IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

PLAINTIFFS' RESPONSE TO RENEWED MOTION TO INTERVENE BY JONES ACADEMY AND THE CHOCTAW NATION

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES

FEDERAL RULES

I. INTRODUCTION

Movants, the Jones Academy Foundation and the Choctaw Nation, fail to show that they satisfy the standards for intervention as of right or permissive intervention. Nor is Movants assertion that they are intended third-party beneficiaries of the Settlement Agreement supported by logic, evidence or authority. The Settlement Agreement is between a certified class,and the U.S. Department of Agriculture. The cy pres provision at issue is intended ultimately to benefit Native American farmers and ranchers, many of whom may have been class members, whether or not they filed claims. It was not intended to, and did not, create a legally protected interest in the cy pres funds for any non-profit organization.

II. BACKGROUND

On September 24, 2014, the parties proposed an Addendum to the Settlement Agreement that would modify the agreement's cy pres provisions by (1) providing for a mechanism to distribute $38 million of the unclaimed settlement funds 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 which would be authorized to invest, manage, and distribute the funds to eligible non-profit organizations over a period up to 20 years. *See* Plaintiffs' Motion to Modify the Settlement Agreement Cy Pres Provisions at 1-6, Dkt. No. 709 ("Mot. to Mod.")

As Plaintiffs' Motion to Modify the Settlement Agreement makes clear, Plaintiffs describe the specific procedural changes that the parties have proposed, including how a panel of Native American leaders would make recommendations to Class Counsel on how to distribute the initial $38 million, how the Trust would be established, operated, and led by professionals with knowledge and a deep commitment to Native American farmers and ranchers, and how a slightly broader group of non-profit organizations and tribal entities that assist Native American

farmers and ranchers could receive distributions from the $38 million and the Trust. *Id*. at 4-9.

In the same Motion, Plaintiffs describe why the Proposed Addendum will make the cy pres distribution more effective, accountable, transparent and beneficial to Native American farmers and ranchers. *See id.* at 9-11. In particular, the decisions about how to spend 90% of the unclaimed settlement funds will be made by a Board of Trustees with expertise in agriculture and the specific needs of Native American farmers and ranchers, as opposed to under the existing agreement that requires Class Counsel to make all recommendations about cy pres distributions. And by investing the funds over time, the Trust would create the opportunity to distribute a greater amount of overall funds to non-profits that serve Native American farmers and ranchers than the amount of the initial endowment. *See id.* at 6-11. Moreover, future distributions of cy pres funds will allow new organizations to receive funding to help Native American farmers and ranchers, and will ensure that Native American farmers and ranchers receive vitally important services for years to come. *Id*. at 6, 7, 10.

Most important, the primary change proposed to the cy pres distribution scheme, which would permit the Trust to distribute the funds over an extended period of time, is fully in accord with the goals of the settlement. As this Court observed when it approved the settlement, the Agreement will "nurture future generations of Native American farmers and ranchers." Transcript of Fairness Hearing Before the Honorable Emmet G. Sullivan, U.S. District Judge at 46:23-47:14 (Apr. 28, 2011). That the cy pres funds may be distributed to organizations that will serve the children, grand-children or other descendants of Class Members, therefore, does not mean that the funds will be used for any purpose other than what was intended by the Settlement Agreement.

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, some of whom are also conversant with the kind of philanthropic, banking, and investment practices that will add important dimensions to the Board. *See id.* at 1-2. Likewise, the proposed executive director of the Trust, 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 and Ex. 14.

III. ARGUMENT

A. Movants Do Not Meet Legal Standards 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 that 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 Have Not Established a Legally Protected Interest

To intervene as a matter of right, a movant must demonstrate Article III standing. *In re Endangered Species Act Section 4 Deadline Litig.*, 704 F.3d 972, 976 (D.C. Cir. 2013). But the Choctaw Nation cannot establish standing because the injury about which it expresses concern– *i.e.*, that a modification to the Settlement Agreement will affect the amount of money that it may receive, or the timing of such awards, as a potential cy pres beneficiary, Mot. at 7 n.3 (Dkt. 713)

– is speculative. *See Deutsche Bank Nat'l Trust Co. v. FDIC*, 717 F.3d 189, 193 (D.C. Cir. 2013). In such circumstances, intervention as of right is inappropriate. *See id*.

The potential economic injury Movants assert is entirely speculative. To receive any award under the existing cy pres provision, Movants must meet eligibility requirements (which they assert but have submitted no evidence to establish are met), including being proposed by Class Counsel and approved by the Court. *See* Settlement Agreement § II.I. The amount that they could receive *even if they were both deemed eligible and were nominated by Class Counsel* would depend upon the number of other organizations nominated, given that the existing cy pres provision require the cy pres funds to be distributed in "equal shares" to eligible cy pres beneficiaries. *See* Settlement Agreement § IX.F.7. Under the proposed modification of the cy pres provisions, a broader eligibility standard for cy pres beneficiaries will make it *more likely* that the Movants may be deemed eligible, and Class Counsel (as to the first $38 million) or the Trustees (as to the balance of the funds), would be permitted to recommend whatever allocation they deem appropriate, regardless of the number of other organizations being awarded funds. Thus, it is impossible to determine whether the Movants might receive more or less of the cy pres funds under the proposed modification of the cy pres provision than under the existing procedures.

Moreover, all or some of the Movants cannot possibly show an injury in fact, because they have not proffered any evidence or facts to show they are *currently* eligible to receive cy pres funds, and a proposed modification cannot take away a right that they currently do not possess. While Movants' motion begins with the presumption that they are eligible cy pres beneficiaries under the original Settlement Agreement, Mot. at 3, it fails to establish that fact. The Jones Academy, as an educational institution, is explicitly ineligible to receive cy pres funds

under the existing Settlement Agreement, which excludes educational institutions. *See* Settlement Agreement § II.I. While Movants assert that the Jones Academy Foundation is not an educational institution, but a separate non-profit organization, it is not clear from the record presented that the Jones Academy Foundation is actually separate, in a meaningful way, from the Jones Academy. Moreover, Movants have not submitted any evidence that the Choctaw Nation, the Jones Academy Foundation, or the Jones Academy provided "agricultural, business assistance or advocacy services to Native American farmers between 1981 and [November 1, 2010]," a requirement to qualify as a cy pres beneficiary under the existing Settlement Agreement. *See id*. Finally, it is not clear that the Choctaw Nation, which is not a section 501(c)(3) organization, qualified as a non-profit under the original Settlement Agreement.[1]

Moreover, the statement that Movants currently "qualify as 'Cy Pres Beneficiaries,'" Mot. at 3, ignores the very significant requirement that "Cy Pres Beneficiaries" must be "proposed by Class Counsel and approved by the Court." Settlement Agreement § II.I. Since none of the Movants has been proposed by Class Counsel or approved by the Court, none of the Movants has established that they qualify as one of the "cy pres beneficiaries," as defined by the original Settlement Agreement.

Thus, Movants have not even established that they are *currently* eligible cy pres beneficiaries who may receive cy pres funds under the existing cy pres provision. Accordingly, the Movants have nothing to lose from the proposed modification. And because the proposed modification would create the possibility that the Movants receive more cy pres funds than under

[1] Among the modifications made to the cy pres provision in the Proposed Addendum to the Settlement Agreement are changes that expressly make certain tribal government entities eligible for funds, as well as removing the bar on educational institutions. There would have been no need to clarify the availability of funds to tribal entities that are not 501(c)(3) organizations had the original Settlement Agreement made tribes eligible to receive funds. See Dkt. 709, Ex. A.

the current provision, the Movants have nothing to lose and everything to gain from the modification that the parties have proposed. These are not facts that demonstrate an injury in fact, but instead defeat any such claim of injury.

In sum, Movants present the sort of speculative basis for intervention that the D.C. Circuit has previously rejected. *Deutsche Bank*, 717 F.3d at 193; *cf. In re Endangered Species Act Section 4 Deadline Litig.-MDL No. 2165*, 704 F.3d 972, 976-77 (D.C. Cir. 2013) (affirming denial of intervention, noting that looser standards of injury apply *only* to cases asserting procedural injury, but not where a statutory right to a particular process was lacking). While Movants suggest the mere potential that they might receive benefits is sufficient, the cases cited do not support such a broad reading, as all involved an existing economic benefit already being received or to which the movant was contractually entitled, and all showed a clear adverse impact to that economic benefit should plaintiffs in those actions receive the relief they sought.[2] Here, Movants merely assert a hypothetical interest under the existing cy pres provision, and only speculate that the outcome might be worse if the relief sought from a modified cy pres provision were to be obtained.

Movants fare no better in arguing that they have standing as intended third-party

[2] In *Utahns for Better Transp. v. U.S. Dept. of Transp.*, 295 F.3d 1111 (10th Cir. 2002), for example, members of a trade association that sought to intervene actually had contracts to perform work on transportation projects whose funding would be eliminated if plaintiffs prevailed, showing a far more concrete and certain right at stake than at issue here. *Id.* at 1113. In *Natural Resources Defense Council, Inc. v. U.S. Nuclear Regulatory Commission*, 578 F.2d 1341 (10th Cir. 1978), the would-be intervenor was one of the largest holders of uranium property in the state, and had an existing license to operate a uranium mill that would shortly be up for renewal, making the standards applicable to uranium processing licenses in the state of direct consequence to its existing economic interests. *Id.* at 1344. In *Fund for Animals, Inc. v. Norton*, 322 F.3d 728 (D.C. Cir. 1981), the Mongolian Natural Resources Department established that it currently received fees from issuing hunting permits for argali sheep, and that – as plaintiffs in that case had argued – a change in U.S. government rules on importing "trophies" created from such sheep would deter most U.S. hunters from seeking permits to hunt those sheep. *Id.* at 733.

beneficiaries to the Settlement Agreement. To start with, just as they assumed they were eligible cy pres beneficiaries, without establishing they met the plain language and clear requirements of Section II.I, the Movants assert, without any analysis, that they are "intended third-party beneficiaries of the Agreement." Mot. at 10. This is simply false. "A party has a cause of action as a third-party beneficiary to a contract if the contracting parties express an intent primarily and directly to benefit that third party." *Vencor Hospitals v. Blue Cross Blue Shield of Rhode Island*, 169 F.3d 677, 680 (11th Cir. 1999). However, the contracting parties here expressed no such intention to benefit any non-profit organizations. The purpose of the cy pres provision was to provide services to Native American farmers and ranchers, and thereby benefit them. While non-profit organizations may provide the means by which to deliver services to members of the class and those similarly situated, non-profit organizations clearly are not the intended beneficiaries of the cy pres doctrine or a distribution pursuant to that doctrine. *See Democratic Cent. Comm. of D.C. v. Washington Metro. Area Transit Comm'n*, 84 F.3d 451, 455-56 (D.C. Cir. 1996) (noting that the cy pres doctrine allows a trust that "finances projects beneficial to the injured [class members] and those similarly situated," and that the doctrine is intended to "parallel the intended use of the funds as nearly as possible as maximizing the number of plaintiffs compensated"); *Diamond Chem. Co. v. Akzo Nobel Chems. B.V.*, 517 F. Supp. 2d 212, 217 (D.D.C. 2007) (stating that the "*cy pres* doctrine allows unclaimed settlement funds to be distributed to the "next best" use, that is, for the indirect benefit of the class and the non-claiming class members").

Further, even if every organization meeting the definition in Section II.I of the Agreement were to gain the status of third-party beneficiary, since Section II.I includes as part of the definition that the non-profit organization be proposed by Class Counsel and approved by the

Court, no organizations can be third-party beneficiaries *at this time*, as Class Counsel have made no proposals and the Court has not approved any selections. In contrast, in *Beckett v. Air Line Pilots Ass'n*, 995 F.2d 280, 286 (D.C. Cir. 1993), on which Movants rely, the consent decree had been negotiated by a union which had a duty to represent its members, and the consent decree explicitly stated that the funds paid "*shall* be distributed to eligible pilots" who were defined as those participating in a particular plan. *Beckett*, 995 F.2d at 287. The Settlement Agreement here, however, does not require that funds be distributed to every group which meets certain criteria, but only to groups proposed by Class Counsel and approved by the Court. Here, Class Counsel and the Court have the very discretion that the union lacked in *Beckett*. Moreover, while the union in *Beckett* had a fiduciary duty to the individual pilots, including the intervenors, the fiduciary duty Class Counsel have here is to the class, not to any particular non-profit organization. Thus, the cases on which Movants rely undermine, rather than support, their claim to third-party beneficiary status.

2. Movants Have Not Shown Impairment of their Alleged Rights if Intervention is Denied

In order to satisfy the requirement that Movants' rights be impaired absent intervention, they must first have rights at issue. But, the Movants have failed to show they have any rights under the Settlement Agreement and, therefore, cannot show a potential impairment of any such rights.

3. Movants Have Not Shown They Lack Adequate Representation

The Movants have not demonstrated that their "interest may not be adequately represented by existing parties." *Hardin*, 600 F. Supp. 2d at 15 (internal quotations and citation omitted). Indeed, Movants' legal authority clearly rejects the position they advance here. In *In re Lease Oil Antitrust Litigation*, 570 F.3d 244 (5th Cir. 2009), on which Movants rely, *see* Mot.

at 1, the Fifth Circuit explained that "[w]hen class counsel has been properly appointed," another party "cannot intervene under the guise of representing owners of the unclaimed property." *Id.* at 250-51 (citing *Paterson v. Texas*, 308 F.3d 448, 451 (5th Cir. 2002) ("The class members are represented by class representatives, who satisfied the district court that they met the representation requirements of federal law and that the settlement was fair. The class representatives, not the State, are by federal law the parties authorized to prosecute and settle the claims of the class members.")). While the Fifth Circuit allowed Texas to intervene, it approved intervention solely because state law granted Texas a preexisting right to unclaimed funds and the Fifth Circuit made clear that a party lacking a preexisting property right would also lack a right to intervene. *See id.* Here, the Choctaw Nation and the Jones Academy Foundation have no preexisting rights that are comparable or even analogous to the rights of the state of Texas in *In re Lease Oil*.

As in *In re Lease Oil*, "class counsel has been properly appointed" here, and thus Movants cannot intervene by purporting to represent a legal interest in the property which is under the control of Class Representatives and Class Counsel. This Court has already determined that the Class Representatives and Class Counsel are adequate representatives of all Class Members. *See* Dkt. No. 577 (Nov. 1, 2010) (certifying the Class and approving Class Counsel and Class Representatives); *see also* Transcript of Fairness Hearing Before the Honorable Emmet G. Sullivan, U.S. District Judge at 45:12, 49:5-11 (Apr. 28, 2011) (recognizing that Class Counsel "obtained an exceptional result for the class," "demonstrated the highest level of skills and professionalism," and "labored intensely for over 11 years without any payment whatsoever and faced a significant risk that they would never receive compensation for the work that they performed on behalf of the class."). In addition, the Court has granted final

approval to the Settlement Agreement that assigns to Class Counsel the duty of recommending to the Court how the cy pres funds should be distributed. *See* Dkt. No. 606 (April 28, 2011) (granting final approval to Settlement Agreement); Dkt. No. 607 (Apr. 29, 2011) (entering final order and judgment); Settlement Agreement § IX.F.7 (stating that "Class Counsel may then designate Cy Pres Beneficiaries to receive equal shares of the Cy Pres Fund"); *id.* § II.I (stating that a "'Cy Pres Beneficiary' is a non-profit organization … that will be proposed by Class Counsel and approved by the Court").

It is has been years since the Court appointed Class Counsel and the Class Representatives as representatives of the Class, and more than three years since the Court carefully considered any objections to the Settlement and granted final approval. There is no basis on which to reconsider those appointments.

Indeed, the rule that Movants propose could lead to intervention of *any party* which speculates that it may qualify for a cy pres distribution. In this case, for example, were Movants granted intervention, then every other eligible recipient of cy pres funds could make the same claim. Movants do not, and cannot, explain how they differ from any other tribes or non-profit organizations who might seek a share of the cy pres funds.[3] This consideration weighs against intervention. *See Deutsche Bank*, 717 F.3d at 192 ("given the implications of appellants' argument [that every creditor could intervene where litigation could affect assets available to pay off creditors], they are swimming up river").

B. Movants Should Not Be Granted Permissive Intervention

Movants are not entitled to permissive intervention, because they have not advanced a

[3] Of course, declining to recognize a *right* to intervene does not prevent – and should not stop – the Court from giving fair consideration to the views expressed by Movants, as well as those individuals and organizations expressing support for the proposed foundation.

legal claim cognizable in this action, and because they have not established an independent ground for subject matter jurisdiction over such a claim, as Rule 24(b) requires.

First, to obtain permissive intervention, Movants must establish "'an independent ground for subject matter jurisdiction'" over a legal claim. *District of Columbia v. Potomac Elec. Power Co*., 826 F. Supp. 2d 227, 233 (D.D.C. 2011) (quoting *E.E.O.C. v. Nat'l Children's Ctr., Inc*., 146 F.3d 1042, 1046 (D.C. Cir. 1998)). Movants fail to address this requirement that they show an *independent* ground for subject matter jurisdiction and do not assert that either federal question or diversity jurisdiction exists over any claim they might advance in this litigation. On this basis alone, permissive intervention should be denied.

While Movants assert that their intervention "will not disturb this Court's retained jurisdiction," Mot. at 11, that is plainly not the legal standard they must satisfy. In this Circuit, Movants must show that they have an *independent* ground for subject matter jurisdiction. *Potomac Elec.*, 826 F. Supp. 2d at 233; *see, e.g.*, *United States v. Morten*, 730 F. Supp. 2d 11, 16 (D.D.C. 2010) (denying permissive intervention because movant "has not even attempted to explain why this Court would have subject matter jurisdiction over its [] claims"). Were Movants correct that they merely need to show the Court's preexisting jurisdiction will not be disturbed by their intervention, the independent subject matter jurisdiction requirement would be superfluous.

Second, to obtain permissive intervention, Movants must also show that they have a legal "claim or defense" under a federal or state statute that "shares a common question with the claims of the original parties." *Nat'l Children's Ctr.*, 146 F.3d at 1045. But Movants fail to satisfy this legal standard, as they do not assert any legal claim, let alone that they share a

common legal claim with the Plaintiffs in this litigation. *See* Mot. at 12.[4] Thus, Movants' request for permissive intervention should be denied. *Schoenman v. FBI*, 263 F.R.D. 23, 25 (D.D.C. 2009) (denying permissive intervention where movant seeking to enforce a consent decree "has not cited to any relevant federal statute that provides him a conditional right to intervene" or "indicated that he has a claim or defense"); *United States v. 8 Gilcrease Ln., Quincy, Fla.*, 641 F. Supp. 2d 1, 6 (D.D.C. 2009) (denying permissive intervention where movants seeking an interest in forfeited property "have not demonstrated that they have a claim or defense available to them").

Instead of addressing these controlling legal standards for permissive intervention, Movants point to a D.C. Circuit decision in which the Court recognized a very limited exception to the rule that a movant must show that it has a claim or defense, where the movant seeks to obtain access to litigation documents it believes should be public. Mot. at 11-12 (citing *Nat'l Children's Ctr.*, 146 F.3d at 1046) (noting "courts have been willing to adopt generous interpretations of Rule 24(b) because of the need for an effective mechanism for third-party claims of access to information generated through judicial proceedings.") (internal quotations and citations omitted).

But this very limited exception does not ordinarily excuse Movants from showing that they have a claim or defense under some law.[5] Indeed, courts in this Circuit have not interpreted

[4] In this action, Plaintiffs only asserted claims arising under the federal Equal Credit Opportunity Act. *See* Eighth Amended Complaint ¶¶ 131-36, Dkt. No. 460 (Feb. 11, 2008). Movants do not allege that they have a claim under ECOA or any other federal or state statute for that matter. *See* Mot. at 10-11. Nor would Movants have been eligible to participate in this action, as only individual Native American farmers and ranchers were included in the certified class, and neither tribes nor non-profit organizations could qualify as claimants in the Settlement Agreement. *See* Settlement Agreement § II.E (defining the "Class").

[5] For example, where a union attempted to intervene in an action involving a wrongful termination claim by one of its members, the Court denied permissive intervention because the

the narrow exception of *National Children's Center* generally to excuse parties in other types of cases from having to assert a legal claim. *See New Hampshire v. Holder*, No. 12-1854 (EGS-TBG-RMC), 2013 U.S. Dist. LEXIS 28721, at *21 (D.D.C. Mar. 1, 2013) (citing *Nat'l Children's Center*, 146 F.3d at 1046, for proposition that one "must ordinarily present . . . a claim or defense that has a question of law or fact in common with the main action"); *In re Fort Totten Metrorail Cases*, 960 F. Supp. 2d 2, 5 n.3 (D.D.C. 2013), appeal dismissed, 2013 WL 7022814 (D.C. Cir. Dec. 31, 2013) (same). And Movants have not identified any case where *National Children's Center* was applied to excuse the absence of a legal claim under circumstances that are analogous to the instant proceeding.[6]

Accordingly, as Movants cannot establish that they have a legal claim or an independent basis for subject matter jurisdiction with respect to a claim, the Court should decline to grant permissive intervention.

October 8, 2014

Respectfully submitted,

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union itself did not have a legal claim. *Norfolk Southern Ry. v. Solis*, 915 F. Supp. 2d 32, 41 (D.D.C. 2013). On the other hand, where a party can actually establish its legal claim under federal or state law, this rule is not a barrier to permissive intervention. *See, e.g.*, *Sheet Metal Workers' Int'l Ass'n v. United Transp. Union*, 767 F. Supp. 2d 161, 177 (D.D.C. 2011) (individual members of the United Transportation Union allowed to permissively intervene in action between the Sheetmetal Workers' union and the UTU, as those individual members "raise claims under" two titles of a federal labor law).

[6] Nor are the circumstances here analogous to the special circumstances at issue in *United States v. SBC Communs., Inc.*, No. 05-2102 (EGS), 2007 U.S. Dist. LEXIS 45791 (D.D.C. June 26, 2007).

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