

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

DANNY L WALKINGSTICK, WHITNYE
A FORT,

Plaintiffs,

v.

SIMMONS BANK,

Defendant.

Case No. 6:19-cv-03184-RK

ORDER

Before the Court is the parties' joint renewed motion for *cy pres* distribution of uncollected settlement funds.¹ (Doc. 172.) After careful consideration and for the reasons explained below, the Court **ORDERS** that the motion is **provisionally GRANTED** pending a publication and objection period.

Background

This was a putative class action lawsuit concerning overdraft fees on debit card transactions.² On November 18, 2022, the action was dismissed after the Court granted final approval to the class action settlement agreement. The settlement agreement provided, in relevant part:

96. Any funds in the Net Settlement Fund following a Second Cash Award Distribution, or any Residual Funds in the Net Settlement Fund held in the Escrow Account if a Second Cash Award Distribution is not feasible (“*Cy pres* Funds”), shall be paid through *cy pres* to non-profit charities that assist low-income consumers and/or provide consumer financial education in the geographic area of the Settlement Class Members, subject to Court approval. The Parties shall confer in good faith about appropriate *cy pres* beneficiaries after the stale date on checks

¹ On August 7, 2024, the Court denied the parties' first joint motion for *cy pres* distribution of remaining funds because the motion and record was insufficient to allow the Court to meaningfully consider all of the principles set forth in *In re BankAmerica Corporate Securities Litigation*, 775 F.3d 1060, 1064-67 (8th Cir. 2015). Additionally, on June 3, 2025, after careful review and consideration of the renewed motion which did address the *BankAmerica* considerations, the Court ordered the parties to submit a joint supplemental brief addressing, *inter alia*, how the Court should weigh the apparent affiliation between Defendant Simmons Bank and its proposed *cy pres* recipient, Simmons First Foundation. (See Doc. 173.) Accordingly, the renewed motion was held in abeyance.

² Plaintiffs' second amended complaint alleged breach of contract, breach of the covenant of good faith and fair dealing, and unjust enrichment stemming from improperly assessed overdraft fees. (Doc. 39.)

to Settlement Class Members passes, and shall each propose beneficiaries for Court approval. Plaintiffs will propose a beneficiary for 50% of the *Cy pres* Funds, subject to approval by Defendant. Simmons intends to propose that the remaining 50% of *Cy pres* Funds be paid to the Simmons First Foundation, with an earmark that the money be used specifically for financial literacy. Plaintiffs do not agree that the Simmons First Foundation is an appropriate *cy pres* beneficiary. If the Court rejects Simmons First Foundation as a *cy pres* beneficiary, Simmons will propose Go Forward Pine Bluff as an alternate *cy pres* beneficiary.

97. The Court may revise this *cy pres* provision as necessary without terminating or otherwise impacting this settlement, provided the Court's revision does not increase the amount that Defendant would otherwise pay under this Agreement.

(Doc. 155-1.)

After two rounds of distributions to class members, \$33,267.23 remains uncollected from the \$3,250,000 settlement fund created by the class action settlement of this matter. The parties request that the Court enter an order granting a *cy pres* award of the remaining funds to two non-profits—one selected by Plaintiffs and one selected by Defendant.

“In the class action context, it may be appropriate for a court to use *cy pres* principles to distribute unclaimed funds.” *Caligiuri v. Symantec Corp.*, 855 F.3d 860, 866 (8th Cir. 2017) (internal quotation marks omitted). “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.” *Id.* (internal quotation marks omitted). The Eighth Circuit has identified the following criteria that the Court must consider in determining whether a *cy pres* distribution is appropriate, and if so, which principles must be followed: (1) a *cy pres* distribution to a third party of unclaimed settlement funds is permissible “only when it is not feasible to make further distributions to class members”; (2) it is not sufficient to declare all class members “satisfied in full” or “fully compensated” in order to authorize a *cy pres* distribution; (3) language in a settlement agreement ordering that a *cy pres* distribution be made in the Court’s “sole discretion” is void and cannot be the basis for awarding such a distribution; (4) “unless the amount of funds to be distributed *cy pres* is de minimis, the district court should make a *cy pres* proposal publicly available and allow class members to object or suggest alternative recipients before the court selects a *cy pres* recipient”; and (5) “when a district court concludes that a *cy pres* distribution is appropriate after applying the foregoing rigorous standards, such a distribution *must be* for the next best use . . . for indirect class benefit, and for

uses consistent with the nature of the underlying action and with the judicial function.” *In re BankAmerica Corp. Sec. Litig.*, 775 F.3d 1060, 1064-67 (8th Cir. 2015) (internal quotation marks omitted)

The Settlement Administrator has completed two rounds of distributions to class members. The parties argue that a third distribution to class members is not feasible given the administrative costs and amount of settlement funds remaining. If a third distribution is completed, the estimated administrative cost is, at best, \$23,999.³ (Doc. 172-1 ¶ 6.) This would leave \$9,268.33 for distribution, resulting in an average class member payout of \$0.18.⁴ (*Id.* at ¶ 7.) Accordingly, the Court finds that it is not feasible to attempt another distribution to class members. “The remaining amount is not ‘sufficiently large’ but instead ‘too small’ to make individual distributions economically viable.” *In re Bank of Am. Corp. Sec. Litig.*, No. 4:99 MD 1264 CDP, 2018 WL 1046890, at *3 (E.D. Mo. Feb. 26, 2018) (citing Principles of the Law of Aggregate Litigation § 3.07(a), (b) (2010)); *BankAmerica Corp.*, 775 F.3d at 1064 (citing Principles of the Law of Aggregate Litigation § 3.07 with approval and considering whether “distributions are sufficiently large to make individual distributions economically viable,” as predominant criteria for whether a court should order a *cy pres* award); *see Caligiuri*, 855 F.3d at 867 (no abuse of discretion in *cy pres* distribution occurring only if remaining funds were insufficient to pay at least two dollars to each approved claimant). Therefore, a *cy pres* distribution of the residual settlement fund is appropriate.

The parties’ proposed *cy pres* distribution satisfies the second and third *BankAmerica* principles because the parties do not request that the Court declare that the class members have been “satisfied in full,” nor does the settlement agreement provide that a *cy pres* distribution be made in the Court’s “sole discretion.” *BankAmerica Corp.*, 775 F.3d at 1065-66.

³ This figure is provided that the third distribution would be completed by Simmons Bank posting credits for class members who have open accounts, with the Settlement Administrator mailing checks only to class members with closed accounts. (Doc. 172-1 at ¶ 6.) The estimated administrative cost for a third distribution if checks are required to be mailed to all class members would be \$67,264—exceeding the residual settlement funds available. (*Id.* at ¶ 7.) However, the parties have not indicated that Simmons Bank would be unable to post credits for class members with open accounts as it has done previously.

⁴ Payments would range from \$0.03 to \$32; however, over 20,000 class members would receive payments less than \$0.05. (Doc. 172-1 ¶ 6.) For reference, during the second distribution, 58,656 class members received credits or distribution checks—meaning roughly a third of the class members would likely receive less than \$0.05. (*Id.* at ¶ 3.)

The Court next considers whether the proposed distribution is the next best use of the settlement funds (the fifth *BankAmerica* consideration). The parties explain that because the underlying action was related to alleged overdraft fees, that class members' accounts "were near a zero balance," and therefore many of the class members "were likely in a financially precarious position." (Doc. 172 at ¶ 17.) Defendant proposes that fifty percent (\$16,633.03) of the *cy pres* funds be awarded to the Simmons First Foundation, "which is a non-profit foundation that helps not only the lives of children through programs that enhance education and healthcare but also assists low-income individuals on fixed incomes who cannot afford necessary expenses." (*Id.* at ¶ 16.) Defendant believes this allocation is appropriate because "with the appropriate earmarking, the organization will utilize the award to assist low-income and elderly individuals on fixed incomes" within the geographic area where the settlement class members hold accounts (Arkansas, Kansas, Missouri, Oklahoma, Tennessee, and Texas), who cannot afford necessary expenses. (*Id.* at ¶¶ 16, 19.) Plaintiff proposes that fifty percent (\$16,633.04) of the *cy pres* funds be awarded to Prosperity Connection, a non-profit whose mission is "to promote economic success for everyone in the St. Louis region by providing financial education and access to reliable financial products and services," which it believes is consistent with the nature of the underlying action. (*Id.* at ¶¶ 18.)

The Court finds that the proposed distribution among these recipients satisfies the fifth *BankAmerica* principle. See *In re Checking Account Overdraft Litig.*, 830 F. Supp. 2d 1330, 1355 (S.D. Fla. 2011) (district court agreeing that "because the claims being settled involve allegations of unfair treatment of customers by a large financial institution [via overdraft fees], it is reasonable to direct these funds to respected organizations that promote financial literacy"). In the Court's June 3, 2025 Order, it expressed concern about the apparent affiliation between Defendant Simmons Bank and the Simmons First Foundation.⁵ See Principles of the Law of Aggregate Litigation § 3.07 cmt. b ("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."); see *In re Google Referrer Header Priv. Litig.*, 869 F.3d 737, 744 (9th Cir. 2017), *vacated and remanded on other grounds sub nom. Frank v. Gaos*, 586 U.S. 485 (2019) ("Of course it makes sense that the district court should examine any claimed relationship between the *cy pres* recipient and the parties or their counsel.

⁵ Simmons First Foundation appears to be a corporate foundation affiliated with Simmons Bank. See *Community Involvement*, Simmons Bank, <https://perma.cc/KRA4-LZ8Z>.

But a prior relationship or connection between the two, without more, is not an absolute disqualifier. Rather, a number of factors, such as the nature of the relationship, the timing and recency of the relationship, the significance of dealings between the recipient and the party or counsel, the circumstances of the selection process, and the merits of the recipient play into the analysis.”); *In re Google Inc. Cookie Placement Consumer Privacy Litig.*, 934 F.3d 316, 330-31 (3d Cir. 2019) (“The parties seeking settlement approval bear the burden of explaining to a court why the *cy pres* selection was fair, which may include describing the nature of any prior affiliations; what role, if any, each affiliation played in the *cy pres* selection process; whether other recipients were sincerely considered; and why these recipients are the proper choice.”).

In the parties’ joint supplemental brief and supporting declaration, the parties have clarified that the entities are separate and independent and are affiliated in name only. (See Doc. 174 at ¶ 3; Doc. 174-1 at ¶¶ 4-10.) In addition, while Simmons First Foundation is partly composed of members who are or who have previously been affiliated with Defendant Simmons First Bank, Simmons First Foundation “has agreed that any board-level decisions relating to any grant award [utilizing *cy pres* funds] will be made only by a special committee of the board comprised of board members who are not currently employed by, or affiliated with,” Defendant Simmons First Bank. (Doc. 174 at ¶ 6.) After review and consideration of the parties’ joint supplemental brief and supporting declaration regarding the affiliation between Defendant Simmons Bank and the Simmons First Foundation, the Court is satisfied that the *cy pres* selection of Simmons First Foundation is fair and made on the merits, and that the Simmons First Foundation would be an appropriate *cy pres* recipient.

Finally, as to the fourth *BankAmerica* consideration, the parties advise that they believe the remaining amount of settlement funds (\$33,267.23) is not de minimis, thereby requiring publication of the *cy pres* proposal.

Accordingly, the joint renewed motion for *cy pres* distribution of uncollected settlement funds is **provisionally GRANTED** pending a publication and objection period. The parties are **ORDERED** to update the settlement website to advise class members (and the public) of the *cy pres* proposal. The *cy pres* update should include the undistributed balance and the proposed recipients and provide an opportunity (with procedures) for any objection or suggested alternative recipients to be made and received. The proposal shall provide a sixty-day (60-day) period for

objections, and the parties shall provide the Court with a status report no later than thirty (30) days after conclusion of the publication period.

Conclusion

After careful consideration, the joint renewed motion for *cy pres* distribution of uncollected settlement funds is **provisionally GRANTED** pending a publication and objection period as explained herein.

IT IS SO ORDERED.

s/ Roseann A. Ketchmark
ROSEANN A. KETCHMARK, JUDGE
UNITED STATES DISTRICT COURT

DATED: July 16, 2025