UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

IN RE CITIGROUP INC. SECURITIES LITIGATION	Civil Action No. 7-9901 (SHS) Judge Sidney H. Stein

MEMORANDUM OF THEODORE H. FRANK IN OPPOSITION TO MOTION TO PERMIT FINAL DISTRIBUTION OF FUNDS AND CY PRES DESIGNATION

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In pro per

INTRODUCTION

Class member Theodore H. Frank opposes and objects to Plaintiffs' Motion to Permit Final Distribution of Funds and *Cy Pres* Designation (Dkt. 373) because the proposed recipients do not meet the legal standards for *cy pres* as the "next best" recipients of class members' money.[1]

Cy pres distributions do not compensate class members, despite the fact that the funds belong to them, and thus such distributions are disfavored by courts and remain an inferior avenue of last resort. *See, e.g., In re BankAmerica Corp. Secs. Litig.*, 775 F.3d 1060, 1063 (8th Cir. 2015) (observing that many courts have "criticized and severely restricted" class action *cy pres*); *see generally* American Law Institute, *Principles of the Law of Aggregate Litig.* § 3.07 ("*ALI Principles*"). In accord with this precept, the Court has ordered that the parties make "subsequent distributions of the funds" to Authorized Claimants whose payments were not paid in full (i.e. those whose distributions exceeded $100) "until no longer feasible." Dkt. 331 at 5.

Presumably Plaintiffs believe this point has been reached as they now move for the distribution of the remaining $374,820 (assuming payment of administrative expenses as requested) to three charitable organizations: (1) South Brooklyn Legal Services ("SBLS); (2) National Consumers League ("NCL"); and (3) Consumer Federation of America ("CFA"). Dkt. 374. But

[1] Plaintiffs' motion was filed on February 5, 2016. Under Local Rule 6.1, Frank's opposition was due today, February 19. The Court granted the motion on February 16, 2016, before Frank had a chance to respond. Frank has filed a motion to reconsider contemporaneous with this motion and is amenable to disposition of Plaintiffs' motion without oral argument.

As documented in his two objections filed respectively in 2012 and 2013 (Dkts. 180, 222), Theodore H. Frank is a member of the class in this case. His objections "enhanced the adversarial process" resulting in supplemental notice to class members that would have been otherwise deprived of reasonable notice, and ultimately a $26.7 million augmentation of class members' share of the common fund. Dkt. 286.

none of the proposed recipients are not the "next best" approximation of class member interests for several reasons.

BankAmerica Corp. is directly on point. In that case, like this one a PSLRA litigation with a nationwide class of shareholders, class counsel sought to distribute $2.7 million remaining in the settlement fund to a local Missouri legal aid society, and the district court granted the motion. The Eighth Circuit reversed for two reasons. *First*, it was feasible to make additional distributions. *Second*, relevant to this case, a legal aid society, while a worthy charity, was not the "next best" recipient of the class's money when it was possible to make donations to, say, the Securities and Exchange Commission's "Fair Funds for Investors." 775 F.3d at 1067. And many of the proposed recipients work directly against the interests of Citigroup shareholders.

ARGUMENT

I. While they may be worthy charities in the abstract, each of the Plaintiffs' proposed organizations is an unsatisfactory *cy pres* recipient in this case.

"[A]s a growing number of scholars and courts have observed, the *cy pres* doctrine—unbridled by a driving nexus between the plaintiff class and the *cy pres* beneficiaries—poses many nascent dangers to the fairness of the distribution process." *Nachshin v. AOL, LLC*, 663 F.3d 1034, 1038 (9th Cir. 2011) (citing *Bear, Stearns & Co.*, 626 F. Supp. 2d at 414-17 and Martin H. Redish et al., *Cy Pres Relief and the Pathologies of the Modern Class Action: A Normative and Empirical Analysis*, 62 FLA. L. REV. 617 (2010)). When cy pres distributions are unmoored from class recovery or ex ante legislative or judicial standards, or where they are "not tethered to the nature of the lawsuit and the interests of the silent class members, 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." *Nachshin*, 663 F.3d at 1039 (citing authorities). To limit any possible mischief, the law

demands rigorous vetting of proposed recipients to ensure that the recipient is truly the "*next best* compensation use" of class funds. *Masters v. Wilhelmina Model Agency, Inc.*, 473 F.3d 423, 436 (2d Cir. 2007) (quotation omitted and emphasis added by Second Circuit); *accord In re Holocaust Victims Assets Litig.*, 424 F.3d 132, 141 n. 10 (2d Cir. 2005) ("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."). It is not enough to simply sign off on a local legal aid society; there must be a nexus between the class's interests and the proposed *cy pres* recipient. *BankAmerica Corp.*, 775 F.3d 1060; *Holtzman v. Turza*, 728 F.3d 682, 688-89 (7th Cir. 2014) (Easterbrook, J.). For the variety of reasons discussed below, none of the charities proposed can be approved.

A. South Brooklyn Legal Services' Foreclosure Prevention Project

Plaintiffs' motion earmarks 37.5% of the *cy pres* remainder for SBLS' Foreclosure Prevention Project. Dkt. 374 at 5-6. The SBLS proposal suffers from two major infirmities: (1) the organization's geographic scope and (2) the nexus of its work to the class's interests.

SBLS serves the "pressing needs of Brooklyn's diverse low-income population" with "clients primarily resid[ing] in Bedford-Stuyvesant, Brownsville, Crown Heights, Canarsie, Flatlands, East New York, and East Flatbush—neighborhoods." Dkt. 375-1 at 2-3. By contrast, owners of Citigroup stock are geographically dispersed throughout the country. As several appellate courts have determined, a local charity simply is not the "next best" approximation of a benefit to a nationwide class. *BankAmerica Corp.*, 775 F.3d at 1067 ("[Legal Services of Eastern Missouri] though unquestionably a worthy charity, is not the "next best" recipient of unclaimed settlement funds in this nationwide class action seeking damages for violations of federal and state securities laws."); *Nachshin*, 663 F.3d at 1040 (reversing cy pres distribution where two recipients were local institutions and class was nationwide); *In re Airline Ticket Comm'n Antitrust Litig.*, 307 F.3d 679, 683 (8th Cir.

2002) (reversing a cy pres distribution because it "failed to consider the full geographic scope of the case"); *Houck on Behalf of U.S. v. Folding Carton Admin. Comm.*, 881 F.2d 494, 502 (7th Cir. 1989) (remanding a proposed cy pres award in a nationwide class action so the district court could consider "a broader nationwide use of its cy pres discretion"). 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. 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 as part of the Class Action Fairness Act of 2005. 28 U.S.C. § 1714 (proscribing favoritism toward segments of the class based on geographic proximity to the court).

In additional to the geographic mismatch, SBLS's Foreclosure Prevention Project work possesses no nexus to shareholder fraud protection. As described by Plaintiffs: "The Project engages in 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." Dkt. 374 at 5. These priorities are far from putting the fund "to its *next best* compensation use." *Masters*, 473 F.3d at 436 (quotation omitted and emphasis added by Second Circuit). "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 Victims Assets Litig.*, 424 F.3d 132, 141 n. 10 (2d Cir. 2005). Like a charity which feeds the indigent, one that addresses foreclosures and predatory lending has "little or nothing to do with the purposes of the underlying lawsuit or the class of plaintiffs

involved." *Dennis*, 697 F.3d at 866 (quoting *Nachshin*, 663 F.3d 1034, 1039 (9th Cir. 2011)); *see also In re Groupon, Inc.,* No. 11-md-2238 DMS (RBB), 2012 U.S. Dist. LEXIS 185750, at *36 (S.D. Cal. Sept. 28, 2012) (requiring "an actual connection, not just between the class and cy pres beneficiary, but between the claims alleged in the case and the cy pres beneficiary."). The ALI's position in section 3.07 is fairly comparable. *ALI Principles* § 3.07(c) ("If, and only if, no recipient whose interests reasonably approximate those being pursued by the class can be identified after thorough investigation and analysis, a court may approve a recipient that does not reasonably approximate the interests being pursued by the class."). Indeed, working to make foreclosures more difficult could be said to be working *against* the interests of shareholders of banking stocks, as that raises the costs of administering mortgages, and banks tend to be creditors, rather than borrowers in the mortgage arena.

Just as Legal Services of Eastern Missouri was not the "next best" option simply because it "serves victims of fraud" (*BankAmerica Corp.*, 775 F.3d at 1067), SBLS' project combatting lender fraud, improper foreclosures and similar malfeasance is not the next best recipient of funds from the settlement of a securities fraud case, even a securities fraud case having to do with subprime mortgaged-backed securities. *See also Dennis* (charity that feeds the indigent has no nexus to settlement of consumer fraud allegations against a cereal manufacturer); *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 refrigerator owners whose fridges caught on fire).[2]

Plaintiffs are descriptively correct that "Other [out-of-circuit district] courts, however, have expanded the cy pres doctrine to permit distributions to charitable organizations that do not

[2] In fact, to the extent that Citigroup still holds mortgage-backed securities, homeowners are actually on the opposite side of the transaction from shareholders. Foreclosure prevention assistance in this circumstance may actually be economically adverse to shareholder interests.

necessarily directly relate to the litigation in which the funds were recovered." Dkt. 374 at 7. But there is no normative lesson to be learned from the fact that "cy pres remedies often stray far from the 'next best use' for undistributed funds and turn courts in a grant giving institution doling out funds to hospitals, legal services organizations, law schools, and other charities." *Bear, Stearns & Co.*, 626 F. Supp. 2d 402, 414 (S.D.N.Y. 2009). The two cases relied on by the Plaintiffs were incorrect to be so permissive and, actually, were the cases specifically disapproved in *Nachshin.* 663 F.3d at 1039. Following those cases here would also contravene the Second Circuit's "next best" recipient standard.

There are any number of non-profit recipients that directly or tangentially work on behalf of shareholder interests in securities litigation, and as such would much more effectively furthers the interests of the class. For example, law professors and organizations housed at, *inter alia*, the University of Chicago, Stanford University, University of California at Los Angeles, Northwestern University, Vanderbilt University, and Cardozo Law School are performing important research on securities litigation and corporate governance. *See, e.g.,* Stanford Law's School's Securities Class Action Clearinghouse, *description available at* http://securities.stanford.edu/about-the-scac.html. Money could readily go to 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)). "Shareholders in the United States injured by securities fraud" are surely a closer fit to the class than residents of Brooklyn in need of foreclosure assistance. *See BankAmerica Corp.*, 775 F.3d at 1067 (suggesting the SEC Fair Funds as close fit with a class of investors alleging securities fraud).

B. National Consumers League

As described by plaintiffs: "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." Dkt. 374-5. As with SBLS, although NCL's agenda may be well-intentioned and laudable in many respects, their mission shares no nexus with the conduct complained of in this lawsuit. And, as with SBLS, it appears that NCL's activities are even adverse to class member interests in some instances. For example, in the past NCL has chastised companies for putting the interest of their "wall street investors" ahead of their employees. Press Release of Nov. 13, 2012, http://www.natlconsumersleague.org/newsroom/press-releases/715-ncl-lends-support-for-hostess-brand-worker-strike (last visited Feb. 15, 2016).

Another reason to reject NCL as a recipient is that lead class counsel's firm Kirby McInerney harbors an undisclosed conflict for interest with NCL. During fiscal year 2012-13, Kirby McInerney was a $1000+ donor to NCL. NCL 2013 Annual Report, *available at* http://www.slideshare.net/nationalconsumersleague/2013-national-consumers-league-annual-report at 15 (last visited Feb. 15, 2016). Kirby McInerney is perfectly entitled to feel that NCL is a worthy charity, and to donate some of their handsome multi-million dollar fee to NCL. What they cannot do is donate the class's money.

As the ALI properly instructs, "A cy pres remedy should not be ordered if the court or any party has any significant prior affiliation with the intended recipient that would raise substantial questions about whether the selection of the recipient was made on the merits." *ALI Principles* § 3.07, cmt. b at 219. If the *cy pres* distribution is related to plaintiffs' counsel, a number of problems

arise. It would result in class counsel being double-compensated: the attorney indirectly benefits from the *cy pres* distribution, and then makes a claim for direct compensation of attorneys' fees based upon the size of the *cy pres*. *Bear, Stearns & Co.,* 626 F. Supp. 2d at 415; 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"); Adam Liptak, *Doling Out Other People's Money*, N.Y. TIMES (Nov. 26, 2007) ("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."). Permitting *cy pres* to a recipient that class counsel has a preexisting relationship with "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; *see also Radcliffe v. Experian Info. Solutions*, 715 F.3d 1157, 1167 (9th Cir. 2013) ("The responsibility of class counsel to absent class members whose control over their attorneys is limited does not permit even the appearance of divided loyalties of counsel.") (internal quotation omitted); *Broussard v. Meineke Disc. Muffler Shops*, 155 F.3d 331, 338 (4th Cir. 1998) ("The premise of a class action is that litigation by representative parties adjudicates the rights of all class members, so basic due process requires that named plaintiffs possess undivided loyalties to absent class members."). In accord with the Second Circuit's adherence to the *ALI Principles'* guidance on use of *cy pres*, class settlement funds should not be used to reward a charity that already has ties to class counsel.

"Cy pres distributions present a particular danger" that "incentives favoring pursuit of self-interest rather than the class's interests in fact influenced the outcome of negotiations." *Dennis*, 858 F.3d at 867. Thus, "Courts are wary of distribution *cy pres* funds to organizations that have a close relationship with class counsel given the appearance of a conflict of interest." *Weeks v. Kellogg Co.*, No. CV-09-08102 (MMM) (RZx), 2011 U.S. Dist. LEXIS 155472, at *69 n.102 (C.D. Cal. Nov. 23,

2011). *Weeks* properly refused to ratify such a conflict. 2011 U.S. Dist. LEXIS 155472, at *70-*71. *Accord In re Linerboard Antitrust Litig.*, MDL No. 1261, 2008 U.S. Dist. LEXIS 77739, at *14-*15 (E.D. Pa. Oct. 3, 2008) (rebuffing proposed *cy pres* awards to institutions with preexisting relationships to class counsel).

This opposition may have only scratched the surface; who know what conflicts lurk deeper with NCL, or with the other proposed recipients? Before the court approves any designees, it should require the parties and attorneys to disclose any other ties to the *cy pres* recipients. *See In re Compact Disc Minimum Advertised Price Antitrust Litig.*, MDL No. 1361, 2005 U.S. Dist. LEXIS 11332, at *4 (D. Me. Jun. 10, 2005). Class counsel's declaration is silent on the question.

C. Consumer Federation of America

As described by the Plaintiffs: "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 proinvestor rule seeking to ensure that investment advisors are held to a fiduciary standard under the Employee Retirement Income Security Act (ERISA)." Dkt. 374 at 5; *see also* Dkt. 375-3 at 1 (CFA's Direct of Investor Protection was a "leading investor advocate working with congressional staff on the drafting of both the Sarbanes-Oxley Act and the investor protection title of the Dodd-Frank Wall Street Reform and Consumer Protection Act."); Dkt. 375-3 at 3 (describing current research as "highlight[ing] inadequacies in the SEC's regulatory proposals to reform credit agencies.").

Even if Plaintiffs could obtain the assurances of CFA that all settlement proceeds would go toward investor protection work, and would not offset other independent expenditures, CFA would still not be a suitable recipient. The reason for this is that CFA's investor protection UNIT boils down to a lot of lobbying; *See* http://consumerfed.org/testimonial/cfa-urges-congress-to-reject-hr-1675-allow-sec-to-properly-oversee-financial-markets/; http://consumerfed.org/testimonial/cfa-

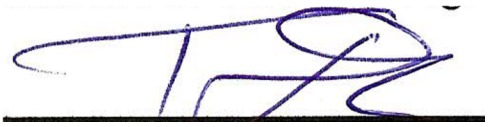
urges-house-ways-and-means-committee-to-oppose-anti-retirement-investor-bill-h-r-4294/; http://consumerfed.org/testimonial/cfa-encourages-members-of-congress-to-oppose-anti-retirement-investor-bills-h-r-4293-and-h-r-4294/ (all last visited Feb. 15, 2016). This work cuts against the policy preferences of many class members. For example, several Pew Research Center polls since 2010 have shown that around 45 percent of respondents believe that "The government has gone too far regulating financial institutions and markets, making it harder for the economy to grow" while 47 percent believe "the government has not gone far enough in regulating financial institutions and markets, leaving the country at the risk of another financial crisis." Karlyn Bowman, *Public Opinion Five Years After Dodd-Frank*, FORBES (Jul. 21, 2015), *available at* http://www.forbes.com/sites/bowmanmarsico/2015/07/21/public-opinion-five-years-after-dodd-frank/#1376fd682d0a. Likewise, "[i]n five identical Gallup questions asked since December 2009, around half have consistently said there was too much regulation of business and industry, while around a quarter have said too little." *Id.* And Citigroup shareholders if polled, would probably even be more opposed to the CFA pro-regulatory agenda than the average American. Given the demographics of the class, it is safe to say that a substantial portion of the class, and perhaps even a majority, opposes the lobbying work of the CFA's investor protection division, which consistently advocates for increased regulation. An organization with a politically polarizing platform is unsuitable as a non-partisan recipient of *cy pres* monies. *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.").

Frank further raises a First Amendment objection to the class's money being given to such a political organization in the name of him and other class members. *See generally Keller v. State Bar of Cal.*, 496 U.S. 1 (1990).

CONCLUSION

For the foregoing reasons, the Court should deny Plaintiffs' motion and require recipients that have a stronger nexus to the class and without a preexisting relationship to class counsel.

Dated: February 19, 2016.



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Certificate of Service

The undersigned certifies he electronically filed the foregoing Motion via the ECF system for the Southern District of New York, thus effecting service on all attorneys registered for electronic filing.

I declare under penalty of perjury that the foregoing is true and correct.

Dated: February 19, 2016

/s/ Theodore H. Frank
Theodore H. Frank