No. 18-

In The Supreme Court of the United States

KEVIN McCABE,

Petitioner,

v.

GERARDO ARANDA and CARIBBEAN CRUISE LINE, INC., *et al.*,

Respondents.

ON PETITION FOR A WRIT OF *CERTIORARI* TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR A WRIT OF *CERTIORARI*

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QUESTIONS PRESENTED FOR REVIEW

1. Whether a *cy pres* provision of a class-action settlement agreement may, in authorizing the class members to make recommendations for the selection, by the district court, of a *cy pres* recipient, do so without requiring that the class members be given either guidance or a list of potential recipients in order to help ensure that the selected recipient has interests that are aligned with the interests of the class members.

2. Whether a *cy pres* provision of a class-action settlement agreement may decline to state when the district court would select the *cy pres* recipient.

3. Whether a *cy pres* provision of a class-action settlement agreement may decline to state whether, or how, the class members would be able to object to the district court's selection of the *cy pres* recipient.

LIST OF PARTIES AND RULE 29.6 DISCLOSURE

Petitioner, Kevin McCabe ("McCabe"), is a natural person. Therefore, no corporate-disclosure statement is required under Supreme Court Rule 29.6.

Respondents are Gerardo Aranda, Grant Birchmeier, Stephen Parkes, and Regina Stone, on behalf of themselves and a class of others similarly situated, and Caribbean Cruise Line, Inc., Economic Strategy Group, Economic Strategy Group, Inc., Economic Strategy, LLC, the Berkley Group, Inc., and Vacation Ownership Marketing Tours, Inc.

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INTRODUCTION

Kevin McCabe respectfully petitions this Court for a writ of *certiorari* to review the judgment of the United States Court of Appeals for the Seventh Circuit.

OPINIONS AND ORDERS

The Opinion of the United States Court of Appeals for the Seventh Circuit, dated July 24, 2018 (the "Opinion"), is reported at 896 F.3d 792, and is reprinted in the Appendix to this Petition ("Appx.") at Appx. "A," 1a-12a.

The Memorandum Opinion and Order of the United States District Court for the Northern District of Illinois dated March 2, 2017, is not reported but is available at 2017 WL 818854 and is reprinted at Appx. "B," 13a-29a.

The Amended Preliminary Approval Order of the United States District Court for the Northern District of Illinois dated October 26, 2016, is not reported; it is reprinted at Appx. "C," 30a-38a.

The Order dated August 23, 2018, of the United States Court of Appeals for the Seventh Circuit, denying McCabe's petition for rehearing and rehearing *en banc*, is not reported; it is reprinted at Appx. "D," 39a-40a.

A portion of the Class Action Settlement Agreement, filed in the District Court on September

26, 2016, is reprinted at Appx. "E," 41-42a.

A portion of the class notice, filed in the District Court on September 26, 2016, is reprinted at Appx. "F," 44a.

STATEMENT OF JURISDICTION

The Opinion was entered on July 24, 2018.

On August 7, 2018, McCabe filed a petition for panel rehearing with suggestion for rehearing *en banc*, which the Seventh Circuit denied on August 23, 2018.

This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

This petition involves Rule 23 of the Federal Rules of Civil Procedure, which states in relevant part:

Rule 23. Class Actions

(e) SETTLEMENT, VOLUNTARY DISMISSAL, OR COMPROMISE.

The claims, issues, or defenses of a certified class may be settled, voluntarily dismissed, or compromised only with the court's approval. The following procedures apply to a proposed settlement, voluntary dismissal, or

compromise:

(1) The court must direct notice in a reasonable manner to all class members who would be bound by the proposal.

(2) If the proposal would bind class members, the court may approve it only after a hearing and on finding that it is fair, reasonable, and adequate.

(3) The parties seeking approval must file a statement identifying any agreement made in connection with the proposal.

(4) If the class action was previously certified under Rule 23(b)(3), the court may refuse to approve a settlement unless it affords a new opportunity to request exclusion to individual class members who had an earlier opportunity to request exclusion but did not do so.

(5) Any class member may object to the proposal if it requires court approval under this subdivision (e); the objection may be withdrawn only with the court's approval.

STATEMENT OF THE CASE

McCabe brought the underlying proceeding in the United States District Court for the Northern District of Illinois, which had jurisdiction under 28 U.S.C. § 1331 and Rule 23(e)(5) of the Federal Rules of Civil Procedure.

To the *cy pres* provision of a proposed class-action settlement agreement, McCabe objected on the grounds that the provision, which gave class members the right to recommend *cy pres* recipients to the District Court, whereupon the District Court, upon the occurrence of certain financial contingencies, would select the recipient, did not: (i) provide any guidance, nor a list of potential recipients, in order to help ensure that the selected recipient had interests that aligned with the interests of the class members; (ii) state when the selection of the *cy pres* recipient would occur; and (iii) state whether, or how, the class members would be able to object to the selection of the *cy pres* recipient.

REASONS FOR GRANTING THE PETITION

I.

THERE IS A CIRCUIT CONFLICT OVER THE CRITERIA THAT GOVERN THE SELECTION OF A *CY PRES* RECIPIENT AS PART OF A CLASS-ACTION SETTLEMENT

The Seventh Circuit, in the opinion that is the subject of this Petition (the "Subject Opinion" or "Opinion"), affirmed the District Court's denial of McCabe's objections to the *cy pres* provision of the Class Action Settlement Agreement (the "Settlement Agreement") and that provision's counterpart in the class notice (the "Class Notice" or "Notice"). The provision of the Settlement Agreement stated:

> Any un-cashed checks issued to Settlement Class Members during the second and final round of payments made in accordance with this Agreement, as well as any unclaimed funds remaining in the Settlement Fund after payment of all Approved Claims, all Settlement Administration Expenses, the Fee Award to Class Counsel, and the incentive awards to the Class Representatives shall be *distributed to an appropriate cy pres recipient selected by the Special Master upon recommendation from counsel for the Parties and the Settlement Class*

> *Members by email to the Settlement Administrator as indicated in the Notice*.

Appx. E at 42a-43a (emphasis added).

The *cy pres* provision of the Class Notice similarly provided:

> Any un-cashed checks issued to Settlement Class Members during the second round of payments, as well as any unclaimed funds remaining in the Settlement Fund after payment of all Approved Claims, all Settlement Administration Expenses, the Fee Award to Class Counsel, and the incentive awards to the Class Representatives shall be *distributed to an appropriate cy pres recipient selected by the Special Master upon recommendations from Settlement Class Members. To recommend a cy pres recipient, please email the Settlement Administrator at [the settlement administrator's email address]*.

Appx. F at 44a (emphasis added) (collectively, the two *cy pres* provisions will be referred to as the "*Cy Pres* Provision" or "Provision").

The Subject Opinion addressed the *Cy Pres* Provision solely in response to McCabe's objections, stating, in full, as follows:

> We can quickly dispose of McCabe's remaining argument: He insists that the notice sent to the class *insufficiently described the process for selecting a cy pres recipient*. Not so. The notice told class members that a *cy pres* recipient might be selected after the second round of payments, gave instructions for recommending recipients, and provided a website where members can learn more about the settlement. That is enough to meet the notice requirements of Fed. R. Civ. P. 23.

Appx. A at 12a (emphasis added). First, McCabe had not taken issue with the Class Notice's (nor, for that matter, the Settlement Agreement's) description of "the process for selecting a *cy pres* recipient," Appx. A at 12a; rather, McCabe had objected to *the process itself*. *See* McCabe's Objections, No. 17-1626 (7th Cir.), Separate Appendix of Objector Kevin McCabe, Doc. 65, A-116 - A-124.

Second, in addressing the *Cy Pres* Provision, the District Court, in neither the Amended Preliminary Approval Order nor the Memorandum Opinion and Order, the latter of which the Subject Opinion affirmed, referred to the website. Likewise, Plaintiffs, in their motion for final approval of the Settlement Agreement, which the District Court granted in the Memorandum Opinion and Order, did not refer to the website in addressing the Provision (which Plaintiffs addressed solely in response to McCabe's objections), *see* Case

No. 1:12-cv-04069 (N.D. Ill.), Dkt. No. 571, at 22-23, whereas Plaintiffs' motion for *preliminary* approval of the settlement did not refer to the Provision at all. *See id.*, Dkt. No. 497.

The above-noted lack of references to the website was consistent with the fact that nothing in the record had shown, nor even suggested, that the website addressed, much less answered, any of McCabe's objections to the *Cy Pres* Provision, such objections having been to the Provision's: (i) lack of measures to help ensure that the selected recipient had interests that aligned with the interests of the class members, such measures being guidance regarding the class members' recommending of a *cy pres* recipient and a requirement that a list of potential recipients be provided to the class members; (ii) lack of informing the class members *when* the selection of the recipient would occur; and (iii) lack of informing the class members of *whether*, or *how*, they would be able to object to the selection.

Third, the District Court, in the Amended Preliminary Approval Order, stated:

> Pursuant to the Settlement Agreement and Federal Rule of Civil Procedure 53, the Court appoints the Honorable . . . (ret.) of JAMS [(from the former name of "Judicial Arbitration and Mediation Services")] as Special Master who is directed to proceed with all reasonable diligence with *the duties outlined in the Settlement*. Any member of the Settle-

> ment Class who wishes to contest a decision made by the Special Master *in accordance with the duties outlined in the Settlement* may do so by seeking Court review of the decision by no later than twenty-one (21) days after a copy of the order is served, unless the Court sets a different time.

Appx. C at 37a-38a (emphases added). Even assuming, *arguendo*, that the class members were deemed to have read (and understood) the Amended Preliminary Approval Order, the right "to contest a decision made by the Special Master *in accordance with the duties outlined in the Settlement*," Appx. C at 38a (emphasis added), was a mirage, for the only requirement regarding the *cy pres* selection was that the recipient be "appropriate," Settlement Agreement, Appx. F at 44a, *see also* Class Notice, Appx. F at 43a (same); but, class members were given no information as to what it meant for a *cy pres* recipient to be "appropriate." Moreoever, the word "appropriate" was superfluous, for with or without that word's appearance in the Settlement Agreement (or Notice), the selection would clearly warrant objections on the basis that it was *not* "appropriate"; but, again, the word "appropriate" merely begged the question of what "appropriate" meant, a question upon which neither the Settlement Agreement nor Notice gave any indication, much less to which either provided a clear answer.

Finally, the Subject Opinion, in finding that "[t]he [N]otice . . . gave *instructions* for recommending

recipients," Appx. A at 12a (emphasis added), was apparently referring to the Notice's statement that, "[t]o recommend a *cy pres* recipient, please email the Settlement Administrator at [the settlement administrator's email address]," Appx. F at 44a, for the Notice did not contain any other instructions relating to the *Cy Pres* matter (nor did the Settlement Agreement); that is, instructions that were tailored to helping ensure that the selected recipient had interests that aligned with the interests of the class members.

The *Cy Pres* Provision would presumably have been invalidated in the Ninth Circuit, which, in *Dennis v. Kellogg Co.*, 697 F.3d 858 (9th Cir. 2012), found that the district court's approval of a class-action settlement was an abuse of discretion due to several flaws of the settlement's *cy pres* provision, *see id.* at 868, among which were that it did not "identify the *cy pres* recipients," *id.* at 867, but, instead, provided that "the [recipients] will be *identified at a later date* and *approved by the court* [(]*a decision from which the Objectors might again appeal*,[)]" *id.* (emphases added), thereby "restrict[ing] [the appellate court's] ability to undertake the searching inquiry that [Ninth Circuit] precedent requires," *id.*; that is, an inquiry for the purpose of addressing the court's concern that, "[w]hen selection of *cy pres* beneficiaries is *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," *id.* (emphasis added); *see also Ira Holtzman C.P.A. v. Turza* , 728 F.3d 682, 689 (7th Cir. 2013) (stating, in reference to *cy pres* funds, that

"[m]oney not claimed by class members should be used for the class's benefit to the extent that [that] is feasible," citing, *inter alia*, *Dennis*; *In re Google Referrer Header Privacy Litig.*, 869 F.3d 737, 743 (9th Cir. 2017), *cert. granted sub nom. Frank v. Gaos*, 138 S. Ct. 1697 (2018) ("we require *cy pres* awards to meet a 'nexus' requirement by being tethered to the objectives of the underlying statute and the interests of the silent class members."); *In re Lupron Mktg. & Sales Practices Litig.*, 677 F.3d 21 (1st Cir. 2012):

> [The] A[merican] L[aw] I[nstitute][,] Principles [of the Law of Aggregate Litigation] § 3.07(c) sets up an order of preference: when feasible, [*cy pres*] recipients should be those "whose interests reasonably approximate those being pursued by the class." *Id.* If no recipients "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." *Id.*

Id. at 33; *Masters v. Wilhelmina Model Agency, Inc.*, 473 F.3d 423, 436 (2d Cir. 2007) ("[a] [d]istrict [c]ourt should bear in mind that the purpose of *[c]y [p]res* distribution is to 'put[ ] the unclaimed fund to its *next[-]best* compensation use, e.g., for the aggregate, indirect, prospective benefit of the class,'" quoting 2 Herbert B. Newberg & Alba Conte, *Newberg on Class Actions*, § 10:17 (4th ed. 2002) (emphasis by *Masters*).

Under the Settlement Agreement, the Seventh Circuit, like the Ninth Circuit in *Dennis*, was forced to issue its ruling *before* the *cy pres* recipient was scheduled to be selected, *see* Appx. E at 41a-43a; *see also* the Settlement Website, which is available at www.freecruisecallclassaction.net/Home.aspx (checked last on Oct. 24, 2018):

> **UPDATE**: The Seventh Circuit Court of Appeals affirmed the Court's Final Approval Order in August 2018. The time for parties to ask the United States Supreme Court to review the case has not yet passed. Until that date passes, the Court's Order is not "Final", as defined in Section 1.20 of the Settlement Agreement, and payments will not issue until the Court's Order is Final.

As a result, the Seventh Circuit was unable to rule upon the propriety of the selected recipient, instead being forced to wait for each of the following to occur: (i) the District Court's selection of the recipient; (ii) the making of objections, in the District Court, to the selection; and (iii) the district court's denial of the objections and an appeal therefrom.

Like the Ninth Circuit, the Eighth Circuit would also presumably have invalidated the *Cy Pres* Provision. In *In re BankAmerica Corp. Sec. Litig.*, 775 F.3d 1060 (8th Cir. 2015), the court explained that, "when a district court concludes that a *cy pres* distribution is appropriate . . ., such a distribution

must be [(emphasis in original)] '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*,'" *id.* at 1067, quoting *In re Katrina Canal Breaches Litig.*, 628 F.3d 185, 196 (5th Cir. 2010) (emphasis added), and that, accordingly,

> 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 [to the proposed recipients] or suggest alternative recipients before the [district] court selects a cy pres recipient*[,] [which] gives class members a voice in choosing a '*next best*' third party . . . and minimizes any appearance of judicial overreaching.

Id. at 1066 (emphases added; citations and quotation marks omitted).

The *In re BankAmerica* court struck the *cy pres* selection at issue in that case, explaining:

> [I]t is clear that [the chosen recipient], 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. In approving [the recipient], the district court found that "there is no

> immediately apparent organization that will indirectly benefit [the] class members," and that [the recipient] sufficiently approximated the interests of the class because it serves victims of fraud. But it is not sufficient to find that no "next-best" recipient is "immediately apparent." Rather, a district court must *carefully weigh all considerations*, including the geographic scope of the underlying litigation, and make a *"thorough investigation"* to determine *whether a recipient can be found that most closely approximates the interests of the class*. ALI, Principles of the Law of Aggregate Litig.[,] § 3.07, cmt b. The court must look for a recipient that relates *directly* to the injury alleged in this lawsuit and settled by the parties.

Id. at 1067 (emphases added; citations and quotations omitted; stylistic modifications).

The *Cy Pres* Provision did not: (i) require a publicly available *cy pres* proposal; (ii) require that the District Court select a "'next best' recipient," *id.*, much less, in doing so, "carefully weigh all considerations," *id.*, and conduct "a 'thorough investigation,'" *id.*; and (iii); give the class members the right to object to the District Court's selection of the *cy pres* recipient.

Unlike in the Subject Opinion, the Third Circuit, in *In re Baby Prods. Antitrust Litig.*, 708 F.3d 163 (3d

Cir. 2013), approved of a *cy pres* provision because, first, it directed the class members to choose the recipient *from a list that the parties had provided*, and, second, the list's potential recipients had *interests that aligned with the interests of the class members*:

> Class members know there is a possibility of a *cy pres* award and that the [district] [c]ourt will select *among recipients proposed by the parties* at a later date. This knowledge is adequate to allow any interested class member to keep apprised of the *cy pres* recipient selection process. We are confident [that] the [district] [c]ourt will ensure [that] the parties *make their proposals publicly available* and will *allow class members the opportunity to object before it makes a selection*.
>
> Courts generally require the parties to identify "a recipient whose interests *reasonably approximate those being pursued by the class*." ALI, Principles of the Law of Aggregate Litig. § 3.07 [(2010)]. In this case, the [district] [c]ourt indicated that it would select a *cy pres* recipient (from *among the organizations proposed by the parties*) that *satisfies this standard*.

Id. at 180 & n.16 (emphases added). Here, neither the Memorandum Opinion and Order nor the Subject Opinion even *suggested* that the *cy pres* recipient

would be required to have "interests [that] reasonably approximate those being pursued by the class." *Id.* at 180, n.16.

In sum, the Seventh Circuit's acceptance of the fatally flawed *Cy Pres* Provision conflicts with the case law of the Third, Fifth, Eighth, and Ninth Circuit Courts of Appeals, and should not be left intact.

CONCLUSION

This Petition should be granted.

Respectfully submitted,

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NOVEMBER, 2018

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Nos. 17-1626, 17-1778, 17-1953,
17-1969, 17-1984 & 17-2857

GRANT BIRCHMEIER, *et al.*,

Plaintiffs-Appellees,

v.

CARIBBEAN CRUISE LINE, INC., *et al.*,

Defendants-Appellants.

APPEALS OF: CARIBBEAN CRUISE LINE, INC.; VACATION OWNERSHIP MARKETING TOURS, INC.; THE BERKLEY GROUP, INC.; FREEDOM HOME CARE, INC.; KEVIN MCCABE

Appeals from the United States District Court for the Northern District of Illinois, Eastern Division.

No. 12 C 4069 — Matthew F. Kennelly, *Judge*.

ARGUED FEBRUARY 14, 2018 — DECIDED JULY 24, 2018

Before EASTERBROOK and ROVNER, *Circuit Judges*,

and GRIESBACH, *District Judge*.*

EASTERBROOK, *Circuit Judge.* During 2011 and 2012 a million people received phone calls asking them to take political surveys in exchange for a chance to go on a free cruise. Some recipients filed a class action under the Telephone Consumer Protection Act, 47 U.S.C. § 227, seeking damages for these unsolicited communications. Caribbean Cruise Line, Vacation Ownership Marketing Tours, and the Berkley Group were named as defendants on the theory that, though they had not placed the calls, they had directed them and thus are vicariously liable. (The plaintiffs also sued the caller, which has not participated in these appeals.) The district court certified a class under Fed. R. Civ. P. 23(b)(3). Later it granted partial summary judgment in the plaintiffs' favor and scheduled a trial. 179 F.Supp.3d 817 (N.D. Ill. 2016).

On the eve of trial the parties settled. Plaintiffs agreed to release their claims against all defendants and any of the defendants' "agents [or] independent contractors". In exchange defendants agreed to pay into a fund no less than $56 million and no more than $76 million. The total will depend on the number of approved claims that class members submit. Out of the fund will come payments to the class, incentive awards to the named representatives, about $2 million in administrative expenses, and attorneys' fees. The class will receive payments in two rounds. If some claimants do not cash the checks sent during the second round,

* Of the Eastern District of Wisconsin, sitting by designation.

money will be left over, and those remaining funds will go to "an appropriate *cy pres* recipient" to be approved by the district court. (The district court has not yet determined whether that occurs, so we need not wait for *In re Google Referrer Header Privacy Litigation*, 869 F.3d 737 (9th Cir. 2017), cert. granted under the name *Frank v. Gaos*, —— U.S. ——, 138 S.Ct. 1697, 200 L.Ed.2d 948 (2018).)

Over the objections of Kevin McCabe, who says he is in the class, the district court approved the settlement, estimating that each claimant will receive $400. 2017 U.S. Dist. LEXIS 29400 (N.D. Ill. Mar. 2, 2017). After approving the settlement, the court entered judgment under Fed. R. Civ. P. 58. It also awarded attorneys' fees to class counsel under Fed. R. Civ. P. 23(h). The award gives counsel 36% of the first $10 million paid into the fund, 30% of the next $10 million, 24% of the next $36 million, and 18% of any additional recovery. 2017 U.S. Dist. LEXIS 54080 (N.D. Ill. Apr. 10, 2017).

We have three sets of appeals: (1) defendants and a member of the class, Freedom Home Care, contend that the award of fees overcompensates class counsel; (2) Freedom Home Care wants an incentive award and attorneys' fees for its role in objecting to class counsel's fees; and (3) McCabe complains that the settlement's approval was improper. Before we discuss the merits of these appeals, we must ensure that we have jurisdiction.

The appeals are within our jurisdiction only if they

challenge "final decisions" of the district court. 28 U.S.C. § 1291. A decision on the merits is final only if it "resolves *all* claims of all parties". *Domanus v. Locke Lord LLP*, 847 F.3d 469, 477 (7th Cir. 2017) (emphasis in original). The caller (or rather, three entities that allegedly acted as the caller—Economic Strategy LLC, Economy Strategy Group, Inc., and a political committee named Economic Strategy Group) did not participate in the settlement. But the settlement releases plaintiffs' claims against the settling defendants' "agents [or] independent contractors". The parties to these appeals tell us that the caller was an "agent" or "independent contractor" of the other defendants for the purpose of this release. Consistent with that understanding, the district court's judgment states: "The Court hereby dismisses the Action"—the whole action, not just some of it—"on the merits and with prejudice". This judgment disposes of the claims against all parties, not just the claims against the settling parties, so it is a final decision on the merits. Freedom Home Care's challenge to the denial of an incentive award and fees therefore falls within the scope of § 1291, as does McCabe's appeal. Cf. *Devlin v. Scardelletti*, 536 U.S. 1, 122 S.Ct. 2005, 153 L.Ed.2d 27 (2002).

Whether the same can be said about defendants' and Freedom Home Care's appeal of the decision awarding fees to class counsel requires more discussion. A decision about fees, if final, is appealable separately from the merits. See *Budinich v. Becton Dickinson & Co.*, 486 U.S. 196, 108 S.Ct. 1717, 100 L.Ed.2d 178 (1988). The district court wrote:

> Because the process for approving claims is still ongoing, the Court awards at this time only those attorney's fees corresponding to the minimum amount defendants will be required to pay into the common fund. As discussed above, that fee amount is $14.76 million [that is, the sum of 36% of the first $10 million, 30% of the next $10 million, and 24% of the next $34 million]. Class counsel may petition the Court for the remainder of the fee award upon conclusion of the claims-approval process.

2017 U.S. Dist. LEXIS 54080 at *32. This decision does not quantify the total fees that counsel will collect. It instead awards a portion of the fees ($14.76 million) and tells counsel to come back for more if the size of the pot grows.

Interim awards of attorneys' fees can hardly be called final, cf. *Sole v. Wyner*, 551 U.S. 74, 127 S.Ct. 2188, 167 L.Ed.2d 1069 (2007), and such awards typically are not appealable under § 1291. See, e.g., *Dupuy v. Samuels*, 423 F.3d 714, 717 (7th Cir. 2005); *People Who Care v. Board of Education*, 272 F.3d 936, 937 (7th Cir. 2001). But an award may be final if the district court lays out a formula for calculating the award's amount. See, e.g., *Hyland v. Liberty Mutual Fire Insurance Co.*, 885 F.3d 482, 484 (7th Cir. 2018); *Production & Maintenance Employees' Local 504 v. Roadmaster Corp.*, 954 F.2d 1397, 1401–02 (7th Cir. 1992); *Parks v. Pavkovic*, 753 F.2d 1397, 1401 (7th Cir.

1985). See also Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, 15B *Federal Practice & Procedure* §3915.2 at 279 (2d ed. 1992) ("[M]erely 'ministerial' proceedings to calculate a specific award do not defeat finality."). Such an award leaves some math but nothing for the district court to decide.

This award does exactly that. Though the district court told counsel to "petition the Court for the remainder of the fee award," it also prescribed a formula for that remainder: 18% of the amount recovered over $56 million. The court had considered other means, such as using a multiplier of 0.15 instead of 0.18. But it landed on 18%, explained its choice, and stated that "the Court awards class counsel ... 18% of the remainder." 2017 U.S. Dist. LEXIS 54080 at *28–31. The total award is not yet known only because the number of approved claims is not yet known. Once the parties know that number, computing the remaining fees will be a mechanical exercise. Some tasks unrelated to the calculation of fees remain for the district court, such as (perhaps) choosing a recipient for funds unclaimed after the second round of payments. But as a practical matter the district court is finished with the litigation about class counsel's fees, so the award is final for the purpose of § 1291.

More: The fact that the award postdates the judgment creates a problem distinct from cases about prejudgment awards. A litigant who wishes to challenge a prejudgment award can do so by timely appealing the judgment. See *Dupuy*, 423 F.3d at 717; *Badger Pharmacal, Inc. v. Colgate-Palmolive Co.*, 1

F.3d 621, 626 (7th Cir. 1993). But when, if not now, could the defendants in this case challenge the postjudgment award? Suppose that months from now the parties determine that only $56 million goes into the fund. Then there will not be any remaining fees for class counsel to seek (18% of nothing is nothing) or any subsequent award from which defendants could appeal. That possibility and its variations, if combined with a conclusion that the original award is not final, would put defendants in a bind. They could not timely appeal the original award, because a second might follow after the expiration of the 30-day deadline to appeal the first. See 28 U.S.C. § 2107(a). But a second might not follow, and defendants cannot appeal an award that is never made. Such dilemmas should be avoided. See *Gelboim v. Bank of America Corp.*, —— U.S. ——, 135 S.Ct. 897, 904–06, 190 L.Ed.2d 789 (2015). We do not mean to suggest that the collateral-order doctrine applies; that possibility goes nowhere after *Mohawk Industries, Inc. v. Carpenter*, 558 U.S. 100, 130 S.Ct. 599, 175 L.Ed.2d 458 (2009). Instead we mean that our conclusion about the award's finality steers clear of a problem that the opposite conclusion would produce.

So we have jurisdiction over the appeals, and we address each in turn. Defendants take issue with the structure of the fee award. They insist that the award should give class counsel only 25% (rather than 30%) of the second tier of recovery, 20% (rather than 24%) of the third, and 15% (rather than 18%) of the remainder. To this Freedom Home Care adds that the third tier should be capped at some figure lower than $56

million. These changes to the award, they say, would align it with awards of attorneys' fees that have been approved in other suits brought under the Act. See also *In re Synthroid Marketing Litigation*, 325 F.3d 974 (7th Cir. 2003).

Defendants are correct that the fee award is bigger than some awards in other suits. But that does not mean the award is too big. When awarding fees to class counsel, district courts must approximate the fees that the lawyers and their clients would have agreed to at the outset of the litigation given the suit's risks, competitive rates in the market, and related considerations. See *In re Synthroid Marketing Litigation*, 264 F.3d 712 (7th Cir. 2001); *Silverman v. Motorola Solutions, Inc.*, 739 F.3d 956 (7th Cir. 2013). The district court engaged in that *ex ante* analysis, explaining at length why this suit had been a riskier undertaking than many others brought under the Act and why counsel thus would have negotiated a relatively high rate of compensation. A primary source of risk was plaintiffs' reliance on a theory of vicarious liability, which created legal and factual complications that do not arise when plaintiffs pursue only direct liability. See 2017 U.S. Dist. LEXIS 54080 at *18–32.

We need not reproduce the district court's thorough discussion of this subject. We review decisions about attorneys' fees for abuse of discretion, see, e.g., *Silverman*, 739 F.3d at 958, and appellants have not identified any abuse. We add only that it is unproductive to make arguments about the percentages assigned to some tiers of recovery, as

defendants have done. Consider: 30% of the first $20 million and 20% of the next $20 million come to the same as 25% of $40 million. Bands and percentages can be juggled, but, unless the bottom line changes, what's the point? (The risk profiles of these two structures may differ, but that does not matter when they are devised after the award of damages has been calculated.) Defendants' position boils down to a contention that the fees exceed the market rate, and the district court did not abuse its discretion in finding otherwise. What got multiplied with what else to produce a market-approximating outcome does not matter.

Freedom Home Care contends that it is entitled to an incentive award and attorneys' fees for its objection to class counsel's fees. Plaintiffs' motion for fees had proposed that class counsel take a third of the fund. Freedom Home Care counter-proposed that the fund be divided into four tiers and that counsel take decreasing proportions of each. The award adopts that structure, which the parties call a "sliding-scale approach," and Freedom Home Care wants to be compensated for proposing it. Yet its proposal did not add marginal value to the litigation. Plaintiffs' motion itself discussed the sliding-scale approach, a common one in large class actions. The district court was certain to consider the possibility, no matter what Freedom Home Care said, so the court did not abuse its discretion in concluding that Freedom Home Care did not supply value to the class. See 2017 U.S. Dist. LEXIS 135755 (N.D. Ill. Aug. 24, 2017).

Last comes McCabe's appeal. He contends that the settlement improperly releases claims outside the class period (August 2011 to August 2012) and that the notice sent to the class members was deficient. For two reasons the district court held that McCabe lacks standing to raise these objections. First, McCabe's objections state that he is "a class member who received calls on his cellphone number ... and landline phone ... outside of the class period". The court found this statement self-contradictory; it treated McCabe's assertion that he received calls "outside of the class period" as an assertion that he did not receive calls within the class period, and it reasoned that McCabe thus could not be in the class. Second, in 2015 McCabe won a judgment against Caribbean Cruise Line in an action he had brought in the Eastern District of New York. The court decided that any claim arising from calls McCabe received during the class period should have been brought in his separate suit, and that the doctrine of claim preclusion now bars any such claim.

The district court's conclusions about standing were flawed. Claim preclusion, an affirmative defense under Fed. R. Civ. P. 8(c), has nothing to do with standing. See *Exxon Mobil Corp. v. Saudi Basic Industries Corp.*, 544 U.S. 280, 293, 125 S.Ct. 1517, 161 L.Ed.2d 454 (2005). And there wasn't a basis to ignore McCabe's assertion that he is a member of the class. The statement on which the district court relied does not say otherwise; it tells us that McCabe is a member who *also* received calls outside the class period. The other parties ask us to disbelieve McCabe because he has not produced logs to show when he

received calls. But McCabe supported his statement by signing it under penalty of perjury. See 18 U.S.C. § 1621; 28 U.S.C. § 1746. Though he could have proved his membership with different evidence, it does not follow that we should disregard the evidence he offered.

Despite concluding that McCabe lacks standing, the district court rejected his objections on the merits. So do we. McCabe first argues that the settlement releases claims arising from calls outside the class period. The settlement defines "released claims" as:

> [A]ny and all actual, potential, filed, known or unknown, fixed or contingent, claimed or unclaimed, suspected or unsuspected, claims ... arising out of the facts, transactions, events, matters, occurrences, acts, disclosures, statements, representations, omissions or failures to act regarding the alleged calls made with a prerecorded or artificial voice offering a free cruise in exchange for taking an automated public opinion and/or political survey[.]

According to McCabe, the "alleged calls" mentioned in this definition include calls made before 2011 or after 2012. Because the class members were never notified that the settlement covers such calls, the argument goes, the court should not have approved it. The argument rests on an incorrect premise. The "alleged calls" include: well, only the calls that were

alleged. And the operative complaint, filed in March 2015, alleges calls only from August 2011 to August 2012. The appellate briefs tell us that plaintiffs and defendants (and the district court) agreed that "alleged calls" means "calls within the class period", and the doctrine of judicial estoppel will prevent those parties from taking an opposite position in future proceedings. See *New Hampshire v. Maine*, 532 U.S. 742, 749–51, 121 S.Ct. 1808, 149 L.Ed.2d 968 (2001).

We can quickly dispose of McCabe's remaining argument: He insists that the notice sent to the class insufficiently described the process for selecting a *cy pres* recipient. Not so. The notice told class members that a *cy pres* recipient might be selected after the second round of payments, gave instructions for recommending recipients, and provided a website where members can learn more about the settlement. That is enough to meet the notice requirements of Fed. R. Civ. P. 23.

AFFIRMED

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS,
EASTERN DIVISION

Case No. 12 C 4069

GERARDO ARANDA, GRANT BIRCHMEIER, STEPHEN PARKES, and REGINA STONE, on behalf of themselves and a class of others similarly situated,

Plaintiffs,

v.

CARIBBEAN CRUISE LINE, INC., ECONOMIC STRATEGY GROUP, ECONOMIC STRATEGY GROUP, INC., ECONOMIC STRATEGY, LLC, THE BERKLEY GROUP, INC., and VACATION OWNERSHIP MARKETING TOURS, INC.,

Defendants.

MEMORANDUM OPINION AND ORDER

Plaintiffs filed suit on behalf of themselves and similarly situated individuals against Caribbean Cruise Line, Inc. (CCL), Vacation Ownership Marketing Tours, Inc. (VOMT), The Berkley Group, Inc., and Economic Strategy Group and its affiliated entities (collectively ESG). Plaintiffs alleged that defendants violated the Telephone Consumer

Protection Act, 47 U.S.C. § 227, by using an autodialer and an artificial or prerecorded voice to call plaintiffs' cellular and landline telephones. After roughly four years of contested litigation, the parties reached agreement on a class-wide settlement of plaintiffs' claims, and plaintiffs have moved for final approval of the proposed settlement. Two purported class members have raised objections to the terms of the agreement. Plaintiffs' counsel have also petitioned for an award of attorney's fees. Defendants and one of the class members have objected to the size of the requested fee. For the reasons stated below, the Court grants final approval of the settlement. The Court will issue a separate decision at a later time concerning the petition for attorney's fees.

Background

The Court assumes familiarity with the basic facts of the case, which the Court has already discussed in other written decisions. *See*, *e.g.*, *Aranda v. Caribbean Cruise Line, Inc.*, 179 F. Supp. 3d 817, 820–22 (N.D. Ill. 2016). In short, plaintiffs allege that ESG placed millions of calls to consumers without their consent. The calls featured prerecorded messages explaining to recipients that they would be eligible for a free cruise if they participated in various short political surveys. According to plaintiffs, ESG's true purpose in placing these calls was to sell vacation products at the direction and on the behalf of CCL, VOMT, and Berkley.

The parties engaged in contested litigation for

roughly four years before reaching a settlement agreement. Over that time, the Court denied defendants' motion to dismiss, granted plaintiffs' motion for class certification over defendants' objection, denied defendants' motions for summary judgment, granted in part plaintiffs' motion for summary judgment, and denied defendants' additional motion for summary judgment and class decertification. Before proceeding to trial, the parties engaged in mediation, conducted by Wayne Andersen, a highly respected retired judge of this court. The parties reached agreement on a memorandum of understanding only four days before trial, and that memorandum formed the basis of the agreement that is now before the Court for approval.

The agreement's definition of the settlement class is the same as the definition of the class in the Court's class certification order. That order certified two classes—one for individuals who received cellular phone calls and one for those who received landline calls—and defined each class as those persons in the United States who received the calls at issue in this case between August 2011 and August 2012 and (a) whose telephone number appeared in defendants' records or the records of third party telephone carriers or (b) whose own records prove that they received the calls. *See Birchmeier v. Caribbean Cruise Line, Inc.*, 302 F.R.D. 240, 256 (N.D. Ill. 2014). The following individuals are excluded from the settlement class under the agreement: the judge in this case, defendants, those who opt out of the class pursuant to Federal Rule of Civil Procedure 23(e)(4), and counsel

and their families.

The agreement provides that defendants will establish a common fund in an amount no lower than $56 million and no higher than $76 million, from which all class members will be paid. The total fund amount will be equal to the sum of the award to class members, settlement administration and notice expenses, any incentive award to class representatives, and any attorney's fee award. Class members may submit claim forms for approval by a settlement administrator, who was selected by plaintiffs and approved by the Court. Each class member who submits an approved claim will be entitled to $500 per call received unless the total of such payments (plus payment of administration expenses, incentive awards to class representatives, and attorney's fees) would exceed the $76 million cap on the fund total. If the cap is met, settlement class members with approved claims will be entitled to a *pro rata* share of the fund based on the number of calls they received. Plaintiffs' counsel have requested a fee award of 33% of the fund (minus notice expenses), up to a maximum of $24.5 million, and plaintiffs request incentive awards of $10,000 for each of the four class representatives. No party or class member has objected to the requested incentive award for the class representatives.

Under the agreement, all cash payments to settlement class members are to be issued via checks that expire and become null and void unless cashed within ninety days. After the first round of cash payments and payment of administration expenses,

attorney's fees, and incentive awards, any uncashed checks or unclaimed funds will be issued to settlement class members with approved claims on a *pro rata* basis. The agreement provides that any uncashed checks and unclaimed funds remaining after this second round of payments will be distributed to a *cy pres* recipient selected by Judge Andersen.

In addition to making payments into the settlement fund, defendants have agreed to conduct annual internal audits of their procedures to ensure that they do not make autodialed calls without consumer consent in the future. In exchange for defendants' agreement to make the required payments and conduct internal audits of their procedures, plaintiffs have agreed that settlement class members will be deemed to have released defendants from all claims against them.

Discussion

As mentioned above, only two purported members of the class have raised objections to any aspect of the settlement agreement other than the size of the potential attorney's fee award. Before addressing those specific objections, the Court first considers generally whether the agreement meets the requirements of Federal Rule of Civil Procedure 23. The Court must determine, for example, whether the notice provided to the settlement class under the agreement is "the best notice that is practicable under the circumstances." Fed. R. Civ. P. 23(c)(2)(B). With respect to the substance of the proposed settlement, the Court must

determine whether it is "fair, reasonable, and adequate." Fed. R. Civ. P. 23(e)(2). In addition, the Court must consider whether there is anything suggesting that the settlement was the product of collusion. *See Mirfasihi v. Fleet Mortg. Corp.*, 450 F.3d 745, 748 (7th Cir. 2006).

A. Notice to the class

The notice directed to the settlement class must be "the best notice that is practicable under the circumstances, including individual notice to all members through reasonable effort." Fed. R. Civ. P. 23(c)(2)(B). Where individual members cannot be identified through reasonable effort, "notice by publication, imperfect though it is, may be substituted." *Hughes v. Kore of Indiana Enter., Inc.*, 731 F.3d 672, 677 (7th Cir. 2013). Kurtzman Carson Consultants, LLC, the Court-approved settlement administrator in this case, has implemented the notice plan by providing both direct and publication notice. The Court is satisfied that the notice provided is sufficient under Rule 23(c)(2)(B).

The settlement administrator delivered notice directly, either through electronic or regular mail, to 78.6% of the 1,040,389 names and addresses associated with telephone numbers obtained from defendants' records. Notice was also published in ten prominent newspapers throughout the United States, as well as in a national edition of People magazine. Notice was also placed in online banner advertisements that received over 150 million impressions and was sent to

the Attorney General of the United States as well as the Attorneys General of all 50 states, the District of Columbia, Puerto Rico, Guam, the Northern Mariana Islands, the U.S. Virgin Islands, and American Samoa. In addition, a settlement website (www.freecruisecallclassaction.net) provides notice and relevant court documents to website visitors, and the settlement administrator maintains a toll-free telephone number to assist class members. In total, nearly 500,000 people have visited the settlement website, and over 9,000 calls have been made to the toll-free number. There have been no objections to the adequacy of the notice to the class, and the Court is confident that under the circumstances of this case, the notice directed to the class has been the best notice practicable.

B. Rule 23(e)(2) factors

A district court may only approve a proposed settlement upon a finding that the proposal is "fair, reasonable, and adequate." Fed. R. Civ. P. 23(e)(2). In making that finding, a court considers the following factors: (1) the strength of plaintiffs' case compared to the amount of defendants' settlement offer; (2) the likely complexity, length, and expense of the litigation; (3) the amount of opposition to settlement among affected parties; (4) the opinion of competent counsel; and (5) the stage of the proceedings and the amount of discovery completed at the time of settlement. *Synfuel Techs., Inc. v. DHL Express (USA), Inc.*, 463 F.3d 646, 653 (7th Cir. 2006).

1. Strength of plaintiffs' case as compared to settlement offer

"The most important factor relevant to the fairness of a class action settlement is the first one listed: the strength of plaintiff[s'] case on the merits balanced against the amount offered in the settlement." Id. (internal quotation marks omitted). As this Court has noted previously, valuing hypothetical continued litigation is necessarily somewhat speculative and not an exact science. *Kolinek v. Walgreen Co.*, 311 F.R.D. 483, 493 (N.D. Ill. 2015) (Kennelly, J.). But the size of the monetary award defendants have agreed to pay under the proposed settlement suggests that this first factor favors approval of the settlement. As plaintiffs point out, TCPA cases of this size generally do not result in awards greater than $40 per plaintiff. *See*, *e.g.*, *In re Capital One Tel. Consumer Prot. Act Litig.*, 80 F. Supp. 3d 781, 787 (N.D. Ill. 2015) (providing $34.60 each to individual claimants); *Kolinek*, 311 F.R.D. at 494 (providing roughly $30 per claimant). Plaintiffs maintain that individual claimants in this case are likely to receive at least $135 per call received, meaning each approved claimant likely will receive at least $400 in total. Thus the monetary award in this case is clearly significant in comparison to the relief awarded in similar TCPA cases.

The amount offered in the settlement also appears to be substantial in light of the risks plaintiffs faced had they continued to trial. As plaintiffs note, a key issue at trial would be the factually and legally complicated question of whether Berkley, CLL, and

VOMT could be held vicariously liable for the calls ESG made, and a jury's adverse finding on that issue would leave the class without any recovery at all. In addition, even if plaintiffs prevailed at trial, there was a serious possibility that a large jury verdict would render the defendants insolvent and unable to pay the damages awarded. *See* Dkt. 463 ("A judgment in the amount Plaintiffs seek could not be paid by Berkley. In fact, such a judgment would require Berkley to terminate thousands of employees and declare bankruptcy."). In light of the real risks associated with continued litigation, the amount defendants have agreed to pay appears to be fair and commensurate with the strength of plaintiffs' case.

2. Complexity, length, and expense of litigation

The risks just discussed, as well as the history of this hard-fought litigation, suggests that continued litigation likely would add complexity, length, and considerable expense to this already complex, long, and expensive case. "If the Court approves the proposed settlement agreement, this case will end, and class members will be entitled to the retrospective and prospective relief [defendants] ha[ve] promised." *Kolinek*, 311 F.R.D. at 495. If, on the other hand, the Court were to deny approval, the parties would proceed to try a week-long class action jury trial. A verdict for plaintiffs likely would lead to a potentially fruitless attempt to recover damages from defendants who would be rendered insolvent or would file for bankruptcy. A verdict for defendants likely would

result in an appeal of not only the verdict, but also certification of the class. (As plaintiffs note, defendants sought appellate review on that issue, but they were denied permission to appeal on an interlocutory basis.) *In Re Caribbean Cruise Line, Inc.*, No. 14-8021 (7th Cir. Oct. 10, 2014). Given the complexity and expense inherent in a class action jury trial, the possibility that plaintiffs might face problems recovering a potential judgment, and the likelihood of a potentially lengthy appellate review process, the Court is confident that the second *Synfuel* factor weighs in favor of approving the settlement and avoiding the increased complexity, length, and expense of continued litigation.

3. Amount of opposition

The extremely low level of opposition to the settlement proposal also favors its approval. Of the more than 1 million class members, only three purported members have objected to the proposed agreement, and one of those objects only to the proposed attorney's fee award, not the settlement itself. And rather than opting out or objecting, tens of thousands of class members—including Fortune 500 companies, Oakland County, Michigan, and other sophisticated actors—have filed claims. Though the Court addresses the objectors' specific concerns below, the fact that so few class members have expresses opposition to the settlement supports the reasonableness of the proposal. *See In re Sw. Airlines Voucher Litig.*, No. 11 C 8176, 2013 WL 4510197, at *7 (N.D. Ill. Aug. 26, 2013) (less than 0.01% objecting or opting out supports reasonableness of settlement).

4. Opinion of competent counsel

It is undisputed that class counsel are experienced and respected members of the plaintiff's class action bar. Attorneys at Edelson PC have extensive experience litigating consumer class actions, including numerous TCPA cases, and attorneys at Loevy & Loevy have extensive experience trying class actions before juries. That complementary experience of co-counsel gives them insight into the value of plaintiffs' claims and the potential risks and rewards of continued litigation through trial and appeal. Thus the opinion of the competent counsel, who negotiated this settlement with defendants at arms-length, and with the assistance of an experienced and respected mediator, favors approval of the proposed settlement. *Isby v. Bayh*, 75 F.3d 1191, 1200 (7th Cir. 1996) ("[T]he district court was entitled to give consideration to the opinion of competent counsel that the settlement was fair, reasonable and adequate.").

5. Stage of proceedings and amount of discovery completed

As discussed above, the parties engaged in hard-fought litigation for over four years and were days away from trial when they reached agreement on settlement terms. They engaged in and reviewed the results of substantial discovery, they briefed three sets of dispositive motions, and the Court ruled on those motions. The Court is therefore "satisfied that the discovery and investigation by class counsel prior to entering into settlement negotiations was extensive

and thorough." *Id.* (internal quotation marks omitted). Thus the final *Synfuel* factor also favors approval of the settlement.

C. Absence of collusion

The Court has not detected any "hints" that the parties' agreement was the result of collusion, and none of the objectors has made such a suggestion. *Mirfasihi*, 450 F.3d at 748. Indeed, the circumstances surrounding the parties' mediation and ultimate agreement minimize the likelihood of any collusion. As plaintiffs note, the parties reached settlement only after several rounds of mediation with a neutral mediator, and they did so only after years of combative litigation. In addition, the agreement lacks any of the problematic features the Seventh Circuit has identified as red flags for collusion. *See*, *e.g.*, *Redman v. RadioShack Corp.*, 768 F.3d 622, 637 (7th Cir. 2014) (questioning "clear-sailing clause" in which defendant agreed not to contest class counsel's request for attorneys' fees); *Eubank v. Pella Corp.*, 753 F.3d 718, 721 (7th Cir. 2014) (criticizing binding of single class despite adversity of subclasses, provision allowing reduction in attorney's fee award to revert back to defendant, and failure to quantify benefits to class members, among other problematic features). Nothing in the history of this litigation or in the terms of the settlement suggests that the agreement was the product of collusion.

D. Objections

Only two purported class members have raised objections to the terms of the proposed settlement. Thomas Taylor has filed a pro se objection, arguing that it is unreasonable to require him to produce documentation of the calls he received in order to be a part of the settlement class. As plaintiffs note, the settlement agreement uses the same definition of the class as the class certification order, which imposes the requirement on class members to produce documentation of calls if their numbers do not appear in defendants' records. *See Birchmeier*, 302 F.R.D. at 256. It is appropriate to require substantiation of claims in large class actions, *see* Settlement Administration, Ann. Manual Complex Lit § 21.66 (4th ed.), and Taylor has not provided any reason for the Court to revisit its class certification order at this stage. And as plaintiffs point out, class counsel helped class members to serve hundreds of subpoenas with wireless and landline providers to obtain records. This assistance would have been available to Taylor and other class members like him had he asked for it. Because Taylor offers no reason for the Court to reconsider its class certification order and has offered no other basis for his objection to the settlement proposal, the Court overrules his objection.[1]

Plaintiffs contend that Kevin McCabe, the second

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[1] The Court notes that if, as is likely, Taylor has no such documentation, that would mean he is not a class member, which would bring into question his standing to object to the settlement.

objector to the settlement proposal, lacks standing to raise an objection. And indeed, McCabe's brief in support of his objection suggests that he is not a member of the class: he states that the calls he received from defendants were made and received outside of the class period (from August 2011 to August 2012). In addition, any claim McCabe might assert in this case would be barred by the doctrine of claim preclusion because he already sued defendants in the Eastern District of New York for the same alleged TCPA violation in a case that reached final judgment. McCabe does not deny that his claims in that case against VOMT and Berkley were dismissed or that the district court entered judgment in his favor against CCL in the amount of $2,500. He contends, however, that the doctrine of claim preclusion does not bar his claims in this case because his claim in the New York case concerned only one of the allegedly improper phone calls he received from defendants. The doctrine of claim preclusion, however, requires a plaintiff to bring all of his claims arising out of the same transaction and bars additional suits against the same defendants if "the same facts were essential to maintain both actions." *Evans ex rel. Evans v. Lederle Labs.*, 167 F.3d 1106, 1113 (7th Cir. 1999). Apart from the dates of the alleged phone calls, the facts underlying McCabe's claim in the previous case and he claims in this case—including all essential facts—are identical. McCabe may not bring multiple, nearly identical actions against defendants merely because he received multiple individual calls. "Claim splitting is not a way around res judicata." *Chicago Title Land Trust Co. v. Potash Corp. of Saskatchewan Sales*, 664

F.3d 1075, 1081 (7th Cir. 2011). Thus because McCabe is not a member of the class or has no live claims against defendants that could be released by the settlement agreement, he lacks standing to object.

Nevertheless, to ensure the interests of the class are protected, the Court will consider McCabe's objections despite his lack of standing. McCabe argues that the portion of the settlement agreement concerning class members' release of claims against defendants is too broad because it does not expressly contain a date restriction. The Court disagrees with McCabe's reading of the settlement agreement. The definition of "released claims" under the agreement is confined to those claims arising out of the "alleged calls," meaning the calls that are the subject of plaintiffs' complaint in this case, and the allegations in plaintiffs' complaint are limited to calls placed between August 2011 and August 2012 (the class period). McCabe is therefore mistaken that individuals who received calls outside the class period are at risk of having their claims released by virtue of the settlement agreement.

McCabe also objects to the agreement's proposed *cy pres* award. He argues that plaintiffs have not demonstrated that it would be infeasible to award the designated *cy pres* funds to the class. Because the agreement does not specify the amount of the potential *cy pres* award or the specific awardee, he contends that the agreement and the notice to the class may be providing inadequate information about an award that may turn out to be the "bulk of the total payout." Dkt.

545 at 10. The contention that a *cy pres* award is likely to involve a significant sum borders on the frivolous. This is a case in which, to receive payment, class members had to submit claim forms providing contact information. In short, they have already provided a concrete expression of their interest in receiving payment. And as previously discussed, the amount each class member will receive is significant—likely several hundred dollars at the low end. Under the settlement agreement, if any class members with approved claims fail to cash their initial checks, the funds left over will be redistributed to those with approved claims in a second round of payments. It is only after this second round of payments that unclaimed funds would go toward a *cy pres* award. For a *cy pres* award to be substantial, therefore, numerous individuals who already went to the trouble of filling out claim forms would have to fail to cash the checks they receive not once, but twice. It is overwhelmingly likely that any unclaimed funds designated for *cy pres* disposition will be so small that the cost of distributing those funds through the mail would far exceed the amount of the funds. Nevertheless, although it is unlikely that the *cy pres* payout would be substantial, the Court will guard against this extremely remote possibility by modifying the agreement to make the size of the *cy pres* award and the identity of the recipient subject to this Court's approval.

Conclusion

For the reasons stated above, the Court grants plaintiffs' motion [dkt. no. 571] for final approval of the

proposed settlement agreement, subject to the following modification to section 2.2(f) of the agreement: a sentence shall be added to the end of section 2.2(f) stating "No funds shall be distributed to a *cy pres* recipient without prior approval of the Court."

IT IS SO ORDERED.

[signature]
MATTHEW F. KENNELLY
United States District Judge

Dated: March 2, 2017

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE
NORTHERN DISTRICT OF ILLINOIS,
EASTERN DIVISION

Case No. 1:12-cv-04069
Honorable Matthew F. Kennelly

GERARDO ARANDA, GRANT BIRCHMEIER, STEPHEN PARKES, and REGINA STONE, on behalf of themselves and a class of others similarly situated,

Plaintiffs,

v.

CARIBBEAN CRUISE LINE, INC., ECONOMIC STRATEGY GROUP, ECONOMIC STRATEGY GROUP, INC., ECONOMIC STRATEGY, LLC, THE BERKLEY GROUP, INC., and VACATION OWNERSHIP MARKETING TOURS, INC.,

Defendants.

AMENDED PRELIMINARY APPROVAL ORDER

This matter having come before the Court on Plaintiffs' Motion for Preliminary Approval of Class Action Settlement ("Settlement") of the above-captioned matter (the "Action") between Plaintiffs

Gerardo Aranda, Grant Birchmeier, Stephen Parkes, Regina Stone ("Plaintiffs") as representatives of the two classes it certified (Dkt. 241), and Defendants Caribbean Cruise Line, Inc., Vacation Ownership Marketing Tours, Inc. and The Berkley Group, Inc., as set forth in the Class Action Settlement Agreement between Plaintiffs and Defendants (the "Settlement Agreement"), and the Court having duly considered the papers and arguments of counsel, the Court hereby finds and orders as follows:

1. Unless defined herein, all defined terms in this Order shall have the respective meanings ascribed to the same terms in the Settlement Agreement.

2. The Court has conducted a preliminary evaluation of the Settlement set forth in the Settlement Agreement for fairness, adequacy, and reasonableness. Based on this preliminary evaluation, the Court finds that: (i) there is good cause to believe that the settlement is fair, reasonable, and adequate, (ii) the Settlement has been negotiated at arm's length between experienced attorneys familiar with the legal and factual issues of this case and was reached with the assistance of the Honorable Wayne R. Andersen (ret.) of JAMS, and (iii) the Settlement warrants Notice of its material terms to the Settlement Class for their consideration and reaction. Therefore, the Court grants preliminary approval of the Settlement.

3. On August 11, 2014, this Court certified two classes pursuant to Federal Rule of Civil Procedure 23(b)(3), one for individuals that received cellular

phone calls and another for those who received landline calls, each defined as:

> All persons in the United States to whom (1) one or more telephone calls were made by, on behalf, or for the benefit of the Defendants, (2) purportedly offering a free cruise in exchange for taking an automated public opinion and/or political survey, (3) which delivered a message using a prerecorded or artificial voice; (4) between August 2011 and August 2012, (5) whose (i) telephone number appears in Defendants' records of those calls and/or the records of their third party telephone carriers or the third party telephone carriers of their call centers or (ii) own records prove that they received the calls—such as their telephone records, bills, and/or recordings of the calls—and who submit an affidavit or claim form if necessary to describe the content of the call.

(Dkt. 241 at p. 31.) For purposes of settlement the Court finds that the following people are excluded from the Settlement Class (1) any Judge or Magistrate presiding over this Action and members of their families; (2) Defendants, Defendants' subsidiaries, parent companies, successors, predecessors, and any entity in which Defendants or their parents have a controlling interest and their current or former officers, directors, agents, attorneys and employees; (3) persons

who properly execute and file a timely request for exclusion from the class; (4) the legal representatives, successors or assigns of any such excluded persons; and (5) counsel for all Parties and members of their families.

4. On February 23, 2017 at 9:30 am CST or at such other date and time later set by Court Order, this Court will hold a Final Approval Hearing on the fairness, adequacy, and reasonableness of the Settlement Agreement, and to determine whether: (a) final approval of the Settlement should be granted and (b) Class Counsel's application for attorney's fees and expenses, and an incentive award to the Class Representatives should be granted. No later than January 9, 2017, Plaintiffs must file their papers in support of Class Counsel's application for attorneys' fees and expenses, and no later than February 9, 2017, Plaintiffs must file their papers in support of final approval of the Settlement and in response to any objections.

5. Pursuant to the Settlement Agreement, Kurtzman Carson Consultants d/b/a KCC is hereby appointed as Settlement Administrator and shall be required to perform all of the duties of the Settlement Administrator as set forth in the Settlement Agreement and this Order.

6. The Court approves the proposed plan for giving Notice to the Settlement Class (i) by direct U.S. Mail and email Notice to all reasonably obtainable addresses of the Settlement Class Members on the

Class List (ii) internet banner ads on premium high quality websites, and 800Notes.com (iii) one-time eighth of a page summary publication notice will be placed in the *New York Daily News*, *Los Angeles Times*, *Chicago Tribune*, *Dallas Morning News*, *Philadelphia Inquirer*, *Miami Herald*, *Houston Chronicle*, *Washington Post*, *Atlanta Journal-Constitution*, and the *Boston Globe* as well as a one-time third of a page summary publication notice will be placed in *People*, and (iv) the modification of the Settlement Website established as part of class certification, as more fully described in the Settlement Agreement. The plan for giving Notice, in form, method, and content, fully complies with the requirements of Rule 23 and due process, constitutes the best notice practicable under the circumstances, and is due and sufficient notice to all persons entitled thereto. The Court hereby directs the Parties and Settlement Administrator to complete all aspects of the notice plan by no later than November 27, 2016.

7. Pursuant to Rule 23(e)(4), all persons who meet the definition of the Settlement Class and who wish to exclude themselves from the Settlement Class must submit their request for exclusion in writing to the Settlement Administrator and postmarked no later than the Objection/Exclusion Deadline of January 23, 2017. The request for exclusion must be personally signed by the Settlement Class Member seeking to be excluded from the Settlement Class, and include his or her name and address, the cellular and/or landline telephone number(s) on which he or she allegedly received calls with a prerecorded or artificial voice

offering a free cruise in exchange for taking an automated public opinion and/or political survey, the caption for the Action (i.e., *Aranda et al v. Caribbean Cruise Line, Inc., et al.*, Case No. 12-cv-04069 (N.D. Ill.)) and a statement that he or she wishes to be excluded from the Settlement Class. A request to be excluded that does not include all of the foregoing information, that is sent to an address other than that designated in the Notice, or that is not postmarked within the time specified, shall be invalid and the Persons serving such a request shall be deemed to remain Members of the Settlement Class and shall be bound as Settlement Class Members by this Settlement Agreement, if approved.

8. Any member of the Settlement Class may comment in support of, or in opposition to, the Settlement at his or her own expense; *provided, however*, that all comments and objections must (i) be filed with the Clerk of the Court or, if the Settlement Class Member is represented by counsel, filed through the CM/ECF system and (ii) be sent via mail, hand or overnight delivery service to Class Counsel and Defendants' Counsel as described in the Notice, no later than the Objection/Exclusion Deadline of January 23, 2017. Any member of the Settlement Class who intends to object to this Settlement Agreement must include his or her name and address, include all arguments, citations, and evidence supporting the objection (including copies of any documents relied on), state that he or she is a Settlement Class Member, provide the cellular and/or landline telephone number(s) on which he or she allegedly received calls

with a prerecorded or artificial voice offering a free cruise in exchange for taking an automated public opinion and/or political survey, the name and contact information of any and all attorneys representing, advising, or in any way assisting the objector in connection with the preparation or submission of the objection or who may profit from the pursuit of the objection; and a statement indicating whether the objector intends to appear at the Final Approval Hearing either personally or through counsel, who must file an appearance or seek *pro hac vice* admission, accompanied by the signature of the objecting Settlement Class Member. Any Settlement Class Member who fails to timely file a written objection with the Court and notice of his or her intent to appear at the Final Approval Hearing in accordance with the terms of this Paragraph and as detailed in the Notice, and at the same time provide copies to designated counsel for the Parties, shall not be permitted to object to this Settlement Agreement at the Final Approval Hearing, and shall be foreclosed from seeking any review of this Settlement Agreement by appeal or other means and shall be deemed to have waived his or her objections and be forever barred from making any such objections in the Action or any other action or proceeding.

9. Any Settlement Class Member who fails to timely file a written objection with the Court and notice of his or her intent to appear at the Final Approval Hearing in accordance with the terms of this Paragraph and as detailed in the Notice, and at the same time provide copies to designated counsel for the

Parties, shall not be permitted to object to this Settlement Agreement at the Final Approval Hearing, and shall be foreclosed from seeking any review of this Settlement Agreement by appeal or other means and shall be deemed to have waived his or her objections and be forever barred from making any such objections in the Action or any other action or proceeding.

10. The Settlement Agreement and the proceedings and statements made pursuant to the Settlement Agreement or papers filed relating to the Settlement Agreement and this Order, are not and shall not in any event be construed, deemed, used, offered or received as evidence of an admission, concession, or evidence of any kind by any Person or entity with respect to: (i) the truth of any fact alleged or the validity of any claim or defense that has been, could have been, or in the future might be asserted in the Action or in any other civil, criminal, or administrative proceeding in any court, administrative agency, or other tribunal, or (ii) any liability, responsibility, fault, wrongdoing, or otherwise of the Parties. Defendants have denied and continue to deny the claims asserted by Plaintiffs. Notwithstanding, nothing contained herein shall be construed to prevent a Party from offering the Settlement Agreement into evidence for the purpose of enforcing the Settlement Agreement.

11. Pursuant to the Settlement Agreement and Federal Rule of Civil Procedure 53, the Court appoints the Honorable Wayne R. Andersen (ret.) of JAMS as Special Master who is directed to proceed with all reasonable diligence with the duties outlined in the

Settlement. Any member of the Settlement Class who wishes to contest a decision made by the Special Master in accordance with the duties outlined in the Settlement may do so by seeking Court review of the decision by no later than twenty-one (21) days after a copy of the order is served, unless the Court sets a different time.

IT IS SO ORDERED.

ENTERED: 10/26/2016

[signature]
HONORABLE MATTHEW F. KENNELLY
UNITED STATES DISTRICT JUDGE

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Nos. 17-1626, 17-1778, 17-1953,
17-1969, 17-1984 & 17-2857

GRANT BIRCHMEIER, *et al.*,

Plaintiffs-Appellees,

v.

CARIBBEAN CRUISE LINE, INC., *et al.*,

Defendants-Appellants.

Appeals from the United States District Court for the Northern District of Illinois, Eastern Division.

No. 12 C 4069
Matthew F. Kennelly, *Judge*.

August 23, 2018

Before

Frank A. EASTERBROOK, *Circuit Judge*
ILANA DIAMOND ROVNER, *Circuit Judge*

WILLIAM H. GRIESBACH, *District Judge*.[*]

Order

Objector Kevin McCabe filed a petition for rehearing and rehearing en banc on August 6, 2018. No judge in regular active service has requested a vote on the petition for rehearing en banc,[†] and all of the judges on the panel have voted to deny rehearing. The petition for rehearing is therefore DENIED.

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[*] Of the Eastern District of Wisconsin, sitting by designation.

[†] Judge Flaum did not participate in the consideration of this petition.

APPENDIX E

UNITED STATES DISTRICT COURT FOR
THE NORTHERN DISTRICT OF ILLINOIS,
EASTERN DIVISION

Case No. 1:12-cv-04069
Honorable Matthew F. Kennelly

GERARDO ARANDA, GRANT BIRCHMEIER, STEPHEN PARKES, and REGINA STONE, on behalf of themselves and a class of others similarly situated,

Plaintiffs,

v.

CARIBBEAN CRUISE LINE, INC., ECONOMIC STRATEGY GROUP, ECONOMIC STRATEGY GROUP, INC., ECONOMIC STRATEGY, LLC, THE BERKLEY GROUP, INC., and VACATION OWNERSHIP MARKETING TOURS, INC.,

Defendants.

CLASS ACTION SETTLEMENT AGREEMENT

***

1.17. **"Effective Date"** means the first business day after which all of the events and conditions specified in Paragraph 9.1 have been met and have occurred.

***

1.20. **"Final"** means one (1) business day following the latest of the following events: (i) the date upon which the time expires for filing or noticing any appeal of the Court's Final Judgment approving this Settlement Agreement; (ii) if there is an appeal or appeals, other than an appeal or appeals solely with respect to the Fee Award and/or incentive award, the date of completion, in a manner that finally affirms and leaves in place the Final Judgment without any material modification, of all proceedings arising out of the appeal or appeals (including, but not limited to, the expiration of all deadlines for motions for reconsideration or petitions for review and/or *certiorari*, all proceedings ordered on remand, and all proceedings arising out of any subsequent appeal or appeals following decisions on remand); or (iii) the date of final dismissal of any appeal or the final dismissal of any proceeding on *certiorari*.

***

1.22. **"Final Judgment"** means the Final Judgment and order(s) to be entered by the Court approving the Settlement Agreement and determining the Fee Award, and the incentive award to the Class Representatives.

***

2.2(f) Any un-cashed checks issued to Settlement Class Members during the first round of payments made in

accordance with this Agreement, as well as any unclaimed funds remaining in the Settlement Fund after payment of all Approved Claims, all Settlement Administration Expenses, the Fee Award to Class Counsel, and the incentive awards to the Class Representatives shall be distributed to Settlement Class Members with Approved Claims in the second round of payments. Any un-cashed checks issued to Settlement Class Members during the second and final round of payments made in accordance with this Agreement, as well as any unclaimed funds remaining in the Settlement Fund after payment of all Approved Claims, all Settlement Administration Expenses, the Fee Award to Class Counsel, and the incentive awards to the Class Representatives shall be distributed to an appropriate *cy pres* recipient selected by the Special Master upon recommendation from counsel for the Parties and the Settlement Class Members by email to the Settlement Administrator as indicated in the Notice.

***

9.1. The Effective Date of this Settlement Agreement shall not occur unless and until each and every one of the following events occurs, and shall be the date upon which the last (in time) of the following events occurs:
. . . (d) The Final Judgment has become Final, as defined above, or, in the event that the Court enters an order and final judgment in a form other than that provided above ("Alternative Judgment") to which the Parties have consented, that Alternative Judgment has become Final.

APPENDIX F

UNITED STATES DISTRICT COURT FOR
THE NORTHERN DISTRICT OF ILLINOIS

Birchmeier v. Caribbean Cruise Line, Inc. et al.,
Case No. 12-cv-4069 (N.D. Ill)

If you received an automated call between August 2011 and August 2012 offering a free cruise in exchange for taking a political and/or public opinion survey, a class action settlement may affect your rights. You may be entitled to up to $500 per call. A court authorized this notice. You are not being sued. This is not a solicitation from a lawyer.

A court authorized this notice. You are not being sued. This is not a solicitation from a lawyer.

***

Any un-cashed checks issued to Settlement Class Members during the second round of payments, as well as any unclaimed funds remaining in the Settlement Fund after payment of all Approved Claims, all Settlement Administration Expenses, the Fee Award to Class Counsel, and the incentive awards to the Class Representatives shall be distributed to an appropriate *cy pres* recipient selected by the Special Master upon recommendations from Settlement Class Members. To recommend a *cy pres* recipient, please email the Settlement Administrator at [the settlement administrator's email address].