ORAL ARGUMENT SCHEDULED JANUARY 13, 2017

Appeal No. 16-5189

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

MARILYN KEEPSEAGLE, et al.,

Plaintiffs,

v.

TOM VILSACK, Secretary, United States Department of Agriculture,

Defendant.

On Appeal from the
United States District Court For the District of Columbia
Case No.: 1999-CV-03119 (EGS)
(The Honorable Emmett Sullivan, Judge)

REPLY BRIEF OF APPELLANT DONIVON CRAIG TINGLE

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GLOSSARY

ECF	Electronic Court Filing
FRCP	Federal Rules of Civil Procedures
USDA	United States Department of Agriculture

INTRODUCTION TO ARGUMENT

Before we begin the salient portions of this Reply Brief, it is necessary to resolve the question raised by an Appellant and an Appellee as to whether Donivon Craig Tingle is a successful claimant. He is. Mr. Tingle is a successful Track A class claimant who sought to become a Track A claimant after carefully considering whether to proceed as a Track B claimant by submitting documents, drawings, and other evidentiary items. With respect to Track A, Mr. Tingle made application in Alabama, was approved for Track A, and received payment under Track A. As an Addendum to this Brief, a copy of the acceptance letter, payment letter, and cancelled check are provided to resolve this issue.

All arguments set forth in this Reply Brief are cumulative and are intended to apply to each Appellee to the fullest extent conceivable under the applicable law, facts, and circumstances. Also, Appellee herein incorporates all case law arguments previously set forth and all other arguments, including the Judgement Settlement Act and the corresponding Judgement Settlement Fund are incorporated by reference herein.

ARGUMENT

1. Reply to Answer Brief of Appellees Porter Holder, Claryca Mandan on Behalf of Themselves, et al.

A. The *Cy Pres* Provision of the Settlement Agreement Must Be Stricken

The *Cy Pres* provision of the Settlement Agreement (Agreement) was and continues to be a monumental failure. It was an ill-conceived provision that was placed into the Agreement despite the fact that the gravamen of case law disfavors its use. The only people or entities that favor its application in the present case are class representatives that stand to gain, individuals who will realize a professional benefit despite conflicts of interest, and certain entities of which it has previously been concluded that no standing exists for them to voice a concern in this matter. No successful claimant (other than some class representatives) favors the *cy pres* provisions and more importantly to this analysis is the fact that no unsuccessful claimant or putative class member favors the use of the *cy pres* provisions.

All of the very people that *cy pres* would allegedly benefit oppose the application of *cy pres*. At the listening conferences, there were successful claimants, unsuccessful claimants, Indians that did not apply, and many who claimed they did not have any notice. Despite this diverse group of individuals, not one person favored a distribution under the *cy pres* provision.

The average successful claimant and all the would-be class members have about a tenth-grade education level from sub-par secondary schools. Any demographical study will show that only about 50% of Native Americans graduate from high school. Other than perhaps class representatives, no one understood the ramifications of a *cy pres* provision. When you get right down to it, most lawyers do not know what *cy pres* means or how it is administered. Nevertheless, poorly educated class members are expected to fully comprehend the ramifications of a *cy pres* provision. The class members relied upon their lawyers, and their lawyers let them down, perhaps intentionally so. Bear in mind that aside from the King James Bible, there is hardly a class member out there that has ever read 50 pages of arcane language, let alone read and understood such language.

As case law has already demonstrated, the district court had an affirmative duty to engage in due diligence to ensure that the Settlement Agreement was reasonable and adequate and fairly applied. The district court undoubtedly understood not only the ramification of *cy pres*, but that such language was overwhelmingly disfavored by all courts when the class member could be located, the distribution would not constitute a windfall, and the amount in question was large enough to be worth the effort of distributing. He had the duty to strike down the *cy pres* provision of the Agreement or to reject the Settlement Agreement entirely.

This notion of refusing to accept an agreement or striking inapposite provisions thereof is hardly anything new to the practice of law. Trial courts routinely refuse to accept settlement terms and in some cases entire settlements. Some of those reasons have included: unlawfulness, lack of jurisdiction, lack of mutuality, adhesion, etc. Sometimes courts refuse to accept a settlement agreement on some of its terms just because the attorney for one of the parties probably has not done a good job of protecting its client. This is what judges do. They are not simply a rubber stamp for and clearinghouse of settlement agreements. It is their job to dig and ensure the adequacy of these settlement agreements. This is especially true of class action lawsuits. Again, the case law has been fully developed in the Appellant's initial Brief to which I refer this Court. A one-day hearing is completely insufficient in a case of this magnitude. The district court should have sent this back down with specific instructions as to what he wanted to see regarding *cy pres*, with the dire warning that if the class members were not well protected in all provisions, including *cy pres*, the court would either strike the entire Agreement or using its inherent equitable powers strike the *cy pres* provision and fashion a better solution.

B. The District Court Committed Reversible Error When it Failed to Reject The Settlement Agreement or Strike The *Cy* Pres Provision

I believe it was the judge himself that recognized that this Settlement was a "monumental failure". The parties were intractable regarding the *cy pres* provision so the court should have stricken *cy pres* from the Agreement or rejected the Agreement entirely. A reasonable jurist conducting a suitable level of due diligence and carefully regarding the apparent conclusions of that due diligence would have determined that the *cy pres* provision was unworkable. As a result, the *cy pres* provision was *void ab initio* because of overwhelming case law on the matter, the Judgement Settlement Act, the Federal Rules of Civil Procedure on the issue of class actions, and national trends regarding *cy pres* provisions in general. Honestly, how much more authority does a judge need to recognize the failure of this *cy pres* provision and his duty under the law to do something about it? Furthermore, only when the district court indicated by its final order that it would do nothing regarding *cy pres* or the overall Settlement Agreement did the Appellant(s) find themselves in a position in which they could do anything about this issue, which was begun when the Notice(s) of Appeals were filed. At no time has the court system lost jurisdiction over this matter. At any time prior to the district court entering its final order it could have stricken or modified the Settlement. It chose to ratify that Settlement Agreement not because it was the correct decision but rather because it was the decision less likely to result in an

appeal. Now that it is before this Court, the authority lies within this body to remand with instructions. Therefore, timeliness is not at issue in the least. Until it was clear that the district court was not going to act in accordance with its duty and issue its final decision, the commencement of finality did not begin. It is not unreasonable for class members to rely upon the court to do its duty.

Appellee contends that the Settlement Agreement expressly prevents any modification of its terms. Nevertheless, the court is not bound by the terms of an Agreement between parties, especially when undertaken in bad faith when it comes to the district court exercising its fiduciary duty to the class. Moreover, to the extent that the district court may be bound and prevented from making modifications, it does have the authority to reject a Settlement Agreement in its entirety. Therefore, even under Appellees analysis, the district court could have *proposed* language striking the *cy pres* provision, and if that language was not acceptable, a manifest statement that if not accepted, the entire Settlement Agreement would be rejected. This course of action was and is clearly within the district court's purview.

C. If My Case Law is So "Inapposite," How Come Everyone Has Done Such a Poor Job of Refuting It?

Now that all the briefs are in, the most in-depth research and analysis of that research has been performed by this author and that case law is an exhaustible discussion of *cy pres* as applied to class action lawsuits in this country at the

federal level. The discussion takes us from the inception of the issue to cases so recent that they do not have an updated federal reporter citation. If one thing is inescapably clear, it is that trial and appellate courts throughout this country hate the *cy pres* doctrine and its application in Settlement Agreements. The courts will *begrudgingly* accept *cy pres* provisions when *and only when* there is nothing else to be done. When the class members cannot be located, or there is a windfall, or the residual amount is too small, then the courts will *tolerate cy pres*. Anyone who knows the case law on this subject understands this is how the courts come down on these issues. Everyone else who has used case law cited to in this author's brief has done so with a view of giving the text a tortured interpretation that any reader could see was not intended. Whether that was the final opinion of the trial court or Appellees.

In point of fact, Klier v. Elf Atochem North America, Inc. stands for one thing above all else and that is the determination that settlement proceeds are a real property right of the class. The clear approach by the Appellee is to irrationally expand the class. In fact, Appellee would have this Court believe that a class member is any Indian that planted a seed or fed a chicken between 1981 and 1999, so long as they sought a USDA loan. Not only is the result absurd but it belies their own position on the matter and their treatment of unsuccessful claimants prior to the moment they filed their Answer Brief. Until that point, the demonstrated

attitude towards these individuals was one of thinly veiled contempt and subtextual hostility or, at the very least, profound indifference. It was not until the need to bolster and create an argument for the Settlement Agreement and its *cy pres* provision that there was any compassion discussed or demonstrated regarding putative class members. Under Klier, the only conclusion is that *cy pres* must be stricken. The case bar at bar **is** Six (6) Mexican Workers v. Arizona Citrus Growers to a tee. The remaining undistributed funds belonging to the class members will never reach them under the proposed *cy pres* scheme. It would be as if the class in Six (6) Mexican Workers consisted of every person of Mexican origin that ever picked a grapefruit or thought about it. TBK Partners, Ltd. v. Western Union Corp. states as clearly as a case can state that once a defendant settles with a plaintiff, that defendant ceases to have any say whatsoever in how the money is spent unless the released defendant is being asked to pay more money. At best the only argument that can be raised by the defendant would be to set aside the entire Settlement Agreement. This sub-issue shall be dealt with more thoroughly below.

If the case law was so "inapposite," it would have been dealt and disintegrated individually in the text rather than in a string cite in a footnote. Frankly, it is clear from the research and the way in which it has been dealt with by opposing counsel that the case law is unassailable. Both Marshall v. National

Football League and In Re Bank of America Corp. Securities Litigation stand for the propositions previously stated that you cannot declare *cy pres* by simply stating that all parties have been fully satisfied. It also reasserts the distribution criteria set forth in Klier and Six (6) Mexican Workers. I am confident that an independent reading of these cases by the Court will bolster Appellant's analysis. Masters v. Wilhelmina Model Agency, Inc. is not "inapposite" for the simple fact that the payment authorized by the Settlement Agreement does not mean that the class members have been fully compensated, following the core construct of Federal Rule of Civil Procedures 23 that each member has a constitutionally recognized property right in the claim or action that the class action resolves and an extension thereof is that the district court has an obligation to strike the *cy pres* provision or invalidate the entire Settlement Agreement. Moreover, in the case at bar there are no unclaimed funds merely improperly held and undistributed funds.

D. *Cy Pres* is Completely Improper and Will Not Benefit Class Members

Until the filing of answer briefs, no one considered unsuccessful claimants as class members. By way of example, dispersions were cast upon Appellant Mr. Tingle as not being a class claimant in an attempt to eliminate his standing. There can be no other reason for raising such issues. Before the answer briefs, no concern was shown toward unsuccessful claimants. If every person who applied or meant to apply were class members, then class counsel had an attorney-client

relationship with all of these people. Therefore, it had an enhanced duty to these people and should have been more proactive in bringing them in and ensuring that their claims were properly processed. To the extent they were hands off, class counsel has breached one or more fiduciary duties to those alleged class members. If those "class members" decided to pursue a class action lawsuit against class counsel, we would hear a deafening cacophony of reasons why these people were not class members. Simply put, the class consists of those Native American Farmers and Ranchers who farmed or attempted to farm between 1981 and 1999 who were victims of discrimination that heeded the notice, went through the exercise of applying for relief, were subjected to an evaluation process, and were ultimately successful in receiving an award. Anything less would be undefinable and completely unworkable. Class counsel is desperately trying to expand the class to protect the *cy pres* provision because if *cy pres* fails, it may have to disgorge all of or a substantial portion of its attorney's fees. Based upon the preceding classification of class membership, the class is defined and certain. Because the law favors certainty over uncertainty, this is the only definition of class that makes any sense.

If class counsel was so concerned that many putative class members were erroneously left behind, it could have and should have petitioned the court to set aside the Agreement or give instructions to go back and do a better job of

incorporating those people. Indeed, fairness and reasonableness is a requirement for every class action settlement. Now class counsel has conceded that the Settlement Agreement was neither fair nor reasonable because by its confession, qualified Indians, indeed large numbers of Indians, have been prevented from receiving proceeds. Therefore, based upon its own analysis, the entire Settlement Agreement must be stricken.

To expand the class as broadly as Appellee(s) seek would violate the core prerequisites of a class, namely commonality and typicality. Those who sought to be included in the class went through a vigorous and demanding process and ultimately some succeeded and some were found wanting. Those who were found wanting lacked the commonality and the typicality found among those who prevailed. They, and they alone, were the embodiment of the definition set forth from the inception of the lawsuit. In Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541, 180 L. Ed 2d 374 (2011), the Court held that commonality requires that the class members have all suffered the same harm. This cannot be assured without some sort of evaluation and culling process.

Moreover, the definition of class posited by Appellees would violate the Equal Protection Clause of the United States Constitution. If some members of the class have to prove up claims to be in the class and to take under *cy pres* and others do not, then this would be disparate treatment under the law. It certainly would be

state action because the Government is one of the parties creating the disparate treatment. Moreover, even when an agreement is strictly a private affair, if that agreement is subject to the scrutiny of the courts and the court enters a decision that violates Equal Protection in its application, then that decision is unconstitutional. Therefore, the Settlement Agreement also fails on Constitutional grounds.

Article III of the Settlement Agreement reinforces the determination that there are class members (those with successful claims) and others who are not part of the class. The Agreement establishes a "Proposed Class" and the actual "Class Members." All language in a legal document, contract, and statute are read to mean something. In this case, that something is that some people are class members and some are not. Only the successful class claimants are class members. See Section III. F. of the Settlement Agreement.

Appellee unsuccessfully tries to claim that unsuccessful claimants have a property right. However, no property right can exist until that claim is proven up. Therefore, by its own analysis, the expansive nature of the class composition must fail.

E. The Class Members Have Neither Received a Windfall Nor Have They Been Fully Compensated

The class members have not been fully compensated. If they had been fully compensated, then it would be improper to provide any additional payment

because to do so would constitute a windfall, something that is not allowed. Therefore, the question becomes whether a secondary payment combined with the initial payment constitutes full payment. It does not. Appellee makes use of this author's language regarding "loss of a dream" and that this is a non-economic loss. Okay, fair enough; so what are some things that constitute economic losses: the loss of twenty years of tobacco crops, cotton, soy beans, cattle, chicken farms, and the list goes on. That loss is clearly quantifiable and certainly more so than some of the claims set forth in its Appellee Brief regarding expert analysis. By taking the acreage of a farmer or rancher and the "in year" commodities value, one can get a pretty close idea as to what was lost and it certainly exceeds $62,500 or $83,775 or $111,111.

F. The *Cy Pres* Distribution Results in a Pretty Lucrative Outcome for Everyone With Authority

Since it was brought up, let us talk about windfalls. The *cy pres* application as established provides a good source of income for a lot of folks who figured prominently in the class action lawsuit. From an outsider's point of view, it has the appearance of a rewards program for litigation elites. We are supposed to believe that this is all ancillary and of no consequence. There are trustees who figured prominently in the process, who received $250,000 Track B awards; $200,000 incentive awards; $100,000 supplemental incentive awards, loan cancellation(s); and will receive stipends for being on the board in the amount of $10,000 per year

for two consecutive terms, or at least $100,000 which will invariably be increased by the Board, along with the potential of other benefits over the course of time. Some of these ***special people*** just became millionaires. In fact, these ***special people*** stand to receive as much as 20 times the amount that the Track A recipients received. I do not think there is anything in the law, the statutes, the Judgement Fund Act, the Federal Rules of Civil Procedures, or common decency that countenance such a large disparity between class members and its representatives. In fact, this must be unconscionable, bad faith, self-dealing or the terms have lost all their meaning.

Then we have a former USDA official not only on the Board but its President. This is the *sine qua non* of conflicts of interest. Appellees Brief makes note of the expertise and dedication of this individual [Holder Br. 56-57 Footnote] as if that salves the violation. Clearly it does not. One does not rate an exception to conflicts of interest for being nice, dedicated, etc. The determination is standard across all jurisdictions, and we certainly have a conflict here. In addition, the Board of Trustees will most certainly require legal counsel over the next 20 years. Who might that be?

One cannot say definitively that the above arrangements will result in fraud, collusion, and improper conduct. But if one was creating an arrangement where such activity could thrive, this one does that rather well. Now we have new

organizations that can be created and receive grants. One has to concede that it is at least possible that a board member could get with a friend, have that friend create a not-for-profit and the board member could steer grants to that not-for-profit in exchange for a kickback. There is good reason why every Indian out there disfavors *cy pres*. Even those with absolutely nothing to gain hate this arrangement.

G. The Addendum Constitutes Bad Faith Collaboration and Must Fail

The sole purpose of the Addendum to the Settlement Agreement (Addendum) was to eliminate the district courts' ability to protect class members as quickly as possible. In Keepseagle v. Vilsack, 815 F.3d 28 (D.C. Cir., 2016) this Court recognized that the district court retained continuing jurisdiction for five years. The signature achievement of the Addendum was to remove the court from involvement; everything else was a "throw away". A "throw away" being something you are willing to give up to get what you really want.

The language in Article XIII. A. 1. of the Settlement Agreement provided the court with jurisdiction over the Settlement Funds until all payments had been made. There is currently over $380,000,000.00 plus unaccounted-for-interest that has yet to be paid.

To fully understand the significance of the collaborative act among class counsel and the other Appellees, one must consider the timing of the Addendum's

execution. That execution occurred on or about December 15, 2016, after the disastrous Listening Conferences. By the time these conferences were over, class counsel recognized that they had a problem on their hands that could result in an appeal. Because they saw themselves losing control over a major portion of the class, they concocted a scheme to squeeze out the district court judge. For whatever reason, perhaps too busy, the absence of a devious mind, or basic incompetence, the district court never recognized the underlying motive of the Addendum.

The Addendum was designed to hinder class members and not to benefit them. Class counsel needed to either follow the law on *cy pres*, or run the risk of disgorging substantial fees, and based upon that course of action, it chose to uphold its own interests over the interests of the class members who had time and again registered their displeasure at every turn. Whatever power the Addendum purports to give the district court is purely illusory. The Addendum, therefore, must be stricken and replaced with a distribution plan favored by the courts. To do otherwise would destroy the district court's ability to do its job by being a fiduciary guardian over the interests of absent, silent class members.

By keeping the *cy pres* provision in place, the Court "opens the floodgates of litigation" - now there's a term I did not think I would ever see again. This is because *cy pres* as applied to this case would violate Klier, Dennis v. Kellog Co.,

Marshall, Six (6) Mexican Workers, and many others. Rest assured that every time a grant is about to be provided under *cy pres* that a complaint, along with a petition for injunctive relief, will be filed each and every time in order to protect class members.

2. Reply to Appellee Marilyn Keepseagle's Answer Brief

A. Appellee Keepseagle's Actions Fail to Square With Her Stated Philosophy

Throughout this Appellee's Brief, we are reminded that her most fervent wish was for the class members, as she defined them, "successful class claimants," was that they should receive all of the proceeds from the Settlement Agreement. If this was the case and if she had not reversed herself for personal gain, then why file an Answer Brief? There are two law firms fighting tenaciously to ensure that Indians get paid, and she is doing her utmost to stop that. That is the underlying thesis of her entire brief. Say what you will, but her actions belie her true position.

There is no question that the timing of Ms. Keepseagle's change of position when considered with the totality of the circumstances raised grave issues concerning collusion, self-dealing, and breaches of fiduciary duty. Whether these actually exist demand a thorough, factual, and evidentiary analysis that can only be conducted by a trial court. There is at least the appearance of impropriety and, as previously cited to case law has shown, that is all that is required to merit a reversal of and remand to the district court.

B. The District Court Simply Never Lost Jurisdiction Over This Case or the Settlement Agreement or the *Cy* Pres Provision

From the time that this lawsuit was commenced until the Settlement Agreement was reached, and up to and including rendition of a final order, the district court never lost jurisdiction of this case, the Settlement Agreement, or the *cy pres* provision of the Settlement Agreement. To the extent the district court has lost jurisdiction it is only because this matter is up on appeal. Upon remand, the district court will once again have the authority to reject the Settlement Agreement or strike any unlawful portion of the Agreement and rewrite that provision if the parties will not come to an agreement. The reason all of this must be done is that the case law does not permit the adoption and implementation of *cy pres* under these circumstances and the Judgement Settlement Act neither contemplates nor permits the use of *cy pres*. Mr. Tingle did not act unreasonably in relying on the competence and skill of its very knowledgeable class counsel. Upon learning that such trust was misplaced, immediate corrective action was taken. No waiver could ever have taken place because, as with all waivers, it must be knowingly and voluntarily made and that was not the case herein. Moreover, class counsel denies that it misled class members into believing that if the *cy pres* was not accepted, the remaining money would have to be returned to the government. That is not true, because it was stated. The denial occurs on Page 54 of Appellee Holder's brief. It was stated clearly and un-mistakenly during the Listening Conference that took

place in Raleigh, NC, and this author heard it and would attest to it at an evidentiary hearing upon remand, along with many others who were in that room when it was said. But, "I'll go you one better than that." Christine Weber, Esq., an attorney for class counsel, told one of her own clients (and not one directly participating in this appeal) that case law outside of the District of Columbia could not be used inside the District of Columbia. This is yet another example of class counsel's willingness to put its own interest above the interests of its client. Upon remand and at an evidentiary hearing, this class member would testify to this very thing.

C. The Appellees are Disingenuous When They State That One Class Member is Trying to Prevent *Cy Pres* From Taking Effect

Out of over 3,600 class members there are not ten people that favor the *cy pres* provision. Appellees would have you believe that Messrs. Mandan and Tingle are lone dissidents to an otherwise acceptable Settlement Agreement. There isn't anyone on the internet advocating for *cy pres*. People did not come to the Listening Conferences advocating *cy pres*. In fact, the only people advocating for *cy pres* are those that stand to benefit directly and monetarily from its application. Indians are not stupid. If *cy pres* was such a good deal, it would not require educated, elite, well-positioned people to ram it down everybody else's throat.

D. Incompetent Contract Drafting Produces Undesirable Consequences

The Settlement Agreement's amendment provision does require unanimous consent. The canons of contractual construction apply here, and we all know what that means. However, I shall restate: When a party drafts a contractual provision that leaves ambiguity in the document, that ambiguity is construed against the parties drafting the document. The parties drafting this Settlement Agreement are very skilled in creating agreements, and there is no exception to the canons simply because the oversight is really a big blunder. Also, there is no relief from these canons simply because its application is inconvenient. If the Appellees do not like the outcome, then they should have done a better job drafting the Agreement.

3. Reply to Answer Brief of Defendant Appellee Thomas J. Vilsack

A. The *Cy* Pres Provision is Unworkable

Not only can the district court reconsider the distribution plan set forth in the Settlement Agreement, it must do so. Appellee Government on Page 13 of its Brief indicates that the court's action must be interpreted "against that backdrop" of an unworkable provision and that is why the course of action entered into by the district court was acceptable. This misses the point entirely because the back drop is a failed Settlement Agreement that is disfavored under common law, federal statutes, civil procedure, and an overwhelming trend to the contrary. Therefore, the district court's decision was anything but prudent, "against that backdrop"

Moreover, on Page 15 of its Brief, the Government states "under these [c]ircumstances" the district court did not abuse its discretion. The Government takes the position despite the clear requirement of the canons of construction and the remainder of an overwhelming amount of money that the district court was reasonable under these circumstances. However, nowhere in the abundance of federal appellate authority does the application of *cy pres* rest upon such a tenuous base. In fact, just the opposite is true as previous analysis and citations have repeatedly demonstrated.

B. Uninjured Parties and Unconfessed Liability

The Government makes a point of stating that nothing in the Judgment Fund Act requires payment to be made to only injured parties. There is no reason why such an act would ever state such an obvious position. There is nothing in that fund or that act that would ever provide relief for uninjured parties that were not part of any verdict or Settlement Agreement. Congress never intended to provide a gratuitous windfall to undeserving non-parties to litigation.

The Government raises the point, for what purpose I am not entirely sure, that the United States has not conceded liability on the class members' claims. I am not aware of any settlement on any action anywhere in which a defendant has confessed liability. Quite the contrary, one of the major purposes behind a settlement is to avoid having liability established. If the Government is suggesting

that it has no liability, then the entire Settlement Agreement might well be invalidated and litigation can begin anew to determine liability and ultimate damages.

C. The Government Paid Handsomely to be Released From Further Liability

There is only one reason why the Government settled this lawsuit for such a large amount of money. Because it was in their best interest to do so. It is reasonably ascertainable that the Government undertook a cost benefit analysis and determined that it faced potential damages far in excess of $680,000,000.00 so it did what many prudent defendants do - it cut a deal. Therefore, despite the arguments that might arise to determine what should be done with the money presently being held by class counsel, the Government has no say in it whatsoever. No one is coming back to them asking for more money, TBK Partners, Ltd. The Government is conveniently out of the lawsuit and has no further "skin in the game." Unless the Government is prepared to reopen the door to its risk, something that is not permitted, it has no further say in how the bargained-for-funds are to be allocated.

CONCLUSION

Based upon the foregoing, this matter should be reversed and remanded to the district court with instructions to strike the *cy pres* provision because it is against the weight of common law, violates the Judgement Settlement Act, and fails to live up to the requirements of the Federal Rules of Civil Procedures requiring a fair, reasonable, and adequate settlement. In the alternative, the district court may invalidate the entire Settlement Agreement and litigation or settlement discussions can begin anew notwithstanding any of the concomitant consequences thereunto pertaining.

The application of *cy pres* will result in substantial funds being placed into the hands of individuals that have already shown themselves willing to place themselves above everyone else and reap disproportionate and enormous returns for themselves. What funds do wind up in the hands of not-for-profit corporations will never benefit the class members who were the demonstrated victims of discrimination but will unjustly enrich people that are undeserving non-parties to this settled action.

The application of the Addendum to the Settlement Agreement is even worse. It intentionally binds the hands of the court for the benefit of class counsel and the Government to the express harm of class members and the jurisprudential interests of the district court in its effort to ensure that the Settlement Agreement

and the Addendum thereto is consistent with the law as we have come to know its present condition pertaining to *cy pres*. The limiting language of the Addendum can serve no other purpose but to bind the hands of the court for reasons that are despicable.

Finally, let us consider the following:

1. The Federal Appellate Courts unanimously oppose *cy pres* under the conditions presented herein.
2. The Judgement Settlement Act and the Judgement Settlement Fund that it enables does not permit payment from the funds to non-litigating third parties.
3. The class counsel, et.al., created the Addendum for the signature purpose of squeezing out the trial court in an effort to prevent the court from using its powers to exercise its fiduciary duty to protect absent, silent class members from abuse.
4. Class Representatives acted in a despicable manner, engaging in collusion, self-dealing, and breaches of fiduciary duties to the class members. While the appellate courts in some circumstances may permit incentive awards, there is no authority anywhere that would justify a class representative receiving 18-20 times the amount of class members

or to receive a total compensation package of $1,000,000 when a class member is receiving a mere $50,000.

For the reasons set forth above and previously by this Appellant, this Court should reverse the ruling of the district court and remand this matter back to the district court with instructions to create a distribution of all remaining funds and accrued interest thereunto belonging, that is consistent with federal appellate authority on this matter or in the alternative, strike the entire Settlement Agreement and resume litigation.

Respectfully submitted,

/s/ D. Craig Tingle
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CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENT, AND TYPE-STYLE REQUIREMENTS

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because:

   This brief contains 6,066 , excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because:

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/s/ D. Craig Tingle
Attorney for Donivon Craig Tingle
Dated: December 1, 2016

CERTIFICATE OF SERVICE

I hereby certify that on December 1, 2016, I electronically filed the foregoing document with the Clerk of Court for the United States Court of Appeals for the District of Columbia Circuit by using the CM/ECF system. The participants in the case who are registered CM/ECF users will be served by the CM/ECF system.

I furthermore certify that an additional eight copies have been furnished to the Clerk of Court via US Mail, Return Receipt Requested.

/s/ D. Craig Tingle
D. Craig Tingle

ADDENDUM

Keepseagle Claims
Administrator PO Box 3560
Portland, OR 97208-3560

Keepseagle v. Vilsack Settlement
Civil Action No. 1 :99-cv-031 19 (DOC) (EGS)

Dear Track A Claimant:

Enclosed with this letter is the ruling on the claim you submitted under Track A of the Settlement in *Keepseogle v Vilsack* . Please note that only Track A determination letters have been distributed at this time. Track B claimants will receive their notifications in a few months. At that time we will also have final details regarding debt relief for successful Track A claimants.

In addition to the enclosed ruling, there is additional information that we want to make sure you are aware of:

- This payment is taxable income for federal, state, and local tax purposes and may be reported to the appropriate taxing authorities . In addition to the award amount below, a payment of $12,500 has been made on your behalf to the IRS to reduce your expected tax liabilitv associated with this award You may be required to make add itional tax payments *or you may be entitled to a tax refund* . Please consult a tax advisor to determine your individual tax payment or refund and reporting situation . You will be sent appropriate tax forms in January of the year following your payment, as applicable . Please notify the Settlement Administrator of any address changes so that any necessary tax forms can be sent to your most current address. Filing tax forms when due is your responsibility. If you are due a refund , you will not receive it unless you fi le a tax return.
- The IRS has a Taxpayer Advocate Service that may be able to answer some of you r tax questions. ·They can be reached at 1-877-ASKTASl (l-877-275-8271).
- If there were co-claimants, their names are also written on the check Banks should require a signature from each person whose name appears on the check in order to deposit the check. You will need to work with your co-claimant to get the check deposited so that you can split the proceeds.
- If there were co-claimants, there is nonetheless just one tax payment made to the IRS and one 1099 form issued - those will be in the name of the primary claimant . As claimant, you must share the 1099 information with your co-claimants and work with them to ensure you each file accurate tax returns.

As a prevailing claimant, you are eligible for elimination of some or all of your USDA farm loan debt. However, the amount of debt relief you will receive cannot be determined until all of the claims, including Track B claims, have been resolved. We expect that Track B determinations and an update to you addressing debt relief will be issued by the end of October 2012.

If you have any questions about your award, please contact the Keepseagle Claims Administrator at (888) 233-5506 or PO Box 3560, Portland, OR 97208-3560.

THIS DECISION IS FINAL. IT IS NOT REVIEWABLE BY CLASS COUNSEL, THE CLAIMS ADMINISTRATOR, THE TRACK A NEUTRAL, THE TRACK B NEUTRAL, THE DISTRICT COURT, OR ANY OTHER PARTY OR BODY, JUDICIAL OR OTHERWISE.

Sincerely, .

Keepseagle Claims Administrator

K:i271 v 003 8 18 2012

Keepseagle Claims Administrator
PO Box 4199
Portland, OR 97208-4199

'271801613099'

Claimant's Tracking Number: 17097

000 0000985 00000000 001 002 00247 INS: 0 0
DONIVON CRAIG TINGLE
535 STAHLMAN AVENUE
DESTIN FL 32541

August 23, 2012

Keepseagle v. Vilsack Settlement
Civil Action No. l:99..cv-03119 (DDC) (EGS)

"TRACK A" CLAIM DETERMINATION FORM

PART I. CLAIMANT INFORMATION

Claimant:
DONIVON CRAIG TINGLE
535 STAHLMAN AVENUE
DESTIN, FL 32541

Claimant's SSN/TIN: XXX-XX-0160
Claimant's Date of Birth: 10/09/1964
Claimant's Phone Number: (850) 543-7123

PART II. SUMMARY OF CLAIM DETERMINATION

Several months ago, you submitted a Track A claim to the Non-Judicial Claims Process under the Settlement Agreement in *Keepseagle v. Vilsack,* No. l :99-cv-03119 (D.D.C.). Since that time, a Neutral has determined that your claim is APPROVED.

□ **Your Claim is APPROVED.**

- Your Total Cash Award is $50,000. A check in this amount is enclosed. If you retained your own attorney for this claim, the check will be made payable jointly to you and your attorney.

- In addition to this amount, a payment of $12,500 has been made on your behalf to the IRS to reduce your expected tax liability associated with this award.

Because your claim was approved, if you have any outstanding USDA farm loan debt, then you are entitled to elimination of some or all of your USDA farm loan debt outstanding. The amount of the debt to be eliminated, and the tax payment that will be made to reduce your expected tax liability associated with the debt relief you receive, will be determined and communicated to you later this fall. After elimination of this debt, if any, if you have an additional outstanding FSA loan balance remaining, the FSA is required to offer you an opportunity to apply for additional 7 CFR Part 766 (formerly 1951-S) loan servicing options. Elimination of these loans, or a prior write-off of eligible FSA farm loan obligations, will not prevent you from being considered for new loans from FSA.

NOTE: You are responsible for compliance with all applicable federal, state, and local tax requirements that arise as a result of this award. Even though you will receive a tax award to be paid on your behalf directly to the IRS, that payment

may not be sufficient to cover all taxes you owe, OR it may be more than you owe in taxes, so you may be able to get a refund. You are encouraged to consult a tax professional if you have any questions about these requirements.

Greer H. Stroud

THIS DECISION IS FINAL. IT IS NOT REVIEWABLE BY THE CLAIMS ADMINISTRATOR, THE TRACK A NEUTRAL, THE TRACK B NEUTRAL, THE DISTRICT COURT, OR ANY OTHER PARTY OR BODY, JUDICIAL OR OTHERWISE.

QUESTIONS: If you have any questions, you may contact the Claims Administrator at 1-888-233-5506.

KEEPSEAGLE CLAIMS ADMINISTRATOR
PO BOX 4199
PORTLAND OR 97208-4199

TRACKING NUMBER:	17097
CLAIM NUMBER:	800008844
CHECK NUMBER:	005949
CHECK AMOUNT:	$50,000.00
CHECK DATE:	AUGUST 23, 2012

ɵoo ooogs1 00000000 002 002 00241 INS: o o

DONIVON CRAIG TINGLE
535 STAHLMAN AVENUE
DESTIN FL 32541

This check is issued pursuant to the terms of the class action settlement, *Keepseagle v. Vilsack,* Case No. 1:99CV03119. You submitted a claim for a settlement award and it was determined to be timely and valid. The enclosed check constitutes full satisfaction of your claim.

This payment is taxable income for federal , state, and local tax purposes and may be reported to the appropriate taxing authorities. In addition to the award amount below, a payment of $12,500 has been made on your behalf to the IRS to reduce your expected tax liability associated with this award. You may be required to make additional tax payments or you may be due a refund. Please consult a tax advisor to determine your individual tax payment and reporting situation. You will be sent appropriate tax forms in January of the year following your payment, as applicable. Please notify us of any address changes so that any necessary tax forms can be sent to your most current address.

If you have any questions about your award, please contact the Keepseagle Claims Administrator at (888) 233-5506 or PO BOX 3560, PORTLAND OR 97208-3560.

K5301 v.O 06 08 20 2012

Beach
Community Bank

Capture Date:	August 30, 2012
Item Number:	990000000000910
Posted Date:	August 30, 2012
Posted Item Number:	77000002000070
Amount:	50,000.00
BOFD Return RT:	UNKNOWN

KEEPSEAGLE CLAIMS ADMINISTRATOR
PO B0X 4199
PORTLAND OR 97208-4199

EagleBank

DATE
08/23/2012

CHECK NUMBER

Vc>id if not negotiated within one hundred eighty (180) days of date of Issue

AMOUNT

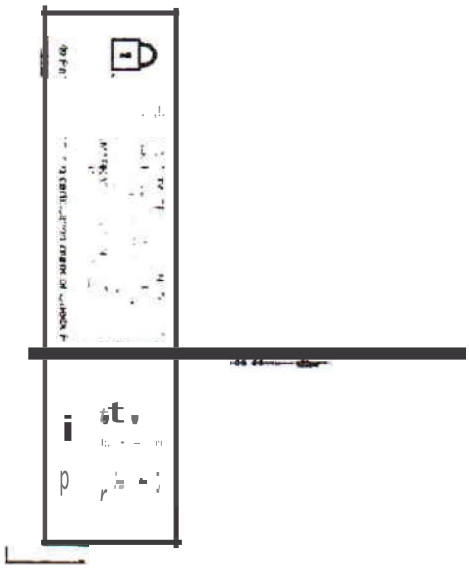
PAY EXACTLY .....**Fifty Thousand COLLARS and NO CENTS $50,000.00 SI.-

PAY TO THE ORDER OF:

DONIVON CRAIG TINGLE

Joe Eckhart
Authorized Signatures

⑈005949⑈ ⑆055003298⑆ 0200124709⑈



S49105117

Donivon Craig Tingle made payable to Sandra Tingle
X Sandra Tingle