No. 17-807

In The

SUPREME COURT OF THE UNITED STATES

DONIVON CRAIG TINGLE, et al.
Petitioners,

v.

SONNY PERDUE, Secretary, United States
Department of Agriculture, et al.
Respondents.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the
District of Columbia Circuit

REPLY BRIEF FOR PETITIONERS

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INTRODUCTION

This case provides the ideal platform to resolve the question as to whether class action settlements should have a *cy pres* clause in the first place. It also affords this Court the opportunity to clarify what several lower courts have already articulated, which is that there is a preference towards paying class members first that cannot be overcome so long as there is no windfall, the amount is not deminimis, and the class members can be located. Moreover, this Court can decide that no class action settlement agreement can eliminate a district court's jurisdiction and fiduciary duty to ensure a fair, reasonable, and adequate settlement. There are indeed significant splits not only between the circuits, but also between governmental settlements and non-governmental class action settlements. There is also a split between the recent lower court decision and the ALI comments on this matter. Even Chief Justice Robert has expressed misgivings regarding the use of *cy pres* provisions in class action settlements. Finally, the recurrence of disputes regarding such *cy pres* provisions will continue to arise with greater frequency as their use intensifies.

FACTUAL BACKGROUND

No non-representative class member would have agreed to the settlement agreement if he/she had the benefit of full disclosure from their counsel. It was not until later that it was discovered by the class members that class counsel and the class representatives had placed their interests before the

silent members. The likelihood that $760 million would wind up with exactly $380 million in left over funds, precisely half of the settlement, is too much of a coincidence to be accepted as random. Additionally, every person opposing the distribution to the class members has a financial interest in that outcome. Class representatives get extra incentive awards beyond those already received and they receive paid positions on the board of trustees that manage the fund, and class counsel will be general counsel to the trust. Even the USDA benefits because two former employees set on the board, one of whom is the president of the board. The dissenting USCA-DC opinion had it correct when she suggested that this was collusion designed to create a slush fund for the USDA.

WAIVER

As with any contract, fraud in the inducement is grounds for recission. However, we need not get that far because ALI 3.08 cmt.b and numerous previously cited opinions set forth that the settlement funds must go to the class members so long as there is no wind fall, the amount is not too small, and the class members can be located. There is no windfall issue because all have agreed by the offering of a second round of payouts that no windfall exists; otherwise, such a payment could not be offered and subsequently approved by the district court. The remaining amount of $380 million is certainly not diminimis, and the class members can be identified and located.

It is clear now that class counsel and USDA craftily created an agreement that sought to

eliminate the trial court's jurisdiction and sever that court's fiduciary duty from the lawsuit. However, this duty is non-waivable by even the parties to the lawsuit because it is a fiduciary duty originating from public policy. It is not a lapse in due diligence for class members to believe that their attorneys are working in their best interest and therefore, to trust their actions and decisions. Furthermore, the class members were not well informed of the terms and conditions of the settlement agreement. In fact, class counsel spent overwhelming more time, money, and effort through listening conferences trying to cajole class members into accepting the *cy pres* provision then it ever spent explaining the settlement agreement.

Moreover, there is nothing a silent class member could ever do to affect a settlement agreement. If a class member, or several or many, had contacted its class counsel and indicated that he or she did not like this clause or that clause or the wording of a certain paragraph, they would have been rebuffed. In this case particularly, class counsel was not interested in the opinions and input of absent class members.

There was collusion and it was not discoverable until after payment was made. It is unbelievable that any law firm, let alone the biggest class action law firm in the country, could conduct ten years of discovery that included: depositions, affidavits, demonstrable evidence, applications, and expert investigation and, after all of that, miss the mark by over 100% and $380 million dollars. Therefore, once

the fraud or unfaithfulness was discovered, it could be acted upon by the client. Consider, if you will, construction defect law or family law. Each of those areas have contracts that are often breached years after the agreement is executed. Fraud, collusion, deceit, and self-dealing changes everything.

Judge Brown's dissenting opinion in the opening paragraph clearly sets forth that the settlement agreement was a product of collusion between class counsel and the USDA. There she stated: "Perhaps one day, I will possess my colleagues Schadenfreude toward the Executive Branch raiding hundreds-of-millions of taxpayer dollars out of the Treasury, putting them into a slush fund disguised as a settlement, and then doling the money out to whatever constituency the Executive wants bankrolled. But, that day is *not* today."

FOREITURE

No one explained *cy pres* to the class members or even made the attempt. Class counsel no doubt understood what a significant section of the settlement agreement this constituted. Considering its vast expertise in this area, it knew how heavily litigated this paragraph has been in other cases around the country. Indeed it has probably litigated these issues before.

However, everyone who knows about *cy pres* provisions knows this: One does not arrive at *cy pres* if there are class members to receive payments. Many cases stand for such a proposition and most of those cases have been previously submitted to this Court in

the Petition. The Fifth Circuit even stated categorically that settlement funds constitute a private property interest of the class members. As such, one cannot simply take away money from the class and give it to undeserving third parties that never suffered a harm. No windfall exists because the settlement does not begin to make class members whole; the leftover amount is not diminimis and every class member or heir can be easily located.

MY INDIANS MAINLY WANT TO BE HEARD

We will not stand here and tell you this is not about money, but it is not mainly about money. All the class members that I speak to are upset by the lack of consideration and they want to be fully heard and have the matter fully investigated if necessary. There is corruption and the district court has the wherewithal to unearth said corruption. A three-panel commission could be appointed to investigate this matter and money from the $400 million dollar settlement fund could be used to pay for this. If misconduct is discovered, then class counsel can be required to disgorge its fees, along with the cost of the commission's fees and costs.

The only parties that matter, the class members, never agreed to a one-time payout and nothing more, and if they had, they would not have done so if they had full knowledge of what was happening at the time. It is clear for all to see that class counsel, class representatives, (except for Keith Mandan), and the USDA were feathering their nests

at the expense of the class. The government should not have any input in this matter because they settled. They paid to be done with this matter so their position is moot. By allowing them to present, they are being provided a double benefit, they bought their way out of the lawsuit, thereby limiting their exposure and yet they still get to have a say in the present outcome.

EXPANSION OF THE CLASS

In order to stave off a personal disaster, class counsel is now attempting to expand the class to include Indians who could've, would've, or should've filed a claim. The Keepseagle class extends to 3,601 people and no more. These class members represent those Indian farmers and ranchers who were discriminated against, that got out of bed, travelled to a destination, and filed a claim, a process which was tedious in itself. Then those class members were exposed to scrutiny. These are the only class members that exist and to try to expand the class after the fact is nothing more than an effort to manipulate the outcome and depletion of the Fund. Similarly, the application of *cy pres* is nothing more than an attempt to put the money into the hands of undeserving third parties with no chance of the money winding up in the hands of class members. This is just what the Ninth Circuit was concerned about in Six Mexican Workers and Nachshin were worried about.

This fund is for class members that were discriminated against and were able to prove up a

claim. That claim was exchanged for money and that money belongs to the class, it is their property. It can only be transferred to others if they cannot be found, the amount is so small as to make it too difficult to pay out, or if there is a windfall, which it is not.

LISTENING CONFERENCES AND BOARD APPOINTMENTS

No listening conferences were ever held. Nobody was listening to the class. It was a campaign to trick and cajole Indians into getting with the program. The presenters were aloof, arrogant, and at times argumentative with their clients and class members. One hundred percent of the class members (sans class representatives) opposed class counsel's course of action. At that point, class counsel should have followed the will of its client class members. If not, then they should have certified a conflict and bifurcated the representation into subclasses, in its failure to do so, class counsel breached its fiduciary duties of loyalty and obedience.

It was about this time that class counsel also began selecting trustees. This was a lawsuit about discrimination and two of those selected were former employees of the party opponent who was accused of discriminatory practices. The opportunity for mischief and the lack of good judgment is so obvious as to not require further comment, especially when one of those was made the board president. Moreover, every class representative that went along with the class counsel was placed on the board and paid well.

Whenever Marilyn Keepseagle "came around to their way of thinking," she was rewarded with a position on the board of directors and extra incentive awards as well. It is no wonder that Judge Emmet Sullivan decried this process as a "monumental failure." Nevertheless, it need not stay that way. The money has not been spent, it does not have to be recalled or disgorged (except for perhaps attorney's fees paid to class counsel).

All the Indians hated the proposal. The only people that liked the agreement were the class representatives (except Keith Mandan), class counsel, and USDA, the only ones who stood to gain financially.

CRONYISM

The basic premise of the *cy pres* agreement and the enabling trust is corruption, self-dealing, and fraud. It is significantly, if not overwhelming populated by people that have shown a propensity for self-dealing. It is not regulated by the district court; indeed, the court was specifically removed from any oversight role. There is nothing to prevent trustees from showing favoritism and reserving for themselves a kickback on every transaction. Indians are not stupid. If this was a good deal for them they would not be opposing *cy pres*. Class members know better than the rest of the world what will become of this money and there will be neither a vehicle in place nor judicial oversight to prevent mischief running amok. Long after everyone else has moved on, Indians will be forced to live with this fiasco.

DISTRICT COURT AUTHORITY

The court had the responsibility to ensure a fair, reasonable, and adequate outcome. It also had the authority to accomplish this. The court failed to reach down deep and investigate the issue using the resources that all trial courts have. Instead, it conducted a one-day venting ceremony masquerading as a hearing in an attempt to pacify Indians but with no effort to solve the problem. This is unacceptable. Rather, it did what many trial courts do, decide in favor of the party that is most capable of filing an appeal.

The USDC-DC was patently wrong and could have done much more to ensue a fair, reasonable, and adequate outcome. It could have invoked the preference to pay all class members as set forth in other cases. It could have modified the settlement agreement's *cy pres* language, and it should have done so once the magnitude of the leftover funds was discovered (at least discovered by the district court that is). It could have rescinded the entire agreement unless the parties came to another agreement. Instead, he did nothing, abdicating its fiduciary duty and letting down thousands of Indians that were counting on it.

The court did not find the agreement fair, reasonable, and adequate; rather the court deemed that matter a "monumental failure" an unmitigated disaster. The modification was allowed simply to close the books on a disgraceful chapter. The judge

simply transferred his duties to "community leaders" despite the fact that no such leaders had been identified, let alone vetted by anyone competent or not. Even the dissenting opinion for the USCA-DC recognizes the collusive nature of the settlement agreement. The comments raised by Respondent Holder regarding the En Banc denial is pure speculation. That court tersely denied the Rehearing En Banc with no reference to the basis for its decision.

DEPARTMENT OF JUSTICE

The Government would love a chance to prevent undeserving third parties from receiving payments. That was the entire purpose of the June 5, 2017, memo from the Attorney General. On Pages 6 and 12 of its opposition brief, it indicated that the *cy pres* distribution scheme was "regrettable." It does not have to be. The money is still available, and this Court has the authority on remand to articulate the standard for a fair, reasonable, and adequate settlement.

PERFECT VEHICLE FOR GRANTING CERTIORARI

This case is the perfect vehicle to resolve the application of *cy pres* in class action settlements. There are conflicts among the circuits with the Fifth, Seventh, Eighth, and Ninth disavowing *cy pres*. The Tenth seems to go along with this as well, but I am not certain. The other numbered circuits have not taken a position on the subject and the USCA-DC favors *cy pres*. The American Law Institute

commentary favors *cy pres* only when it is not feasible to pay the class member (no windfall, not diminimis, locatable). Chief Justice Roberts in Marek supplies his own misgivings about *cy pres* in class action settlements and most scholarly articles, though not all, disfavor using *cy pres*. Moreover, there is a conflict between government and non-government defendants. Furthermore, there is a proliferation of class action settlement agreement applying *cy pres* and this matter is ripe for consideration and Keepseagle is the perfect case to decide these issues because of the timing and its presentation of all of the Marek factors.

ACTIVATION OF *CY PRES*

Throughout its brief in opposition, Respondent Holder misses a fundamental point. We do not even reach *cy pres* because the class members are entitled to their property. *Cy pres* activates when there is a residue. The amount, $380,000,000.00, is not a residue. The members can be located and they have not been adequately compensated.

Moreover, Petitioner Holder raises an important issue that should be addressed in the negative, namely: Whether a settlement agreement that seeks to restrict the court's jurisdiction and sever the court from its fiduciary duty is ever appropriate. The answer is no it cannot because such an act is void on public policy and due process grounds.

The fact that Petitioner Tingle, et.al., did not state that the application of *cy pres* is unlawful is of no significance. The issue was being raised in a court

of law, the clear inference to such an audience is that it is unlawful to distribute via *cy pres* particularly under all the circumstances set forth.

THE PETITION IN A NUTSHELL

Class counsel created a settlement agreement in collusion with USDA. That agreement was created and approved in such a manner that the district court would have no jurisdiction over the essence of the agreement, just the administration. The agreement was pushed out to the class members with no explanation with the intent by class counsel that if anyone did learn of the misconduct, they would not be able to pursue any remedies.

When the magnitude of the settlement fund was discovered by everyone else, class counsel and most class representative bent every sail to convince class members to go along with *cy pres*. Based upon the conduct of class counsel and representatives at the "listening conferences," research was undertaken to check the credibility of what was being stated. That due diligence showed that Petitioner Holder's position was unsound.

By then the picture was coming into focus. Case law overwhelming disfavored *cy pres* in class action settlements. It became increasingly clear that both class counsel, most class representatives, as well as USDA were involved in actions that did not make sense, at least where the class members were concerned. Once misfeasance or malfeasance was discovered, action quickly followed. No one is to be

faulted or penalized for trusting class counsel or class representatives.

All the issues that have been raised can be rectified and should be. The funds have not been depleted. The risk of real harm to the class members is too great to simply ignore because a settlement agreement has been signed in light of what we know now.

CONCLUSION

The Petition for Certiorari should be granted.

Respectfully submitted,

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