IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

MARILYN KEEPSEAGLE, et al.,	)	
	)	
Plaintiffs,	)	Civil Action No. 1:99CV03119
	)	(EGS)
v.	)	
	)	
TOM VILSACK, Secretary, United States	)	Judge: Emmet G. Sullivan
Department of Agriculture,	)	Magistrate Judge: Alan Kay
	)	
Defendant.	)	

RESPONSE TO GREAT PLAINS CLAIMANTS' SECOND MOTION TO INTERVENE

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Plaintiffs respectfully submit the following Response in Opposition to the Great Plains Claimants' Second Motion to Intervene. *See* Dkt. No. 705-1 (Sept. 16, 2014) ("Great Plains Mem").

I. INTRODUCTION

The "Great Plains Claimants" are 415 individuals who claim to be successful Track A claimants in the settlement in this action, and who seek to intervene under Rule 24 in order to offer their views on the proposals for disposition of the *cy pres* funds. *See id.* at 1-5 & n.5. The Movants are seeking leave to intervene, they assert, so that members of the Class "are adequately represented with respect to any proposed amendment of the Settlement Agreement, including, but not limited to the distribution of the Cy Pres Fund." *Id.* at 94. In particular, the Great Plains Claimants are seeking to intervene to express the view that the Court should not approve the modification the parties have proposed to the Settlement Agreement's cy pres provision, or at least should not approve the modification without considering the views of the Class Members. *Id.* at 95-96; *see also* Plaintiffs' Unopposed Motion to Modify the Settlement Agreement Cy Pres Provisions, Dkt. No. 709 (Sept. 24, 2014) ("Mot. to Mod.").[1] The Movants, however, fail to meet the requirements for intervention under Rule 24.

The Movants are not entitled to intervention as a matter of right. First, they have no legally cognizable interest in the cy pres funds, as all of the Movants have forever and finally released all of their claims and have received the maximum damages permitted by the Settlement Agreement claims process. Second, their intervention is not necessary in order to apprise the Court of their views, as the Court has already indicated its willingness to consider their views

[1] Although the Movants filed their Motion to Intervene a week before the parties proposed the modification to the Settlement's cy pres provisions, the Movants were fully aware of the substance of the proposed modification. Accordingly, it ought to make no difference that the Movants' motion preceded the parties' proposal to modify the Settlement Agreement.

and those of others seeking to intervene in determining whether to allow the modifications to the Settlement Agreement that the parties propose.

Third, the Movants have not identified any way in which Class Representatives and Class Counsel have been inadequate representatives. Although the Movants express their expectation that the Class Representatives and Class Counsel should have personally and orally communicated with each Class Member about the proposed modification to the cy pres provisions, this expectation is fundamentally inconsistent with the representative nature of class action litigation, and finds no support in Rule 23 or any other legal authority. In fact, as described in Plaintiffs' Motion to Modify the Settlement Agreement, Class Counsel and Plaintiffs have gone to great lengths to inform all *Keepseagle* claimants and the Native American community about the proposed modifications and to elicit the views of Class Members through in-person meetings, correspondence, and other means. *See* Motion to Mod. at 23-25. Indeed, the Movants' counsel and many of the Movants attended one or more of the public meetings at which Class Counsel and Plaintiffs presented in detail the terms of the proposed modifications to the Settlement Agreement, and these individuals expressed their unequivocal opposition to the proposed changes. *See* Great Plains Mem. at 9, 16. As the Movants legal interests in the settlement will not be impacted by the proposed changes and they have been afforded ample notice of the pending revisions, they lack any grounds to intervene as of right.

Furthermore, permissive intervention should be denied, as the Movants have not identified any way in which they would be prejudiced or in which the Class Representatives and Class Counsel have been inadequate representatives to warrant intervention.

Finally, Plaintiffs have no objection to the Court permitting the Movants to share their views with the Court, as they have already done, or permitting other Class Members to share

their views with the Court, as this Court has already permitted in prior instances.

II. FACTUAL BACKGROUND

A. The Parties' Proposal to Modify the Settlement Agreement

In an August 2013 status report, Plaintiffs summarized a proposal to use the $380 million of unclaimed settlement funds to endow a foundation that would award grants to non-profit organizations that have served Native American farmers and ranchers. Dkt. No. 646. Before notifying the Court of their proposal, Plaintiffs had already tried and failed to obtain USDA's consent to award additional damages to prevailing claimants, or provide consideration for claims that were not timely cured of defects. Therefore, in the months before submitting their proposal to the Court, the named Plaintiffs and Class Counsel discussed with leaders in Indian Country the general concept of using the cy pres funds to endow a foundation overseen by Native American leaders. Over the course of the ensuing year, the terms of the proposed modification to the Settlement Agreement evolved, as the plaintiffs and USDA engaged in extensive negotiations and class counsel continued their consultation with Native leaders and class representatives.

On September 24, 2014, the parties proposed an Addendum to the Settlement Agreement that would modify the agreement's cy pres provisions by (1) distributing $38 million of the unclaimed settlement fund to eligible non-profit organizations within 180 days of the Court's approval of the modification and (2) establishing a trust that would be endowed with the remaining 90% of the unclaimed settlement fund, and then invest, manage, and distribute the funds to non-profit organizations that assist Native American farmers and ranchers over a period of up to 20 years. Mot. to Mod. at 1-11. Plaintiffs' Motion to Modify the Settlement Agreement describes in detail the specific procedural changes the parties have proposed, how the Trust would be established and operated, who would be eligible to receive the initial cy pres funds and disbursements from the Trust, and why the Proposed Addendum will make the cy pres

distribution more effective, accountable, transparent and beneficial to Native American farmers and ranchers than the existing cy pres provisions. *Id*. As the Court and the Movants were served with Plaintiffs' Motion, Plaintiffs incorporate by reference these facts and assertions about the proposed modification and the reasons why the it best serves the interests of the Class.

Demonstrating their commitment to have persons intimately familiar with the needs of Native farmers and ranchers manage and distribute these funds, Plaintiffs nominated a distinguished group of candidates to serve on the inaugural Board of Trustees of the proposed Trust. *See* Dkt. No. 712. As is evident from the nominations, if approved, the Board of the Trust would have leaders familiar with a wide range of farming and ranching activities in which Native Americans are engaged, drawn from across the country and some of whom are also conversant with the kind of philanthropic and banking and investment practices that will add important dimensions to the Board. *See id.* at 1-2. Likewise, the proposed executive director, Janie Hipp, has worked with tribal leaders and Native American farmers and ranchers nationwide for years, and has the experience and skill to develop an effective organization. *See id.* at 2.

B. <u>Class Counsel Consulted Extensively With Class Members and Representatives Before and After Proposing the Current Proposal</u>

The Movants complaint that the plaintiffs have failed to inform them of the changes to the Settlement Agreement herein proposed is hard to reconcile with the extensive efforts in which the plaintiffs engaged to consult with class members and representatives before and after the pending proposal was formulated. Over the past two years, Class Counsel and Plaintiffs have consulted extensively with Class Members, Native American leaders and other individuals who have expressed views about how the unclaimed settlement funds should be deployed. This extensive consultation occurred long before Plaintiffs and the USDA agreed on the terms of the proposed modification to the Settlement Agreement, and those consultation efforts continued to

expand once Plaintiffs made a public announcement about the type of modification the parties would propose to the Court.

1. <u>Consultation Before Announcing the Intent to Modify the Settlement</u>

Even before any proposal was made to use the unclaimed funds to endow an philanthropic institution serving Native farmers and ranchers, Class Counsel consulted regularly with the Class Representatives appointed by this Court, discussed the possible uses of the cy pres funds with leaders of Native American tribes and organizations, discussed options for use of these funds at public meetings, and responded to a large number of inquiries made by Class Members by telephone call and email. In December 2012, Joseph Sellers spoke about the status of the settlement, including options for use of the cy pres funds, at the Inter-tribal Agricultural Council (IAC) National Conference in Las Vegas. This conference draws a large cross-section of Native Americans involved in agriculture and was attended by approximately 1000 people. Thereafter, Mr. Sellers, as well as other members of Class Counsel, circulated among the conferees and spoke with many of them about the case in one-on-one discussions.

The Council on Native American Farming and Ranching (CNAFR), created pursuant to the Settlement Agreement and whose Native membership is drawn from tribes around the country, held one of its meetings in Las Vegas at the same time as the IAC conference. In one of the public comment periods, Christine Webber, a member of Class Counsel, addressed the Council and many attendees about the status of the settlement and Plaintiffs' cy pres plan, and answered questions from attendees and Council members. In addition, Class Counsel took note of the comments made by attendees at the public meeting of the CNAFR about their views of how best to use the cy pres funds. Many attendees spoke about the need to support youth interested in careers in agriculture, and to ensure that future generations of Native Americans would remain engaged in farming and ranching. *See* Transcript of U.S. Dept. of Agriculture

Council for Native American Farming and Ranching, Dec. 12, 2012 Meeting, at pp. 70-106, http://www.usda.gov/documents/cnafr-dec-13-2012-transcript.pdf.

Even before the first public discussion of a proposal of a foundation or trust at the IAC meeting, Class Counsel had discussed the idea with Native American leaders, including (i) Ross Racine, Chair of the IAC; (ii) Tex Hall, Chairman of the Three Affiliated Tribes and of the Great Plains Tribal Chairmen's Association, and a leader who was instrumental in the development and filing of this litigation; (iii) Sherry Solway Black of the National Congress of American Indians (NCAI); (ii) Cris Stainbrook, of the Indian Land Tenure Foundation; (iv) Mark Wadsworth, Chairman of the Council on Native American Farmers and Ranchers and Natural Resource Manager for the Blackfeet Tribe; (v) Dr. Phil Baird, Vice President (now Acting President) of United Tribes Technical College in Bismarck; and (vi) Michael Roberts, of the First Nations Development Institute. Class Counsel had further discussions about this subject with Tex Hall and Ron Brownotter, a member of the Standing Rock Sioux tribal council, in March 2013. Class Counsel also made a presentation to the Coalition of Large Tribes (COLT) regarding the foundation or trust proposal in early 2013.

Throughout the entire settlement administration period, Class Counsel received many telephone calls and email messages from class members expressing their views about use of the cy pres funds. The Plaintiffs took those calls into consideration in formulating their initial proposal. Once the foundation or trust proposal had been formulated and disclosed, Class Counsel discussed it when class members called to ask about use of the cy pres funds.

2. **Consultation and Notice of Plaintiffs' Specific Trust Proposal**

Once the parties reached an agreement over the basic terms of the proposed modification to the Settlement Agreement, Plaintiffs and Class Counsel undertook substantial efforts to notify and consult with Class Members about the specific proposal, elicit their views about the proposal

and the unclaimed settlement funds, and solicit the views of Class Members and Native American leaders about features of the trust that they regarded as important.

As described in the Motion, Plaintiffs and Class Counsel have engaged in a range of activities to inform and consult with Class Members about their proposal, including:

- Posting on the case web site, *IndianFarmClass.com*, a description of the proposed changes to the Settlement Agreement;

- Posting on the same web site a copy of Plaintiffs' August 2013 Status Report that described Plaintiffs' proposal to establish a trust or foundation and the rationale for doing so;

- Mailing to all Class Members who submitted claims (successful and unsuccessful) a notice that summarized the changes to the cy pres provisions that were being proposed and inviting those individuals to attend any of eight in-person informational meetings planned throughout the country or any of three conference calls;

- Informing Class Members who had submitted claims through the same mailing about the proposed changes to the Settlement Agreement and inviting them to write or call Class Counsel to express their views about the proposal;

- Holding eight full day, in-person informational meetings between July 30 and August 26, 2014 in Tulsa, OK, Albuquerque, NM, Phoenix, AZ, Rapid City, SD, Bismarck, ND, Spokane, WA, Billings, MT, and Raleigh, NC., for Class Members and others to share their views and ask questions about Plaintiffs' proposal; and

- Holding three conference calls that each lasted three hours and provided a similar opportunity for Class Members to share their views and ask questions about the proposal.

Plaintiffs provided the Court with a detailed description of these efforts in their Motion to Modify the Settlement Agreement. *See* Mot. to Mod. at 23-25 & Exhibit E, Keepseagle Listening Sessions, Summary Report, Prepared for Keepseagle Class Counsel by Indigenous Food & Agriculture Initiative, University of Arkansas School of Law (September 2014).

3. Plaintiffs and Class Counsel Sought to Obtain Additional Funds for Successful Claimants, But USDA Opposed Such an Amendment

Plaintiffs and Class Counsel have sought an agreement from USDA to modify the Settlement Agreement to award additional amounts to the prevailing claimants, both prior to pursuing the trust idea, and once again at the November 18, 2013 status conference. Mot. to Mod. at 2 (citing Transcript of the Status Conference Before the Hon. Judge Emmet G. Sullivan, United States District Judge at 31-33, Dkt. No. 675 (Nov. 18, 2013)). In short, Class Counsel sought precisely the relief that the Movants have stated they favor, and it was only after it became clear that it would not be possible to obtain agreement from USDA to provide that relief, that Class counsel entered into an agreement with USDA to modify the settlement agreement to make the cy pres distribution more effective for the benefit of the Class.

III. ARGUMENT

Movants have failed to demonstrate grounds that warrant their intervention either as of right or in the exercise of the Court's discretion. In addition, Movants make a number of assertions critical of the manner in which Plaintiffs and Class Counsel have administered the settlement and formulated and communicated the proposed changes to the Settlement Agreement. While none of these assertions should have any bearing on the request to intervene, they are nonetheless addressed briefly herein.

A. Movants Raise Irrelevant Issues That Should Be Summarily Rejected

The Movants raise a number of issues that are wholly irrelevant to whether the Court should grant the intervention motion or that misrepresent the actions of Plaintiffs and Class Counsel. We clear away this underbrush so that we can move on to addressing the actual legal standards at issue in the instant Motion.

First, contrary to the Movants' suggestion that Class Counsel have not been transparent

about the amount of unclaimed Settlement funds that remain available for a cy pres distribution, Class Counsel and Plaintiffs *have* previously informed the Court and the public about the exact amount of unclaimed settlement funds (including the amount of any unredeemed checks), and have described how those funds have been conservatively invested to protect them for a future cy pres distribution. *See* Dkt. No. 646 at 3; Transcript of Status Conference Before the Honorable Emmet C. Sullivan at 5:1-5, 16:5-11 (Nov. 18, 2013), Dkt. No. 675; *see also* Dkt. Nos. 603, 611 (describing investment strategy); Dkt. 612, Order (July 21, 2011) (approving investment plans). Moreover, neither the Settlement Agreement nor Rule 23 requires Class Counsel to provide the Movants' counsel with the "exact" balance of the unclaimed funds or the specific types and amounts of investments, as the Movants suggest. Great Plains Mem. at 2 n.1 (faulting Class Counsel for declining to produce the "exact size" of the unclaimed Settlement funds to the Movants' counsel or providing them with specific information on how those funds are being invested). Nonetheless, an updated report to the Court was planned ahead of the scheduled hearing, and Plaintiffs present it here to allay any lingering concerns. Attached hereto are the Declaration of Joseph M. Sellers, Ex. 1 ("Sellers Decl."), and the Declaration of Sanford Haber, Ex. 2 ("Haber Decl."). The Sellers Declaration provides an overview of how funds have been handled and provides the current balance available for a cy pres distribution. The Haber Declaration provides additional details on the investment strategy and results.

Second, Movants are incorrect in contending that Class Counsel have refused to propose that the unclaimed funds be disbursed as additional damages to successful claimants. Great Plains Mem. at 3. The record reveals that, at the urging to some members of the class, Class Counsel have on several occasions proposed just such a use of the remaining settlement funds, including a recent occasion before this Court. *See* Motion to Modify Settlement Agreement Cy

Pres Provisions at 2 (citing Transcript of the Status Conference Before the Hon. Judge Emmet G. Sullivan, United States District Judge at 31-33, Dkt. No. 675 (Nov. 18, 2013) (USDA's counsel stating the government's opposition to distributing cy pres funds to Keepseagle claimants and stating that the claimants "were fully compensated for their claims"). Repeatedly USDA has declined to agree to such a use of these funds. As Class Counsel have informed Movants on multiple occasions, the Settlement Agreement does not permit its modification without consent of the parties. *See* Settlement Agreement § XXII.

Third, the issue of whether the unclaimed settlement funds may be distributed pursuant to a cy pres award is not, and has not been since the original negotiation of the Settlement Agreement, an open question, as the Movants appear to suggest. *See* Great Plains Mem. at 3-4. This Court has already approved the cy pres provisions of the Settlement Agreement, there was no objection to the cy pres provisions, and the cy pres provisions were incorporated into a final judgment from which there was no appeal. Accordingly, the time has long passed when the Court's authority to permit a cy pres award may be called into question, either generally or in the specific circumstances of this action. The issue before the Court at this juncture is not whether unclaimed settlement funds may be disbursed through a cy pres award or even whether the funds may be disbursed to non-profit entities, as both issues were presented to the Class through plenary notice in 2010 and 2011, and were considered and approved by the Court at an April 2011 fairness hearing. Rather, the only question before the Court at this juncture is the best way to structure the process for distributing the remaining settlement funds to eligible non-profit organizations.

Nor, as Movants assert, should disbursement of the unclaimed settlement funds through a cy pres award be approached with caution, as the proposal to distribute the funds to eligible non-

profit groups over a period of time comports fully with the jurisprudence of this and other circuits approving just such an approach. *See Democratic Cent. Comm. of D.C. v. Washington Metro. Area Transit Comm'n*, 84 F.3d 451, 456 (D.C. Cir. 1996) (approving the distribution of unclaimed settlement funds to non-profit organizations directly and to endow a trust that will, in turn, distribute the funds in the future to other non-profit organizations). And while the Movants criticize situations where a cy pres distribution was used to fund charities that had little to do with the class members or the legal violations they suffered, Great Plains Mem. at 3-4, here the direct and sole focus of the cy pres funds will be to assist the same Native American farmers and ranchers on whose behalf this action was brought. Under the current Settlement Agreement and the proposed Addendum, the cy pres funds could only be used to support the work of non-profits that will directly help class members and similarly situated Native American farmers and ranchers.

B. Movants Do Not Qualify for Intervention as of Right.

Movants cannot satisfy Rule 24(a), as they have failed to show that (1) they have a legal interest in the property, (2) that their inability to intervene will impair their rights, and (3) that they lack adequate representation, the last of which is the central element of any intervention inquiry. *See Hardin v. Jackson*, 600 F. Supp. 2d 13, 15 (D.D.C. 2009); *see also Jones v. Prince George's County*, 348 F.3d 1014, 1019 (D.C. Cir. 2003) (stating a movant "must satisfy all four elements of the Rule in order to intervene as of right[,]" and citing *Bldg. & Constr. Trades Dep't, AFL-CIO v. Reich*, 40 F.3d 1275, 1282 (D.C. Cir. 1994)).

1. Movants Lack a Legally Protected Interest

The Movants have no "legally protected interest in the action," *Deutsche Bank Nat'l Trust Co. v. FDIC*, 717 F.3d 189, 192 (D.C. Cir. 2013), as all the Movants received the maximum amount of damages to which they were entitled under the Settlement Agreement and

previously agreed that those damages would result in a full and final release of their claims.

"In approaching the question of the appropriate distribution of [leftover settlement] funds, various courts have determined that 'neither the class members nor the settling defendants have any legal right to unclaimed or excess funds.'" *Diamond Chem. Co. v. Akzo Nobel Chems. B.V.*, 517 F. Supp. 2d 212, 217 (D.D.C. 2007) (quoting *Powell v. Georgia-Pacific Corp*., 843 F. Supp. 491, 495 (W.D. Ark. 1994), *aff'd* 119 F.3d 703, 704, 706 (8th Cir. 1997) (agreeing with district court "neither party has a legal right to the unclaimed funds" in settlement where plaintiffs agreed to damages that were limited based on a specific formula and where plaintiffs already had received awards based on the formula); *accord In re Motorsports Merch. Antitrust Litig*., 160 F. Supp. 2d 1392, 1393 (N.D. Ga. 2001) (quoting *Powell*, 843 F. Supp. at 495, and *Wilson v. Southwest Airlines, Inc*., 880 F.2d 807, 812 (5th Cir. 1989); *In re Folding Carton Antitrust Litigation*, 744 F.2d 1252, 1254 (7th Cir. 1984)).

In *Diamond Chemical*, the Court reasoned that class members did not "retain any legal claim to the Settlement Fund," due to the "binding settlement agreements," and where "all claimants who filed a timely notice of their claims received the full amount of settlement funds for each of their allowed claims[.]" *Diamond Chem.*, 517 F. Supp. 2d at 217; *accord Powell*, 119 F.3d at 706; *Wilson*, 880 F.2d at 811-12.

The *Keepseagle* class members – including the Movants – are in an analogous position to the *Diamond Chemical* class members who did not retain any legal claim to the unclaimed settlement funds, and likewise lack a legal right to the cy pres funds. As the Movants admit, all of them received the full, maximum award that Track A recipients were eligible to receive under the Settlement Agreement. Like all successful claimants, when they filed their Track A claims the Movants all affirmatively elected an option that stated the cash award under Track A was

limited to a maximum of $50,000 plus an additional tax payment of 25% of the $50,000 , plus debt relief on outstanding USDA/Farm Service Agency Loan Program debt. *See Keepseagle* Claim Form Part 4. In addition, each of the Movants acknowledged on their claim forms that by participating in the claims process they "forever and finally release[d] USDA from any and all claims and causes of action that have been or could have been asserted against the Secretary by the proposed Class and the Class Members in the Case arising out of the conduct alleged therein." *Id.* Part 3, Acknowledgment 1.

By electing an option that clearly limited the damages they could receive under the Settlement, including a statement that they could not change their election to Track B at a later time, and expressly acknowledging that they forever released their claims in this action, the Movants relinquished any legally protected interest in the action and, in particular, in the cy pres funds.[2] Indeed, both the detailed and summary notice provided to Class Members made clear that *all* of the unclaimed settlement funds would be "donated to one or more organizations that have provided agricultural, business assistance, or advocacy services to Native Americans." *See* Mot. to Mod. at p.6, Ex C; *see also id.*, Ex. D. Accordingly, it is unclear how any of these individual claimants could have a legally protected interest in the cy pres funds, as they assert.

2. <u>Movants' Alleged Interests Will Not Be Impaired by the Denial of Intervention</u>

As the Movants have not asserted any legally protected interest in this action, or in the cy pres funds specifically, the Court cannot find that denying the Movants' intervention motion would impair a legally protected interest. Indeed, it is impossible to impair or extinguish a legal

[2] That the Movants have no legally-protected interest in the unclaimed settlement funds does not preclude the funds being disbursed to successful claimants upon consent of the USDA and approval by the Court. The lack of a legally-protected interest, however, does preclude Movants' intervention as of right.

right that no longer exists. *Diamond Chem.*, 517 F. Supp. 2d at 217. Moreover, while the Movants claim that the denial of their Motion would impair them from presenting arguments regarding the modification of the cy pres provisions, Mot. at 17, the parties have previously expressed that they have no objection to allowing the Movants to express their views to the Court, as they have done several times. Accordingly, the Movants' arguments will be heard by the Court. In fact, the same should be true for any Class Member who wants to share his or her views on the proposed modification, as this Court has routinely allowed the letters of Class Members and Native American leaders to be filed in this action.

3. Movants Cannot Show a Lack of Adequate Representation

The Movants have not shown that Class Counsel are inadequate representatives of the Class. At the outset, the Movants must overcome a high standard to show that the Class Representatives and Class Counsel, whom the Court already found to be adequate representatives of the Class, are no longer adequate.

Rule 24 has been widely interpreted to create "a presumption of adequate representation when the persons attempting to intervene are members of a class already involved in the litigation or are intervening only to protect the interests of class members." *Jenkins v. Missouri*, 78 F.3d 1270, 1275 (8th Cir. 1996) (citing *Bradley v. Milliken*, 828 F.2d 1186, 1192 (6th Cir. 1987), and *United States v. South Bend Community Sch. Corp*., 692 F.2d 623, 628 (7th Cir. 1982)); *accord In re Pet Food Prods. Liab. Litig.*, 629 F.3d 333, 349 n.26 (3rd Cir. 2009); *cf. Environmental Defense Fund, Inc. v. Higginson*, 631 F.2d 738, 740 (D.C. Cir. 1979) (recognizing "presumption of adequate representation" of the state when a "citizen or subdivision of [a] state" tries to intervene on the same side as the state).

And fatal to the instant intervention motion, "[a] difference of opinion concerning litigation strategy or individual aspects of a remedy does not overcome the presumption of

adequate representation." *Jenkins*, 78 F.3d at 1275. Consistent with these principles, the D.C. Circuit has observed that "a[] mere difference of opinion concerning the tactics with which litigation should be handled does not make inadequate the representation of those whose interests are identical with that of an existing party or who are formally represented in the lawsuit.'" *Jones v. Prince George's County*, 348 F.3d 1014, 1020 (D.C. Cir. 2003) (quoting 7C Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice and Procedure* § 1909, at 344 (2d ed. 1986)).

Here, the presumption of adequacy clearly attaches to Class Counsel's representation, because the proposed interveners are members of the Class, and the Movants cannot overcome this presumption in order to express their opinions about how to disburse the remaining settlement funds. These circumstances, therefore, do not present an occasion for absent class members to intervene in an ongoing class action, much less an action that has already settled. *See Jenkins*, 78 F.3d at 1275; *Jones*, 348 F.3d at 1020; *Higginson*, 631 F.3d at 740.

Nor are Movants correct in asserting that their "burden is *de minimis*" and that they "need to only show that there is a *possibility* that their interest may not be adequately represented[.]" Mot. at 18. None of the cases the Movants cite to support their position for those propositions involved a class action where, as here the Court already found counsel were adequate representatives of the class and where the Movants have failed to show they represent the broader class's interests.[3] *See id.* (citing *Karsner v. Lothian*, 532 F.3d 876 (D.C. Cir. 2008),

[3] Movants may be under the mistaken impression that they, or even the group of successful claimants, comprise the entire class in this case. The class, however, is not so limited. It includes "all persons who are Native American farmers and ranchers who (1) farmed or ranched or attempted to farm or ranch between January 1, 1981 and November 24, 1999; (2) applied to the USDA for participation in a farm loan program during that same time period; and (3) during the same time period filed a discrimination complaint with USDA either individually or through a representative with regard to alleged discrimination that occurred during the same

Wildearth Guardians v. Salazar, 272 F.R.D. 4, 13 (D.D.C. 2010), and *Fund for Animals, Inc. v. Norton*, 322 F.3d 728, 735 (D.C. Cir. 2003)). Accordingly, there is no basis to disregard the presumption of adequacy that applies to Class Counsel in this class action proceeding.

Regardless of the standard this Court applies on adequacy, the Movants cannot satisfy it. The Movants appear to assert that Class Counsel are no longer adequate because (1) they allegedly did not engage in enough "communication to or consultation with" the Movants, and (2) the Movants disagree with Class Counsel's decision to modify the cy pres procedures without distributing additional funds to successful claimants. Mot. at 18-19. But these arguments are unpersuasive for several reasons.

In general, this Court has already determined that the Class Representatives and Class Counsel are adequate representatives of the Class, whose members will be the primary beneficiaries of the cy pres funds. *See* Dkt. 577 (Nov. 1, 2010) (certifying the Class and approving Class Counsel and Class Representatives). The differences of opinion the Movants may have over how to use the unclaimed settlement funds cannot serve as a basis to reject the adequacy of counsel to represent the class after 15 years of work on behalf of the class. *See infra* at 18. The Court has had the opportunity to assess first-hand the quality of work and dedication of class counsel. Movants have presented no evidence to support their contention that Class Counsel and the Class Representatives have become inadequate representatives of the Class.

Furthermore, the Movants' argument on notice misperceives the type of notice required under Rule 23, overlooks the extensive consultation and meetings in which class counsel and the named plaintiffs have been engaged and fails to identify any particular features of the proposed use of the unclaimed funds of which the Movants have not been informed. *See* Mot. at 18. Nor

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time period." Settlement Agreement §II.E. That class members did not submit, or prevail on, claims in the claims process, however, doesn't diminish their membership in the class.

is formal notice of the proposed changes required by Rule 23 (e), as supplemental notice "is only required where the amendment to the settlement agreement would have a material adverse effect on the rights of class members." *In re Diet Drugs*, MDL No. 1203, 2010 U.S. Dist. LEXIS 66879, at *17 (E.D. Pa. 2010) (citing *In re Prudential Ins. Co. of Am. Sales Practices Litig*., 962 F. Supp. 450, n.10 (D.N.J. 1997), aff'd 148 F.3d 283 (3d Cir. 1998)). As the Plaintiffs explained in their Motion to Amend the Settlement Agreement, and incorporate herein, the provision that unclaimed settlement funds be distributed to non-profit entities serving Native farmers and ranchers was the subject of Rule 23(e) notice issued in 2011 and a formal fairness hearing. The proposed changes to the Settlement Agreement do not alter that scheme for distribution of the remaining settlement funds and, therefore, the prior notice sufficed to protect the interests of absent class members. Nonetheless, Class Members were fully informed of the proposed modifications to the cy pres provision through the range of activities described above, that included public meetings and conference calls, posting of the proposed changes on the class website and the claims administrator website and first class mail to all claimants. Other than a disagreement over the use of the remaining settlement funds, the Movants cannot legitimately complain about the *process* by which proposed changes to the Settlement Agreement have been publicized or proposed to the Court.

Even if supplemental notice were required, the type of personal communication the Movants expect finds no support in Rule 23 or cases applying it, and Class Counsel's prior efforts to inform the Class about the proposed modification far surpass the basic notice requirements of Rule 23. When Class Members can be "individually identified and located, courts will require that individual notice be sent via mail," and here every single Movant received detailed notice about the proposed modification via first class mail from the Settlement

Administrator. *Pigford v. Veneman*, 355 F. Sup. 2d 148, 162 (D.D.C. 2005) (citing *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 174-75 (1974), and Fed. R. Civ. P. 23(c)(2)(B)). Accordingly, not a single member of the Movants can claim that he or she was deprived of adequate notice under Rule 23. Contrary to the Movants' suggestion, nothing in the law or the Settlement Agreement requires Class Counsel to consult personally with each class member before discharging the responsibility the Settlement Agreement expressly entrusts to them to recommend how to disburse the remaining settlement funds. *See* Settlement Agreement, § IX.F.7. In any event, by hosting and participating in 11 public meetings in the summer of 2014 that lasted for dozens of hours and speaking with many additional Class Members on-on-one via telephone, Class Counsel have indeed communicated personally with many of the proposed interveners.

Nor do the objections of the Movants to use of the remaining settlement funds to endow a trust constitute a basis on which the pending proposal must be rejected. As the D.C. Circuit explained in *Thomas v. Albright*, 139 F.3d 227 (D.C. Cir. 1998), "a settlement can be fair even though a significant portion of the class and some of the named plaintiffs object to it." *Id.* at 232 (citing *Grant v. Bethlehem Steel Corp.*, 823 F.2d 20, 23 (2d Cir. 1987) (affirming settlement where approximately 36% of class members objected); *E.E.O.C v. Hiram Walker & Sons, Inc.*,768 F.2d 884, 891-92 (7th Cir. 1985) (affirming settlement of sex discrimination case where less than 15% of class members objected); *Flinn v. FMC Corp.*, 528 F.2d 1169, 1173 (4th Cir. 1975) (affirming settlement of sex discrimination action where three of five original named plaintiffs objected)). In all of these cases where settlements were approved by district courts and affirmed by appellate courts, a class was certified based on a finding that, inter alia, class counsel was adequate. *See Thomas*, 139 F.3d at 233. The rule proposed by the Movants, of course,

would turn this principle on its head, and require a finding that class counsel are inadequate whenever a portion of the class disagree with a course of action recommended by class counsel. And, as the *Thomas* decision reaffirms, Rule 23 provides a mechanism for class members to voice concerns about a term of settlement through objections lodged pursuant to formal notice. The time for such objections to use the remaining settlement funds to support programs offered by non-profit organizations to serve Native farmers and ranchers has come and passed, as the currently pending proposal provides for the same use of the remaining settlement funds as was announced to the class in the original formal notice and was considered by the Court at a duly convened fairness hearing in 2011. Intervention is not the proper mechanism to voice the concerns raised by the Movants.

Additional considerations related to the adjudication of class actions require denial of the intervention motion here. Membership in the class does not in itself create a right to intervene in the class litigation. While Plaintiffs have no objection to the Court considering the views of these movants and others who have submitted comments about the proposed use of cy pres funds to fund a trust, the Movants have no right to participate formally in the litigation. *See, e.g., Hobson v. Hansen*, 44 F.R.D. 18, 25-27 (D.D.C 1968); *In re Lorazepam & Clorazepate Antitrust Litig.*, 205 F.R.D. 363, 367-68 (D.D.C. 2001); *Allen v. Dairy Farmers of Am., Inc.*, 5:09-CV-230, 2011 WL 1706778 (D. Vt. May 4, 2011) (intervention denied because not required to protect class members interests, they could present their views on the proposed settlement without intervention).

In *In re Lorazepam*, a settlement had been preliminarily approved and notice issued to the class. A group of class members sought to intervene for the purpose of taking discovery in order to aid in their decision whether to opt out, object, or participate in the settlement. The district

court denied the motion, holding that:

> the record is devoid of evidence on Class Counsel's inadequacy. The only hint of inadequacy stems from the IRCs' unsubstantiated speculation concerning Class Counsel's motives. Merely refusing to provide a document request does not by itself evidence a conflict of interest warranting intervention at this stage, especially in light of the fact that the IRCs will suffer no prejudice.

In re Lorazepam, 205 F.R.D. at 367-68. Similarly, Movants here have presented no evidence that the Named Plaintiffs and Class Counsel are unable to represent their interests.

In *Hobson*, the district court had entered a decree following trial in a school desegregation case. Parents of school children, including some who would have been members of the plaintiff class, sought to intervene for the purpose of appealing the decree after the defendant Board of Education decided not to appeal. The district court denied the request to intervene, even though some of the would-be interveners fell within the plaintiff class. *Hobson*, 44 F.R.D. at 25-27. The district court noted that the interveners' disagreement with the decision made by the Board of Education did not mean they were inadequately represented, where the Board had acted in good faith and within its statutory authority. *Hobson*, 44 F.R.D. at 30. Similarly, here, Class Counsel have acted properly and within the bounds of their authority under Rule 23.

C. Permissive Intervention Is Also Inappropriate.

Permissive intervention is "inherently discretionary." *E.E.O.C. v. National Children's Ctr., Inc.,* 146 F.3d 1042, 1046 (D.C. Cir.1998) (citing *Hodgson v. United Mine Workers of America,* 473 F.2d 118, 125 n. 36 (D.C. Cir.1972)). A party seeking permissive intervention must show: "(1) an independent ground for subject matter jurisdiction; (2) a timely motion; and (3) a claim or defense that has a question of law or fact in common with the main action." *In re Lorazepam*, 205 F.R.D. at 368 (citing *E.E.O.C. v. National Children's Ctr., Inc.*, 146 F.3d 1042, 1046 (D.C.Cir.1998)).

Movants have not articulated a claim or defense that would support intervention. The *In re Lorazepam* Court denied permissive intervention under circumstances similar to those here, explaining that:

> The IRCs have merely cited their "concern" about the fairness, reasonableness, and adequacy of the proposed settlements. While it may be true that the IRCs have a significant economic interest in the settlements, they have neither articulated a particular claim or defense of their own nor any prejudice that will result from having to decide whether or not to opt-out that would necessitate intervention for discovery at this stage.

In re Lorazepam, 205 F.R.D. at 368; *see also Allen v. Dairy Farmers of Am., Inc.*, 5:09-CV-230, 2011 WL 1706778 (D. Vt. May 4, 2011) (denying permissive intervention because it was not required to protect class members' interests, and they could present their views on the proposed settlement without intervention). Moreover, the Class Members who filed this Motion cannot possibly have a legal claim, as all of them received the full amount of damages available to them under the Settlement Agreement and three years have passed since the final judgment in this action. *See supra* at 12-13

Here, where Movants have not identified a common claim or defense, and will not be prejudiced by expressing their views on the cy pres proposals without intervention, permissive intervention is not appropriate.

IV. CONCLUSION

For the foregoing reasons, the Movants' motion to intervene should be denied. The Plaintiffs have no objection to the Court considering the views of Movants about use of the cy pres funds to support a trust.

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By *<u>/s/Joseph M. Sellers</u>*
Joseph M. Sellers, Bar No. 318410
Christine E. Webber, Bar No. 439368

Respectfully submitted,

Paul M. Smith, Bar No. 358870
Jessica Ring Amunson, Bar No. 497223
Carrie F. Apfel, Bar No.

Peter Romer-Friedman, Bar No. 993376
COHEN MILSTEIN SELLERS &
TOLL PLLC
1100 New York Avenue, N.W.
Suite 500, West Tower
Washington, DC 20005
Telephone: (202) 408-4600
Facsimile: (202) 408-4699

David J. Frantz, Bar No. 202853
CONLON, FRANTZ & PHELAN
1818 N Street, N.W.
Suite 400
Washington, DC 20036-2477
Telephone: (202) 331-7050
Facsimile: (202) 331-9306

Sarah Vogel
SARAH VOGEL LAW OFFICE
1203 N. 2nd St.
Bismarck, ND 58501
Telephone: (701) 355-6521
Facsimile: (701) 425-0155

JENNER & BLOCK LLP
1099 New York Ave., N.W.
Suite 900
Washington, DC 20001-4412
Telephone: (202) 639-6000
Facsimile: (202) 639-6066

Phillip L. Fraas
STINSON MORRISON HECKER
1150 18th St. NW, Suite 800
Washington, DC 20036
Telephone: (202) 785-9100
Facsimile: (202) 785-9163

Attorneys for Plaintiffs