipients should be those 'whose interests reasonably approximate those being pursued by the class." (quoting ALI Principles of the Law of Aggregate Litigation [hereinafter "ALI Principles"] § 3.07(c) (2010)); *Nachshin*, 663 F.3d at 1039. This element stems from the trust law requirement that any new, *cy pres* beneficiary of a trust be related to the old beneficiary so as to preserve the settlor's original purpose in creating the trust.

Here, Frank does not contend that *cy pres* designations should not be made. Nor does he dispute that it is no longer feasible to make further distributions to class members. Instead, Frank contends solely that lead plaintiffs' three proposed *cy pres* designees have an insufficiently close nexus to the class and the purposes of this litigation. Specifically, Frank says the fund can only be distributed to the "'next best' class of beneficiaries," *Nachshin*, 663 F.3d at 1036; *BankAmerica Corp.*, 775 F.3d at 1067, and plaintiffs' three designees are simply not "next best." He contends, in essence, that it is not appropriate to distribute any *cy pres* funds to a recipient whose interests merely "reasonably approximate those being pursued by the class." *Lupron Mktg.*, 677 F.3d at 33 (quoting ALI Principles § 3.07(c)). Rather, the recipient must be the "next-best" recipient apart from the class members themselves.

For their part, lead plaintiffs dispute that Frank's next-best standard governs. Instead, they say that their designees are appropriate because the three nonprofits "'reasonably approximate'" the interest of the class. *See Lupron Mktg.*, 677 F.3d at 33 (quoting ALI Principles § 3.07(c)). Plaintiffs' "reasonable approximation" standard finds support in the Principles of the Law of Aggregate Litigation drafted by the American Law Institute, a highly respected organization of lawyers, judges, and academics that seeks to "clarify, modernize, and improve the law." *See About ALI*, The American Law Institute, https://www.ali.org/about-ali/ (last visited Aug. 8, 2016). Its work has often been accorded substantial consideration by the courts. *See, e.g., Smith v. Bayer Corp.*, 564 U.S. 299, 316 n.11 (2011). Numerous courts in this circuit have considered—and applied—ALI's Principles of the Law of Aggregate Litigation. *See Masters*, 473 F.3d at 436; *In re Nortel Networks Corp. Sec. Litig.*, No. 01-cv-1855, 2010 WL 3431152, at *7 (S.D.N.Y. Aug. 20, 2010); *Bear, Sterns & Co.*, 626 F. Supp. 2d at 416. Among other things, the ALI

Principles state that before a Court grants a *cy pres* award, it "should require the parties to identify a recipient whose interests reasonably approximate those being pursued by the class." ALI Principles § 3.07(c).[3]

The U.S. Court of Appeals for the Second Circuit has yet to hold definitively which standard applies—the ALI's "reasonable approximation" standard or Frank's "next best" standard.[4]

A. In the class action context, *cy pres* designees must reasonably approximate the interests of the class and the purposes of the litigation.

After reviewing relevant caselaw and commentary, this Court has concluded that the "next-best" rule is not only impractical but would also tax judicial resources and require courts to opine on matters over which they have little cognizance. The lower costs and greater benefits of the reasonable-approximation test render it superior.

Those courts that follow the stringent "next-best" standard stress the trust law origins of the *cy pres* doctrine. The doctrine took its name from the Norman French expression meaning, "as near as possible," and therefore *cy pres* designees in the trust context were selected to be "as near as possible"

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[3] The ALI Principles also require that, prior to any distribution of a *cy pres* award: (1) "settlement proceeds should be distributed directly to individual class members" to the extent class members are individually identifiable and individual distributions are "economically viable," ALI Principles § 3.07(a); and (2) that there should be further distributions to class members until "the amounts involved are too small to make individual distributions economically viable," ALI Principles § 3.07(b). Both of those criteria have been met—and are not at issue—here.

[4] In *Masters v. Wilhelmina Model Agency, Inc.*, 473 F.3d 423 (2d Cir. 2007), the court, after remanding the case to the district court on an unrelated ground, advised in passing that the district court should "bear in mind that the purpose of Cy Pres distribution is to 'put[] the unclaimed fund to its *next best* compensation use, e.g., for the aggregate, indirect, and prospective benefit of the class.'" *Id.* at 436 (emphasis and alteration in original) (quoting 2 Herbert B. Newberg & Alba Conte, *Newburg on Class Actions* § 10:17 (4th ed. 2002)); *see also In re Holocaust Victim Assets Litig.*, 424 F.3d 132, 141 n.10 (2d Cir. 2005) (footnoting a similar standard). But what standard to use was not at issue in that litigation.

to the original trust beneficiaries. *Nachshin*, 663 F.3d at 1038. *But see* Restatement (Third) of Trusts § 67 (2003) (requiring that trust law *cy pres* designees merely "reasonably approximate[]" the trust's "designated purpose"). But the doctrine's ancestry alone is not enough to dictate governing law in a different context—the class action context. *See Holtzman v. Turza*, 728 F.3d 682, 689 (7th Cir. 2013).

The purposes of class action *cy pres* on the one hand and trust *cy pres* on the other are sufficiently different so as to make the Court wary of importing wholesale the trust concept requirements into the context of class actions. The broad purpose of trust law's *cy pres* doctrine is to preserve to the extent possible the intent of the trust creator. The theory is that "the settlor would have preferred a modest alteration in the terms of the trust to having the corpus revert to his residuary legatees." *Mirfasihi*, 356 F.3d at 784. Because *cy pres* in trust law is designed to honor as much as possible the original purpose of the trust, *see Hummel*, 30 A.D. 3d at 804, the nexus between *cy pres* awardee and the trust's original beneficiary should be very snug.

But by the time a *cy pres* distribution is appropriate in the context of a class action settlement, the necessity of honoring the original purpose of that fund has been diminished. Generally, the point of creating a settlement fund is to compensate injured plaintiffs at the expense of the defendants. *Mirfasihi*, 356 F.3d at 784; *Bear, Sterns & Co.*, 626 F. Supp. 2d at 416; Redish, 62 Fla. L. Rev. at 631. That purpose has typically been achieved or essentially achieved by the time a *cy pres* award of remaining funds becomes appropriate. In this action, for example, 99.937 percent of the fund has already been paid out. The trust law goal of preserving the trust's original purpose thus carries less force, because the original purpose—compensating the class members—has almost entirely been achieved. As such, the trust law justification for requiring that a *cy pres* designee be limited to only the "next-best" entity—thus perpetuating the unfulfilled intent of the trust creator—is diminished in the class action context.

The "next-best" standard is also justified as a means of restraining the use of *cy pres* in the class action context generally. *See Nachshin*, 663 F.3d at 1038-39; Redish, 62 Fla. L. Rev. at 622. The theory is that a very strict standard for determining which group qualifies for *cy pres* donations—viz., only the "next-best" entity is entitled to participate—mitigates the dangers

of deploying *cy pres* awards, especially the risk that potentially conflicted class counsel will undercompensate, even ignore, class members in order to gift the class's money to a personally favored designee. *See Nachshin*, 663 F.3d at 1038-39.

However, the way to ensure class members recover as much as possible is not to limit to whom we deploy these awards, but rather to focus on *when* we deploy the award. The proper tactic to ensure class members obtain the fullest possible recovery is the requirement that *cy pres* designations occur only when it is no longer feasible to distribute funds to the class as it is in this action. *See Masters*, 473 F.3d at 436; ALI Principles § 3.07(a)-(b). This requirement ensures that *cy pres* designations occur as a last resort only, a requirement that the parties concede has been met here. Narrowing the substantive definition of which groups qualify for *cy pres* awards, by contrast, has little to do with the goal of ensuring class members are compensated as fully as possible.

The "next-best" standard is also no more adept at protecting silent class members than the reasonable-approximation standard is. *But see Nachshin*, 663 F.3d at 1038-39. The concern that silent class members will be ignored is an inherent feature of class action litigation, and the concern is traditionally mitigated through vesting in the district court the obligation to appoint as class counsel "the applicant best able to represent the interests of the class," Fed. R. Civ. P. 23(g)(2), as well as broad discretion to police class action settlements. *See McReynolds v. Richards-Cantave*, 588 F.3d 790, 803-04 (2d Cir. 2009). The court's flexible settlement approval standard under Rule 23—asking whether the settlement is "fair, reasonable, and adequate," Fed. R. Civ. P. 23(e)(2)—has long protected the rights of class members both silent and noisy. A standard that requires that designees "reasonably approximate" the goals and interests of the class should suffice as well, especially considering that in approving a *cy pres* designee there is less at issue than in approving the settlement of a class action. While settlement approval commences a process that ultimately vitiates the ability of class members to bring future claims, the approval of a *cy pres* designation causes no class member tangible harm: by the time *cy pres* designations are ripe, any remaining settlement funds cannot be distributed further to the class.

The adoption of the stringent "next-best" standard also cannot be justified by a risk that class counsel's hypothetical conflicts of interest will harm the class more in the *cy pres* context than in other phases of the class

action. Indeed, class counsel is most certainly not entitled to unfettered discretion in selecting counsel's favorite *cy pres* designees. *See Bear, Sterns & Co.*, 626 F. Supp. 2d at 415. But in the absence of any evidence of an actual or apparent conflict of interest, class counsel is entitled to a certain amount of leeway. When *cy pres* designations are made—at the tail end of the litigation—class counsel has presumably already proved worthy of the court's trust. They have survived the crucible of the class counsel appointment inquiry by virtue of their experience, diligence, and fairness. *See Deangelis v. Corzine*, 286 F.R.D. 220, 223-24 (S.D.N.Y. 2012); Fed. R. Civ. P. 23(g). They have also withstood a district court's continuing scrutiny and ongoing obligation to police a settlement's implementation. *See In re Holocaust Victim Assets Litig.*, 424 F.3d 132, 146 (2d Cir. 2006). Even if courts should be concerned that class counsel generally may be incentivized to use their *cy pres* authority to throw money at their personally favorite organizations, the trust that counsel has earned mitigates that danger.

There thus exists no heightened conflict-of-interest risk in the *cy pres* context that can justify ratcheting up the standard for *cy pres* designee approval. Courts use a more flexible standard to scrutinize counsel throughout the class action; the reasonable-approximation standard is similarly sufficient in the *cy pres* context. Certainly here, experienced class action counsel have labored assiduously in the interests of the class.

Indeed, the rigid and overly restrictive "next-best" standard actually risks the appearance of judicial impropriety by embroiling district courts in disputes over which the judiciary has no cognizance—judging the comparative worth of our nation's public interest organizations. In this action, for instance, Frank contends that one of lead plaintiffs' proposed designees—the National Consumers League ("NCL")—is inappropriate because the group helped draft the Dodd-Frank Wall Street Reform and Consumer Protection Act. (Mem. of Theodore H. Frank in Opp. at 10-11, Dkt. No. 378.) According to Frank, that group is not the "next-best" designee because Dodd-Frank may actually harm investors or, alternatively, that the public hotly disputes the statute's worth. Theoretically, the merits of Dodd-Frank would therefore help determine whether NCL satisfies the "next-best" test or not. Does Dodd-Frank advance the interests of investors or is it merely harmful overregulation?

Those are policy waters that Congress—not the courts—is best equipped to navigate. Under the "next-best" standard such ideological

issues—best avoided by the courts—must be faced and might well prove dispositive. *See Lane v. Facebook, Inc.*, 696 F.3d 811, 820-21 (9th Cir. 2012).

Instead, this Court will approve counsel's proposed *cy pres* designees if those three organizations "reasonably approximate" the interests of the class. This standard best preserves the district court's "'broad supervisory powers . . . with respect to the administration and allocation of settlement funds,'" *Holocaust Victim Assets Litig.*, 424 F.3d at 146 (citation omitted); Fed. R. Civ. P. 23(e), and appropriately gives the Court needed flexibility to review the designations class counsel has proposed. *Cf., e.g., Stefaniak v. HSBC Bank USA, N.A.*, No. 05-cv-720S, 2011 WL 7051093, at *1-2 (W.D.N.Y. Dec. 15, 2011).[5]

This approach—approving counsel's *cy pres* designees if they reasonably approximate the interests of the class—is consistent with this Court's mandate throughout the settlement approval process. The Court approves not the *best* possible settlement but one that is "'fair, reasonable, and adequate.'" *McReynolds*, 588 F.3d at 803-04 (citation omitted); *see also In re Baby Prods. Antitrust Litig.*, 708 F.3d 163, 173-74 (3d Cir. 2013). That flexible settlement-approval standard harmonizes competing tensions between allowing parties to come to private agreements and protecting the rights of non-vocal people that those agreements may affect. *See Baby Products*, 708 F.3d at 173-74.

B. The three proposed nonprofit organizations are appropriate *cy pres* designees.

Lead plaintiffs have proposed to distribute the remaining 0.064 percent of the settlement fund to three nonprofit organizations: South Brooklyn Legal Services, the National Consumers League, and the Consumer Federation of America. The Court now addresses whether these three organizations "reasonably approximate" the interests of the class members

[5] It should be pointed out that the recipients were required to be "designated by Lead Counsel," subject to "approv[al] by the Court." (Stip. & Agreement of Settlement, Ex. 1 to Press Decl. at 26.) The Court itself should not be designating the designees, and it has not done so here. To do otherwise would run the risk of overly involving the Court in designating fund recipients. *See Bear, Stearns & Co.*, 626 F. Supp. 2d at 415; Adam Liptak, *Doling Out Other People's Money*, N.Y. Times (Nov. 26, 2007).

and the purposes of the litigation. ALI Principles § 3.07(c); *see Lupron Marketing*, 677 F.3d at 33.

First, lead plaintiffs ask to donate 37.5 percent of the remaining funds to South Brooklyn Legal Services' ("SBLS") Foreclosure Prevention Project. SBLS "redress[es] abusive lending and consumer practices" and attempts to aid homeowners misled by "lending and loan servicing abuses, mortgage fraud, and deceptive real estate transactions, and mortgage and tax lien foreclosures." (*Foreclosure Prevention Project Feb. 2016*, Ex. 1 to Linden Decl.) Lead plaintiffs contend that SBLS's work makes it an appropriate recipient because the organization fights the very practices that exposed Citigroup to risk in the first instance. *See In re Citigroup Inc. Sec. Litig.*, 965 F. Supp. 2d at 374. Lead counsel contends that, if more groups such as SBLS had stepped in to thwart subprime mortgage lending practices, Citigroup would not have exposed itself to those practices, and its investors might not have suffered the losses they did.

Frank responds that SBLS is not an appropriate recipient for two reasons: First SBLS is far too geographically limited since it focuses on lending practices primarily in Brooklyn, (*Foreclosure Prevention Project Feb. 2016*, Ex. 1 to Linden Decl. at 2), whereas the class resides throughout the country. The geographical scope, however, does not detract from SBLS's reasonableness, especially given the amount of funds available. Indeed, the Court concludes that, given the limited amount of money left to distribute, it is reasonable to conclude that the funds are likely to be more immediately impactful when directed to a narrow geographic area than if they were directed to an organization with a national footprint.

Second, Frank contends that SBLS's interests are contrary to the interests of the class, because SBLS's efforts to prevent foreclosures *harms* Citigroup's investors because those efforts drive up the bank's costs, thereby decreasing its profits. However, it is certainly in the direct interest of the class members to limit shoddy mortgage practices, something that SBLS targets. The organization's work arguably creates value for bank investors by limiting the proliferation and deterring the issuance of substandard loans. SBLS is an appropriate *cy pres* designee in this action.

Lead plaintiffs' next proposed donee, the National Consumers League ("NCL"), is similarly an appropriate designee. The NCL claims it is the

"nation's oldest consumer advocacy organization" and states that it dedicates itself to helping consumers "avoid scams targeting homeowners and investors," and "works for legislation and regulations that help create a fairer, more secure marketplace for homebuyers and investors." (*The Work of the Nat'l Consumers League: 116 Years of Fighting for Consumer Prot.*, Ex. 2 to Linden Decl.) For instance, the organization states it helped "shepherd[] through" the Dodd-Frank Wall Street Reform and Consumer Protection Act. (*Id.*) The NCL sufficiently targets the market pestilence that led to the damage plaintiffs suffered.

Frank again raises two arguments as to why NCL is an inappropriate *cy pres* designee. First, he again contends that the nexus between NCL and the class is too remote. In fact, Frank argues that NCL—which apparently in a press release "chastised" companies for giving priority to the interests of their "wall street investors"—is actually adverse to the shareholding class members. (Mem. of Theodore H. Frank at 8, Dkt. No. 378.) But press-release rhetoric alone does not render an organization unreasonable. NCL aims to "create a fairer, more secure marketplace for homebuyers and investors." (*The Work of the Nat'l Consumer's League*, Ex. 2 to Linden Decl.) Those efforts once again target the underlying market damage that caused plaintiffs' injury.

Second, Frank contends that class counsel has a conflict of interest because counsel's law firm was one of scores of entities that donated $1,000 or more to NCL in 2012-13. *2013 National Consumers League Annual Report*, *available at* http://www.slideshare.net/nationalconsumersleague/2013-national-consumers-league-annual-report at 15 (last visited Aug. 8, 2016). Frank is correct that a conflict of interest or even class counsel's "significant prior affiliation" might well disqualify a proposed *cy pres* designee. ALI Principles 3.07 cmt. b; *see Bear, Sterns & Co.*, 626 F. Supp. 2d at 415. Here, however, the donation raises no actual or apparent impropriety. It simply signals what is evident: class counsel believes NCL is a legitimate and worthy operation whose interests are aligned with those of the class. There is no evidence in this record that class counsel has received any benefit whatsoever from NCL or that class counsel's affairs are intermingled with NCL's in any way. The Court can locate no conflict of interest that would disqualify NCL. *See* ALI Principles 3.07 cmt. b (warning that *cy pres* designations should not be approved when the "court or any party has any

significant prior affiliation with the intended recipient" (emphasis added)). NCL is an appropriate *cy pres* recipient in this action.

Finally, lead plaintiffs propose to donate 25 percent of the remaining funds to the Consumer Federation of America ("CFA"), which is heavily involved with investor protection activities. (*See CFA as a Leader on Investor Prot. Issues*, Ex. 3 to Linden Decl. at 1.) One of the CFA's directors helped draft the Sarbanes-Oxley Act and the Dodd-Frank Act as a "leading investor advocate." (*Id.*) Class counsel represents that they have "earmarked" the settlement funds to be used only by the Investor Protection division of the CFA, which "works to support full and fair corporate disclosures" and thus benefits shareholders. (Lead Pls.' Mem. in Opp. to Theodore H. Frank's Mot. for Reconsideration at 10, Dkt. No. 381.)

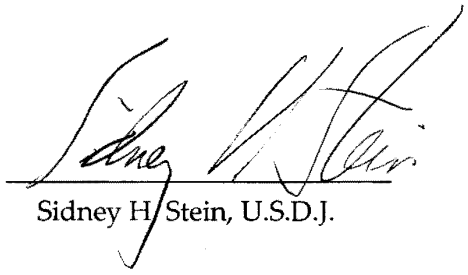
Frank contends that the CFA is an inappropriate *cy pres* designee because the organization "boils down to a lot of lobbying" and Citigroup shareholders oppose its message. (Mem. of Theodore H. Frank in Opp. at 10.) But nonprofit lobbying organizations are appropriate if their lobbying goals are consistent with the interests of the class as reflected in the litigation. The CFA advances investor interests through its efforts to regulate the financial industry. (*CFA as a Leader on Investor Prot. Issues*, Ex. 3 to Linden Decl.) This litigation sought to advance the interests of a group of investors of a particular company in the financial industry. That relationship is sufficient to justify a *cy pres* award here whether or not CFA's disputed regulatory tactics are ultimately successful.

Frank proposes alternate *cy pres* designees who he believes are truly "next best" recipients. The Court declines to consider his proposals. *See Lane*, 696 F.3d at 820-21. This class action settlement confers authority on lead counsel to propose to the Court *cy pres* designees, a procedure that this Court approved and to which Frank did not object at the time. This Court, in exercising its broad supervisory authority set forth in Fed. R. Civ. P. 23 and caselaw over the settlement's implementation, *Holocaust Victim Assets Litig.*, 424 F.3d at 146, finds that those organizations are consistent with, and reasonably approximate, the interests of the class.

III. CONCLUSION

Frank's motion to reconsider the "Order Authorizing Final Distribution of Funds and *Cy Pres* Designation" dated February 13, 2016, is granted, and, upon reconsideration, the Court adheres to its earlier determination approving lead plaintiffs' three *cy pres* designees. The Court finds that the selection—by experienced counsel who have effectively worked in the interests of their clients throughout this litigation—of South Brooklyn Legal Services, the National Consumers League, and the Consumer Federation of America is closely tethered to the nature of this lawsuit and the interests of the class. Thus, lead plaintiffs' motion to distribute 37.5 percent of the remaining settlement funds to South Brooklyn Legal Services, 37.5 percent to the National Consumers League, and 25 percent to the Consumer Federation of America is granted.

Dated: New York, New York
August 9, 2016



Sidney H. Stein, U.S.D.J.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

IN RE CITIGROUP INC. SECURITIES LITIGATION

07-Cv-9901 (SHS)

ORDER

SIDNEY H. STEIN, U.S. District Judge.

This Court authorized the initial distribution of the Net Settlement Fund in its Order dated May 30, 2014, (Dkt. No. 331), and it authorized the reserve distribution of the Net Settlement Fund in its Order dated December 29, 2014, (Dkt. No. 365).

In an Order dated February 13, 2016, the Court approved the late reissuance of checks to Claim No. 2916498 in the sum of $797.57 and Claim No. 1704243 in the sum of $494.74 and ordered the distribution of the remaining funds in the Settlement Fund to three *cy pres* designees selected by Lead Counsel. (Dkt. No. 377.) However, on March 21, 2016, the Court stayed the February 13 Order in light of Theodore H. Frank's motion to reconsider that Order, (Dkt. No. 383), and no final distribution has been made.

On April 27, 2016, Peter S. Linden, Esq., of Kirby McInerney LLP wrote the Court seeking "guidance on a late request for check reissues." (Dkt. No. 384.) That request, received by the Claims Administrator on April 20, 2016, asked for reissuance of 103 voided checks totaling $35,100. The Court hereby approves that late request for reissuance.

For the reasons set forth in the Opinion dated August 9, 2016, Frank's motion to reconsider the February 13 Order, (Dkt. No. 379), is granted and, upon reconsideration, the Court adheres to its February 13 "Order Authorizing Final Distribution of Funds and *Cy Pres* Designation," including ordering final payment be made to GCG, two late check reissues, and the *cy pres* designations. The remaining funds in the Settlement Fund are to be donated 37.5% to South Brooklyn Legal Services for use by its Foreclosure Prevention Project, 37.5% to

the National Consumers League, and 25% for the Consumer Federation of America for use by its Investor Protection division as soon as is practicable.

Dated: New York, New York
August 9, 2016

SO ORDERED:

Sidney H. Stein, U.S.D.J.