[SCHEDULED FOR ORAL ARGUMENT JANUARY 13, 2017]
Nos. 16-5189, 16-5190

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

MARILYN KEEPSEAGLE, PORTER HOLDER; CLARYCA MANDAN; ALL PLAINTIFFS, ON BEHALF OF THEMSELVES AND ALL OTHERS SIMILARLY SITUATED, *et al.*,

Plaintiffs-Appellees,

KEITH MANDAN,

Plaintiff-Appellant,

DONIVON CRAIG TINGLE, SILENT CLASS MEMBER,

Interested Party-Appellant,

v.

THOMAS J. VILSACK,

Defendant-Appellee,

On Appeal from the United States District Court For the District of Columbia, Case No. 1:99-cv-03119-EGS

REPLY BRIEF FOR PLAINTIFF-APPELLANT KEITH MANDAN

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GLOSSARY

ALI	American Law Institute
CC	Class Counsel
ECOA	Equal Credit Opportunity Act
IRS	Internal Revenue Service
MK	Marilyn Keepseagle
USDA	United States Department of Agriculture

INTRODUCTION AND SUMMARY OF ARGUMENT

Over forty years ago, our President declared: "The first Americans – the Indians – are the most deprived and isolated minority group in our nation…This condition is the heritage of centuries of injustice…Even the Federal programs which are intended to meet their needs have frequently proved to be ineffective and demeaning." Public Papers of the Presidents of the United States: Richard Nixon, Special Message to the Congress on Indian Affairs, pp. 564-567, 576-76 (July 8, 1970).[1]

Without explanation, the USDA stands between $380 million of settlement proceeds and the intended recipients, Native American farmers and ranchers. (JA1252, 1296, 1427). In contrast, Keith Mandan's proposed distribution is entirely consistent with class action law and amounts to approximately $100,000 per farmer or rancher, none of whom have been fully compensated. (JA1256, 1259, 1313, 1321, 1325-1329, 1346-1349, 1352-1354, 1363-1365).

Ineffective and demeaning is the only way to describe the USDA and Class Counsel's approved Addendum.

I. Mandan did not waive his right to appeal. The fact that the 2011 Settlement Agreement contained *cy pres* provisions similar to those in the Addendum does not mean Mandan appeals from the 2011 Agreement. The Addendum provides that its *cy pres* provisions "govern in place of" the original ones. Also, the Judgment Fund

[1] *Available at* https://www.epa.gov/sites/production/files/2013-08/documents/president-nixon70.pdf

argument was preserved when Mandan objected to the Addendum's *cy pres* giveaway to uninjured non-parties with no claims against the United States. Regardless, all litigants were on notice of the issue when the district court raised it in its July 24, 2015 memorandum opinion. Furthermore, the Judgment Fund argument is a purely legal one which can be heard at this Court's discretion.

II. Appellees ignore Mandan's statutory construction arguments. They fail to explain how a *cy pres* beneficiary could ever satisfy the statutory prerequisites for receipt of payment from the Judgment Fund. USDA also fails to distinguish the *Cobell, Pigford II, Garcia,* and *Love* settlements where separate Congressional appropriations were made to settle claims.

III. Rule 23 vests the district court with traditional equitable power to address distribution of class settlement proceeds. Here, the district court erroneously concluded it lacked power under Rule 23 to provide an equitable allocation of the remaining settlement funds. It incorrectly approved the Addendum by assuming it had only two options: accept the negotiated Addendum or, reject the Addendum, leaving the parties bound by the original Settlement's $380 million giveaway.

The third option of exercising its Rule 23 equitable power was never considered. Appellees contend this equitable power is non-existent, but their argument ignores long-standing case law recognizing the court's traditional equitable authority. Failing to consider this power in approving the Addendum was legal error.

IV. In conducting its Rule 23 fair, reasonable, and adequate analysis of the Addendum, the district court failed to make preliminary findings as to whether additional distributions to Prevailing Claimants were logistically feasible and economically viable. That analysis cannot be abrogated by an agreement of the parties. In *Dem. Cent. Comm. v. Wash. Met. Area Transit Comm.*, 84 F.3d 451 (D.C. Cir. 1996), this Court made the preliminary findings before considering an alternative distribution of restitution funds. Many other federal circuit courts followed this analysis when determining the appropriateness of *cy pres* awards of class settlement proceeds. It does not matter whether the analysis occurs in the context of final approval of the settlement or post-final judgment amendment of the settlement.

Class Counsel contends the *cy pres* award protects the interests of class members who did not file or did not prevail on their claims. This assumes the interests of the non-participating class members were not adequately protected by the Settlement's programmatic relief. Furthermore, the Settlement limits distributions from the settlement fund to successful Track A and B claim payments. Payments to non-participating class members were not contemplated under the Settlement.

V. Failing to analyze the fairness, reasonableness, and adequacy of the amount of the Addendum's additional payments to Prevailing Claimants ($18,500 plus $2,275 IRS payment) was an abuse of discretion. Appellees do not dispute the absence of such an analysis. Instead, Class Counsel offers an "average loss" per class member theory limited to economic damages. This theory is flawed because it

artificially restricts the analysis to economic damages for discrimination under the ECOA and is based on an assumption that Prevailing Claimants were denied only one loan and one loan servicing request over the class period, and contradicts the experiences of class members. Regardless, this theory cannot be substituted for the court's required analysis under Rule 23.

VI. The negotiated Settlement Agreement required modification by agreement of the Secretary, class representatives, named plaintiffs, and class members. It was legal error to approve the Addendum over the objection of class representative, Keith Mandan.

ARGUMENT

I. Keith Mandan Has Not Waived The Right To Appeal.

Keith Mandan ("Mandan") preserved his issues for appeal. Contrary to Class Counsel and USDA's contentions, he does not appeal from the 2011 Settlement Agreement. (CC Br. 20-22, USDA Br. 17). He appeals from the 2016 order approving the Addendum to the Settlement Agreement. The Addendum provides that its *cy pres* provisions replace those in the Settlement Agreement.[2] Thus, the

[2] The Addendum states: "The purpose of this Addendum is to modify the *cy pres* provisions set forth in the Settlement Agreement. Thus, the provisions of this Addendum will govern in place of the following portions of the original and revised Agreement. . . ." JA1169, § I.

Addendum constitutes a new agreement subject to Rule 23 district court approval, and that approval is the subject of this appeal.[3]

Class Counsel further asserts that the Settlement Agreement's terms prohibit Mandan's appeal because the district court is precluded "from ordering the *cy pres* clause to be modified or stricken" absent the consent of the parties. (CC Br. 21). Similarly, USDA and Marilyn Keepseagle ("Keepseagle") argue that Mandan's participation in the claims process and the Settlement Agreement's release provisions bar an attack on the *cy pres* provisions in the Addendum. (USDA Br. 17-18, MK Br. 22-23). These arguments ignore that the district court, sitting in equity, is not constrained by the Settlement Agreement terms. *See infra* § III. Moreover, these arguments fail to consider that the Settlement Agreement contemplates challenges to the validity and enforceability of its terms through the inclusion of a severance provision. JA0536, §XXVI. "[T]he [severance] provision can only be used with Court involvement and approval…so any interpretation of the Agreement as withholding jurisdiction to enforce the [severance] provision would render that provision a complete nullity." *Keepseagle v. Vilsack*, 118 F. Supp. 3d 98, 129 (D.D.C. 2015)(internal citations omitted); JA1160-61; *see also Booker v. Robert Half Int'l, Inc.,* 413

[3] USDA and Class Counsel's current attempt to block the appeal of the Addendum's *cy pres* giveaway is unsurprising given their previous efforts to block any appeal of the *cy pres* giveaway in the Settlement Agreement, having structured the Agreement so that the case would be dismissed with prejudice and no longer appealable before the claims process was completed – effectively denying *Keepseagle* class members a real opportunity to object to or appeal any defects or deficiencies in the claims process which we now know resulted in a $380 million remainder.

F.3d 77, 83 (D.C. Cir. 2005)("the district court's severance [i]s a contingency contemplated by the parties at the time of formation…"). Furthermore, issues raised in Mandan's current appeal regarding *cy pres* distribution of Judgment Fund money and post-judgment amendment of the Settlement Agreement were not part of the underlying ECOA discrimination claims asserted in *Keepseagle*. Consequently, Mandan is not claim precluded from raising these issues on appeal.

USDA and Class Counsel further maintain that Mandan failed to raise in the district court his Judgment Fund argument — that the Constitution and the Judgment Fund Act, 31 U.S.C. § 1304, preclude the payment of Judgment Fund money via *cy pres* to uninjured non-parties with no claims against the Government. (USDA Br. 19, CC Br. 46-47). Mandan, however, raised this very argument in his timely objection to the Addendum. He argued that "[p]ayments should not be made to third parties who have not suffered any injury and who have no claims against the United States." [4]

[4] Class Counsel asserts that because Mandan's comment did not cite the Judgment Fund Act by name "[t]he district court could not reasonably have been expected to understand this as raising a potential violation of the Judgment Fund Act." (CC Br. 47 n.12). However, the district court raised the very issue in its July 2015 opinion, noting:

> [T]he result is that **$380,000,000 of taxpayer funds is set to be distributed inefficiently to third party groups that had no legal claim against the government.** Although a $380,000,000 donation by the federal government to charities serving Native American farmers and ranchers might well be in the public interest, **the Court doubts that the judgment fund from which this money came was intended to serve such a purpose.** The public would do well to ask why $380,000,000 is being spent in such a manner.

JA1199; *see also* JA1468 (district court's summary of Mandan's Judgement Fund argument). This issue was not waived. Furthermore, since this issue is a pure question of law, it is within this Court's discretionary authority to address it on appeal. *Prime Time Int'l Co. v. Vilsack*, 599 F.3d 678, 686 (D.C. Cir. 2010); *Roosevelt v. E.I. Du Pont de Nemours & Co.*, 958 F.2d 416, 419 n.5 (D.C. Cir. 1992).

II. The District Court Erroneously Approved *Cy Pres* Payments of Judgment Fund Money.

A. The Judgment Fund Act Does Not Authorize *Cy Pres* Payments.

Appellees cite no authority for their proposition that funds from the Judgment Fund may be paid via *cy pres* to persons without claims against the United States. They also offer no response to Mandan's analysis of the plain language of the Judgment Fund Act and 28 U.S.C. § 2414, the settlements authority statute, nor do they address his statutory construction arguments.

The Judgment Fund Act is an appropriations statute that must be narrowly construed and given a common-sense contextual reading. *United States v. Maccollum*, 426 U.S. 317, 321 (1976); *Yates v. United States*, 135 S. Ct. 1074, 1081-82 (2015); *Schindler Elevator Corp. v. United States ex rel. Kirk*, 563 U.S. 401, 407-08 (2011). The settlements authority statute provides that compromise settlements may be paid from the Judgment Fund Act appropriation **only** if they are settled and paid in a manner similar to judgments in like causes, and only for those claims as to which litigation is

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Keepseagle, 118 F. Supp. 3d at 104; JA1105 (emphasis added).

imminent. The settlements authority statute must be construed to fit the Judgment Fund Act's language, intent, and purpose. *See United States v. Delgado-Garcia,* 374 F.3d 1337, 1347 (D.C. Cir. 2004). In failing to address these points, Appellees tacitly concede the constraints of Chief Justice Marshall's general rule: "what cannot be done directly, from defect of power, cannot be done indirectly." *Wayman v. Southard*, 23 U.S. 1, 50 (1825).

Utilizing the plain language of the settlements authority statute, the USDA states, "[h]ad class members succeeded on the merits of their claims, any resultant final judgment against the United States would have been made from the Judgment Fund." (USDA Br. 20). It is inconceivable, however, that a yet-to-be-identified *cy pres* beneficiary could ever succeed to judgment on the merits since it would lack any claim altogether.

B. The Judgment Fund Act's Legislative History Underscores That the Act Was Not Intended to be Used in This Manner.

USDA argues that the legislative history recited by Mandan merely establishes that the Judgment Fund was intended solely to streamline the process for "settling litigation" against the Government. Thus, USDA argues, Congress, via the Judgment Fund and ancillary settlement authorization statute, did not impose substantive limits on how settlements must be structured. (USDA Br. 21). In truth, the purpose of the Judgment Fund Act and the settlements authority statute was to streamline the process for **making payments** of judgments and settlements against the government. *See Report on H.R. 6835, Payment of Judgments and Compromise Settlements:* U.S. H. Rep.

Com. on the Judiciary at 5 (87th Cong.)(May 24, 1961) ("The attached draft bill…[will] simplify the procedure for the payment of nearly all compromises effected by the Attorney General. It would add a new paragraph to Section 2414 … providing that compromises effected by the Attorney General…shall be settled and paid in the same manner as judgments in like causes. **It refers to the compromise of only those claims as to which litigation is imminent…**")(emphasis added). Congress, by placing limitations on the type of payments and the circumstances under which payments can be made from the Judgment Fund, has limited how compromise settlement payments from the Judgment Fund must be structured.

Class Counsel relies on dicta in *Trout v. Garrett*, 891 F.2d 332 (D.C. Cir. 1989), for the proposition that the Judgment Fund Act "is auxiliary legislation; its sole office is to furnish a mechanism for facilitating payment of judgments rendered on claims authorized by another statute." (CC Br. 47); *Trout*, 891 F.2d at 335(quotations omitted). The issue in *Trout* was whether sovereign immunity shields the United States from interim fee awards in Title VII cases. *Id.* at 334. The government argued that the Judgment Fund Act requires a final judgment and therefore it could not immediately pay the interim fee. *Id.* The court disagreed. *Id.* at 335. *Trout* provides no insight into whether Judgment Fund money can be distributed pursuant to compromise settlements via *cy pres* when the recipients have no claims against the government.

Class Counsel argues that the purpose of the Judgment Fund Act is to permit payments for "any final judgments, awards, compromise settlements, and interest and costs where payment is not otherwise provided for." (CC Br. 47)(quotations omitted). This argument omits the other plainly stated requirements for payment from the Judgment Fund set forth in 28 U.S.C. § 2414: claims against the government, for which litigation was imminent, and which would have resulted in a payable money judgment. It simply is not enough to present a class action compromise settlement of any kind which has ripened into a final judgment and demand payment from the Judgment Fund, without meeting any other statutory criteria.

C. Prior Judgment Fund Settlements Highlight the Unlawfulness of the *Keepseagle Cy Pres* Distribution.

USDA seeks to refute Mandan's reference to prior proper uses of the Judgment Fund in *Cobell*, *Garcia*, *Love* and *Pigford II*, arguing that "no two settlements are alike" and that there is no provision of the Judgment Fund or other governing statute that requires the Attorney General to follow previous compromise settlements in future cases. (USDA Br. 21).

USDA miscasts Mandan's reference to *Cobell, Garcia, Love and Pigford II* and avoids any meaningful discussion of those settlements. Mandan did not argue that the Government is bound by its prior actions in these previous settlements. Instead, Mandan offers these prior settlements as examples of how complex class actions – like *Keepseagle* – can be settled in ways that comport with the plain language of the Judgment Fund statute. (Mandan Br. 29)("…the Government's prior conduct in

other class action settlements – where it obtained stand-alone Congressional appropriations to pay non-parties – highlights the unlawful nature of its conduct here.").

Mandan does not argue that the Government must follow one rigid framework to settle class actions using Judgment Fund money, quite the opposite. *Love, Garcia*, *Cobell* and *Pigford II* collectively illustrate that there are many constitutionally permissible options for the government to use in compromising claims asserted against it. These cases also illustrate that Congress, through the Judgment Fund Act and the settlements authority statute, set specific criteria for the payment of compromise settlements and judgments using Judgment Fund money. In order to settle cases using Judgment Fund money, the settlement must not have otherwise been provided for, there must be actual or imminent litigation, and there must be a claim to settle.

The government negotiated settlements in *Cobell* and *Pigford II* in which all or part of the settlements would not have met Judgment Fund Act criteria. Consequently, each of these settlements required separate congressional appropriations. Payments could not be made from the Judgment Fund in *Pigford II* because the funds were "otherwise provided for." They could not be made in *Cobell* because: (1) Congress had not yet waived sovereign immunity for the *Cobell* claims, and (2) the government agreed to pay third parties without claims against the government. Congress, therefore, made a separate appropriation for payment of

Judgment Fund money to uninjured third parties and "deemed" the conditions for Judgment Fund payments to have been met. *See* Claims Resolution Act of 2010, Pub. L. 111-291 §101(e)(C)(ii), 124 Stat. 3070 (Dec. 8, 2010).

Contrary to USDA's assertions, Mandan does not argue that Congress is required to sign off on every government settlement. In *Love* and *Garcia,* the government set up an administrative claims process by which claimants were compensated only when they demonstrated valid claims. This process ensured that no Judgment Fund money would be paid to anyone who did not have a claim, and there would be no residual or unclaimed *Love* and *Garcia* settlement money, thus avoiding the situation where *cy pres* would be utilized. (Mandan Br. 30-31).

USDA, despite previously admitting that a reverter in *Keepseagle* would be unlikely, now seems to argue that if Mandan believes the residual settlement funds remain in the Judgment Fund, (a belief he does not hold), this belief somehow magically confers upon USDA the right to revert the funds back to Treasury.[5] (USDA Br. 23-24). There is no language in the Settlement Agreement to support a reverter and courts have consistently rejected requests by defendants for reverter of residual settlement funds. *See Diamond Chem. Co. v. Akzo Nobel Chems. B.V.*, 517 F. Supp. 2d 212, 218 (D.D.C. 2007)("when faced with statutes that have deterrence as a goal, courts have declined to order reversion of unclaimed settlement funds to a settling

[5] "I understand. We have not foreclosed that position [that the Government has a reversionary interested in the remaining settlement funds]. I think in all candor I think it would be a tough argument to make." JA0747.

defendant"); *Six (6) Mexican Workers v. Ariz. Citrus Growers*, 904 F.2d 1301, 1309 (9th Cir. 1990)(holding reversion of remaining settlement funds to defendants was improper because of the "deterrence objective" of the Farm Labor Contractor Registration Act); *In re Motorsports Merch. Antitrust Litig.*, 160 F. Supp. 2d 1392, 1395 (N.D. Ga. 2001)(holding that remaining settlement funds should not revert to defendants because they had already received the benefit of their bargain, an end to litigation).

III. The District Court Erred as a Matter of Law When it Failed to Recognize its Equitable Power Under Rule 23, Including the Power to Make an Equitable Distribution of the Remaining Settlement Funds to Prevailing Claimants.

USDA and Class Counsel argue that the district court's traditional equitable powers under Rule 23 to address the appropriate distribution of class action settlement proceeds are non-existent — even "imaginary." (USDA Br. 25, CC Br. 18, 22-26).[6] They surmise the district court retained jurisdiction only to approve an agreed upon modification of the Settlement Agreement, not an equitable distribution of the remaining settlement proceeds. (USDA Br. 25, CC Br. 23-26). This argument ignores the Agreement's plain language that the district court retains authority "to supervise the distribution of the Fund…." JA0429; *See also Keepseagle v. Vilsack*, 815

[6] Class Counsel misstates Mandan's argument as the "district court **should have** used its equitable power to strike the *cy pres* clause altogether." (CC Br. 22). Mandan instead argues that the district court failed to recognize its equitable powers. The district court previously stated that if it were empowered to do so, it would give the remaining funds to Prevailing Claimants. *Keepseagle*, 118 F. Supp. at 104-105.

F.3d 28, 34 (D.C. Cir. 2016)(affirming the district court's jurisdiction over distribution of the funds, and stating that distribution of funds concerns "processes that take place after the claims determination process."). This retained jurisdiction provision necessarily includes, and is consistent with the court's Rule 23 equitable power over, the distribution of class settlement proceeds.

Nonetheless, it is immaterial whether the district court retained jurisdiction in the Settlement Agreement. Jurisdiction necessary to modify a settlement agreement may not be contracted away by the parties.[7] *Pigford v. Johanns*, 416 F.3d 12, 16 (D.C. Cir. 2005)("The power of a District Court sitting as a court of equity to modify the terms of a settlement agreement it previously adopted cannot be drawn into question.")(internal citations omitted).[8] Class Counsel's reliance on *Pigford v. Veneman*, 292 F.3d 918 (D.C. Cir. 2002)("*Pigford I*") is similarly misplaced because that court narrowly addressed whether a district court retained sufficient jurisdiction to **interpret** a consent decree. *Pigford I* did not address a district court's inherent jurisdiction to

[7] Citing *Masters v. Wilhelmina Model Agency, Inc.*, 473 F.3d 423 (2d Cir. 2007), Class Counsel claims a district court retains no equitable power to distribute remaining settlement funds absent discretion provided in the settlement agreement's terms. (CC Br. 30). In fact, the *Masters* court instructed the district court to analyze its equitable powers to redistribute remaining settlement funds – in the form of treble damages – despite the settlement agreement's silence as to damages and in the face of contradictory statutory authorization. *Masters*, 473 F.3d at 435-436. The *cy pres* provisions in the Addendum did not remove the equitable power of the district court to order a redistribution of the remaining settlement fund.

[8] This case dispels any notion that the district lacks equitable power to modify a settlement agreement. (*See* CC Br. 33)(the district court "possesses two types of authority over consent decrees.").

modify a consent decree outside of Rule 60.[9] *Id.* at 921; *see also Hammon v. Kelly,* 154 F.R.D. 11, 27 (D.D.C. 1994)(holding that a reviewing court had the inherent authority to make "legitimate modifications" to a consent decree); *David C. v. Leavitt*, 242 F.3d 1206, 1210 (10th Cir. 2001)(a court exercising its broad equitable power to modify a settlement agreement does not have the same constraints as it would in interpreting that agreement.).

Class Counsel incorrectly cites *Beecher v. Able*, 575 F.2d 1010 (2d Cir. 1978), for the proposition that "courts are bound by the terms of the settlement agreement…." (CC Br. 30-31). *Beecher* actually illustrates that the terms of a settlement agreement do not constrain a court's equitable power to modify. In *Beecher*, the parties agreed the settlement agreement's provisions governing allocation of remaining funds were deficient, but disagreed on proper allocation of the remainder. The Second Circuit held that while the district court could not modify the settlement under traditional legal or contract principles, it had the equitable power to modify the settlement and allocate the proceeds in a manner contrary to the settlement's terms. *Id.* at 1016.

In the instant case, the parties agree that the *cy pres* provisions are inadequate, but disagree on the proper distribution of the remaining settlement funds. Consistent with *Beecher*, Mandan maintains that the district court possesses equitable power to allocate the undistributed settlement funds to Prevailing Claimants, despite

[9] *Pigford v. Vilsack*, 777 F.3d 509 (D.C. Cir. 2015)("*Pigford II*") is similarly distinguishable as this decision concerns a district court's ability to **interpret** a consent decree.

the parties' failure to agree on such a distribution by written modification. *See also In re BankAmerica Corp. Sec. Litig.*, 775 F.3d 1060 (8th Cir. 2015)("a proposed *cy pres* distribution must meet our standard governing *cy pres* awards regardless of whether the award was fashioned by settling parties or the trial court.")(internal citations omitted); *Zients v. LaMorte*, 459 F.2d 628, 630-631 (2d Cir. 1972)(where "equities are on the side of the claimants" a settlement agreement can be modified to allow late claims); *In re Orthopedic Bone Screw Prods. Liab. Litig.*, 246 F.3d 315, 320 (3d Cir. 2001)(finding that the district court had "equitable authority to excuse late filings" contrary to the settlement agreement terms.).

IV. The District Court Erred as a Matter of Law in Approving the Addendum Under Rule 23(e)(2) Without First Determining Whether Prevailing Claimants Were Reasonably Identifiable and Further Distributions Were Economically Viable.

Appellees do not dispute that the district court failed to analyze the Addendum in the context of this Court's decision in *Dem. Cent. Comm.*, where this Court first determined whether injured parties were reasonably identifiable and contemplated whether distributions were economically viable **before** considering an alternative distribution of restitution funds. (Mandan Br. 35-37). Nor do they dispute that numerous federal circuit courts, consistent with Section 3.07 of the American Law Institute's Principles of the Law of Aggregate Litigation ("ALI Principles"), have determined that *cy pres* distribution of unclaimed class settlement proceeds should be utilized only when it is no longer logistically feasible or economically viable to make such distributions to participating class members. (Mandan Br. 39-40).

Instead, Class Counsel maintains that the cases cited by Mandan where the district court's *cy pres* analysis occurred in the settlement approval phase cannot be applied to the district court's analysis of a post-final judgment amendment to the settlement agreement. (CC Brief 27-28). While *cy pres* distributions frequently are analyzed by courts as part of granting final approval to a settlement, it does not follow that the same analysis is unnecessary in a post-judgment settlement amendment context. The importance of the conditions precedent to *cy pres* distribution followed by numerous federal circuits – that the injured parties are reasonably identifiable and that additional distributions to them are economically viable – does not depend upon when in the proceedings the conditions are considered. *See generally*, *In re BankAmerica Corp. Sec. Litig.*, 775 F. 3d 1060. Class Counsel's position would render the district court's Rule 23 supervisory role over distribution of class settlement proceeds a nullity.

Regardless, Mandan cites two cases where appellate courts rejected *cy pres* distributions post-final judgment because the injured parties were reasonably identifiable and additional distributions to them were economically viable, *Klier v. Elf Atochem North America, Inc.*, 658 F.3d 468 (5th Cir. 2011) and *In re BankAmerica*, 775 F.3d 1060. Class Counsel's attempt to distinguish these cases is unpersuasive. While the *Klier* settlement agreement did not contain a *cy pres* provision, the Fifth Circuit, nevertheless, recognized that "where it is still logistically feasible and economically viable to make additional pro rata distributions to class members, the district court

should do so, except where an additional distribution would provide a windfall to class members with liquidated-damages claims that were 100 percent satisfied at initial distribution." *Klier,* 658 F.3d at 475 (emphasis added).

The Eighth Circuit, in *In re BankAmerica*, relied on *Klier* when it rejected a district court's approval of a post-final judgment *cy pres* award of unclaimed class settlement proceeds. Class Counsel in *In re BankAmerica*, like Class Counsel in *Keepseagle*, argued that the *cy pres* distribution had to be affirmed because both the district court and the Eighth Circuit were bound by the language of the parties' settlement agreement. The Eighth Circuit rejected this argument for two reasons. Class Counsel cites only one — that the agreement and order stating that a *cy pres* distribution would be made in the district court's sole discretion was void *ab initio* because it was not within the court's traditional Article III function. (CC Brief 29). The Eighth Circuit's analysis, however, did not stop there. The court continued: "[m]ore importantly, we agree with the Ninth Circuit that 'a proposed *cy pres* distribution must meet [our standards governing *cy pres* awards] regardless of whether the award was fashioned by the settling parties or the trial court.'" *In re BankAmerica,* 775 F.3d at 1066 (*quoting Nachshin v. AOL, LLC*, 663 F.3d 1034, 1040 (9th Cir. 2011)). The Eighth Circuit further observed that Class Counsel, by relying on the holding in *Klier* to argue to the contrary, had misstated "the holding of *Klier*, which *overturned* the district court's *cy pres* award because '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.'" *In re BankAmerica,* 775 F.3d at 1066 (internal citations omitted).

Both Class Counsel and USDA contend that the Addendum's $380 million *cy pres* award is necessary to protect the interests of Native American farmers and ranchers who met the class definition but never filed claims, filed late claims, or filed claims that were denied. (CC Brief 32-37, USDA Brief 27). However, the Settlement Agreement as negotiated by the parties precludes payments to anyone other than Prevailing Claimants.[10] It provides that Class Counsel **shall** use the settlement fund "solely to pay Final Track A Liquidated Awards, Final Track A Liquidated Tax Awards, Final Track B Awards, and Debt Relief Tax Awards to, or on behalf of, Class Members pursuant to the Non-Judicial Claims Process." JA0403, §VII F(2). The Settlement Agreement makes programmatic relief the sole relief for class members who do not file or prevail on a claim. That does not mean non-participating class members received no benefit from the Settlement, or that their interests are not protected under the Settlement Agreement. Class Counsel and USDA both acknowledge that the most important aspect of the *Keepseagle* settlement was the significant programmatic relief awarded. (Dkt. 571-1 at 1, USDA Br. 5). Thus, the *cy pres* giveaway of more than 50% of the settlement funds to uninjured non-parties is

[10] The Agreement did not reserve settlement funds for non-claiming or non-prevailing class members, even though it could have. *See In re Folding Carton Antitrust Litig.*, 557 F. Supp. 1091 (N.D. Ill. 1983)(parties included reserve fund for payment of late-filed claims).

not justified on the basis of protecting non-participating class members, nor is it consistent with the Settlement Agreement's terms.

Class Counsel and USDA's argument that the *cy pres* giveaway will provide a benefit to non-participating class members (CC Brief 33, USDA Brief 27) is contradicted by the class members themselves. As lead class representative Marilyn Keepseagle told the district court when Class Counsel initially moved for approval of a trust to give away the undistributed settlement money: "[t]he foundation as proposed by class council would not benefit the Keeps Eagle class members one iota." JA0874.

This case is a textbook example of the perils of shoe-horning a trust law remedy meant to save testamentary gifts into the completely different context of a class action. *See Mirfashi v. Fleet Mortg. Corp.* 356 F.3d 781, 784 (7th Cir. 2004)("There is no indirect benefit to the class from the defendant's giving the money to someone else."). The problems associated with *cy pres* awards of class settlement proceeds are so numerous that there now exists both a substantial body of federal case law criticizing and restricting such awards, and a well-recognized set of guidelines in the form of the ALI Principles, placing conditions on such awards. Yet, the district court ignored all of this when approving the Addendum.

Class Counsel asserts that the economic viability analysis applies to all class members, not just the successful claimants. This argument conflicts with the §3.07(b) of the ALI Principles which make it clear that economic viability is tied to additional

distributions to participating class members of unclaimed funds, not the economic viability of distributing unclaimed funds to "all" class members. Regardless, neither Class Counsel nor USDA dispute that the district court failed to engage in an economic viability analysis with respect to the *cy pres* payments provided for in the Addendum.

Class Counsel relies on two district court cases, *In re Folding Carton Antitrust Litig.*, and *Fears v. Wilhelmina Model Agency, Inc.*, No. 02-civ-4911, 2007 U.S. Dist. LEXIS 48151 (S.D.N.Y. Jul. 5, 2007), in support of its position that additional distributions to successful claimants should be denied in order to protect the interests of the non-participating class members. (CC Brief 36-37). This contention ignores the fact that those interests were completely served by the programmatic relief provided by the Settlement Agreement. Nevertheless, in both cases cited by Class Counsel the courts considered additional distributions to participating class members— something not done by the district court in *Keepseagle*. These cases also are factually dissimilar from *Keepseagle* based on the recoveries of the successful claimants. In *In re Folding Carton Antitrust Litig.*, the court denied additional distributions from an unused $6 million late-filed claims fund because successful claimants had already received all but 3% of the available $200 million settlement fund and roughly 163% – 174% of their provable damages. *In re Folding Carton Antitrust Litig.*, 557 F. Supp. at 1105-1106. Likewise, in *Fears* the court calculated that additional distributions to successful claimants would result in a 116% recovery. *Fears*, 2007 U.S. Dist. LEXIS 48151 at 28-

29. In contrast, *Keepseagle* Prevailing Claimants have recovered only a fraction of their actual damages and less than 50% of the original $680 million settlement fund.[11]

V. The District Court Abused its Discretion in Approving the Addendum Under Rule 23(e)(2) When it Failed to Analyze Whether the Amount of the Additional Payments to Prevailing Claimants was Fair, Reasonable, and Adequate Under the Facts of the Case.

No Appellee addresses Mandan's argument that the district court made no analysis under Rule 23(e)(2) for why the payment of an additional $18,500 to each Prevailing Claimant was fair, reasonable, and adequate under the facts of this case. Likewise, no Appellee addresses Mandan's assertion that the sheer size of the *cy pres* award is too large to receive such summary approval as fair, reasonable, and adequate.

Instead, Class Counsel contends Prevailing Claimants should not receive additional distributions beyond those provided in the Addendum because they have been "fully compensated" for their economic damages. (CC Br. 37-41). USDA argues receipt of the funds provided for in the settlement should bar any additional recovery by Prevailing Claimants. (USDA Br. 16-17).

These arguments are based on two erroneous assumptions —that receipt of an amount authorized by the settlement agreement is the equivalent of full compensation, and that Prevailing Claimants' economic damages are the only measure of whether they have been fully compensated. *Klier* and *In re BankAmerica* dispel these false assumptions.

[11] No Appellee argues that a *pro rata* distribution of the entire *Keepseagle* remainder to Prevailing Claimants would be a windfall.

In *Klier*, the Fifth Circuit specifically rejected the argument that class members are fully compensated by receiving payments specified in the settlement agreement. Citing the comments to §3.07 of the ALI Principles, the court explained "[a]s a general matter, 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 for those class members." *Klier*, 658 F.3d at 479. Likewise, in *In re BankAmerica*, the court rejected the argument that a *cy pres* distribution was appropriate where Class Counsel declared that all class members who submitted claims had been paid in full. The court recognized that class members with unliquidated damage claims in the underlying litigation are not fully compensated just because they receive the amounts allocated to their claims in the settlement. *In re BankAmerica*, 775 F.3d at 1065-66. Furthermore, Appellees contend the Addendum constitutes a compromise in which no party received everything they sought. (CC Br. 40, USDA Br. 2, MK Br. 4). That admission negates any assertion that Prevailing Claimants have received full compensation.

Class Counsel contends that in judging whether Prevailing Claimants have been fully compensated, a reviewing court should look only at their economic damages but cites no cases for this proposition. (CC Br. 38). This assertion contradicts *In re BankAmerica* where the court referenced "unliquidated damage claims in the underlying litigation" as the measure for determining whether successful claimants were fully compensated. *In re BankAmerica*, 775 F.3d at 1065. The *Keepseagle* class

asserted discrimination claims for unliquidated damages under the ECOA. The ECOA allows recovery for actual damages, both economic and non-economic. (Mandan Br. 44). Both kinds of damages were included in the class's prayer for relief. JA0386 ¶136. USDA, in exchange for the $680 million settlement fund and programmatic relief, obtained a release of all claims asserted in the underlying litigation, not just a release of claims for economic damages. There is no reason for this Court to restrict its analysis of whether Prevailing Claimants have been fully compensated to just economic damages. Even if such an artificial limitation were followed, it is evident that Prevailing Claimants have not even been fully compensated for their economic damages based on the amounts provided for in the Settlement Agreement and the Addendum. Descriptions of these economic losses by the farmers and ranchers, and their lawyers, bear repeating here:

- "A piece of equipment, one tractor to farm today will cost you anywhere from 100 to $300,000. $50,000 wouldn't even get you started." JA1018, Comments by Dwayne Hutt.

- "There is no way that 50,000 or even $100,000 will buy back the 380 acres of productive farmland that George Keepseagle was forced to sell…" JA1312-1313, Comments of Donovan Oshambo.

- "Because even if . . . $100,000 was given to each of the 3,605 --which is about what it'd turn out to -- it still wouldn't buy back the ranches that people lost, or the acreage that had to be sold, or the cows that had to be sold, or the hay that had to be sold to justify -- to make ends meet." JA1256, Comments of Marshall Matz, Esq.

Class Counsel proffers an average loss theory to demonstrate that Prevailing Claimants have received "full compensation." (CC Br. 5). This theory was part of

Class Counsel's motion for approval of the *Keepseagle* settlement. (Dkt. 589 at 42 n.18). Class Counsel explained that the average loss per loan denied was $19,040, and the average loss per loan servicing request denied was $37,070, resulting in an average loss per farmer or rancher denied one loan and one loan servicing request of $56,110. *Id.* But even Class Counsel acknowledged "[t]hese are, of course, averages, and an individual claimant might have been denied more than one loan, or have greater than average losses but other claimants would have lower than average losses." *Id.* Thus, by Class Counsel's own admission, any Prevailing Claimant denied more than one loan and more than one servicing request on average would have sustained economic losses in multiples of $56,110. Given the 18 year class period and the cash flow demands of farming and ranching operations, it is more likely that each Prevailing Claimant was denied by USDA more than once.

Class Counsel further contends that when all the monetary relief afforded under the Settlement Agreement is combined with the Addendum's additional payments, each Prevailing Claimant will receive the equivalent of $83,775, plus $16,460 in debt relief. Consequently, the average individual claim has been fully compensated. (CC Br. 38). This argument fails for all the reasons previously stated: it limits the analysis to economic damages, assumes each Prevailing Claimant was denied only once, and contradicts the experiences of the class members who told the district court that even $100,000 would not begin to make-up for the economic losses suffered under USDA's failed loan programs.

VI. The District Court Committed an Error of Law in Approving the Addendum Without Mandan's Approval.

Class Counsel and USDA circumscribed the ability of the "Parties," defined in the Settlement Agreement as "Plaintiffs and the Secretary" to modify the Settlement Agreement. JA0494 §II. DD. "Plaintiffs" are defined as "the individual plaintiffs named in *Keepseagle v Vilsack*, No. 1:99 CV03119 (D.D.C.), the members of the Class, and the Class Representatives." JA0494 §II. EE. Modification of the Settlement Agreement requires the written agreement of all the "Parties" and approval of the court. In 2015, the district court modified the definition of "Parties" to exclude the individual plaintiffs. JA1164-65. In a later decision, the district court re-defined "Parties" again, this time to mean a majority of class representatives, not all of them. JA1463-65. The court's unilateral modification of the term "Parties" was necessary in order to approve the Addendum over the objection of class representative, Mandan. These facts demonstrate the fallacy of Appellees' current contention that the district court was bound by the Settlement Agreement's *cy pres* provisions because it could not unilaterally modify those terms without consent of the "Parties."

Appellee Keepseagle unfairly attempts to portray Mandan as a laissez-faire class representative. Mandan, as an original named plaintiff, has been seeking justice and compensation for the class since the case's inception. His steadfast refusal to agree to a proposal that would include *cy pres* distributions to uninjured non-parties left him

estranged from Class Counsel, not unlike the Keepseagles' own estrangement evidenced in letters to Judge Sullivan in 2014.[12] (Mandan Br. 10).

On December 14, 2015, Class Counsel filed a re-negotiated "unopposed" motion to modify the Settlement Agreement with the Keepseagles on board, leaving Mandan as the only class representative advancing the position that the settlement money should be distributed *pro rata* to Prevailing Claimants. Mandan hired his own counsel to timely object to that motion. Mandan has continuously and zealously represented the interests of the class by maintaining his opposition to Class Counsel and USDA's *cy pres* giveaway.

CONCLUSION

For the foregoing reasons, Mandan asks this Court to: (1) hold that *cy pres* awards are not appropriate in class action cases where the settlement proceeds are taken from the Judgment Fund; and (2) reverse the district court's order approving the Addendum and remand the case with further instructions to distribute the remaining settlement proceeds *pro rata* to Prevailing Claimants.

[12] Mandan's opposition to the *cy pres* payments is evidenced by Marilyn Keepseagle previously seeking removal of Porter Holder and Claryca Mandan, but not Keith Mandan, as class representatives. JA0334, Dkt.760.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that this Reply brief complies with the requirements of Fed. R. App. P. 32(a)(5) and (6) for the following reasons: (1) it has been prepared in 14-point Garamond, a proportionally spaced font; and (2) pursuant to this Court's November 3, 2016, Implementation of Amendments to the Federal Rules of Appellate Procedure, it complies with the word limit for actions with a schedule submitted prior to November 30, 2016.

I certify that this brief complies with the type-volume limitations of the governing version of Fed. R. App. P. 32(a)(7)(B)(ii) for actions with a schedule submitted prior to November 30, 2016, because it contains 6,917 words, excluding the parts of the brief exempted under Fed. R. App. P. 32(f), according to the count of Microsoft Word.

s/William A. Sherman
William A. Sherman

CERTIFICATE OF SERVICE

I hereby certify that on 7th day of December, 2016, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the D.C. Circuit by using the appellate CM/ECF system. The participants in the case are registered CM/ECF users and service will be accomplished by the appellate CM/ECF system.

s/William A. Sherman