

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

THOMAS H. KRAKAUER, on behalf)
of a class of persons,)

Plaintiff,)

v.)

1:14-CV-333

DISH NETWORK, LLC,)

Defendant.)

MEMORANDUM OPINION AND ORDER

Catherine C. Eagles, District Judge.

At trial in this class action, the jury found that Dish Network, LLC, made thousands of repeat telephone solicitations to thousands of residential phone numbers on the Do-Not-Call list, in violation of the Telephone Consumer Protection Act. The jury awarded damages of \$400 per call, which the Court trebled after it found the violations were willful. Final judgment was entered against Dish and in favor of the plaintiff class in the amount of \$61,342,800. The judgment was affirmed on appeal, Dish has satisfied the judgment, and the claims process has concluded.

Because not all of the judgment funds will be claimed by class members, the Court must decide what to do with these unclaimed funds. Reversion to Dish and escheat to the states are inappropriate. The Court will appoint a special master to help it evaluate potential *cy pres* recipients so that the Court can make an appropriate decision between federal escheat and *cy pres*.

BACKGROUND

Through its agent, Dish made 51,119 telephone solicitations to 18,066 residential phone numbers on the Do-Not-Call list in willful violation of the Telephone Consumer Protection Act. Doc. 538 at 1. There are 18,066 class members, many of whom received more than one violative call. At trial, the jury awarded \$400 per violative call, and the Court trebled this amount for willfulness to arrive at a total judgment in favor of the class of \$61,342,800. Doc. 439. The Fourth Circuit affirmed the final judgment, *see Krakauer v. Dish Network, LLC*, 925 F.3d 643 (4th Cir. 2019), and the Supreme Court denied certiorari. Doc. 537.

The Court then approved attorney's fees and costs, Doc. 495, and determined that the attorney's fees and costs would be paid from the judgment as a whole. Doc. 538 at 1–2. The Court entered a final disbursement order to 13,000 class members, Doc. 560 ¶ 4, directing that fees and costs would be deducted from the \$1,200 awarded per violative call, so that each class member will receive \$812.99 for each such call. Doc. 560 at 2–3.¹

Approximately 11,000 class members were identified fully and without contradiction in the existing data. *See* Doc. 560-1 (listing these class members). The remaining 7,000 were subject to a claims process, and 1,958 valid claims were submitted by class members. *See* Doc. 536 at 1; Docs. 560-2, 560-3 (listing successful claimants).

¹ These orders are presently on appeal, *see* Docs. 545, 562, but whatever the result of that appeal, there are certain to be unclaimed judgment funds in some amount. The disbursement order has been stayed for the time being. Doc. 568.

Thus, there are approximately 5,000 class members who have not claimed and will not receive their part of the judgment. Doc. 538 at 2; *see* Doc. 560 at 3–4 (listing groups of class members who are entitled to payment). Their share of the judgment funds available for distribution is approximately \$11 million. *See* Doc. 578 at 2; Doc. 581 at 2. It is also likely that some class members may not cash their checks, adding to the unclaimed funds. The Court must now determine what will happen to the undisbursed judgment funds.

APPLICABLE LAW

“Most class actions result in some unclaimed funds.” *Six (6) Mexican Workers v. Ariz. Citrus Growers*, 904 F.2d 1301, 1307 (9th Cir. 1990). There are four common ways of distributing unclaimed funds: reversion to the defendant, pro rata redistribution to class members who did file claims, escheating funds to the state or federal government, or *cy pres*. *Id.*; *accord* 4 William B. Rubenstein, *Newberg on Class Actions* § 12:28 (5th ed. June 2020 Update). No one has advocated for pro rata redistribution to class members who did file claims, and this possibility will not be discussed further.²

When money has been paid into the federal court to satisfy a judgment, those funds cannot be used for another purpose except by order of the court. *See* 28 U.S.C. § 2041. While the case law discussing distribution of unclaimed funds after a class action verdict and judgment is, unsurprisingly, thin, there is consensus that the decision of how

²*See In re Lupron Mktg. & Sales Practices Litig.*, 677 F.3d 21, 35 (1st Cir. 2012) (noting in the context of class action settlements that redistribution of unclaimed funds to already-compensated plaintiffs can result in an undeserved windfall and create incentives for suits where large numbers of absent class members were unlikely to make claims); *Van Gemert v. Boeing Co.*, 553 F.2d 812, 815–16 (2d Cir. 1977) (same).

to distribute unclaimed funds falls within the general equitable powers of the court and that the court has broad discretion in distributing these funds. *See Six Mexican Workers*, 904 F.2d at 1307; *Van Gemert v. Boeing Co.*, 739 F.2d 730, 737 (2d Cir. 1984) (noting that distribution of unclaimed class action funds is equitable, requiring the exercise of discretion in light of “the circumstances of the particular case”). “The district court’s choice among distribution options should be guided by the objectives of the underlying statute and the interests of the silent class members.” *Six Mexican Workers*, 904 F.2d at 1307; *see also see also Ira Holtzman, CPA, & Assocs. v. Turza*, 728 F.3d 682, 689–90 (7th Cir. 2013) (collecting authorities and noting that “[m]oney not claimed by class members should be used for the class’s benefit to the extent that is feasible.”).

1. Reversion

Reversion would return unclaimed judgment funds to Dish. “[R]everversion to the defendant may be appropriate when deterrence is not a goal of the statute or is not required by the circumstances.” *Six Mexican Workers*, 904 F.2d at 1308. Conversely, reversion is not appropriate when deterrence is a statutory goal, unless otherwise required by the circumstances. *See Harris v. Vector Mktg. Corp.*, No. C-08-5198 EMC, 2011 WL 1627973, at *12 (N.D. Cal. Apr. 29, 2011) (discussing fairness of class action settlement requiring reversion of unclaimed funds when statute violated had a deterrence purpose).

For example, in *Van Gemert v. Boeing Co.*, the Second Circuit affirmed a decision to revert unclaimed funds back to the defendant in a securities action when “during each step of the process Boeing had acted without malice, without bad faith and relied on the advice of others before taking each step,” including the advice of outside law firms. 739

F.2d at 737. Because “[the defendant] complied with the letter of the then existing law and could not have anticipated” its liability, reversion was appropriate. *Id.*

Reversion is not appropriate in every case where distribution to the class is not possible. It can “undermine the deterrence function of class actions . . . by rewarding the alleged wrongdoer simply because distribution to the class [is not] viable.” *In re Lupron Mktg. & Sales Practices Litig.*, 677 F.3d 21, 32–33 (1st Cir. 2012) (quoting Am. Law Inst., *Principles of the Law of Aggregate Litigation* § 3.07 cmt. b. (Apr. 1, 2009) (proposed final draft)); *accord Six Mexican Workers*, 904 F.2d at 1309 (remanding for decision between *cy pres* and escheat after claims period expires, noting that “[i]n light of the deterrence objective of FLCRA and the nature of the violations, we find that reversion of the funds to the defendants is not an available option.”).

2. *Cy pres* distribution

With *cy pres* distribution, an organization that suitably represents the interests of or benefits the class members receives the unclaimed funds. *Cy pres* and variations of *cy pres* have often been used as a remedy when class actions are settled. This happens most typically as part of the settlement terms, *see, e.g., In re Toyota Motor Corp. Unintended Acceleration Mktg., Sales Practices, & Products Liab. Litig.*, No. 8:10ML 02151 JVS, 2013 WL 3224585, at *13 (C.D. Cal. June 17, 2013) (approving a charitable contribution as part of a settlement and distinguishing it from *cy pres*); *Perry v. FleetBoston Fin. Corp.*, 229 F.R.D. 105, 117-18 (E.D. Pa. 2005) (approving *cy pres* donation to “an appropriate non-profit, legal, charitable or educational organization or entity” as part of class settlement), or, in some cases, when “it is not feasible to make further distributions

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