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

REPLY MEMORANDUM IN SUPPORT OF GEORGE AND MARILYN KEEPSEAGLES' MOTION TO MODIFY THE SETTLEMENT AGREEMENT

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Marilyn and George Keepseagle (the Keepseagles)[1] respectfully submit this Reply Memorandum in support of their Motion to Modify the Settlement Agreement (the Keepseagles' Motion). *See* Dkt. No. 779.

ARGUMENT

The central remaining question in this case is what form of relief from the Settlement Agreement is appropriate. The shortfall in class members that filed successful claims as part of the Settlement Agreement's non-judicial claims process led to changed circumstances that were unforeseen and unforeseeable when the Settlement Agreement was entered into. Under the current Settlement Agreement, $380 million – 55 percent of the settlement funds – would not directly benefit the class members who actually suffered damages due to the U.S. Department of Agriculture's (USDA) discriminatory lending practices. Class Counsel, with USDA's acquiescence, and the Keepseagles both agree that the current Settlement Agreement should be modified to better serve the class members whose damages under the Equal Credit Opportunity Act (ECOA) form the basis of this case. However, the relief sought in Class Counsel's Unopposed Motion to Modify the Settlement Agreement *Cy Pres* Provisions (Class Counsel's Motion) varies substantially from the relief sought in the Keepseagles' Motion to Modify the Settlement Agreement (the Keepseagles' Motion).

Class Counsel's Motion seeks to revise the Settlement Agreement to provide for a more efficient distribution of the remaining settlement funds to charitable organizations. If the purpose of this lawsuit was to infuse funds into the relatively small universe of charitable organizations that serve Native American farmers and ranchers, then the Keepseagles would not

[1] Marilyn Keepseagle is the lead plaintiff and a class representative in the above-captioned matter. Her husband, George Keepseagle, formerly served as a class representative until he was required to step down for health reasons. *See* Dkt. No. 772, at 6, n.2.

oppose Class Counsel's motion, as it is better designed for that purpose than the original Settlement Agreement. However, that was not the goal of this case. The purpose of this case was to compensate the Native American farmers and ranchers that were injured by USDA's discriminatory lending practices. The relief sought in the Keepseagles' Motion would best approximate the goals of this case and the purpose of the ECOA by using the remaining settlement funds for the direct benefit of the class members.

This Court has the authority to grant the Keepseagles' Motion in the exercise of its equitable discretion. Providing for direct benefits to the class members that were actually subjected to years of USDA's discriminatory lending practices is the best use of these funds, not a *cy pres* distribution to third-party charitable organizations. Accordingly, this Court should grant the relief sought in the Keepseagles' Motion.

I. THIS COURT HAS THE AUTHORITY TO GRANT THE KEEPSEAGLES' MOTION TO MODIFY THE SETTLEMENT AGREEMENT UNDER RULE 60(b)(5)

A. The Terms of the Settlement Agreement Do Not Supersede This Court's Authority Under Rule 60(b)(5)

Both Class Counsel and USDA assert that this Court need not resort to its authority under Rule 60(b)(5) of the Federal Rules of Civil Procedure because Section XIV of the Settlement Agreement provides a mechanism for modification of the settlement terms. *See* Dkt. Nos. 782, at 3; 786, at 7. However, neither USDA nor Class Counsel has presented any authorities supporting the proposition that the terms of the Settlement Agreement supersede this Court's authority under Rule 60(b)(5). Simply put, no such authority exists.[2]

Rule 60(b)(5) allows for relief from a final judgment or order if "applying it

[2] In fact, USDA and Class Counsel both acknowledge that this Court has the authority to modify the Settlement Agreement pursuant to Rule 60(b)(5). *See* Dkt. Nos. 782, at 5; 786, at 10.

prospectively is no longer equitable." Such modifications are available to the Court if it is presented with "'a significant change either in factual conditions or law' that warrants revision of the [agreement.]'" *In re Black Farmers Discr. Litig.*, 29 F. Supp. 3d 1, 3 (D.D.C. 2014) (quoting *Rufo v. Inmates of Suffolk County Jail*, 502 U.S. 367, 383-84 (1992)).

Here, substantial changed circumstances exist that warrant a revision of the Settlement Agreement. Due to a shortfall in the number of successful claimants, $380 million of the settlement funds remain unclaimed. Barring this Court's intervention under Rule 60(b)(5), this money will be used to fund the largest *cy pres* distribution in the history of American class actions. This outcome was both unforeseen and unforeseeable at the time the parties entered into the Settlement Agreement. This is not to say that the parties did not anticipate that some of the settlement funds would go unclaimed. Indeed, by including the current *cy pres* provisions, the Settlement Agreement specifies a plan for the distribution of the remaining funds. It is true that, in *Rufo*, the Court held that "modification should not be granted where a party relies upon events that were actually anticipated at the time it entered into a decree." 502 U.S. at 385. However, that $380 million, the majority of the remaining settlement funds, would go unclaimed was clearly not anticipated at the time of the settlement. This result is not a mere inconvenience – it is an absurd result that neither party bargained for. This Court should not allow it to stand.

Both USDA and Class Counsel rely on this Court's recent decision regarding a challenge to the settlement agreement terms in *In re Black Farmers Discrimination Litigation* for the assertion that a mutual-agreement revision clause in a settlement should prevent this Court from exercising its authority under Rule 60(b)(5). *See* Dkt. Nos. 782, at 4; 786, at 9, n.6. However, their reliance on this authority is misplaced. In *In re Black Farmers Discrimination Litigation*, the Court held that the claimants, who were denied awards after an appeal to a Track A neutral,

had not demonstrated "any significantly changed circumstances that would warrant modification of the Settlement Agreement." 29 F. Supp. 3d at 3. As there were no changed circumstances in that case, the Court did not have authority to modify the settlement agreement under Rule 60(b)(5). However, in the present case, the Keepseagles have demonstrated significantly changed circumstances that warrant modification pursuant to Rule 60(b)(5).

B. The Relief Sought by the Keepseagles Is Proper Under Rule 60(b)(5)

The relief sought by the Keepseagles, distribution of the remaining funds to class members, is proper under the changed circumstances that have come to light since this case was settled four years ago. Under *Rufo*, a party seeking relief from a judgment under Rule 60(b)(5) must also demonstrate that the proposed modifications are "suitably tailored to the changed circumstance." 502 U.S. at 383. Here, the primary changed circumstance is the unexpected shortfall in timely claimants. The net effect of this shortfall under the current *cy pres* provisions is that $380 million will be distributed to third-parties via a *cy pres* distribution instead of directly benefitting the class members who were actually harmed by USDA's discriminatory lending practices.

Class Counsel's Motion is premised on the notion that the Settlement Agreement's primary defect in light of the changed circumstances is *how* the remaining settlement funds are distributed to third-parties, not that the majority of the settlement funds would <u>not</u> directly benefit the class members. If this case were an exercise in how to more efficiently fund the relatively small universe of charitable organizations that provide agricultural, business, and advocacy services to Native American farmers and ranchers, then Class Counsel's Motion might have merit. However, this ECOA class action was intended to compensate the victims of USDA's discriminatory lending practices. As such, a distribution of the remaining funds to class members who have demonstrated that they were victims of USDA's discriminatory lending

practices is suitably tailored to resolve the primary problem created by the changed circumstances – an unwarranted and unreasonable payout to third-parties that have suffered no damages due to USDA's discriminatory lending practices.

II. THE REMAINING SETTLEMENT FUNDS SHOULD BE DISTRIBUTED TO THE CLASS MEMBERS

A. This Court Should Order a *Pro Rata* Distribution

The determination of how to distribute the remaining settlement funds falls within the general equity powers of this Court. *Six Mexican Workers v. Arizona Citrus Growers*, 904 F.2d 1301, 1307 (9th Cir. 1990) ("Federal courts have broad discretionary powers in shaping equitable decrees for distributing unclaimed class action funds."); *see also* Alba Conte & William B. Newberg, *Newberg on Class Actions* § 12:28 (5th ed.). Here, this Court is faced with two options for distributing the remaining funds: a *cy pres* distribution of $380 million or distributing the remaining funds directly to the class members.[3] Ultimately, "a court's goal in distributing class action damages is to get as much of the money to the class members in as simple a manner as possible." *Newberg on Class Actions* § 12:32. Here, a *pro rata* distribution would achieve this goal far more effectively than a *cy pres* distribution.

The Keepseagles do not dispute that the current Settlement Agreement provisions provide that the remaining settlement funds are to be disbursed via a *cy pres* distribution. Settlement

[3] In the event that settlement funds remain unclaimed in a class action, courts generally have four methods available for disbursement of the remaining funds: (1) reversion; (2) escheatment to the government; (3) a *pro rata* distribution amongst the successful claimants; and (4) a *cy pres* distribution. *See Diamond Chemical Co. v. Akzo Nobel Chemicals B.V.*, 517 F. Supp. 2d 212, 217 (D.D.C. 2007); see also, *Newberg on Class Actions* § 12:30. In their Motion, the Keepseagles argued that reversion and escheatment are not appropriate options under ECOA due to the deterrent purpose of the ECOA. *See* Dkt. No. 779-1, at 7. Class Counsel echoed this proposition in their response. *See* Dkt. No. 782, at 9. USDA failed to counter the Keepseagles' argument regarding the impropriety of a reversion or escheatment in their response to the Keepseagles' Motion. *See* Dkt. No. 786.

Agreement IX.F, ¶ 7. Class Counsel correctly notes that *Newberg* § 12:28 provides that if a settlement agreement contains a provision expressing the settling parties' preference with regard to unclaimed funds, then the court will "enforce the provision and follow its distributional instructions." *See* Dkt. No. 782, at 8-9. However, this same authority follows up this proposition with the conclusion that "the . . . court retains the equitable authority to direct distribution of funds under its jurisdiction." *Newberg on Class Actions* § 12:28. Thus, Class Counsel's reliance on this authority for the proposition that the terms of the Settlement Agreement override this Court's equitable powers is not persuasive.

The Keepseagles have also noted that this Court has held that the successful claimants, unsuccessful claimants, and class members who did not file claims retain no interest in the remaining settlement funds. *See* Dkt. No. 779-1, at 8-9; *see also Keepseagle v. Vilsack*, No. CV 99-3119 (EGS), 2014 WL 5796751, at *12-14 (D.D.C. Nov. 7, 2014); *Keepseagle v. Vilsack*, No. CV 99-3119 (EGS), 2015 WL 1851093, at *5 & n.4 (D.D.C. Apr. 23, 2015). Furthermore, the Keepseagles acknowledge that some of the class members did not submit a claim or were denied a claim for a number of reasons during the non-judicial claims process and, thus, the class consists of more than just the 3601 successful claimants. However, these facts do not in any way dislodge the Keepseagles' argument that the remaining settlement funds should be distributed to the class members. Furthermore, in their responses, neither USDA nor Class Counsel identified a third-party that can claim a property interest in the remaining settlement funds.

This Court's remedy for the disposition of the remaining settlement funds should be to distribute the remaining funds to the class members. Doing so would benefit the class members, not third-parties that suffered no injuries under the ECOA. Unless this Court decides to retain the current *cy pres* provisions, it will be required to exercise its equitable authority in choosing

between the Keepseagles' Motion and Class Counsel's Motion. Equitable decisions do not always yield perfect or precisely tailored results. However, equitable remedies should be implemented with the goal of serving the ends of justice. The relief sought in the Keepseagles' Motion would ensure that the remaining settlement funds are used to directly benefit the class members who have proven that they were the victims of USDA's discriminatory lending practices. In contrast, a *cy pres* distribution would ensure that none of the remaining settlement funds would directly benefit any of the class members. Moreover, due to deaths, retirements, the shuttering of farm operations, and the independent nature of farming and ranching itself, only a fraction of the class members will even receive *indirect* benefits under Class Counsel's proposal.

The Keepseagles re-assert that this Court should adopt the Eighth Circuit's approach to remaining settlement funds, as explained in *In re BankAmerica Securities Litig.*, 775 F.3d 1060 (8th Cir. 2015). In *In re BankAmerica*, the court held that "[i]f individual class members can be identified through reasonable effort, and the distributions are sufficiently large to make individual distributions economically viable, settlement proceeds should be distributed directly to individual class members." 775 F.3d at 1063-64 (quoting AM. LAW INST., PRINCIPLES OF THE LAW OF AGGREGATE LITIG. § 3.07 (2010) (ALI § 3.07)). In the present case, $380 million in settlement funds remain unclaimed and the successful claimants are easily identifiable to the Claims Administrator. A *pro rata* distribution to the successful class members is feasible and economically viable.

As is the case in the present matter, the settlement agreement at issue in *In re BankAmerica* contained a provision directing a *cy pres* distribution of the unclaimed settlement funds. 775 F.3d at 1066. The *In re BankAmerica* court held that, regardless of the terms of a settlement agreement, "a *cy pres* distribution to a third party of unclaimed settlement funds is

permissible only when it is not feasible to make further distributions to class members." *Id*. (quoting *Klier v. Elf Atochem N. Am., Inc*., 658 F.3d 468, 475 (5th Cir. 2011)).

USDA argues that this Court should not follow the decision in *In re BankAmerica* because it would "unbalance[] the bargain of the parties and upend[] the finality of a settlement." Dkt. No. 786, at 14, n.11. However, this reasoning is not persuasive. If a *cy pres* distribution is not supported by law (*i.e.*, a *pro rata* distribution is feasible), then a *cy pres* distribution should not be permitted, regardless of the agreement brokered between the counsel for the parties in the dispute. USDA's and Class Counsel's implication that third-party charitable organizations are more deserving of the remaining settlement funds than the class members, whose ECOA damages serve as the basis for these funds, should be rejected. *See, e.g.*, Dkt. No. 782, at 15-17; Dkt. No. 786, at 12-16. *In re BankAmerica* cautions against such reasoning:

> We flatly reject [the] contention [that class members are less worthy than charities]. It endorses judicially impermissible misappropriation of monies gathered to settle complex disputes among . . . parties, one of the "opportunities for abuse" that make it "inherently dubious" to apply the *cy press* [sic] doctrine from trust law "to the entirely unrelated context of a class action settlement."

Id. at 1065 (citing *Klier*, 658 F.3d at 480 (Jones, C.J., concurring).[4]

Class Counsel asserts that this Court should not adopt *In re BankAmerica*'s holding

[4] USDA cites *Marshall v. National Football League*, -- F.3d --, 2015 WL 2402355[, *16] (8th Cir. May 21, 2015)[(Smith, C.J., concurring)], for the proposition that the Proposed Trust would not amount to "a *cy pres* distribution at all" because the Proposed Trust would benefit the class members and would have two class members serving as trustees. *See* 786, at 14, n.11. USDA's reliance on this authority is misplaced. First, in *Marshall*, the settlement agreement established the Common Good Entity, which provided substantial direct benefits to the class members. 2015 WL 2402355, at *4. In contrast, the Proposed Trust specifically prohibits the provision of direct benefits to the class members. *See* Dkt. No. 709-3, at 4.. Second, the issue before the Eighth Circuit was whether to approve a settlement agreement, not how to equitably disburse unclaimed settlement funds. 2015 WL 2402355, at *2. Finally, Class Counsel's Motion would disburse 10 percent of the remaining settlement funds to organizations that were not established for the benefit of the class members and do not include class members in their leadership ranks. USDA ignores this fact when it asserts "even if the original Agreement would fail under the Eighth Circuit's precedent, the Class's proposed amendment would not." *See* Dkt. No. 786, at 14, n.11.

regarding the propriety of *cy pres* distributions because it is "contrary to many prior D.C. Circuit rulings on cy pres." *See* Dkt. No. 782, at 11. However, the authorities they rely upon are not persuasive in the present matter. Class Counsel relies on *Democratic Cent. Comm. of D.C. v. Washington Metro. Area Transit Comm'n*, 84 F.3d 451, 456 (D.C. Cir. 1996), to assert that a *cy pres* distribution is appropriate. *Democratic Cent. Comm.*, however, supports the Keepseagles' position. In that case, the court recognized that a distribution to class members was not feasible, and, thus, a *cy pres* distribution was the "next best" relief. *Id*. at 455-56 (noting that identifying, locating, and notifying transit passengers subjected to excessive fares 25 years after their injuries would be "very difficult, if not impossible."). In the present case, there are no valid arguments that a direct distribution to class members is not feasible.

Class Counsel also relies on a series of decisions before this Court in *Diamond Chem. Co. v. Akzo Nobel Chemicals, B.V.* to support their argument that a *cy pres* distribution is appropriate. *See* Dkt. No. 782, at 11. However, the facts in *Diamond* are easily distinguishable from the present matter. In *Diamond*, the class members filed a class action against chemical manufacturers alleging antitrust violations, such as price-fixing and allocation in the market for a particular chemical. 517 F. Supp. 2d 212, 214 (D.D.C. 2007). In *Diamond*, the damages were uniform on a per-unit basis and the successful claimants were fully compensated for their damages. *Id*. at 218. On this basis, this Court held that a *cy pres* distribution was allowable. *Id*. at 220. In contrast, there are no uniform damages in the present case. Furthermore, unlike in *Diamond*, a supplemental distribution of funds would not result in a windfall to the class members whose *actual* damages under the ECOA far exceed the compensation that they received in this case. *See*, *infra* Argument II.B.

B. A *Pro Rata* Distribution Would Not Result in a Windfall to the Class Members

Both Class Counsel and USDA incorrectly assert that a *pro rata* distribution would be inappropriate because it would result in a windfall to the claimants. *See* Dkt. Nos. 782, at 12; 786, at 11. Indeed, if the class members were fully compensated for their *actual* damages, then a *pro rata* distribution would amount to a windfall. *See In re BankAmerica*, 775 F.3d at 1064 (quoting *Klier*, 658 F.3d at 475). The Keepseagles re-assert that the class members' actual damages exceed what they received under the Settlement Agreement's non-judicial claims process. As the Keepseagles have previously noted, the nature of their damages – lost farms, lost economic opportunities, higher interest rates, and lack of lending accommodations – vary substantially from the uniform transactional damages that underlie cases where courts have typically found class members' damages satisfied in full. *See* Dkt. No. 779-1, at 10-12. Indeed, USDA offers no support for their argument that additional payments to class members would exceed the actual damages they suffered due to USDA's discriminatory lending practices.

Class Counsel supports its argument by pointing to a study conducted by its own expert witness, Patrick O'Brien, to show that, on average, the class members' damages totaled $56,110 apiece. *See* Dkt. No. 782, 13. However, Mr. O'Brien's study is not conclusive – or even persuasive – evidence regarding the class members' actual damages. Mr. O'Brien admits that his analysis is hampered due to a dearth of reliable data. *See* Dkt. No. 551-57, at 53. For instance, a database that tracked loan application submissions and processing (the MAC database), which would account for denied applications, contained "substantially incomplete" and "corrupted" information for loan applications submitted from 1981 through 1997. *Id.* Due to this unreliable information, Mr. O'Brien's analysis relied upon a database that only tracked loans that had actually been provided (the PLAS database) in lieu of more detailed and reliable data. *Id*. at 53-

54. Furthermore, Mr. O'Brien's findings were subject to criticism from other experts involved in this case. *See, e.g.*, Expert Report of Gordon C. Rausser (Oct. 19, 2009) (under seal as Dkt. No. 551, Ex. 33), *see also* Dkt. No. 551-57, at 54 ("Dr. Rausser . . . reads [the MAC data] as substantiating his conclusion that there were no significant shortfalls in the services that USDA provided Native Americans."). Although the Keepseagles disagree with Dr. Rausser's purported conclusion that Native Americans did not receive disparate treatment from USDA, they note his expert report to illustrate that Mr. O'Brien's report does not enjoy the unanimous support of experts who have studied this issue.

The Keepseagles and the class members suffered extensive damages due to USDA's discriminatory lending practices. The Farmers Home Administration and, later, the Farm Service Agency were in many cases, the only source of agricultural lending services for many of the class members. Many of the *Keepseagle* class members lost their farms due to USDA's discriminatory lending practices. Others suffered under more onerous interest rates and repayment conditions than their non-Native counterparts. Regardless, the *Keepseagle* class members suffered major financial setbacks that hindered their livelihood. The *Keepseagle* class members, especially those who lost their farming operations or are farming on a smaller scale than they would be otherwise, continue to suffer from the ill effects of USDA's discriminatory lending practices. The compensation offered in the non-judicial claims process did not cover class members' damages or make them whole. As the First Circuit has correctly noted, "few settlements award 100 percent of a class member's losses, and thus it is unlikely in most cases that further distributions to class members would result in more than 100 percent recovery." *In re Lupron Mktg. and Sales Practices Litig.*, 677 F.3d 21, 32 (1st Cir. 2012) (internal quotations omitted). A *pro rata* distribution would better serve to make the class members whole –

especially compared with a *cy pres* distribution to third-party charitable organizations. *See*, *infra* Argument II.C.

C. A *Cy Pres* Distribution Would Be an Inappropriate Use of the Remaining Settlement Funds

USDA and Class Counsel's assertions in opposition to the Keepseagles' arguments that a *cy pres* distribution would be an inappropriate use of the remaining settlement funds fall short of the mark. With $380 million in settlement funds remaining and class members readily identifiable to the Claims Administrator, a direct distribution to the class members is feasible and economically viable.[5] Furthermore, the class members were not made whole by the payments they received through the non-judicial claims process. *See* Declaration of Marilyn Keepseagle, May 19, 2015, at ¶¶ 11-13, Dkt. No. 779-9. These facts should foreclose any argument that a *cy pres* distribution to third-parties is the most equitable option.

The ECOA was enacted by Congress to compensate victims who are discriminated against by lending institutions on the basis of, among other attributes, their race. *See* 15 U.S.C. § 1691e. A *cy pres* distribution of the $380 million in remaining settlement funds would result in an unwarranted and unprecedented transfer of wealth to third-parties that were not subject to USDA's discrimination. This would be an absurd outcome when a direct distribution to the class members, whose damages serve as the basis for this action, is feasible.

Class Counsel and USDA urge this Court to ignore the primary holding in *In re BankAmerica*: *cy pres* distributions should only be resorted to when a *pro rata* distribution is not feasible. 775 F.3d at 1064. Neither Class Counsel nor USDA offer any well-founded arguments and cite no persuasive authorities to support their belief that third-party charitable

[5] The vast majority of the *Keepseagle* class members are known to the Claims Administrator. The Claims Administrator recently provided notice to all successful claimants, unsuccessful claimants, and others believed to be class members.

organizations are more deserving of funds than class members who were subjected to pervasive, governmental discrimination.

In the present circumstances, a *cy pres* distribution is not appropriate. "*Cy pres* is shorthand for the old equitable doctrine '*cy près comme possible*' – French for "as near as possible." *Dennis v. Kellogg Co.*, 697 F.3d 858, 865 (9th Cir. 2012). As the term suggests, the doctrine should be employed when the ideal or intended relief is not possible, putting the remaining funds to their "next best compensation use." *Klier*, 658 F.3d at 474. However, in the present case, the best use of these funds – direct compensation of the class members – is feasible. Thus, there is no need to resort to a *cy pres* solution.

In their response, Class Counsel failed to allay the concerns raised by the Keepseagles regarding the putative effectiveness of the Proposed Trust. Under the terms of the Proposed Trust, the funds would be used "to make grants to Eligible Grant Recipients . . . to fund the provision of business assistance, agricultural education, technical support, and advocacy services to Native American farmers and ranchers." *See* Dkt. No. 709-1. Based on their experience gained from five decades of ranching, the Keepseagles question how the Proposed Trust will deliver even indirect benefits to class members. While the Proposed Trust may read like a good solution on paper, it ignores the reality on the ground for farmers and ranchers. Farming and ranching are very independent professions. To remain viable, farming and ranching operations need adequate land, adequate access to financial services, and an operator capable of profitably producing commodities under the constraints imposed by soil quality, water access, and climate on the particular farm or ranch. As such, each agricultural operation's needs are different and do not make farms or farmers effective subjects for charitable efforts. This is likely why there is little in the way of charitable resources devoted to serving the needs of farmers and ranchers in

Indian Country.[6] Class Counsel has failed to offer any concrete examples of how the charitable entities that would receive grants might provide indirect benefits to the class members. Without clear evidence of benefits to class members, this Court should decline to consider approving a $380 million *cy pres* distribution.

Class Counsel asserts that the Proposed Trust "would bring substantial benefits to Native American farmers and ranchers." *See* Dkt. No. 782, at 14. They note that these beneficiaries would include "those who were denied USDA loans in the past, and the heirs of those who suffered such denials." *Id.* However, Class Counsel fails to counter the Keepseagles' argument that the Proposed Trust would not benefit the class members who lost their farms and ranches due to USDA's discriminatory lending practices. An unfortunate truth in modern agriculture is that once a farmer loses their operation, they are rarely able to recover it or replace it with another farm. Many of the *Keepseagle* class members lost their farms due to USDA's discriminatory lending practices and are no longer in agriculture. This leaves them in a situation where they are unable to pass along farming operations to the next generation. Because many of the class members are no longer active in farming and were unable to pass farms along to the next generation, a substantial portion of the class members and their heirs will not receive any indirect benefits from the Proposed Trust.

[6] It may be worth noting that charitable organizations have not historically played a significant role in supporting non-Native farmers and ranchers either. The primary farmer-support organizations in the United States are quasi-governmental commodity-specific promotion organizations (e.g., The National Pork Board) or grassroots lobbying organizations (e.g., American Farm Bureau Federation). These types of entities are generally not organized as 501(c)(3) charities. As 501(c)(3) entities that must serve a charitable or educational purpose, the Eligible Grant Recipients would be limited in their ability to promote Native American farm products. Furthermore, the Eligible Grant Recipients would not be permitted to devote a substantial part of their activities to lobbying due to Internal Revenue Code restrictions. *See* Internal Revenue Service, "Charities and Non-Profits: Lobbying," *available at* http://www.irs.gov/Charities-&-Non-Profits/Lobbying (last viewed June 15, 2015).

Class Counsel's response to the Keepseagles' concerns regarding anticipated overhead expenses associated with the Proposed Trust and the grant recipients misses the point. *See* Dkt. No. 782, at 15. Class Counsel insists that this is not a concern because the Proposed Trust will attempt to fund itself through interest income. This does not change the fact that each dollar devoted to overhead, whether it is derived from the principal or interest earned from the principal, is money that is not benefitting *Keepseagle* class members.

The Keepseagles are also concerned about the 20-year operation period of the Proposed Trust because most of the class members will have either retired or passed away by 2035. *See* Dkt. No. 779-1, at 14. Class Counsel responds to this concern by noting that the 20-year period is a maximum time period and that it may indeed have a shorter lifespan. *See* Dkt. No. 782, at 15. However, this provides no binding assurances that the Proposed Trust, which will be overseen by trustees that would not be accountable to this Court,[7] will actually endeavor to deliver the remaining funds to the benefit of the class members in as quick a manner as possible.

In the memorandum supporting their Motion, the Keepseagles cited several cases for the general proposition that *cy pres* distributions are facing increased scrutiny by appellate courts. *See* Dkt. No. 779-1, at 14-15. Class Counsel correctly noted that in some of those cases, the appellate courts did actually approve *cy pres* distributions. *See* Dkt. No. 782, at 16. However, these cases do not support the proposition that a *cy pres* distribution is appropriate in the present case. For instance, in *Powell v. Georgia-Pac. Corp.*, 119 F.3d 703 (8th Cir. 1997), the Eighth Circuit held that a *cy pres* distribution was appropriate in a circumstance where "locating the individual class members for an additional distribution would be very difficult and costly." 119 F.3d at 705. In *In re Baby Products Antitrust Litig.*, 708 F.3d 163 (3d Cir. 2013), the Third

[7] *See* Section 12 of the Proposed Trust, Dkt. No. 709-3, at 5.

Circuit rejected a settlement agreement and remanded it to the district court for further consideration because it was apparent that the vast majority of the settlement funds would be distributed to *cy pres* recipients instead of providing direct benefits to class members. 708 F.3d at 175.[8] In *In re Lupron*, the First Circuit actually adopted the principles encompassed in ALI § 3.07, which support a *pro rata* distribution in this circumstance. 677 F.3d at 33.

D. A Second Claims Process Should Be Favored Over a *Cy Pres* Distribution

In the alternative, this Court should grant the relief sought by the Keepseagles in Addendum B that accompanies their Motion. *See* Dkt. No. 779-3. As discussed above, due to unforeseen circumstances, $380 million in settlement funds remain unclaimed in this case. *See, supra*, Argument I. These substantially changed circumstances warrant relief from the terms of the original Settlement Agreement under Rule 60(b)(5).

The Keepseagles re-assert that this Court has the equitable discretion to permit a re-opening of the non-judicial claims process. *See, e.g.*, *Dahingo v. Royal Caribbean Cruises, Ltd.*, 312 F. Supp. 2d 440, 446-47 (S.D.N.Y. 2004); *Grace v. City of Detroit*, 145 F.R.D. 413, 417-18 (E.D. Mich. 1992). An unknown number of class members did not file claims with the Claims Administrator. Furthermore, an unknown number of class members filed claims with the Claims Administrator that were denied due to technicalities, such as missing documents, missing signatures, or late submissions. USDA would not be prejudiced by a re-opening of the claims period because its obligations under the Settlement Agreement would remain the same.[9] Re-

[8] The Third Circuit also noted that "direct distributions to the class are preferred over *cy pres* distributions." 708 F.3d at 173.

[9] USDA asserts that a *pro rata* distribution would prejudice the Department, claiming that it has an "institutional interest" in avoiding "incentives for future plaintiffs to seek excessive damages." *See* Dkt. No. 786, at 13, n.10. Here, based on the extent of their actual damages, the *Keepseagle* class members would not receive "excessive damages." Furthermore, USDA offers no authority to support its proposition that it has an "institutional interest" that would be

opening the claims period would be an equitable solution that would allow more class members to receive direct compensation for the injuries they suffered due to USDA's discriminatory lending practices.

The Keepseagles acknowledge that this Court has previously held that the terms of the Settlement Agreement precluded it from granting a motion filed under Rules 6(b)(1)(B) and 60(b)(1) to allow late-filed claims. *See* Dkt. No. 633, at 7-8. However, that decision should not preclude the relief sought under the Keepseagles' alternative proposal. Unlike the earlier motion regarding individual late-filed claims, the Keepseagles are seeking an equitable distribution of the remaining settlement funds for the benefit of the class members. Exercising this equitable authority would ensure that the settlement funds were used for the direct benefit of the class members, not third-parties charitable organizations. Accordingly, should this Court find that a *pro rata* distribution solely to the successful claimants is not appropriate, this Court should grant the Keepseagles' alternative request for relief.

CONCLUSION

For the foregoing reasons and the reasons set forth in their opening brief, the Keepseagles respectfully submit that this Court should grant their Motion to Modify the Settlement Agreement and approve a *pro rata* distribution of the remaining settlement funds to successful claimants. In the alternative, this Court should adopt the Keepseagles' alternate proposal for modification of the Settlement Agreement pursuant to the terms contained in Proposed Addendum B of their Motion to Modify the Settlement Agreement.

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prejudiced by a *pro rata* distribution.

Respectfully submitted this 16th day of June, 2015.

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CERTIFICATE OF SERVICE

On June 16, 2015, I electronically filed the foregoing with the Clerk of the Court by using the CM/ECF system, which will send a notice of electronic filing to all counsel of record.

/s/ Marshall Matz
Marshall Matz