[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**

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MARILYN KEEPSEAGLE, PORTER HOLDER; CLARYCA MANDAN, ON BEHALF OF THEMSELVES AND THE PLAINTIFF CLASS, *et al*

Plaintiffs-Appellees,

KEITH MANDAN,

Plaintiff-Appellant,

DONIVON CRAIG TINGLE, SILENT CLASS MEMBER,

Interested Party-Appellant

v.

THOMAS J. VILSACK

Defendant-Appellee,

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

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# BRIEF FOR PLAINTIFFS-APPELLEES PORTER HOLDER; CLARYCA MANDAN, ON BEHALF OF THEMSELVES AND THE PLAINTIFF CLASS

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## CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

The brief of Appellant Keith Mandan accurately sets forth the parties, rulings and related cases.

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## STATEMENT OF JURISDICTION

The district court had jurisdiction pursuant to 28 U.S.C. §§ 1331, 1343, and 2201, and the provision in the Settlement Agreement which allowed for modification of the Settlement Agreement with consent of the parties. The district court granted Plaintiffs' Unopposed Motion to Modify the Settlement Agreement *Cy Pres* Provision and entered a final Order and Memorandum Opinion amending the Settlement Agreement on April 20, 2016. This Court has appellate jurisdiction pursuant to 28 U.S.C. § 1291.

## STATEMENT OF THE ISSUES

1. Whether the district court acted within its discretion by approving a modification to the Settlement Agreement that was agreed to by all parties, as required by the Agreement, and rejecting Appellants' argument that the Agreement's *cy pres* provision, which was part of a final judgment entered more than five years ago, without objection or appeal at that time, should now be eliminated in its entirety.

2. Whether the district court acted within its discretion by approving modification of the Settlement Agreement's *cy pres* provision where *cy pres* will benefit the entire class, including class members who did not file successful claims, where those who did file successful claims have already been compensated

for their economic damages, and where the *cy pres* relief was carefully tailored to benefit the entire class.

3. Whether the Settlement Agreement is a binding final judgment whose payment is not otherwise provided for, and thus within the parameters of the Judgment Fund Act.

4. Whether the district court's ruling that a single class representative cannot unilaterally veto a settlement agreement or modification that the court finds to be in the best interests of the class as a whole was precluded by "law of the case."

5. Whether there was any conflict of interest or breach of duty simply because class counsel and the class representatives could not obtain everything for which some plaintiff class members wished.

## STATEMENT OF THE CASE

In 2010, a class of Native American farmers and ranchers reached a historic settlement with the United States Department of Agriculture ("USDA") in which the USDA agreed to pay more than $680 million to resolve the class's claims that the USDA had discriminated against Native Americans by denying loans and loan servicing over a period of almost three decades as part of its Farm Loan Program. The Settlement Agreement had a *cy pres* provision, providing that unclaimed funds

must be distributed in *pro rata* shares to non-profits in existence as of 2010 that served Native American farmers and ranchers, and that such organizations would be selected by class counsel, subject to approval by the district court. Following the settlement, Native American farmers and ranchers filed far fewer claims than had been expected and, upon completion of the claims process, approximately $380 million in settlement funds remained unclaimed. All parties realized the immediate, one-time distribution of $380 million—far more than anyone had expected would remain at the time of the original Agreement—would not be in the best interests of the class. Consequently, the parties commenced negotiations to modify the Settlement Agreement in accordance with the Agreement's provision requiring that any modification have the consent of all parties and the district court. The parties eventually agreed on a modification that provided some additional payments to successful class claimants and revised the *cy pres* provision to establish a trust for the benefit of all class members over a period of many years. The district court approved that modification, finding it to be fair, reasonable, and adequate. Unhappy that the modification did not provide instead that *all* remaining funds be distributed to successful claimants, Appellants Mandan and Tingle filed the instant appeals.

## STATEMENT OF FACTS

A. History of the Litigation

On November 24, 1999, Plaintiffs filed suit against the USDA under, *inter alia*, the Equal Credit Opportunity Act, 15 U.S.C. §§ 1691-1691f, alleging discrimination against Native Americans in its Farm Loan Program. Dkt. 1; J.A. 350. Two years later, the district court certified a class under Federal Rule of Civil Procedure 23 for purposes of declaratory and injunctive relief. The class was defined as:

> All Native American farmers and ranchers, who (1) farmed or ranched between January 1, 1981 and November 24, 1999; (2) applied to the USDA for participation in a farm program during that period; and (3) filed a discrimination complaint with the USDA either individually or through a representative during the time period.

*Keepseagle v. Veneman*, No. 99-03119, 2001 WL 3467944, at *6 (D.D.C. Dec. 12, 2001). The district court denied Plaintiffs' request to certify the class for damages, pending discovery and without prejudice, in 2001 and again in 2005. *Keepseagle*, 2001 WL 3467944, at *6, *14; *Keepseagle v. Johanns*, 236 F.R.D. 1, 1-2 (D.D.C. 2006).

On December 4, 2009, when discovery was essentially complete, Plaintiffs renewed their motion to certify the class for economic damages only. Dkt. 551-1 at 35. The district court then stayed proceedings to allow the parties to explore settlement opportunities. J.A. 295.

B. Plaintiffs' Damages Analysis

Plaintiffs presented an expert report from Patrick O'Brien, a 27-year veteran of the USDA's Economic Research Service, which calculated the economic damages that Native American farmers and ranchers suffered as a result of the USDA's discriminatory policies and practices in denying loans and loan servicing. Mr. O'Brien calculated that from 1981 through 2007, Native American farmers and ranchers incurred at least $776 million in economic losses as a result of the discriminatory practices. Dkt. 551-4 at 6. Based on the shortfall in loans provided and the number of loan servicing actions expected, the loss reflects an average of $19,040 for each loan improperly denied and an average of $37,070 for each denial of loan servicing. Dkt. 589 at 42 n.18. Thus, a Native American farmer or rancher who was denied a loan and loan servicing suffered an average loss of $56,110.

C. Settlement Agreement, Notice, and Approval

After lengthy negotiations spanning ten months, the parties reached a Settlement Agreement in October 2010. J.A. 389. In addition to substantial injunctive relief, the Settlement Agreement included $680 million in monetary relief, or approximately 88% of the $776 million in economic damages calculated by Plaintiffs' expert. J.A. 403 § VII.F; Dkt No. 551-4 at 6-7. The USDA also agreed to provide up to an additional $80 million to extinguish farm loan debt for qualifying class members and $20 million to cover the administrative costs

associated with implementing the settlement. J.A. 417 § IX.E.4; J.A. 393§ II.H; J.A. 402 § VII.B & C.

Under the Settlement Agreement, a two-track process was established for claimants: Track A and Track B. Track A claimants were not required to provide documentation to prove their economic loss, but rather claimants attested to the circumstances causing their loss. Track A claimants were entitled to a maximum payment of $50,000, plus $12,500 paid to the IRS in tax relief. Track B claimants were required to provide documentation of the circumstances giving rise to their losses, and could receive up to $250,000. *See* J.A. 420-21 § IX.F.3; Dkt. 731 at 3-4.

The Settlement Agreement further required that following the conclusion of the claims process, any unclaimed funds would be distributed as *cy pres* awards to non-profit organizations (other than educational institutions or legal services entities) that had provided agricultural, business assistance, or advocacy services to Native American farmers prior to November 1, 2010. J.A. 393 § II.I; J.A. 422-23 § IX.F.7; Dkt. 731 at 3-4. Class counsel would select these organizations, with approval by the district court. *Id.*

Finally, the Agreement could be "modified only with the written agreement of the Parties and with the approval of the District Court, upon such notice to the Class, if any, as the District Court may require." J.A. 438 § XXII.

Following the Settlement Agreement, a detailed notice was mailed to potential class members and a publication notice was disseminated throughout the country. After detailing the two-track process and the monetary limit on each claim, the notice stated: "If any money remains in the Settlement Fund after all payments to class members and expenses have been paid, then it will be donated to one or more organizations that have provided agricultural, business assistance, or advocacy services to Native Americans." Dkt. 731-1 at 6-7; *see also* Dkt. 731-2.

The district court approved an extensive plan to notify potential class members. Dkt. 571-3; J.A. 585. First, the detailed notices described above, along with claim forms, were mailed to over 12,500 readily-identifiable potential class members, as well as to 1,895 persons who had requested the notice as of March 15, 2011. Dkt. 583-2 ¶¶ 12-13; Dkt. 583-3 ¶¶ 6, 9. Second, the publication notice described above appeared in paid media, including local radio, print media, and websites most likely to reach Native Americans and farmers. Dkt. 583-2 ¶¶ 18-32. Third, press releases brought significant "earned media"—news stories about the settlement—which provided additional notice without cost. *Id.* ¶¶ 33-36. Fourth, there was extensive tribal and third party outreach to over 1,100 organizations whose memberships or constituents were likely to include class members. *Id.* ¶¶ 37-40. Finally, class counsel participated in 25 meetings with potential class members and leaders of the Native American community, attended by

approximately 1,700 people. Dkt. 583-1 ¶¶ 1, 4.

Additionally, class counsel created a website, www.IndianFarmClass.com, which provided information about the case and the Settlement Agreement, along with notice forms, claim forms, relevant court documents, and other important information. The district court also approved a claims administrator who established a toll-free number that individuals could call for information about the settlement or help with the claims process. Through March 15, 2011, the toll-free number had handled over 5,400 calls, and the website had received over 20,000 unique visits. Dkt. 583-3 ¶¶ 12, 14.

Six potential class members opted out of the settlement, and 35 objections were filed, many of which were identical. *See* Dkt. 585-1 ¶3; Dkt. 593; Dkt 598. None of these objections complained about the possibility of a *cy pres* distribution for unclaimed funds. Instead, two "objections" submitted suggestions about specific non-profits or purposes for which *cy pres* funds should be expended. Dkt. 589 at 62.

The district court granted final approval of the Settlement Agreement on April 29, 2011, and entered an order and final judgment dismissing the case with prejudice. J.A. 592. No appeals were taken.

D. The Claims Process

Following the process approved by the district court, the claims process commenced. During the six-month process, class counsel held 427 days of meetings in 32 different states to provide direct in-person assistance to class members submitting claims, and used paid media, direct mail, and outreach to relevant Native American organizations to ensure potential class members were aware of these meetings. J.A. 594-95; Dkt. 618. In addition, assistance was available via telephone. *Id*. 5,191 claims were timely filed, of which 4,380 were completed Track A claims, and 92 were completed Track B claims.[1] Over 700 claims were incomplete and never cured, and thus denied. Of the 4,380 completed Track A claims, 3,587, or 81.8%, were successful. For the claims prepared with the assistance of class counsel, 94% were successful. Of the 92 completed Track B claims, 14, or 15.2%, were successful. Dkt. 858-1 ¶7. Each prevailing claimant received a minimum of $62,500 ($50,000 directly and $12,500 to the IRS), and on average received an additional $16,460 in debt forgiveness.[2] The direct payments

[1] When class members submitted claim forms under either Track A or Track B, they acknowledged on the form that they "finally release USDA from any and all claims and causes of action that have been or could have been asserted against the Secretary by the proposed Class and the Class Members in the Case arising out of the conduct alleged therein." J.A. 451 ¶1.

[2] A total of $59,260,840.32 in debt relief was paid, an average of about $16,460 per claimant. The actual amount of debt relief varied widely, with those

to successful claimants, and payments to the IRS on behalf of the claimants, as well as service awards and attorneys' fees, totaled approximately $300 million. J.A. 716-17.

Approximately 70 individuals whose claims were denied as late or incomplete sought relief from the district court. Dkt. 625-1. Many individuals showed good cause for the error, including not receiving a defect notice from the claims administrator, dying during the period set to cure defects (defects their heirs could have cured), and mailing materials not received by the claims administrator, among others. *Id.* at 9-14. The district court denied the requested relief, finding that the Settlement Agreement specifically stated that the court could not review the determination of which claims were untimely, incomplete, or non-meritorious. Dkt. 633 at 8. Thus, there exist many individuals who appear to fall within the definition of the class, but have not received any relief.

At the conclusion of the claims process, the number of claims filed was about half of what was expected based on the federal government's estimates of the number of Native American farmers and ranchers[3] and the USDA's past

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who had no debt receiving no loan forgiveness, and the largest loan forgiveness award reaching over $1 million. J.A. 716-17.

[3] *See* Census of Agriculture, Table 55, *available at http://www.agcensus.usda.gov/Publications/2007/Full_Report/Volume_1,_Chapter*

experience with litigation involving racial discrimination in the Farm Loan Program in *Pigford v. Veneman*, 292 F.3d 918, 924-25 (D.C. Cir. 2002). J.A. 718 n.2. There were several reasons for the lower numbers, including that this case addressed conduct arising between 1981 and 1999, and therefore many individuals who were otherwise eligible to participate in the settlement were deceased by the time the claims process began in mid-2011, and their heirs simply lacked sufficient information to complete the claim form. J.A. 719 n.3. Further, only individuals who could establish that they had made a complaint of discrimination were permitted to participate in the settlement. *Id.* There were also many potential class members who were distrustful of the federal government for historic reasons and therefore did not submit claims. *Id.* Thus, when the claims process was completed, approximately $380 million remained unclaimed. In August 2013, Plaintiffs reported the unexpectedly large amount of unclaimed funds to the district court. J.A. 715.

E. Modification of the Settlement

The original *cy pres* provision called for class counsel to submit a list of proposed recipients for the *cy pres* funds to the district court for approval, and for an equal division of funds between all groups selected, with no further oversight

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*_1_US/st99_1_055_055.pdf* (over 61,000 current Native American farm and ranch operators).

after payments were made. The recipients were limited to non-profit organizations (other than educational institutions or legal services entities) that had provided agricultural, business assistance, or advocacy services to Native American farmers prior to November 1, 2010. There were a limited number of such organizations, and Plaintiffs immediately recognized the problems presented in equally dividing $380 million in *cy pres* funds to a handful of organizations. J.A. 715.

Plaintiffs discussed potential revisions to the Settlement Agreement with USDA's counsel. Among the options Plaintiffs presented was a further payment to successful claimants and permitting some with defective claims to cure them. The USDA repeatedly and resolutely declined to agree to reopen the claims process or to use the funds in those ways. Dkt. 685. Because the Settlement Agreement requires consent from all parties for any modification, Plaintiffs understood that the USDA's refusal to agree to the use of the funds in this manner foreclosed that option. J.A. 758-60; J.A. 438 § XXII. Plaintiffs evaluated the possibility of pursuing relief under Rule 60(b) over the USDA's objections, but believed that such a motion was not likely to be successful, and that it opened up the possibility of the government seeking a reverter of the remaining $380 million in settlement funds. J.A. 746-48 at 19:13-21:2; Dkt. 772 at 3, 18-19.

Thus, Plaintiffs focused instead on improving the *cy pres* provision. Class counsel solicited input on modifying the *cy pres* provision by posting information

online, mailing notice to all claimants (both successful and unsuccessful), and conducting a series of in-person listening sessions and conference calls. Dkt. 709 at 23-24. Hundreds of class members commented. Many had thoughtful suggestions about how best to distribute the *cy pres* funds to non-profit organizations, but most class members who expressed a preference wanted some or all of the *cy pres* funds to be distributed directly to class members. Some urged that the funds be distributed only to prevailing claimants, others asked that the funds be distributed to claimants who had not been successful, and still others spoke in favor of creating a second claims process for class members who had never filed claims during the original claims process. Dkt. 709 at 25. After considering this input and negotiating further with the USDA, Plaintiffs submitted a motion to modify the Settlement Agreement in September 2014, which would have directed the leftover money to create a trust that would make grants to organizations benefiting Native American farmers and ranchers over a period of years. Dkt. 709. The USDA did not object to this proposed modification.

One of the class representatives, Marilyn Keepseagle, expressed opposition to this proposed modification. Mrs. Keepseagle retained separate counsel and filed her own motion under Rule 60(b) to modify the Agreement to provide for a further

distribution to the prevailing claimants. Dkt. 779.[4] The USDA objected to this proposed modification. *Id.* Notice regarding Plaintiffs' proposed modification, as well as Mrs. Keepseagle's alternate Rule 60(b) motion, was mailed to all claimants, and a short version also appeared in newspapers. Dkts. 776, 778. The district court received numerous comments both in writing and at a lengthy hearing on June 29, 2015. J.A. 899.

At that hearing, the district court questioned for the first time whether language in the Settlement Agreement required that all named plaintiffs approve any amendment. J.A. 945-971. Ultimately, the court rejected both Rule 60(b)(5) motions on the grounds that the *cy pres* provision failed to qualify as the type of prospective effect required by Rule 60(b)(5), and the absence of changed circumstances precluded the relief sought. J.A. 1147-58.[5] The court also held that

[4] Mrs. Keepseagle also filed a motion to remove two class representatives, Porter Holder and Claryca Mandan. Dkt. 760-1. That motion was denied on April 23, 2015, not only because a final judgment had already been entered in 2011, but because Mr. Holder and Ms. Mandan remained adequate class representatives, who were concerned about the interests of the entire class, and were using their best judgment as to what would best serve the entire class given the factual circumstances. Dkt. 772 at 15-25. The district court specifically rejected certain attacks claiming self-dealing or other impropriety as being "wholly unsupported allegations." *Id.* at 16 n.5.

[5] The Court also found that even if there were changed circumstances, Mrs. Keepseagle's proposal to make a *pro rata* distribution to prevailing claimants was not narrowly tailored to address the issues with the *cy pres* provision raised by the changed circumstances. J.A. 1155-57.

Plaintiffs' reliance on Section XXII of the Agreement (governing modification) was insufficient in light of Mrs. Keepseagle's objection, and therefore left in place the original *cy pres* provision that the parties no longer supported. J.A. 1161-65.

Further negotiations ensued among representatives of the plaintiff class, the USDA and Mrs. Keepseagle. The parties ultimately agreed to a "hybrid" proposal, which provided for an additional distribution to the successful claimants of $18,500 directly and $2,775 to the IRS in tax relief, $38 million to be distributed directly to qualifying non-profit organizations within six months, and the bulk of the funds to create a Trust. J.A. 1169. Plaintiffs filed a new motion to modify the Agreement. Dkt. 824. As with the first motion to modify, notice was mailed and posted online. J.A. 1196.[6] Another all-day hearing was held on February 4, 2016, allowing class members to register any objections. J.A. 1203. The district court granted approval to the proposed modification on April 20, 2016. J.A. 1445.

F. Details of the *Cy Pres* Modification

The new *cy pres* provision, set forth in an Addendum to the Settlement Agreement, divides the distribution into two parts. In the first part, in order to expedite distribution of some of the funds, $38 million is to be distributed in the

[6] A copy of the notice is available at http://www.indianfarmclass.com/Documents/SupplementalNotice.pdf. The information provided included notice that "some money [would go] to several of the named Plaintiffs as Class Representative service awards." *Id.* at 2.

manner contemplated in the original Settlement Agreement—based on the recommendations of class counsel and approval of the district court. The organizations eligible to receive shares of this $38 million are defined as they were in the original Settlement Agreement, with two changes: (a) legal services and educational institutions are not excluded, although litigation activity is barred; and (b) "non-profit" is defined more specifically to include tribal organizations. J.A. 1169-70 § II.A.

The second part provides that the remainder of the funds would fund a Trust charged with distributing the funds over a period not to exceed 20 years. J.A. 1172 § IV.B.; J.A. 1181 § 10. Organizations eligible to receive funds from the Trust are defined in the same way as for the $38 million distribution above, except that the organizations need not have already existed or been assisting Native American farmers and ranchers prior to November 1, 2010. J.A. 1178 § 8.

Pursuant to the agreed-upon terms of the modification, the Trust would qualify for recognition as a section 501(c)(3) tax-exempt organization under the Internal Revenue Code, would be administered in order to exempt earnings from the invested funds from federal taxation, and would be operated exclusively for charitable and educational purposes. J.A. 1177 § 5(a). The Trust is banned from lobbying, engaging in political activity, making grants to support litigation, and engaging in self-dealing. J.A. 1180 § 9.

The Trust Agreement requires that the non-profit grant recipients

> make efficient use of grant funds without paying administrative overhead expenses in excess of reasonable amounts to accomplish the purposes of the grant, taking into account the amount of administrative expenses that a like organization would ordinarily pay for like expenses in like circumstances. The Trustees will consider best practices for grant making private foundations in determining what are reasonable administrative overhead expenses.

J.A. 1179 § 8(b)(1)(v). The Trust is expected to fund much, if not all, of its administrative expenses from interest generated by investments of the principal with which it is endowed. Dkt. 824-1 at 12.

Decisions on how to distribute the Trust's funds would be made by a Board comprised of 14 Native American leaders. Under the Trust Agreement, at least two-thirds of the Trustees would "have substantial knowledge of agricultural issues, the needs of Native American farmers or ranchers, or other substantive knowledge relevant to accomplishing the Trust's Mission." J.A. 1184 § 13(f)(1). At least one Trustee would "have professional financial and investment experience," *id.* § 13(f)(2), and at least one Trustee would "have professional grantmaking experience," *id.* § 13(f)(3). Plaintiffs solicited suggestions for Trustees during the listening sessions and received over 100 suggestions, from which class counsel reviewed the proposals, researching each candidate's qualifications, and nominated candidates who possessed the most relevant

experience addressing the challenges faced by Native American farmers and ranchers. Dkt. 824-1 at 3 n.3; Dkt. 824-4. Class representatives Porter Holder and Claryca Mandan were among the candidates nominated as Trustees. The individuals nominated have impressive qualifications and a great breadth of experience. Dkt. 824-4.

## STANDARD OF REVIEW

This Court reviews a district court's decision to modify a settlement agreement for abuse of discretion, *Pigford v. Johanns*, 416 F.3d 12, 16 (D.C. Cir. 2005), and reviews the interpretation of the terms of a settlement agreement *de novo*, *Keepseagle v. Vilsack (Keepseagle I)*, 815 F.3d 28, 33 (D.C. Cir. 2016).

## SUMMARY OF ARGUMENT

The question before this Court is whether the district court acted within its discretion by approving a modification to the Settlement Agreement in accordance with the Agreement's provision allowing for such modifications with the consent of the parties and the approval of the district court. It did. Appellants act as though the district court had some free-ranging authority to rewrite the Settlement Agreement in a manner contrary to the modification proposed by the parties. But this Court has repeatedly rejected that argument, including in the context of this very case. Appellants further claim that the district court should have exercised this imaginary authority to entirely eliminate the *cy pres* provision of the

Settlement Agreement. That argument comes far too late. The agreement to deal with unclaimed funds through *cy pres* was made and approved five years ago as part of a final judgment approving the Settlement Agreement. No one objected to the *cy pres* provision or appealed that final order, and Appellants' attempt to challenge the use of *cy pres* now is improper.

Even if this Court considers Appellants' untimely challenges to the *cy pres* provision, it should reject them on the merits. *Cy pres* relief was entirely proper in this case given that there are many class members who did not file successful claims and therefore will not benefit from the monetary relief in the Settlement Agreement absent a *cy pres* distribution. While Appellants claim that the remainder of the settlement funds should have been distributed to successful claimants rather than through *cy pres*, those individuals who filed successful claims were already substantially compensated for their economic damages under the settlement, and the non-economic damages about which Appellants complain were never a part of these class claims. The modifications to the Settlement Agreement's *cy pres* provision are narrowly tailored to ensure that the entire class will benefit from the settlement.

Appellants' remaining claims are meritless. Contrary to Appellants' arguments, this settlement may be paid out of the Judgment Fund because it is a final judgment that is not otherwise provided for by congressional appropriation,

which is exactly what the Judgment Fund Act covers. And Appellants' claim that under "law of the case," the district court was bound to give veto power over the Settlement Agreement to a single class representative is plainly wrong. Finally, the district court properly rejected Appellants' attempts to cast aspersions on class counsel and other class representatives for purported conflicts of interest, which are baseless.

This Court should affirm the district court's approval of the modified Settlement Agreement, which ensures that all members of the class will benefit from this settlement.

## ARGUMENT

### I. THE DISTRICT COURT CORRECTLY RECOGNIZED THAT IT COULD NOT UNILATERALLY MODIFY THE SETTLEMENT AGREEMENT.

The narrow question on appeal in this case is whether the district court properly approved the Addendum pursuant to the terms of the Settlement Agreement, which states that any modification requires "the written agreement of the Parties and … the approval of the District Court." J.A. 438 § XXII; *see also* J.A. 1459 at 13. However, the majority of Appellants' claims do not address that question. Rather, Appellants' briefs devote a significant amount of time attacking the propriety of including a *cy pres* clause in the Settlement Agreement in the first place. *See* Tingle Br. 15-30; Mandan Br. 21-35. But the time for such arguments

has long passed. At the time that the district court approved the Settlement Agreement five years ago, neither Appellants (nor anyone else) objected to or otherwise challenged the propriety of *cy pres*. Having failed to do so, Appellants cannot now argue that *cy pres* is inappropriate. *See* Dkt. 585.

When the settlement containing the original *cy pres* provision was approved by the district court in April 2011, it was incorporated into a final judgment whose terms—including the term prescribing how it may be modified—bind the parties and the district court. *Keepseagle v. Vilsack (Keepseagle I)*, 815 F.3d 28, 33 (D.C. Cir. 2016). Accordingly, the terms of the Settlement Agreement precluded the district court from ordering the *cy pres* clause to be modified or stricken, as Appellants sought, without consent of the parties. *See* J.A. 1459 at n.13 (relying on the district court's prior analysis on this issue in *Keepseagle v. Vilsack*, 118 F. Supp. 3d 98 (D.D.C. 2015)).

It is clear that the Settlement Agreement provides the district court authority over the *cy pres* provision, and precludes modification of its terms without consent of the parties. It is also clear that the parties did not consent to the modification Appellants seek. Therefore, as this Court has already held, the district court lacked authority to grant the relief Appellants request. *See Keepseagle I*, 815 F.3d at 33; *accord Pigford v. Veneman (Pigford I)*, 292 F.3d 918, 924-25 (D.C. Cir. 2002); *Pigford v. Vilsack (Pigford II)*, 777 F.3d 509, 514 (D.C. Cir. 2015).

A. The Settlement Agreement Is a Final Judgment Whose Terms Bind Appellants and the District Court.

Throughout their briefs, Appellants challenge the propriety of using *cy pres*. For example, Mr. Tingle argues that *cy pres* was altogether "improper" here because "all of the class members are identifiable and ascertainable." Tingle Br. 15. Mr. Mandan argues that payments made pursuant to a *cy pres* provision violate the Judgment Fund Act, *see* Mandan Br. 21-31, and that the district court should have used its "equitable power" to strike the *cy pres* clause altogether, *id.* at 32-35.

While these arguments lack merit on their own terms, they fail as well because they come too late. As the district court properly noted: "[T]hat ship sailed in 2011." *Keepseagle v. Vilsack*, 102 F. Supp. 3d 306, 314 (D.D.C. 2015). The proper time to raise these challenges was five years ago, when the district court entertained objections to the proposed Settlement Agreement, including its *cy pres* clause. Yet no one, including Appellants, objected to the mandatory *cy pres* provision before the district court approved it in April 2011. *See generally* Dkt. 585[7]; *Keepseagle I*, 815 F.3d at 30. Appellants subsequently accepted payouts under the terms of the Agreement. Dkt. 839 at 39; J.A. 1197.

By failing to object to the Settlement Agreement and then participating in

[7] Mr. Tingle has essentially conceded that his arguments could have been made in 2011. *See* Dkt. 839 at 39 (Tingle conceding in 2016 that he believed *cy pres* "was inappropriate at the time the settlement was contrived" in 2011).

the claims resolution process, Appellants assented to "the extinction of their legal claims," *Keepseagle*, 102 F. Supp. 3d at 314, and they cannot now complain that they would have preferred a different arrangement. As the district court correctly held, it is "undisputed" that the Settlement Agreement "is a final judgment," *Keepseagle v. Vilsack*, 118 F. Supp. 3d 98, 114 (D.D.C. 2015); *accord* J.A. 1459, and, as such, its terms are enforceable as to all members of the class as "a judicial decree," *Pigford I*, 292 F.3d at 923. "A consent decree no doubt embodies an agreement of the parties and thus in some respects is contractual in nature. But it is an agreement that the parties desire and expect will be reflected in, and be enforceable as, a judicial decree that is subject to the rules generally applicable to other judgments and decrees." *Rufo v. Inmates of Suffolk Cty. Jail*, 502 U.S. 367, 378 (1992).[8] While parties can, under very limited circumstances, use Rule 60(b) to challenge a final judgment to which they are bound, *see Pigford I*, 292 F.3d at 925-27, Appellants cannot satisfy those strict requirements.[9]

[8] The same legal standards apply to settlement agreements that are not in the form of a consent decree. *In re Black Farmers Discrim. Litig.*, 29 F. Supp. 3d 1, 3-4 (D.D.C. 2015) (applying Rule 60(b)(5) to a settlement agreement, and inserting the term "settlement agreement" when quoting prior cases that applied Rule 60(b)(5) to consent decrees).

[9] The district court explained in a prior order that arguments very similar to Appellants' could not satisfy the requirements of Rule 60(b). *See Keepseagle*, 118 F. Supp. 3d at 123-28. That reasoning is just as persuasive here and would refute

Appellants nevertheless claim that the district court had some kind of freewheeling authority to modify the Settlement Agreement in 2016. Mr. Tingle, for example, asserts that the district court abused its discretion by not eliminating the *cy pres* provision, rather than approving the modifications set forth in the Addendum to which the parties agreed. Tingle Br. 6, 20-21. Similarly, Mr. Mandan argues that the district court had broad "equitable power" under Rule 23 to modify the Settlement Agreement to remove the *cy pres* clause. Mandan Br. 32-35.

But the terms of a settlement agreement, except in very rare circumstances not present here, control the actions of the district court, whose authority to modify and interpret a final agreement is otherwise severely circumscribed. This Court has held that district courts "possess two types of authority over consent decrees." *Pigford I*, 292 F.3d at 923. "First, they may interpret and enforce a decree to the extent authorized either by the decree or by the related order." *Id.* "Second, they may modify a decree pursuant to [Rule] 60(b)(5)." *Id.* Appellants have not sought to invoke, nor could they, either basis for the relief they seek.

Rather, Appellants seem to believe that the district court had some ancillary or "equitable power" to modify the Settlement Agreement. Mandan Br. 32; Tingle

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Appellants' arguments had they even attempted to show that they meet the requirements of Rule 60(b).

Br. 20-21. This Court rejected that very argument in *Keepseagle I*, holding that "district courts enjoy no free-ranging 'ancillary' jurisdiction to enforce consent decrees, but are instead constrained by the terms of the decree and related order." *Keepseagle*, 815 F.3d at 33 (quoting *Pigford II*); *accord Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 380-81 (1994) (district court lacked "ancillary jurisdiction" to enforce a consent decree because neither the decree nor the order dismissing the case expressly retained jurisdiction to do so).

Accordingly, the district court's authority over a settlement agreement "is drawn exceedingly narrowly," *Keepseagle I*, 815 F.3d at 36, and "depends on the terms of the decree and related court order, rather than on some 'ancillary' or 'inherent power,'" *Pigford I*, 292 F.3d at 925. In other words, "[w]hile it may be a 'well-established principle ... that a district court retains jurisdiction under federal law to enforce its consent decree[s],' it retains this authority only if the parties' agreement or the court order dismissing the action reserves jurisdiction to enforce compliance." *Pigford II*, 777 F.3d at 514 (citation omitted). After all, "[w]ho would sign a consent decree if district courts had free-ranging interpretive or enforcement authority untethered from the decree's negotiated terms?" *Pigford I*, 292 F.3d at 925.

Here, the Settlement Agreement expressly stated that *any* modification to its terms would *require* "the written agreement of the Parties and … the approval of

the District Court." J.A. 438 § XXII. As the USDA repeatedly and resolutely declined to modify the *cy pres* clause to allow distribution of all the remaining funds to prior successful claimants, Dkt. 685, the district court had no authority to impose such a condition unilaterally. *See Keepseagle I*, 815 F.3d at 36; *Pigford II*, 777 F.3d at 514; *Pigford I*, 292 F.3d at 925.

By raising arguments at this late date against the use of *cy pres*, Appellants plainly "ignore the fact that a final judgment speaks directly to the issue in this case and mandates the use of a *cy pres* remedy." *Keepseagle*, 118 F. Supp. 3d at 117; *see* J.A. 1459 at n.2. The question before the district court was not which distribution method it "should choose in a vacuum"; rather, the district court faced "specific and mandatory language in a final settlement that was never challenged or appealed," *Keepseagle*, 118 F. Supp. 3d at 115. That mandatory language required the court to order distribution of any unclaimed funds through a *cy pres* provision and to allow modifications to that provision only upon consent of the parties. The district court honored the terms of the agreement, as this Court has repeatedly instructed. *See Keepseagle I*, *Pigford I*, and *Pigford II*, 777 F.3d at 514.

B. Appellants' Out-of-Circuit Caselaw Is Inapposite.

This Court's directly on-point decisions in *Keepseagle I*, *Pigford I*, and *Pigford II* plainly require rejection of Appellants' challenge to the *cy pres* clause. Appellants cite various out-of-circuit, inapposite authorities. Some did not even

involve a binding final judgment. Others involved a final judgment, but the terms of the agreement were markedly different from the Settlement Agreement here. Still others involved a final judgment, but one that was silent or ambiguous about *cy pres*, creating the need for the district court to interpret the agreement.

The vast majority of the cases Appellants cite fall into the first category because they involve a district court's *initial* decision either to approve or reject a proposed class settlement under Rule 23.[10] In contrast to the current case, in which the district court was bound by the final Settlement Agreement approved years earlier, Appellants' cases did not involve the presence of a prior final, binding agreement. This is a critical distinction: "While the settlement agreement must gain the approval of the district judge, once approved its terms must be followed by the court and the parties alike." *Klier v. Elf Atochem N. Am., Inc.*, 658 F.3d

[10] *See, e.g., Mace v. Van Ru Credit Corp.*, 109 F.3d 338, 340 (7th Cir. 1997) (cited in Tingle Br. 17); *Hughes v. Kore of Ind. Enter.*, 731 F.3d 672, 675 (7th Cir. 2013) (cited in Tingle Br. 17); *Six (6) Mexican Workers v. Ariz. Citrus Growers*, 904 F.2d 1301, 1304 (9th Cir. 1990) (cited in Tingle Br. 18, 26, 28); *Dennis v. Kellogg Co.*, 697 F.3d 858, 861 (9th Cir. 2012) (cited in Tingle Br. 18); *Molski v. Gleich*, 307 F.3d 1155, 1159 (9th Cir. 2002) (cited in Tingle Br. 19); *Nachshin v. AOL, LLC*, 663 F.3d 1034, 1039 (9th Cir. 2011) (cited in Tingle Br. 19, Mandan Br. 38); *TBK Partners, Ltd. v. W. Union Corp.*, 675 F.2d 456, 459-60 (2d Cir. 1982) (cited in Tingle Br. 19-20); *Sullivan v. DB Invs., Inc.*, 667 F.3d 273, 285 (3d Cir. 2011) (en banc) (cited in Tingle Br. 20); *In re Katrina Canal Breaches Litig.*, 628 F.3d 185, 189 (5th Cir. 2010) (cited in Tingle Br. 20,Mandan Br. 38); *In re Baby Prods. Antitrust Litig.*, 708 F.3d 163, 169-70 (3d Cir. 2013) (cited in Tingle Br. 23-24; Mandan Br. 38).

468, 475-76 (5th Cir. 2011).

In the few cases Appellants cite where there *was* a binding final judgment, the terms of the consent decree were considerably different from the Settlement Agreement here. For example, both Appellants rely on the Fifth Circuit's decision in *Klier*, 658 F.3d 468, for the proposition that *cy pres* is proper only "when further distributions to class members are no longer feasible." Tingle Br. 16-17; *id.* at 23; Mandan Br. 38-39. In *Klier*, the Fifth Circuit reversed a district court's use of *cy pres* to distribute funds that remained in one subclass after the claims process was completed. *Klier*, 658 F3d at 476-77. There, however, the relevant settlement agreement made no provision for a *cy pres* distribution. The Fifth Circuit expressly recognized this fact, stating that "[t]his is not a case where the settlement agreement itself provides that residual funds shall be distributed via *cy pres*." *Id.* at 476. *Klier* simply held that the "district judge must abide the provisions of the settlement agreement, reading it to effectuate the goals of the litigation," and the "terms of the settlement agreement are always to be given controlling effect." *Id.* at 475-76. That reasoning is fully in accord with this Court's decisions in *Keepseagle I*, *Pigford I*, and *Pigford II*—all of which make clear that it is the terms of the final judgment that bind the district court in interpreting and applying the settlement agreement.

Both Appellants also rely on *In re BankAmerica Corp. Securities Litigation*,

775 F.3d 1060 (8th Cir. 2015), in which the Eighth Circuit addressed a final settlement agreement containing an unusual clause stating that the district court had "sole discretion" to select *cy pres* recipients. *Id.* at 1066; *see* Tingle Br. 22-23; Mandan Br. 38-39. The Eighth Circuit, relying on its own precedent, held that the district court was not bound by that clause, which was "void ab initio" because distributing funds at the sole discretion of the court "is not a traditional Article III function." *In re BankAmerica*, 775 F.3d at 1066 (citation omitted). That holding has no relevance to the Settlement Agreement in this case, which entrusts to class counsel, not the court, the nomination of *cy pres* recipients, leaving approval of the nominees to the court. *See* J.A. 423 § IX.F.7. In fact, the kind of discretionary arrangement the Eighth Circuit rejected is precisely what Appellants propose here—entrusting the choice of *cy pres* recipients to the sole discretion of the court, untethered from what the parties themselves desired. *See also Keepseagle*, 118 F. Supp. 3d at 120-22 (concluding *BankAmerica* is unpersuasive for these reasons). *BankAmerica* thus does not support the relief Appellants seek.

Mr. Mandan also cites several out-of-circuit decisions to argue that the district court had broad "equitable power" to modify the *cy pres* provision. Mandan Br. 32-35. But the cases on which Mandan relies are readily distinguishable, primarily because the underlying agreements in those cases did not expressly resolve the disputed question regarding *cy pres*. *See Klier*, 658 F.3d at

476 n.21 ("Of course, the district court has inherent equitable authority to resolve any issues that are not covered by the terms of the settlement agreement.").

For example, in *Masters v. Wilhelmina Model Agency, Inc.*, 473 F.3d 423 (2d Cir. 2007), the Second Circuit faulted the district court for ordering distribution of the remaining funds by *cy pres* without acknowledging it had discretion to "allocate funds to the members of the class," *id.* at 435, an option that remained available there, but not here, because the *Masters* agreement left distribution of unclaimed funds to the discretion of the court, stating the district court "shall, in its discretion, determine the disposition … after hearing the views of the parties." *Id.* at 428. The district court had mistakenly interpreted the agreement to require distribution of unclaimed funds by *cy pres*. *Masters* is inapposite here, however, because the Settlement Agreement in this action expressly requires that unclaimed funds be distributed by *cy pres*.

Mr. Mandan's reliance on *Beecher v. Able*, 575 F.2d 1010 (2d Cir. 1978), is likewise misplaced because the Second Circuit there specifically noted that the district court's options for distributing remaining funds were limited "by the express terms of the settlement." *Id.* at 1016. Because those terms "foreclosed" reversion of the unclaimed funds to the defendant, but all agreed that the original allocation formula would lead to inequitable results, the district court was obligated to distribute the funds by other means, including reallocating proceeds

among the different classes of claimants. *Id.* *Beecher* therefore simply confirms that courts are bound by the terms of the settlement agreement, as the district court was here.

Mr. Mandan also cites cases in which courts allowed late-filed claims in class actions to argue that district courts retain broad "inherent equitable authority under Rule 23 … despite the contrary terms of an agreement between the parties." Mandan Br. 33. However, the cases he cites do not support such a broad proposition. In *Zients v. LaMorte*, 459 F.2d 628 (2d Cir. 1972), for example, the Second Circuit held that the district court should have approved several untimely claims for payment. *Id.* at 631. But that decision did not grant district courts wide authority to rewrite settlement agreements against the parties' wishes—in fact, quite the opposite. First, the Second Circuit relied heavily on language in the agreement explicitly conferring authority on the court to consider whether untimely claims should be accepted. *Id.* at 629-30. Thus, the terms of the agreement, not the inherent discretion of the court, created the authority to reconsider untimely claims. Second, in *Zients*, unlike the present case, the parties did not oppose payment of the late claims. *Id.* at 630.[11]

[11] *In re Orthopedic Bone Screw Products Liability Litigation*, 246 F.3d 315 (3d Cir. 2001), also cited by Mandan, is distinguishable for the same reasons. The Third Circuit's decision to allow the untimely claim, *id.* at 323-29, was based on ambiguous language in the agreement that could have been properly construed to

Accordingly, the cases Appellants cite support the conclusion reached below that, where an agreement clearly prescribes a particular course of action, the district court ordinarily is obliged to follow it.

## II. USE OF *CY PRES* IS PROPER UNDER THE CIRCUMSTANCES OF THIS CASE.

Apart from the untimeliness of their challenge, Appellants' challenge to the *cy pres* provision to distribute unclaimed funds is unfounded. *Cy pres* provided a proper means to distribute unclaimed funds because the funds will benefit many class members, including those who did not file successful claims, and those class members whose claims were successful were already substantially compensated under the terms of the Agreement.

### A. There Are Class Members Who Did Not File Successful Claims but Who Nonetheless Are Entitled to Settlement Proceeds.

In a class action settlement, the court and class counsel must protect the interests of all class members, whether or not they have been identified. *See Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 595 (1997) ("Rule 23 … must be … applied with the interests of absent class members in close view."); *Thomas v.*

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permit such claims. *See In re Orthopedic Bone Screw Prod. Liab. Litig.*, 176 F.R.D. 158, 183 (E.D. Pa. 1997); *In re Orthopedic Bone Screw Prod. Liab. Litig.*, No. 97-381, 2000 WL 1023782, at *1 (E.D. Pa. July 10, 2000) (allowing certain late claims). In *In re Orthopedic,* therefore, the relief granted was authorized by the terms of the agreement, while here the relief Appellants seek is at odds with the Agreement.

*Albright*, 139 F.3d 227, 233 (D.C. Cir. 1998) ("[T]he best interests of the class as a whole must remain the paramount consideration even though some class members believe that they will not receive all the individual relief to which they believe they are entitled."). When class members cannot all be identified, *cy pres* may be used in order to "maximiz[e] the number of plaintiffs compensated." *Democratic Cent. Comm. of D.C. v. Washington Metro. Area Transit Comm'n*, 84 F.3d 451, 455 (D.C. Cir. 1996).

Appellants are mistaken in their contention that the population of class members whose claims were successful constitutes the entire class and, therefore, the remaining funds should be disbursed to those claimants. Tingle Br. 15; Mandan Br. 40. The record demonstrates otherwise. While successful claimants have been the most outspoken in advancing their interests, the certified class is clearly much larger than the 3,601 successful claimants. It includes Native American farmers and ranchers who did not file claims as well as those whose claims were unsuccessful.

While the precise contours of the class cannot be discerned, the proxies for class membership demonstrate that the class clearly exceeds those who were successful claimants. As the USDA failed to retain records of the farmers and ranchers denied loans for many years, the population of Native American farmers and ranchers denied USDA loans cannot be confirmed from agency records.

Instead, the parties used recent counts from the Agricultural Census to estimate class size in their reports to the Court, which enumerated more than 61,000 Native Americans engaged in farming and ranching. *Supra* n.3. And that count undoubtedly fails to capture those Native Americans who were engaged in farming and ranching in earlier stages of the class period, which began in 1981. J.A. 718 at n.2. The likely class size, therefore, is multiples larger than the population of successful claimants.

There are a number of reasons why many class members did not have successful claims. First, many class members passed away since the onset of the class period in 1981—35 years ago—and many heirs lacked sufficient information with which to satisfy the requirements for the claims process. As Mr. Mandan acknowledges, "the notoriously poor recordkeeping practices of USDA … placed claimants at a severe disadvantage," Mandan Br. 42-43, particularly for heirs who could not simply rely on their own sworn testimony as other claimants could. Second, the record clearly demonstrates that many class members filed claims that failed due to procedural technicalities, such as inadvertently checking the wrong box on a form or missing a deadline. *See* Dkt. 625-1 (motion to permit 67 class members with good cause to cure defective claims). Third, many Native Americans are justifiably distrustful of the federal government, and would not subject themselves to a claims process with federal government oversight. J.A.

913. There is therefore a high probability that many class members who otherwise could have processed claims did not, and there is no authority for ignoring the property rights of these absent class members. Numerous putative class members submitted comments to the court below expressing concern over claims that were denied, or over their missed chance to submit a claim at all. Dkt. 757; Dkt. 789 at 1-3, 68, 95, 99-100; Dkt. 790 at 8, 47-48, 54, 64, 70, 80, 120-21; Dkt. 795 at 40; Dkt. 791 at 7, 47, 60, 61, 99; Dkt. 796-1 at 123; Dkt. 798 at 4, 6; Dkt. 799 at 84; Dkt. 799-1 at 53; J.A. 1021, 1026, 1033, 1049, 1055, 1073, 1082-84, 1368, 1369, 1371, 1374-75.

This Court has approved the distribution of unclaimed funds by *cy pres* in these circumstances. In *Democratic Central Committee*, 84 F.3d at 455, this Court held that when identifying all members of a class is not feasible, distributing unclaimed funds by *cy pres* is acceptable as long as the funds will be used to serve the interests of the class. There, the district court could not identify all class members because "[m]ore than a quarter of a century ha[d] passed since" the defendant's conduct giving rise to the lawsuit. *Dem. Cont. Comm.*, 84 F.3d at 454-55. Here, an even longer period has passed. Moreover, the Court found it unlikely that many members of that class would claim a share of the settlement funds because of the small per capita recovery. *Id*. at 455. While the size of the payments here should have been sufficient to attract claims, the record below

documented other reasons that members of this class may have been reluctant to submit claims or lacked the information on which to base a claim. *Supra* at 34. As Mr. Tingle acknowledges, *cy pres* is "ideal for circumstances in which it is difficult … to identify persons whom damages should be assigned or distributed." Tingle Br. 17. Those circumstances are present here.

Appellants also contend that, as distribution of the remaining funds to the known claimants would be administratively simple, the remaining funds should be distributed to that population. Tingle Br. 15; Mandan Br. 40. Appellants miss the point—the question is not whether distribution to the *known* claimants is feasible, but whether distribution to the *entire class of Native American farmers and ranchers* who were subject to the USDA's challenged conduct is feasible. Distribution of the unclaimed funds to the successful claimants alone would provide a benefit to only part of the class on whose behalf this case was brought. *See In re Folding Carton Antitrust Litig.*, 557 F. Supp. 1091, 1107 (N.D. Ill. 1983) *aff'd in part*, 744 F.2d 1252 (7th Cir. 1984) ("[N]on-claiming class members … furnished equal consideration for the settlement … [and] are bound by the final judgment. Even though the settlement fund was established for their benefit and, in effect, paid for in part with consideration furnished by them, the non-claiming class plaintiffs have to date received no direct or indirect benefit from the settlement fund."); *Fears v. Wilhelmina Model Agency, Inc.*, No. 02 CIV 4911 HB,

2007 WL 1944343, at *9 (S.D.N.Y. July 5, 2007) (placing excess funds into *cy pres* because of "the small number of claiming class members who received a direct benefit, as compared to the large number of non-claiming class members who might receive an indirect benefit from a *cy pres* distribution"), *vacated on other grounds*, 315 F. App'x 333, 336 (2d Cir. 2009) (holding "the district court did not err in awarding the residual funds to charities" but vacating and remanding because the modification of the fee award would affect the amount of unclaimed funds to allocate).

B. Prevailing Claimants Were Fully Compensated.

The use of *cy pres* to distribute the remaining funds was also appropriate because successful claimants have already received the relief authorized for their claims in this settlement.

1. Prevailing Claimants Received Full Compensation for Their Class Claims.

Appellants argue that the remaining funds should go to successful claimants rather than be distributed by *cy pres* because the successful claimants were not fully compensated by the payments they initially received or by the supplemental payments that the Addendum would provide. Tingle Br. 8-9; Mandan Br. 42. There is no question that the non-economic harm suffered by many, if not all, successful claimants far exceeds the relief that this settlement can provide them, as they have endured decades of alleged deprivation and discrimination by the

USDA. The only relief that can be secured through this litigation, however, derives from the claims advanced in this action, which are limited to economic damages.

Plaintiffs' expert provided a detailed economic and statistical report establishing a reliable method of calculating damages. Dkt. 551-4; see *supra* at 4-5. Based on the calculations in that report, the average loss attributable to denial of a loan and loan servicing totaled $56,110. *Id*. Prevailing claimants under Track A received $62,500 ($50,000 directly and $12,500 in tax relief), plus an average of $16,460 in debt forgiveness, under the original Settlement Agreement, J.A. 389, and would receive an additional $21,275 ($18,500 directly and $2,775 to the IRS) under the proposed amendment. J.A. 1169. Claimants' receipt of $83,775 total, plus $16,460 in debt relief, therefore fully compensates the calculated average value of an individual claim.

The harm for which Appellants seek relief cannot be redressed in this action. Mr. Tingle seeks relief for the "loss of a dream," Tingle Br. 9, while Mr. Mandan claims non-economic losses such as mental and emotional distress and injury to reputation, Mandan Br. 43-44. But such individual claims were not, and could not, have been encompassed in this class case. Dkt. 551-1 at 35. The certified class was permitted to seek declaratory and injunctive relief and economic losses attributable to the denial of loans and loan servicing by the USDA. While the

certified class never encompassed claims for non-economic losses, such as emotional distress, members of the class were granted the opportunity to opt out of the class if they wished to seek those types of individual damages on their own. Dkt. 731-1 at 12.

Therefore, while the citations to numerous hardships Native Americans have suffered, much at the hands of the United States government, Mandan Br. 43-44, are undeniable and tragic, they fail to document evidence of damages that could have been recovered under the Equal Credit Opportunity Act, which formed the basis for this action. The only measure of damages available on which claims for relief would have been presented at trial showed that the economic losses suffered by class members, on average, were fully compensated by the amounts paid in damages to successful Track A claimants supplemented by the additional payments provided in the proposed modification. *See In re Lupron Mktg. & Sales Prac. Litig.*, 677 F.3d 21, 34 (1st Cir. 2012) ("The … claimants have already received an enhanced payment beyond single damages. Because the [settlement] fund was established for the benefit of [the entire class], not just [those] 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.").

2. The Amounts Paid to Class Members Were the Result of the Negotiation Process.

Mr. Mandan seems to assume that the amounts of payments made under the Settlement Agreement must match the amounts in damages claimants would have received if they were successful at trial. Mandan Br. 44. But the payments made to members of the class were pursuant to a settlement, not the result of an award at trial. Therefore, the amounts paid to the members of the class represent a compromise between the parties. As the district court correctly observed, "[t]he fact that [Plaintiffs'] claims, if ultimately successful at trial, could have resulted in higher damages awards changes nothing," since "class certification was not a foregone conclusion," and had this case "gone to trial … the Plaintiffs [may] not [have] recovered anything." Dkt. 728 at 34-35. The lower court continued:

> Settlements, by definition, are compromises in which plaintiffs accept less than their full claim of damages in exchange for avoiding the risks of further proceedings and trial. The [objecting claimants] accepted that trade off, consented to an Agreement that provided for a maximum award of $50,000, and recovered that amount. They cannot now claim a property right in funds that were intended to pay the claims of other class members who did not claim their award.

*Id*. at 35.

Similarly, Mr. Mandan faults Plaintiffs and the district court for failing to explain why $18,500—rather than some other amount—was a fair payment to the claimant class members. Mandan Br. 42. The explanation is simple: it was the

product of extensive negotiations between the parties and not a computation of the amount each class member lost. As the record reflects, Plaintiffs had available economic analyses that estimated the amounts lost to Native American farmers and ranchers *in toto*, which informed the settlement negotiations from which payments to successful claimants were made. Nor did Mr. Mandan or any other class member object to the amounts payable to successful claimants prescribed by the settlement of which they had notice and which the court approved in 2011.

3. Even if Claimants Were Not Fully Compensated, They Are Not Entitled to Non-Claimant Class Members' Settlement Funds.

Regardless of whether the successful claimants were fully compensated for their losses covered by this case, they have no right to recover the settlement funds paid to satisfy the claims of class members who never made claims or whose claims were unsuccessful. Recognizing this, the district court properly found:

> [A]n individual's presence as a class member in a class action hardly expands her property rights to include the property of the other class members. Even if it is the case that the claiming class members have received less than the full value of their claims by the settlement, that fact does not magically make the nonclaimants' property theirs.

Dkt. 728 at 34 (quoting *Newberg on Class Actions* § 12:30 (5th ed.)). *See also* *Newberg*, *id*. ("Intraclass redistribution does little good for those not claiming, while *pro bono* work on behalf of the class's interests or government services may benefit the class."); *In re Folding Carton*, 557 F. Supp. at 1107; *Fears v.*

*Wilhelmina Model Agency, Inc.*, No. 02 CIV 4911 HB, 2007 WL 1944343, at *9. Accordingly, class members who submitted successful claims have no legal right to claim for themselves the settlement funds paid to satisfy the claims of other class members.

C. The *Cy Pres* Fund is Narrowly Tailored to Directly Benefit the Class.

The *cy pres* provision is also proper because it was tailored to benefit the interests of the entire class. As this Court has recognized, the *cy pres* doctrine permits unclaimed settlement funds "to be distributed to the 'next best' class when the plaintiffs cannot be compensated individually." *Democratic Cent. Comm.*, 84 F.3d at 455. The object of *cy pres* "is to parallel the intended use of the funds as nearly as possible by maximizing the number of plaintiffs compensated." *Id*. Here, the proposed distribution of the *cy pres* funds would benefit the entire class through the work of the non-profit organizations receiving funds.

The amendment retains the same objective that previously existed in the Agreement: to provide business assistance, agricultural education, technical support, and advocacy services to Native American farmers and ranchers, including those seeking to become farmers and ranchers. *See* J.A. 1170 § II.B. The only difference now is in the process by which those payments can be made, which, given the larger-than-expected amount of funds, better assures that the funds will benefit the entire class.

First, the amendment transfers decision-making authority over distribution of nearly 70% of the *cy pres* funds from class counsel to a Board of Trustees with expertise in the specific needs of Native American farmers and ranchers. The Board consists of Native leaders, ensuring greater trust and confidence from the community it will serve.

Second, the Trust provides for a professional staff that will oversee the Trust and analyze grant proposals, providing accountability and transparency. Grant recipients would be required to report regularly about how the distributed funds are being used and the results obtained. This allows the Trust to evaluate the effectiveness of the programs it has funded, thus informing future grant decisions and ensuring funding is used only for the highest quality services and assistance. J.A. 1177.

Third, the Trust would disburse the funds over a maximum of 20 years, rather than immediately. The Trustees would have discretion over the speed with which the funds are distributed, permitting them to ensure good results from the first grants before committing further funds.

Fourth, the proposed amendment would permit grants to new non-profit organizations, rather than just supporting organizations already in existence as of 2010 as the current provision requires. Today, there are many places in Indian Country where not a single non-profit organization provides assistance to farmers

and ranchers. The Trust would have the resources and staff needed to provide seed funding to new non-profits and help them grow into viable organizations.

Finally, the proposed amendment permits distribution of the funds in amounts commensurate with the needs being addressed and not, as the current agreement requires, in equal amounts to each chosen organization.

In sum, under the proposed amendment, *cy pres* funds would serve the same community of Native American farmers and ranchers that brought this action—whether successful claimants or not—and will ensure that the funds are used to serve their agricultural interests and needs. Assessed against this record, Mr. Tingle's contention that "it is virtually certain that no class member will benefit" from the *cy pres* distributions, Tingle Br. 18, is hard to fathom and certainly unsupported.

The authorities that Appellants cite, in which a *cy pres* provision was set aside because it did not benefit the class, stand in sharp contrast to the *cy pres* approved here. *See Ira Holtzman, C.P.A. v. Turza*, 728 F.3d 682, 689 (7th Cir. 2013) (funds used "to make contributions to judges' favorite charities" rather than to benefit the class); *Dennis v. Kellogg Co.*, 697 F.3d 858, 866 (9th Cir. 2012) (*cy pres* used to feed the indigent too far removed in breakfast cereal false marketing action); *Nachshin v. AOL, LLC*, 663 F.3d 1034, 1040 (9th Cir. 2011) (donations to legal organizations had no relation to class in website unlawful advertising action);

*In re Airline Ticket Comm'n Antitrust Litig.*, 307 F.3d 679, 683 (8th Cir. 2002) (legal services organization receiving *cy pres* had no relation to issues in antitrust suit); *Six (6) Mexican Workers v. Ariz. Citrus Growers*, 904 F.2d 1301, 1308 (9th Cir. 1990) (*cy pres* fund for indirect distribution to Mexico too remote from class of immigrant farm laborers).

In fact, many of the cases Appellants mention actually approved of *cy pres* distributions when, as is the case here, the proposed recipients will serve the interests of the class. *See In re Baby Prod.*, 708 F.3d at 172 ("[A] district court does not abuse its discretion by approving a class action settlement agreement that includes a *cy pres* component directing the distribution of excess settlement funds to a third party to be used for a purpose related to the class injury"); *In re Lupron*, 677 F.3d at 30, 33 (adopting "reasonable approximation" test for distribution of *cy pres*).

Still other cases Appellants cite arose in circumstances far different from those presented here—where the only distribution of settlement funds was made through a *cy pres* term and no funds were distributed to any class members directly. *See In re Katrina Canal Breaches Litig.*, 628 F.3d 185, 198 (5th Cir. 2010); *Molski v. Gleich*, 318 F.3d 937, 955 (9th Cir. 2003). While such uses of *cy pres* may be questionable, they bear no relationship to the facts of this case.

The court below acted within its discretion when it approved the amendment

to the Settlement Agreement, which further assures that the *cy pres* funds will be used for the direct benefit of the class.

## III. THE JUDGMENT FUND CAN MAKE PAYMENTS TO *CY PRES.*

Mr. Mandan also challenges the proposed distribution of the unclaimed funds on grounds that the Judgment Fund Act "does not authorize the Government to demand, or the district court to approve payments of money to persons without claims against the United States," Mandan Br. 23, and that "yet-to-be-identified *cy pres* recipients" could "never meet the specificity required for Congressional appropriation," Mandan Br. 25. Mr. Mandan's challenge on this ground has been waived, as it was neither raised in 2011 when the district court first considered use of unclaimed funds for this purpose nor when the court considered the proposed Addendum in 2016.

In his objection to the Addendum filed below, Mr. Mandan never cited the Judgment Fund Act, nor even mentioned it by name. *See* Dkt. 833. As this Court has consistently held, "an argument never made below is waived on appeal." *Shea v. Kerry*, 796 F.3d 42, 56 (D.C. Cir. 2015) (citation and quotation marks omitted). Because he did not raise the argument below about the supposed limits of the Judgment Fund Act, Mr. Mandan has waived his ability to raise this argument on

appeal and this Court should refuse to consider its merits.[12]

Even if this argument is considered on its merits, it fails because the Judgment Fund Act does not impose such restrictions on the use of funds paid pursuant to it. This Court has held 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." *Trout v. Garrett*, 891 F.2d 332, 335 (D.C. Cir. 1989). Mr. Mandan never addresses the purpose of the Judgment Fund Act, which is to permit payments for any "final judgments, awards, compromise settlements, and interests and costs" where "payment is not otherwise provided for." 31 U.S.C. § 1304(a). It is undisputed that the Settlement Agreement here is a binding final judgment and settlement whose payment is not otherwise provided for. Accordingly, that judgment qualifies for funding under the Judgment Fund Act. There is no independent, additional requirement that each specific payment within that judgment must separately qualify under the Judgement Fund Act. *See* 31 C.F.R. § 256.1. Mr. Mandan's interpretation of the Act would effectively require the government to obtain a separate appropriation for

[12] Appellant Mandan made one passing statement 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," Dkt. 833 at 3; however, he cited no authority for that claim. The district court could not reasonably have been expected to understand this as raising a potential violation of the Judgment Fund Act.

every settlement reached in future cases, precisely the balkanized approach to the payment of settlements with the federal government that the Act sought to avoid. Further, contrary to Mr. Mandan's suggestion, nowhere does the statutory language or legislative history indicate that payments are forbidden "to persons without claims against the United States." Mandan Br. 23. Because the Settlement Agreement is a binding final judgment whose payment is not otherwise provided for, the Judgment Fund statute applies and permits payment of that judgment, including any payments made pursuant to a *cy pres* provision.

## IV. THE DISTRICT COURT PROPERLY APPROVED THE MODIFICATION TO THE SETTLEMENT OVER THE OBJECTION OF NAMED PLAINTIFF KEITH MANDAN.

Mr. Mandan claims, incorrectly, that as a class representative, his objection to the proposed Addendum precluded the district court from approving it. Contrary to his arguments, Rule 23 does not permit a named plaintiff to obstruct a course of action that may be in the best interests of the class, as the district court found here, and "law of the case" did not bind the district court to take that erroneous position simply because the court had mistakenly interpreted the Settlement Agreement on a previous occasion.

### A. The District Court Correctly Followed Rule 23 in Finding that Class Representatives Could Not Veto Actions that the Court Found Were Fair and Reasonable to the Entire Class.

Pursuant to Rule 23(g), class counsel are charged with responsibility for

representing the class as a whole, and may not defer to the wishes of a single class representative where the interests of the class as a whole dictate another course of action. The Advisory Committee Notes clearly state:

> Appointment as class counsel means that the primary obligation of counsel is to the class rather than to any individual members of it. The class representatives do not have an unfettered right to "fire" class counsel. In the same vein, the class representatives cannot command class counsel to accept or reject a settlement proposal. To the contrary, class counsel must determine whether seeking the court's approval of a settlement would be in the best interests of the class as a whole.

Fed. R. Civ. P. 23(g), advisory committee notes to 2003 amendment. Thus, in the event of a conflict, "it is class counsel who speaks for the class, not the class representatives." *Newberg* § 3:82.

Of course, this does not leave the class at the mercy of potentially unscrupulous class counsel. As *Newberg* explains, the "counsel-monitoring function" rests not with the class representatives, but with the court, and "the rule sets forth explicit standards and procedures for monitoring class counsel." *Newberg* § 3:82. In addition, Rule 23(e) ensures that no settlement agreement can be final without approval of the court, which can only be granted if the court finds the settlement is "fair, reasonable, and adequate" after a fairness hearing, where objections of class members and class representatives are duly considered. Fed. R. Civ. P. 23(e).

This division of responsibility between the class representatives, class counsel, and the court is well recognized in this Circuit and others. This Court has previously affirmed approval of a consent decree over the objections of some named plaintiffs, noting that a class settlement "can be fair even though a significant portion of the class and some of the named plaintiffs object to it." *Thomas v. Albright*, 139 F.3d 227, 232 (D.C. Cir. 1998) (collecting cases); *see also Reed v. GM Corp*., 703 F.2d 170, 174-75 (5th Cir. 1983) (affirming approval of settlement despite opposition by twenty-three of twenty-seven named plaintiffs); *Lowery v. City of Albuquerque,* No. CIV 09-0457 JB/WDS, 2013 WL 1010384, at *35 (D.N.M. Feb. 27, 2013) (overruling named plaintiff's objections because class counsel "would have violated its duties to the class if he had put [the named plaintiff's] opinion and interests above those of the class").

Allowing a class representative unilateral veto power over a settlement agreement would also contravene Rule 23(g). While the parties in a class action have broad discretion in formulating the terms of their settlement, they cannot alter the requirements of Rule 23. Indeed, even courts lack the authority to modify the requirements of Rule 23. *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 620-22 (1997). An agreement that empowers class representatives to interfere with entry into a settlement agreement or the modification of a settlement agreement would contravene the mandate of Rule 23(g). Where a conflict arises between the views

of one or more class representatives and that of class counsel about how best to serve the interests of the class, Rule 23 reflects an expectation that class counsel present to the court the views of the class, after duly considering any objections from the class representatives or members of the class. Class representatives may present objections to the course of action recommended by class counsel, which the court may consider in determining whether to approve or reject class counsel's recommendation.[13] But Rule 23 does not permit one or more named plaintiffs to block, or to dictate, action taken on behalf of the class as a whole. As both certification of the class and approval of the class settlement in 2011 were undertaken pursuant to Rule 23, the Settlement Agreement that ensued must be interpreted in a manner consistent with the requirements of Rule 23. Any interpretation of the Settlement Agreement, therefore, that would have empowered individual class representatives to block amendments to the agreement cannot be reconciled with Rule 23.

B. Law of the Case Is Not Relevant to Appellate Review.

Mr. Mandan argues that the law of the case doctrine constrains this Court's review because the district court at one point appeared to agree that a single class representative could veto a proposed modification to the Settlement Agreement

[13] Thus, it was totally appropriate for the district court to consider Marilyn Keepseagle's objections to the first proposed modification, and within the court's discretion to decline to approve the modification after hearing those objections.

and then later, after receiving the relevant authority, reached a different conclusion. This argument is a red herring because even if the district court had considered itself bound by its prior inclination, this Court would not be.

In any case, even the district court was not bound by law of the case. "Law of the case directs a court's discretion, it does not limit the tribunal's power." *Arizona v. California*, 460 U.S. 605, 618 (1983), *decision supplemented*, 466 U.S. 144 (1984); *Crocker v. Piedmont Aviation, Inc.*, 49 F.3d 735, 740 (D.C. Cir. 1995). Rule 54(b) likewise states that "any order … that adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties … may be revised at any time before the entry of a judgment adjudicating all the claims." Fed. R. Civ. P. 54(b); 18B Fed. Prac. & Proc. Juris. § 4478.1 (2d ed.). "[A]ll federal courts retain power to reconsider if they wish." *Id.* § 4478.

Accordingly, the district court had ample authority to revisit its initial interpretation of the Settlement Agreement to determine whether, consistent with Rule 23, it required consent of each class representative in order to amend the Agreement. At the time the district court first raised the issue with the parties, no one briefed the question of whether a single class representative had unilateral veto power. With the benefit of briefing that addressed the strictures imposed by Rule 23, the court re-examined its earlier interpretation of the Agreement and reached a different conclusion. Nothing about that action constitutes a violation of the law of

the case doctrine. Indeed, "law of the case cannot be substituted for the law of the land." *Crocker*, 49 F.3d at 740 quoting *Women's Equity Action League v. Cavazos*, 906 F.2d 742, 752 n.14 (D.C. Cir. 1990).

## V. THERE IS NO CONFLICT OF INTEREST BETWEEN EITHER CLASS COUNSEL OR CLASS REPRESENTATIVES AND CLASS MEMBERS.

### A. Class Counsel Have Served the Full Class Diligently.

Mr. Tingle also mounts an attack on class counsel, arguing that counsel "coerced" class members to accept the *cy pres* amendment. Tingle Br. 30. Such an assertion has no basis in the record. Notice of the original settlement was very clear in explaining the presence of the *cy pres* provision, and there were no objections on that basis. *Supra* at 6-8. In the absence of any modification of the Settlement Agreement, the original *cy pres* provision would have applied and no additional funds would have gone to the prevailing claimants. Instead, the $380 million would have been immediately distributed in equal sums to non-profit organizations that existed on or before 2010. To avoid that result, class counsel held extensive discussions with class members, engaged in extensive negotiations with the USDA, and were ultimately able to achieve a modification that included an additional distribution to the successful claimants, along with distribution of the remaining funds through *cy pres* to serve Native American farmers and ranchers. When that proposal was formulated, members of the class once again received

notice and were provided the opportunity to express their views. *Supra* at 12-15. While Mr. Tingle may have received less under the claims process than he had hoped for, he was not coerced into proceeding through the claims process. *See Thomas*, 139 F.3d at 232. All class members were offered the opportunity to opt out of the settlement before the claims process began and after being informed of the financial limits on the amounts that would be paid to successful claimants. Had Mr. Tingle been dissatisfied with the amounts payable to claimants who succeeded in the claims process, he could have opted out of the settlement and pursued his claim on his own.

Nor, as Mr. Tingle claims, did class counsel mislead the class by warning that any effort to modify the Settlement Agreement without the USDA's consent ran the risk that the USDA would seek to have the funds revert to the government. The USDA expressed these views in open court. J.A. 747 at 20:20-24; *see also* Dkt. 772 at 3, 18-19 (rejecting attack on the class representatives by noting it was reasonable of them to take the threat of reversion into account). While the reversion of settlement funds already paid out is rare where a settlement agreement does not expressly provide for such action, it is not unprecedented. *Newberg* §§ 12:29, 12:30; *Klier*, 658 F.3d at 482 (Jones, C.J., concurring) ("In the ordinary case, to the extent that something must be done with unclaimed funds, the superior approach is to return leftover settlement funds to the defendant.").

Finally, in suggesting that the award of attorneys' fees to class counsel should be reduced if any funds are distributed by *cy pres*, Mr. Tingle overlooks controlling authority. It is well-settled that when attorneys' fees are awarded from a common fund, as they were here, the amount of the award is based on the total fund available to satisfy claims of the class, not the amount of funds claimed by class members. *See Boeing Co. v. Van Gemert*, 444 U.S. 472, 478, 480 (1980). That rule applies even where the unclaimed funds could revert to the defendant. *Id.* at 477, 480. Here, under the *cy pres* provision, the funds will be used for the benefit of class members. Thus, even by Mr. Tingle's own logic, no reduction in fees should be made because the entire fund will be expended for the benefit of class members, either in direct payments or indirectly through low interest loans, training, and other services to help Native American farmers and ranchers grow their businesses.

B. The Class Representatives Have Served the Class Diligently.

Mr. Tingle also contends, without citation to any evidence, that the class representatives have engaged in collusion, self-dealing and other improper conduct when they supported modification of the Settlement Agreement. Tingle 35-38. The district court has already rejected these arguments, Dkt. 772 at 15-25, and specifically chastised the movant there for making "wholly unsupported allegations." *Id.* at 16 n.5. Mr. Tingle offers no additional support to his claims.

Mr. Tingle mistakenly assumes that a class representative must simply follow the views of the majority of class members. A difference of opinion does not make a representative inadequate, and a settlement can be fair "even though a significant portion of the class … object to it." *Thomas*, 139 F.3d at 232; *Newberg* § 3:65; Dkt. 772 at 16-17. As the district court held, "a class representative must also exercise judgment as to the propriety and likelihood of success of any particular course of action." Dkt. 772 at 17; *see also Twelve John Does v. District of Columbia*, 117 F.3d 571, 576 (D.C. Cir. 1997) (rejecting contention that class counsel was inadequate for failing to seek "concessions not contained in the consent decree"). Moreover, the modification Mr. Tingle desires—providing benefits *only* to the prevailing claimants and not to class members who did not make claims or whose claims were denied—fails to consider the interests of all class members, interests that the class representatives appropriately took into account. Dkt. 772 at 23.

Mr. Tingle's attacks on the qualifications of class representatives Holder and Mandan to serve as Trustees are also entirely unfounded.[14] Both Mr. Holder and

[14] Mr. Tingle also suggests that employees of the USDA would control the Trust in a manner suggestive of collusion, but made no such reference to USDA influence below. Tingle Br. 10, 26, 28; J.A. 1201-02. This new argument appears to refer to one of the Trustees who is a former employee of the USDA's Rural Development division, and the Executive Director who served as Director, Office of Tribal Relations at the USDA. The Trustee's five years of employment with the

Ms. Mandan are extremely well qualified to serve as Trustees, and their inclusion as Trustees addresses the concern expressed by many class members that there be actual class members on the Board, and that there be individuals with first-hand experience with farming and ranching. Dkt. 772 at 20 n.6; Dkt. 824-4. The service awards provided in the Addendum—which were subject to district court approval—were fair compensation for the many, many hours that the class representatives spent traveling to and attending multiple listening sessions, talking to many class members about the efforts to modify the Settlement Agreement, and participating in negotiations with the USDA to obtain the modification.[15] Dkt. 824-1 at 5. As with service awards in initial settlements, where the awards are supported by the record and are subject to court approval, such service awards are

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USDA in a lengthy career dedicated to economic development for the Native American community provides no basis to conclude that she will favor the interests of the USDA over the class members. Dkt. 824-4 at 34. The Executive Director is a member of the Chickasaw tribe and Director of the Indigenous Food and Agriculture Initiative at the University of Arkansas School of Law. She has a lifetime of public and academic service, of which her time with the USDA was a small part. *See* Dkt. 824-4 at 57 (left USDA in January 2013).

[15] Mr. Mandan points out that no further service award was provided for him. Mandan Br. 13. Class counsel were not aware of what, if any, service Mr. Mandan provided to the class following the settlement, as he declined to participate in the numerous meetings with the other class representatives. *See*, e.g., J.A. 814, 818, 821, 825, 828, 830, 834, 837, 869, 870 (record from the listening sessions notes the participation of the three other class representatives at multiple meetings, but not Mr. Mandan). When Mr. Mandan asked about a service award, he was asked to provide information about his service, which he refused to do, as his counsel acknowledged. J.A. 1244-45, 1273.

routinely approved. *In re Lorazepam & Clorazepate Antitrust Litig.*, 205 F.R.D. 369, 400 (D.D.C. 2002); *Vista Healthplan, Inc. v. Warner Holdings Co. III, Ltd*, 246 F.R.D. 349, 365 (D.D.C. 2007); *Wells v. Allstate Ins. Co.*, 557 F. Supp. 2d 1, 8-9 (D.D.C. 2008). The notice to claimants about the proposed modification included notice regarding the service awards. *Supra* at 15 n.6.

## CONCLUSION

For the foregoing reasons, Plaintiffs request that this Court affirm the district court's ruling approving the modification of the Settlement Agreement as fair, reasonable, and in the best interests of the class as a whole.

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Respectfully submitted,

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## CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the requirements of Fed. R. App. P. 35(a)(5) and (6) because it has been prepared in 14-point Times New Roman, a proportionally spaced font.

I further certify that this brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B)(i) because it contains 13,986 words, excluding the parts of the brief exempted under Fed. R. App. P. 32(a)(7)(B)(iii), according to the count of Microsoft Word.

*/s/Joseph M. Sellers*

**CERTIFICATE OF SERVICE**

I hereby certify that on the 22nd day of November, 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/Joseph M. Sellers*