**IN THE UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF COLUMBIA**

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

**DEFENDANT'S OPPOSITION TO GREAT PLAINS CLAIMANTS' SECOND MOTION TO INTERVENE**

A group of class members, calling themselves the Great Plains Claimants, seek to intervene in this case. They were fully compensated under the terms of the settlement agreement that resolved the underlying litigation, and they seek to intervene primarily to argue that they should receive additional payments. The Court should deny their motion.

The settlement agreement created a privately administered, non-judicial claims process under which class members could submit claims for compensation for alleged discrimination by the United States Department of Agriculture ("USDA") in the administration of agricultural loan programs. Revised Settlement Agreement ("RSA"), Exhibit 2 to Unopposed Motion to Revise Settlement Agreement, July 31, 2013, ECF Dckt. No. 621-2, at 22-27. The undersigned have been informed that eligible class members' claims have been paid and that the process has otherwise been completed, and approximately $380 million remain.

The agreement provides that funds remaining after the completion of the claims process will be dispersed to non-profit organizations selected by plaintiffs (and approved by the Court) that meet certain criteria. *Id.* at 2, 3, 33. These are the so-called *cy pres* provisions of the agreement, and they are based on the idea that leftover funds can benefit uncompensated class members through proxies (*i.e.*, the non-profit organizations deemed by plaintiffs and the Court to receive funds). *See In re Lupron Mktg. and Sales Practice Litig.*, 677 F.3d 21, 34 (1st Cir. 2012) ("Because the consumer fund was established for the benefit of all consumer purchasers of Lupron, not just the 11,000 who filed claims, the court appropriately determined that the 'next best' relief would be a *cy pres* distribution which would benefit the potentially large number of absent class members."). The agreement – to which the Great Plains Claimants, as unnamed class members, agreed – does not provide for the distribution of remaining funds to fully compensated class members. RSA, at 2, 3, 33.

Plaintiffs have filed an unopposed motion to, among other things, alter the agreement to change the universe of eligible beneficiaries and create a charitable trust to distribute most of the remaining money. *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. But Plaintiffs have not sought to channel millions of dollars to fully compensated class members. *See id.* The Great Plains Claimants want to intervene to do just that. Memo. of Points and Authorities In

Support of Great Plains Claimants' Second Motion to Intervene ("GPC Memo."), Sept. 16, 2014, ECF Dckt. No. 705-1, at 4-5, 11. They have moved to intervene under both Federal Rule of Civil Procedure 24(a) (intervention as of right) and 24(b) (permissive intervention).[1] *Id.* at 14. 19.

To intervene as a matter of right, the Great Plains Claimants 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."); *see also League of United Latin American Citizens v. City of Boerne*, 659 F.3d 421, 428 (5th Cir. 2011) (explaining that a would-be intervenor who "urge[d] the court to reject [an] amended consent decree" sought by plaintiffs and defendants needed to establish standing).[2] Thus, they must show the existence of (i) a concrete injury-in-fact that is (ii) "fairly traceable" to defendant's conduct,

[1] This brief does not address the antecedent question of whether unnamed class members need to intervene to move to alter the judgment.

[2] The Great Plains Claimants 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 putative intervenor must demonstrate an independent basis for jurisdiction. But contrary to the Great Plains Claimants' suggestion, GPC Memo. at 20, 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.

and (iii) which can be remedied by a favorable order from the Court. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992) (quotation marks omitted).

The Great Plain Claimants cannot establish standing because the complained-of injury is not fairly traceable to defendant – it is self-inflicted. *See Brotherhood of Locomotive Engineers and Trainmen v. Surface Transp. Bd.*, 457 F.3d 24, 28 (D.C. Cir. 2006). The injury they appear to articulate is that they will not receive more money. *E.g.*, GPC Memo. at 4-5 (complaining about the fact that plaintiffs have not sought "supplemental payment for successful *Keepseagle* claimants"). But the Great Plains Claimants are class members. *Id.* at 4. As such, they are bound by the settlement agreement, which established maximum payments for successful claimants, and which includes the *cy pres* provisions. RSA at 2, 3, 33. Those provisions establish the permissible uses of the *cy pres* funds, and – by extension – that dispersing more money to already fully compensated class members is not a permissible use of those funds. The D.C. Circuit has held that a litigant cannot establish standing when the injury about which it complains results from a contract that it entered into. *Brotherhood of Locomotive Engineers*, 457 F.3d at 28. Such injuries, the court concluded, are "entirely self-inflicted and therefore insufficient to confer standing . . . ." *Id.* Because the Great Plains Claimants agreed to the contract terms that inflict their purported injury (*i.e.*, the *cy pres* provisions), those injuries are "entirely self-inflicted," and *Brotherhood of Locomotive Engineers* forecloses them from establishing standing. Importantly, the modification proposed by plaintiffs would not cause the Great Plains Claimants' any alleged injury.

Whether the Court approves the proposed amendments or not, the Great Plains Claimants will find themselves in the same situation they are in now: that of claimants who were fully compensated under the terms of the settlement agreement and who have no entitlement to additional payments.[3]

Permissive intervention is also not warranted. Standing is a requirement for permissive intervention as well, *Deutsche Bank*, 717 F.3d at 193 (opinion for the court), 195-196 (concurring opinion), and as the Great Plains Claimants lack standing for the reasons just discussed, their request for permissive intervention should be denied.[4] Standing aside, their request to intervene as permissive matter to seek more money lacks merit. The decision of whether to grant permissive intervention is a discretionary one. *EEOC v. Nat'l Children's Ctr. Inc.*, 146 F.3d 1042, 1048 (D.C. Cir. 1998). In determining the propriety of permissive intervention, a court may consider "whether parties seeking intervention will

[3] Although the movants assert that they suffered discrimination by USDA, that cannot be the basis for a finding of injury here. GPC Memo. at 11. No such discrimination has been established; indeed, the Secretary of Agriculture disclaimed any wrongdoing or liability in this case, RSA at 10. And this case was dismissed with prejudice by Order of this Court entered on April 29, 2011 (ECF Dckt. No. 607), over two years before movants filed their first intervention motion. Sept. 28, 2013, ECF Dckt. No. 654. Moreover, the fact that the Supreme Court said in *Devlin v. Scardeletti*, 536 U.S. 1, 6-7 (2002), that unnamed class members have an interest in a settlement agreement sufficient to meet the test for standing has no bearing on the movants' standing here. In *Devlin*, the unnamed class members did not challenge the terms of a settlement agreement to which they had assented (after receiving the benefits of the settlement agreement). *See id.* at 5-7.

[4] 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).

significantly contribute to . . . the just and equitable adjudication of the legal question presented." *Aristotle Int'l, Inc. v. NGP Software, Inc.*, 714 F.Supp.2d 1, 18 (D.D.C .2010) (internal quotation marks omitted). The remaining legal issue related to the *cy pres* fund is whether the settlement agreement's *cy pres* provisions should be modified in the manner described in plaintiffs' recently filed motion for modification. And the Great Plains Claimants would not significantly contribute to the resolution of this question. They suggest that they will oppose the modifications agreed to by the parties after many months of negotiations and will instead primarily champion revisions that would funnel millions of dollars to claimants who have been fully compensated under the terms of the settlement agreement. *E.g.*, GPC Memo. at 11. Great Plains Claimants assert that they are owed money because of discrimination by the USDA and it seems that this belief drives their approach. *Id.* at 3, 11. But the Court has never found the USDA liable for discrimination, and the settlement agreement specifically states that "[t]he Secretary expressly denies any wrongdoing . . . and does not admit or concede any actual or potential fault, wrongdoing or liability in connection with any facts or claims that have been or could have been alleged in the Case."[5] RSA at 10. Any entitlement to settlement funds that the Great Plains Claimants had was a contractual matter, and they received their contractual due.

[5] Moreover, that an individual recovered under the settlement agreement's claims process does not establish that the USDA discriminated against the individual, as is evident from the criteria that had to be established to recover under the agreement. RSA at 22-27.

The settlement agreement explicitly provides that it may not be amended without the parties' agreement. RSA at 49. As indicated in plaintiffs' memorandum in support of modifying the settlement agreement, the USDA has agreed to modification of the agreement, but not on terms under which the *cy pres* money would be paid to the successful claimants, Memo. in Support of Mtn. to Modify Settlement Agreement, ECF Dckt. No. 709-1, at 2. In short, the arguments that the Great Plains Claimants indicate they wish to present would not contribute to the just resolution of this matter.[6]

For the reasons stated above, the Court should deny the Great Plains Claimants' motion to intervene.

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Respectfully submitted,

JOYCE R. BRANDA
Acting Assistant Attorney General

RONALD C. MACHEN JR
United States Attorney

JUDRY L. SUBAR,
DC Bar # 347518
Assistant Director
Federal Programs Branch

/s/ Justin M. Sandberg
JUSTIN M. SANDBERG
(Ill. Bar No. 6278377)
Trial Attorney
U.S. Dept. of Justice, Civil Division,

[6] The Great Plains Claimants also seek to participate as *amicus curiae*. GPC Memo. at 21. Defendant would have no objection to the Great Plains Claimants' participation as *amicus curiae* should the Court decide that such participation would be worthwhile.

Federal Programs Branch
20 Mass. Ave., NW, Rm. 7302
Washington, DC 20001
(202) 514-5838 phone
(202) 616-8202 fax
*Counsel for Defendant*