

IN THE
Supreme Court of the United States

KEVIN McCABE,

Petitioner,

v.

GERARDO ARANDA, *et al.*,

Respondents.

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

**BRIEF IN OPPOSITION OF RESPONDENTS
GERARDO ARANDA, GRANT BIRCHMEIER,
STEPHEN PARKES, AND REGINA STONE**

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I. STATEMENT OF THE CASE

1. Plaintiffs Gerardo Aranda, Grant Birchmeier, Stephen Parkes, and Regina Stone filed this lawsuit under the Telephone Consumer Protection Act, 47 U.S.C. § 227, after they received unsolicited robocalls offering a “free cruise” for the purpose of marketing timeshare products. Pet. App. 13a-14a. Four days before the start of the jury trial, they reached a settlement agreement on behalf of two certified classes. Pet. App. 15a. The settlement creates a fund of between \$56 million and \$76 million from which class members will receive cash relief for each telephone call they received from the defendants. *Id.* Most class members who file a valid claim will recover about \$400. Pet. App. 3a, 20a.

Because the defendants were unable to pay \$76 million all at once, the settlement provides for class members to receive checks in two distributions. Pet. App. 2a. If any class members do not cash the checks they receive in the first distribution, those funds will be split evenly among claiming class members in the second distribution. *Id.* If any second-round checks are not cashed, then the settlement provides for that money to be distributed to an appropriate *cy pres* recipient. Pet. App. 2a-3a. There will be no *cy pres* distribution if all claimants cash their second checks. *See id.*

No checks can be mailed to class members until this Court resolves all certiorari petitions challenging the settlement, so it is not yet known whether the *cy pres* component of the settlement will be triggered. Pet. App. 3a, 42a. If it is, the recipient will be selected by the special master—a retired federal judge—in consultation with the

parties and class members. Pet. App. 37a-38a, 43a. The court-ordered notice to class members included an email address that they can write to if they wish to recommend a *cy pres* recipient. Pet. App. 12a, 44a; *see also* Fed. R. Civ. P. 23(e)(1).

2. Petitioner Kevin McCabe claims to be a class member and filed an objection to the settlement.¹ Pet. App. 10a; *see also* Fed. R. Civ. P. 23(e)(5). His objection raised a number of purported issues, but the only one relevant to this petition is his view that “the notice to the class may be providing inadequate information about” the *cy pres* arrangement. Pet. App. 27a. McCabe suggested that the notice was particularly problematic because of his belief that the *cy pres* award “may turn out to be the ‘bulk of the total payout.’” *Id.*

The district court disagreed, finding that McCabe’s “contention that a *cy pres* award is likely to involve a significant sum borders on the frivolous.” Pet. App. 28a; *see also* Pet. App. 18a-19a (describing class notice). That is because “[f]or a *cy pres* award to be substantial ... numerous individuals who already went to the trouble of filling out claim forms,” and who stand to receive a “significant” amount of money, “would have to fail to cash the checks they receive not once, but twice.” Pet. App. 28a. Nevertheless, the district court agreed to “guard against this extremely remote possibility by modifying the agreement

1. It bears mention that both McCabe and his attorney have previously filed lawsuits against the defendants in this case alleging similar conduct. *See McCabe v. Caribbean Cruise Line, Inc.*, No. 13-CV-6131, 2014 WL 3014874, at *5 (E.D.N.Y. July 3, 2014) (enumerating cases brought by both McCabe and Todd Bank); *see also* Pet. App. 25a-27a.

to make the size of the *cy pres* award and the identity of the recipient subject to [its] approval.” *Id.* Having found the settlement to be “fair, reasonable, and adequate,” *see* Fed. R. Civ. P. 23(e)(2), the district court overruled McCabe’s objection and approved the settlement. Pet. App. 18a, 28a-29a.

3. The court of appeals affirmed the district court’s approval of the settlement, noting that McCabe’s argument with respect to *cy pres* could be “quickly dispose[d] of[.]” Pet. App. 12a. The court of appeals held that the district court’s approved notice was sufficient because it “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.” *Id;* *see also* Pet. App. 44a.

II. REASONS FOR DENYING THE PETITION

McCabe’s petition inaccurately describes the underlying settlement and decisions below, and thus does not implicate any issues deserving of review by this Court. First, the case does not involve *cy pres* as a substitute for cash relief. Second, class members have been given full notice of the *cy pres* provision and have been provided the opportunity to participate in the process. And third, the district court will not select the *cy pres* recipient.

1. McCabe does not discuss the cash relief going to the class, instead attempting to portray this settlement as using *cy pres* as a substitute for sending out checks to class members. Courts are rightly skeptical of settlements that use *cy pres* distributions as an imperfect “substitut[e]

for ... direct compensation ... that is at best attenuated and at worse illusory." *In re Baby Prod. Antitrust Litig.*, 708 F.3d 163, 173 (3d Cir. 2013). But unlike *In re Google Referrer Header Privacy Litigation*, 869 F.3d 737, 741 (9th Cir. 2017), *certiorari granted under the name Frank v. Gaos*, 138 S. Ct. 1697 (2018), *cy pres* here is not acting as a substitute for distributing checks to class members. Pet. App. 2a-3a. Every dollar that could go to *cy pres* must first have been sent to a claiming class member who failed to cash her check before the expiration date. *See* Pet. App. 3a.

Courts have also expressed concern that funds might be improperly directed to a *cy pres* recipient when it would be feasible to distribute that money to the class. *See, e.g.*, *Ira Holtzman, C.P.A. & Assocs., Ltd. v. Turza*, 728 F.3d 682, 689 (7th Cir. 2013). But here, 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." Pet. App. 28a. The district court has indicated that it will make certain that is true before permitting a *cy pres* distribution. *See id.*

2. McCabe's concern that class members have not been given notice and an opportunity to object to a *cy pres* recipient is also not presented. Again it is uncertain whether *cy pres* will be required. If it is, the amount of money involved will necessarily be small. Pet. App. 28a; *see also In re BankAmerica Corp. Sec. Litig.*, 775 F.3d 1060, 1066 (8th Cir. 2015) (noting that class members' participation in the *cy pres* process is a concern when the amount is not "de minimis").

In any event, McCabe's characterization of the notice is inaccurate. Far from obscuring the *cy pres* component of the settlement, the notice explains how class members can participate in the selection of a *cy pres* recipient (should one be needed). Pet. App. 12a. Further, if a *cy pres* distribution is necessary, the special master's proposal will be filed on the district court's public docket for approval. Pet. App. 28a. The district court's final judgment allows for class members to object to any of the special master's decisions and provides the procedure for doing so. Pet. App. 37a-38a. As the court of appeals correctly held, "[t]hat is enough to meet the notice requirements of Fed. R. Civ. P. 23." Pet. App. 12a.

3. Finally, McCabe incorrectly suggests that the district court will select the *cy pres* recipient. In fact, the special master, in consultation with the parties and based on the recommendations of class members, will make the selection. The district court's function, as always in a class action, is to safeguard the interests of the class. *See Deposit Guar. Nat. Bank, Jackson, Miss. v. Roper*, 445 U.S. 326, 331 (1980). In this instance, the district court will fulfill that responsibility by approving both the amount of any *cy pres* distribution and the identity of the recipient selected by the special master. Pet. App. 29a.

III. CONCLUSION

The petition for certiorari should be denied.

Respectfully submitted,

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