IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

MARILYN KEEPSEAGLE, *et al.*,	)	
Plaintiffs,	)	
v.	)	Case No. 1:99-CV-3119 (EGS)
TOM VILSACK, Secretary of Agriculture,	)	
Defendant.	)	

DEFENDANT'S OPPOSITION TO THE CHOCTAW NATION OF OKLAHOMA'S SECOND MOTION TO INTERVENE

Without standing, a proposed intervenor may not intervene in a district court action. The Choctaw Nation of Oklahoma and Jones Academy Foundation seek to intervene in this case to oppose plaintiffs' motion to modify the settlement agreement based on a faulty premise that, when its flaw is recognized, makes clear that they lack standing. The movants incorrectly claim that they are eligible to receive money as *cy pres* beneficiaries under the current agreement, and, they continue, if the agreement is amended, then their potential share of the *cy pres* fundmight shrink – and might be delivered later. But, as explained below, the Choctaw Nation and the Jones Academy Foundation are not, in fact, eligible *cy pres* beneficiaries under the settlement agreement (although they might qualify under the proposed expanded definition were the agreement to be amended). This fact deprives them of standing and dooms their efforts to intervene under both the Federal Rules of Civil Procedure's mechanisms for intervention as of right and

permissive intervention. *See* Fed. R. Civ. P. 24(a), (b). Their motion to intervene also founders for lack of prudential standing, to the extent they seek to opine on the proper interpretation of the settlement agreement.

The class-wide settlement agreement in this case created a $680 million dollar fund to be distributed to class members through a privately administered claims process. Revised Settlement Agreement ("RSA"), Exhibit 2 to Unopposed Motion to Revise Settlement Agreement, July 31, 2013, ECF Dckt. No. 621-2, at 13. The process has ended and defendants understand that approximately $380 million remain. The agreement requires that such unspent funds be dispersed to certain "non-profit organizations," termed "Cy Pres Beneficiar[ies]" by the agreement. *Id.* at 2-3. The modifier "certain" was used in the previous sentence because the agreement excludes some "non-profit" groups from the universe of eligible *cy pres* beneficiaries. *Id.* at 2-3. These excluded non-profit groups include among their number "educational institution[s]." *Id.* at 2-3 ("'Cy Pres Beneficiary' is any non-profit organization, other than a law firm, legal services entity, or educational institution, that has provided agricultural, business assistance, or advocacy services to Native American farmers between 1981 and the Execution Date that will be proposed by Class Counsel and approved by the Court."). Moreover, the Agreement does not mention "tribes" as a category of entities eligible to receive *cy pres* funds. *Id.* at 2-3.

Owing to the amount of money remaining, plaintiffs have filed a motion – unopposed by defendants – to modify the *cy pres* provisions of the settlement

agreement. Plaintiffs' Memo. of Points and Authorities in Support of their Unopposed Motion to Modify the Settlement Agreement Cy Pres Provisions, Sept. 24, 2014, ECF Dckt. No. 709, at 15. The proposed changes to the settlement agreement, to which defendants have agreed, would expand the scope of potential *cy pres* beneficiaries to include some educational institutions and tribal instrumentalities. *See* Addendum to Settlement Agreement, Exhibit A to Plaintiffs' Memo. of Points and Authorities in Support of their Unopposed Motion to Modify the Settlement Agreement Cy Pres Provisions, Sept. 24, 2014, ECF Dckt. No. 709-2. The proposed amendment would also authorize the creation of a charitable trust to distribute 90% of the remaining funds over approximately the next 20 years. *Id.* at 2. (The other ten percent of the remaining funds would be distributed in the relatively short term by Class Counsel. *Id.*)

The Choctaw Nation and the Jones Academy Foundation assert that these changes would reduce their chances of being selected as a *cy pres* beneficiary and could delay their receipt of any funds, as the bulk of the remaining money will be distributed by the trust over some period of time (up to 20 or so years). Memorandum in Support of Renewed Mtn. to Intervene ("Memo."), Oct. 1, 2014, ECF Dckt. No. 713, at 6-7, n.3. Accordingly, they have moved to intervene under both Federal Rule of Civil Procedure 24(a) (intervention as of right) and 24(b) (permissive intervention).

To intervene, whether as of right or permissively, a movant must establish Article III standing. *Deutsche Bank Nat'l Trust Co. v. FDIC*, 717 F.3d 189, 193

(D.C. Cir. 2013) ("It is therefore circuit law that intervenors must demonstrate Article III standing.").[1] Thus, it must show the existence of (i) a concrete injury-in-fact that is (ii) "fairly traceable" to defendant's conduct, and (iii) which is "likely" to be redressed by a favorable order from the Court. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992) (quotation marks omitted).[2] The Choctaw Nation and the Jones Academy Foundation argue that they have standing to intervene because altering the *cy pres* provisions of the settlement agreement – and the judgment incorporating them – would rob them of the opportunity to pursue a benefit, *i.e.*, the benefit of receiving the *cy pres* funds under the current terms of the settlement agreement. Memo. at 6-7, 10.

In fact, movants cannot satisfy this bedrock jurisdictional requirement. It is true that "the loss of an *opportunity to pursue a benefit*" can constitute a cognizable

[1] Prior to *Deutsche Bank*, a D.C. Circuit decision stated that "[i]t remains, however, an open question in this circuit whether Article III standing is required for permissive intervention." *In re Endangered Species Act Section 4 Deadline Litigation-MDL No. 2165*, 704 F.3d 972, 980 (D.C. Cir. 2013). *Deutsche Bank* closed the question. 717 F.3d at 193 (opinion for the court), 195-96 (concurring opinion).

[2] Movants must demonstrate standing even though they do not ask the Court to resolve an additional cause of action on the merits; under D.C. Circuit precedent, even those seeking to intervene *as defendants* must establish standing. *Deutsche Bank*, 717 F.3d at 193. *E.E.O.C. v. Nat'l Children's Ctr., Inc.*, 146 F.3d 1042, 1046-47 (D.C.Cir.1998), recognized a "narrow exception" to the requirement that a would-be intervenor must demonstrate an independent basis for jurisdiction. But contrary to the movants' suggestion, Memo. at 11-12, the exception recognized in *EEOC* does not apply broadly to post-judgment intervention motions. Rather, it is "a narrow exception [that applies] when the third party seeks to intervene for the limited purpose of obtaining access to documents protected by a confidentiality order." *E.E.O.C., Inc.*, 146 F.3d at 1047. Where, as here, there is no confidentiality order at issue, and the movant seeks to participate in a more merits-related aspect of the case (*i.e.*, the modification of the terms of the settlement that resolved the case), the rule in *Deutsche Bank* governs – and standing is required.

injury. *Ranger Cellular v. FCC*, 348 F.3d 1044, 1050 (D.C. Cir. 2004). But the opportunity cannot be entirely "illusory," because if it is the Court cannot provide redress and standing is lacking. *Id.* Here, the opportunity to compete for *cy pres* funds under the terms of the current agreement is illusory: Neither the Jones Academy Foundation nor the Choctaw Nation is eligible to receive *cy pres* funds under the current settlement agreement. (Given that movants have submitted a joint proposal for *cy pres* funds, Ex. A to Memo., at 4 (proposal), it would suffice to defeat movants' argument if one of half of the duo were ineligible – but both are.)

The settlement agreement states that "educational institution[s]" cannot be *cy pres* beneficiaries. The Jones Academy Foundation would be deemed an educational institution for purposes of the agreement and, accordingly, is ineligible to receive *cy pres* funds. The Jones Academy is listed in the United States Department of the Interior Bureau of Indian Education (BIE) National Directory as a residential school funded by grants issued by the Secretary of the Interior pursuant to the Tribally Controlled Schools Act of 1988. *See* http://www.bie.edu/cs/groups/xbie/documents/text/idc-008039.pdf. The Jones Academy, according to its website, "has always been a residential learning center," http://www.jonesacademy.org/about.html, or in other words, an educational institution. And the Jones Academy Foundation is the school's fundraising arm: "Private support is essential to the continued expansion of facilities and quality programming for Jones Academy's American Indian youth. That's why, in 2003, to help ensure a bright future for Jones Academy, the Choctaw Nation established the

Jones Academy Foundation . . . ," http://www.jonesacademy.org/donations.html. Any question about whether the Foundation is essentially an arm of the school, and as such would be treated as an "educational institution" under the settlement agreement as currently written, is resolved by the following fact taken from the Jones Academy website: "100% of [a] donation [to the Foundation] goes toward Jones Academy and its students."[3] *Id.*

Not only is the Jones Academy Foundation ineligible to compete for *cy pres* funds under the current terms of the agreement, but its proposal partner, the Choctaw Nation, is also ineligible to receive *cy pres* funds. The agreement states that, with exceptions, "non-profit organizations" are eligible to receive *cy pres* funds. Tribes are not mentioned as eligible entities, however. RSA at 2-3. It is true that federally recognized tribes, like some non-profit organizations, are immune from state and federal income taxation, and it is also true that donations to tribes may be tax deductible. Ex. A. to Memo. at 14. But "tribes" and "non-profit" organizations are commonly considered distinct categories of entities. *E.g.*, *Blue Lake Rancheria v. United States*, 653 F.3d 1112, 1118-19 (9th Cir. 2011) (quoting House of Representatives conference report which considers "Indian Tribes" and "nonprofit organization" as separate categories of entities); *Mason v. Morrisette*, 403 F.3d 28, 31 (1st Cir. 2005) (quoting HUD and EPA regulations which list separately "Indian

[3] Although this percentage would apparently change if the Jones Academy Foundation were to receive money from the *cy pres* fund, the question is whether the entity is an educational institution at the time of the application, and the fact that the Foundation, by its own admission, currently channels 100% of the donations that it receives to the school demonstrates that it is.

Tribes" and "nonprofit organizations); *SEC v. Bear Stearns*, 2004 WL 885844, at *6 (S.D.N.Y. March 25, 2004) (quoting from plan document for non-profit grant-making entity which separately specified as eligible grant recipients "[n]on-profit organizations" and "Indian tribes"). And consistent with this common usage, "tribes" and "non-profit organizations" were considered as distinct entities in the settlement agreement. Presumably, that is why plaintiffs' memorandum in support of the motion to amend the settlement agreement notes that the proposed addendum to the settlement agreement would "expand" the universe of entities eligible to receive *cy pres* funds to include tribal instrumentalities – they were not included before. Memo. in Support of Mtn. to Modify Settlement at 11. In short, tribes are not eligible to compete for *cy pres* funds under the current terms of the agreement.

Because neither the Jones Academy Foundation nor the Choctaw Nation is eligible to receive *cy pres* funds under the current terms of the settlement agreement, modifying the settlement agreement will not deprive them of any opportunity to secure *cy pres* funds. (To the contrary, the modification may permit them to compete for funds when they otherwise would be unable to do so.) And as the "opportunity to pursue [the] benefit" is illusory, the Court is not able to provide redress, and movants lack Article III standing. *Ranger Cellular*, 348 F.3d at 1050. Without standing, the movants cannot intervene in this case. *See Deutsche Bank*, 717 F.3d at 193.

Movants' request to intervene should also be denied to the extent they "wish to be heard on a specific question of contract interpretation," because they lack prudential standing to raise that issue. *See Deutsche Bank*, 717 F.3d at 194. Movants seek to intervene, at least in part, to argue that the section of the settlement agreement over which the Court retained jurisdiction (section XIII) does not provide the Court with the authority to modify the terms of the *cy pres* distribution. *See* Order on Plaintiffs' Mtn. for Final Approval of Settlement, April 28, 2011, ECF Dckt. No. 606, at 2, ¶ 5; Ex. B to Memo., proposed Opposition to Plaintiffs' Motion to Modify the Settlement Agreement Cy Pres Provisions, at 4, 4 n.2. But they are not parties to the agreement, so unless they are intended third-party beneficiaries, they are "effectively seeking to enforce the rights of third parties . . . which the doctrine of prudential standing prohibits." *Deutsche Bank*, 717 F.3d at 194. Movants are not intended beneficiaries. A third party is not an intended beneficiary in this circumstance unless the parties "intended that a third party should receive a benefit *which might be enforced in the courts*." *SEC v. Prudential Sec. Inc.*, 136 F.3d 153, 159 (D.C. Cir. 1998) (emphasis in original) (quotation marks omitted). Nothing in the agreement establishes that the parties intended for potential *cy pres* beneficiaries – of which, as described above, movants are not – to have a an enforceable right to the *cy pres* provisions as written.[4] To the contrary,

[4] *Beckett v. Air Line Pilots Association*, which concluded that nonunion pilots who were not parties to a consent decree could sue to enforce it, differs from this case because the consent decree established a trust and named the plaintiff nonunion pilots as the beneficiaries, 995 F.2d 280, 285-289 (D.C. Cir. 1993), whereas the movants here do not fit the definition of *cy pres* beneficiaries. Furthermore, even

the agreement may be amended with the parties' and the Court's consent. RSA at 49. No provision was made for seeking the approval of potential beneficiaries because none was necessary; they do not have an enforceable right to distribution of the *cy pres* funds under the agreement's current terms. Thus, movants lack prudential standing to intervene to be heard on the meaning of section XIII of the settlement agreement.

For the reasons stated above, the Court should deny the renewed motion to intervene.

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Respectfully submitted,

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entities that do meet that definition are, at best, potential beneficiaries, given that the agreement provides plaintiffs with the discretion to select amongst eligible beneficiaries (subject to the Court's approval), RSA at 2-3, 33-34. *See Prudential Sec.*, 136 F.3d at 157.

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