IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

MARILYN KEEPSEAGLE, et al.,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	Civil Action No. 1:99CV03119 EGS
	)	Judge Emmet G. Sullivan
	)	Magistrate Judge Alan Kay
TOM VILSACK, Secretary	)	
United States Department of Agriculture,	)	
	)	
	)	
Defendant.	)	
	)	

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MARILYN AND GEORGE KEEPSEAGLE'S MOTION TO MODIFY THE SETTLEMENT AGREEMENT

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INTRODUCTION

Marilyn and George Keepseagle (the Keepseagles)[1] respectfully submit the following Memorandum in Support of their Motion to Modify the Settlement Agreement pursuant to Rule 23 and Rule 60(b) of the Federal Rules of Civil Procedure.[2]

This motion is warranted based on the present circumstances in this litigation, which were wholly unanticipated and entirely unprecedented. More than 15 years have passed since this lawsuit was filed and more than four years have passed since the Class Representatives entered into a Settlement Agreement with the U.S. Department of Agriculture (USDA). Yet $380 million in settlement funds remain. The final issue to determine in this litigation is how these unclaimed funds should be disbursed.

Since bringing the unclaimed settlement funds to the Court's attention, Class Counsel has endeavored to direct most of the remaining funds to a charitable trust. *See* Dkt. No. 646, at 1. First, Class Counsel indicated they planned to propose establishing a perpetual foundation that would distribute interest income to "institutions that provide educational, technical, and business development services to Native American farmers and ranchers." *Id.* at 8. Now, Class Counsel has moved this Court to accept their proposal to distribute the remaining funds in the following fashion: (1) 10% (approximately $38 million) in immediate payments to non-profit groups that have served Native American farmers or ranchers prior to November 1, 2010; and (2) 90% (approximately $342 million) to endow the proposed Native American Agriculture Fund (Proposed Trust) that would distribute the principal and interest from $342 million of the

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[1] The Keepseagles acknowledge that George Keepseagle is no longer a class representative due to health reasons. *See* Dkt. No. 772, at 6, n.2.

[2] *Amicus Curiae*, the Great Plains Claimants, which comprise more than 500 successful Track A claimants, support the Keepseagles' Motion to Modify the Settlement Agreement.

remaining settlement funds to non-profits that have served or will serve Native American farmers and ranchers. Dkt. No. 709-1, at 1-2. While providing a historically-unprecedented infusion of money for Native American charities is certainly an admirable goal, it was not the purpose of this litigation and should not be its final outcome.

There is a better way to resolve this matter. Instead of a *cy pres* distribution funding charities, these remaining funds should be distributed to the class members whose claims for damages resulting from discriminatory lending practices served as the basis for this historic litigation. As this Court is aware from the record in this matter, Indian Country is plagued with the lingering effects of longstanding and pervasive discriminatory policies. As noted by the White House, "some reservations face unemployment rates of up to 80 percent."[3] On many rural reservations, agriculture is one of the few available options for economically sustainable livelihoods. These funds should be disbursed to the victims of USDA's discrimination for further investments, by them (and not third-parties), in living expenses or infrastructure, such as land, equipment, livestock, and facilities. If the Keepseagles' Motion is approved, the class will realize direct benefits from a *pro rata* distribution whereas third parties will be the primary beneficiaries of any *cy pres* distribution. This option is the understandably preferred option of *amicus curiae*, the Great Plains Claimants and, likely, a majority of the class members.[4]

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[3] White House Rural Council, "Collaborating with Tribes through the White House Rural Council" (July 1, 2011), *available at* https://www.whitehouse.gov/blog/2011/07/01/collaborating-tribes-through-white-house-rural-council

[4] Class Counsel conducted several "listening sessions" during the summer of 2014 to explain their proposal for modifying the *cy pres* provisions. The vast majority of the comments provided at these listening sessions opposed a *cy pres* distribution and supported supplemental payments to successful claimants. *See* Dkt. No. 709-6, at 60-65.

Furthermore, a *pro rata* distribution is supported by the vast majority of tribal governments that have expressed opinions on this matter.[5]

In the following sections of this Memorandum, the Keepseagles discuss their proposed modifications to the Settlement Agreement and explain why their proposal is the proper method for disbursing the remaining funds. In addition, the Keepseagles address the Court's authority to approve their proposed modification.

FACTUAL AND PROCEDURAL BACKGROUND

As this Court is already familiar with the factual and procedural background of the Settlement Agreement in the above-captioned case and the dispute over the distribution of the remaining settlement funds, the Keepseagles will dispense with a recitation of the facts of the case and its procedural posture. The Keepseagles bring this Motion to Modify the Settlement Agreement in their capacity as current (Marilyn) and former (George) lead plaintiffs and class representatives in this case on behalf of the class members.

I. THE PROPOSED AMENDMENT TO THE SETTLEMENT AGREEMENT

The Keepseagles' proposed amendments to the Settlement Agreement are offered as

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[5] *See* Letter from Kevin Keckler, Chairman, Cheyenne River Sioux Tribe to Judge Emmet G. Sullivan, U.S. District Court for the District of Columbia, (Aug. 20, 2014), *see* Exhibit C; Standing Rock Sioux Tribe Resolution No. 471-14, *see* Exhibit D; Oglala Sioux Tribe Council Resolution No. 14-166, *see* Exhibit E; Oglala Sioux Tribe Executive Committee Resolution No. 14-72XB, *see* Exhibit F; Rosebud Sioux Tribe Resolution No. 2014-225, *see* Exhibit G. The tribal governments' belief that the settlement funds should remain with the class members is consistent with the policy of Indian self-determination. It is now well-established federal policy to respect Indian self-determination, consultation, and Tribal sovereignty. *See* Memorandum on Tribal Consultation, 2009 Daily Comp. Pres. Doc. 887 (November 5, 2009) *available at* https://www.whitehouse.gov/the-press-office/memorandum-tribal-consultation-signed-president. Starting with President Lyndon B. Johnson, every presidential administration has recognized that it is incumbent on the federal government to recognize Native Americans' "freedom of choice and self-determination." *See* STEPHEN L. PEVAR, THE RIGHTS OF INDIANS AND TRIBES 12 (3d ed., Southern Illinois University Press, 2002) (internal citation omitted).

addenda to the Settlement Agreement. *See* Exhibits A & B. The proposed amendments are offered as addenda, instead of amendments to the text of the original Settlement Agreement, in an effort to provide a simple, straightforward document that will illustrate the Keepseagles' intended modifications for the Court, class members, and other interested individuals.

Under Proposed Addendum A, the Keepseagles propose deleting the provisions in the Settlement Agreement that disburse the remaining settlement funds to *cy pres* beneficiaries. *See* Exhibit A. Next, Proposed Addendum A would direct that the unclaimed settlement funds be distributed to the successful Track A and Track B claimants on a *pro rata* basis.

Proposed Addendum B contains the Keepseagles' alternate proposed modifications. *See* Exhibit B. First, as with Proposed Addendum A, Proposed Addendum B proposes deleting the provisions in the Settlement Agreement that disburse the remaining settlement funds to *cy pres* beneficiaries. Addendum B also proposes that the Court order a second claims period, which would allow class members who did not submit a successful Track A or Track B claim under the original claims process to apply for a claim from the settlement fund. Finally, after the second claims period has ended and the related funds have been distributed, Proposed Addendum B directs that the unclaimed settlement funds be distributed on a *pro rata* basis to the successful claimants from both claims periods.

II. DISTRIBUTION OF THE REMAINING FUNDS TO SUCCESSFUL CLAIMANTS

Under the Keepseagles' proposal, the remaining funds would be distributed to the successful individual claimants and the estates of deceased claimants. Both Track A and Track B claimants would be eligible for this supplemental distribution. This distribution is appropriate under the circumstances because these claimants have already successfully demonstrated that they are members of the class whose damages served as the basis for this action.

Distributing the remaining funds in the form of supplemental payments to successful claimants will ensure that these funds actually reach injured class members and directly serve the goals of this litigation – making class members more whole and deterring future governmental discrimination. *See* discussion *infra*, Argument, Sec. I.A. These funds, in the hands of class members, can be invested into the purchase of equipment, livestock, facility improvements, and land to improve the long-term economic stability of Native American farming and ranching operations. For those successful claimants that have lost their farms, have retired from farming, or wish to pursue other ventures, these funds can be used to provide for living expenses, facilitate a re-entry into production agriculture, or pursuit of other economic opportunities. In short, these funds will directly improve the lives of the class members and assist in ameliorating the injuries resulting from discriminatory lending practices.

The Keepseagles appreciate that Native American charitable organizations serve a very valuable and noble purpose. However, these organizations are limited in their ability to benefit the class members or assist in righting the wrongs underlying this case when compared to direct payments to victims. Charitable organizations, even the most reputable entities, are burdened with overhead expenses. Funds must be expended to cover salaries, office space, supplies, travel, and other miscellaneous expenses. Each dollar devoted to overhead is money that is not benefitting Keepseagle class members. Nor is it likely that these charities will provide services or fund projects that achieve the goals of this litigation – righting the wrongs that resulted from discriminatory governmental lending practices. These charities would serve a much broader purpose than was intended by this lawsuit, further diluting the efficient use of the remaining settlement funds.

III. ALTERNATIVE PROPOSAL: SUPPLEMENTAL DISTRIBUTION AND REOPENING OF THE CLAIMS PROCESS

Should this Court find that a *pro rata* distribution only to successful claimants is not the most appropriate use of the remaining settlement funds, the Keepseagles propose that this Court issue an order directing a two-part alternate plan. First, the Court would re-open the settlement claims process to permit class members that did not receive payments during the initial distribution, including those that applied, but were rejected, to submit claims to the Claims Administrator. Upon completion of the second round of distributions, the remaining settlement funds would be distributed on a *pro rata* basis to successful claimants from both claims periods.

This alternate plan would also achieve the goals of this litigation by ensuring that the remaining settlement funds directly compensate the class members' damages instead of providing an unprecedented and unwarranted distribution for third-party charitable organizations. The class, which is defined by the terms of the Settlement Agreement, includes Native American farmers and ranchers beyond those that were successful in the initial claims process. As Class Counsel has noted, there are a number of reasons why the initial claims process failed to yield more successful claimants. *See* Dkt. No. 646, at 5, n.3. A second claims process would allow prior unsuccessful claimants, those who chose not to participate in the initial claims process, and those that were not aware of the initial claims process, an opportunity to submit a claim through the Claims Administrator.

Under this plan, once the second round of the claims process is complete, the remaining funds will be distributed amongst the successful claimants from both rounds of the claims process. This is an equitable solution that will result in the entirety of the settlement funds being distributed to the members of the class and would avoid an unwarranted to third-party organizations.

ARGUMENT

I. THE REMAINING FUNDS SHOULD BE DISTRIBUTED TO THE CLASS MEMBERS

At this late stage in the litigation, this Court is tasked with determining how the unclaimed settlement funds should be disbursed. There are four methods available to this Court for distributing the remaining settlement funds: (1) reversion to USDA; (2) *pro rata* distributions among the successful class members; (3) escheatment to the government; and (4) *cy pres* distribution to charitable organizations. *Diamond Chemical Co. v. Akzo Nobel Chemicals B.V.*, 517 F. Supp. 2d 212, 217 (D.D.C. 2007); *see also* Herbert B. Newberg & Alba Conte, *Newberg on Class Actions* § 12:30 (5th ed.). This Court should choose the second option, which is encompassed in the Keepseagles' motion, and distribute the remaining funds to successful claimants. A *pro rata* distribution is the superior option that most closely approximates the goals of this Equal Credit Opportunity Act litigation because it ensures that the entirety of the settlement funds remain in the hands of the class members.

A. Reversion and Escheatment Are Inappropriate Solutions

Reverting the remaining funds to USDA is not an appropriate solution in this particular case. When analyzing whether unclaimed settlement funds should be reverted to the defendant, this Court looks to the purpose of the litigation. *Diamond Chemical*, 517 F. Supp. 2d at 218. This Court has suggested that where the purpose of a lawsuit is simply to compensate damages, then reversion may be warranted. *Id*. at 218-19; (citing *Wilson v. Southwest. Airlines, Inc.*, 880 F.2d 807, 815 (5th Cir. 1989)). However, in instances where the underlying statute has both compensatory elements as well as punitive and deterrence goals, reversion to the defendant is not appropriate. *Id*. at 218.

The statute underlying this case, the Equal Credit Opportunity Act, serves to deter against

discriminatory lending practices. *See* 15 U.S.C. § 1691e(b). Although Congress has not waived sovereign immunity to the extent that it allows punitive damages against the government in these cases, this does not change the deterrent effect of this statute. When faced with statutes that have deterrence as a goal, this Court has declined to allow reversions of unclaimed settlement funds to the settling defendant. *Diamond Chemical*, 517 F. Supp. 2d at 218 (finding reversion to the defendant inappropriate in Sherman Act case where damages were awarded pursuant to provision that allowed punitive damages) (citing *Six Mexican Workers v. Arizona Citrus Growers*, 904 F.2d 1301, 1308 (9th Cir. 1990) ("When . . . a statute's objectives include deterrence or disgorgement, it would contradict these goals to permit the defendant to retain unclaimed settlement funds.")). Likewise, escheatment to the federal government is neither a viable nor appropriate solution in the present case because it would effectively amount to a reversion to the defendant.

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

With reversion and escheatment being improper remedies in this case, the Court is faced with choosing to allow a *cy pres* distribution to third-parties or a *pro rata* distribution of the unclaimed funds to the successful claimants. Here, the Court can most effectively serve the goals of this litigation by exercising its equitable discretion to approve the Keepseagles' Motion to Modify and order a *pro rata* distribution, which would ensure that the unclaimed funds remain with the class members and not third parties.

The settlement fund proceeds, which were generated by the value of the class members' damages for discrimination, belong solely to the members of the class. *See Klier v. Elf Atochem N. Am., Inc.*, 658 F.3d 468, 474 (5th Cir. 2011). The Keepseagles acknowledge that this Court is skeptical of the "class property" approach in this particular case because, unlike *Klier*, the

original Settlement Agreement contained a *cy pres* provision. *See* Dkt. No. 772, at 14, n.4. However, rejecting the "class property" theory raises one unavoidable and heretofore unanswered question – to whom do the remaining settlement funds belong if they do not belong to the class? No party to this case has demonstrated that the funds belong to anyone other than the class members and, in settlement, USDA has acknowledged that these funds should be in the hands of persons, such as class members, in recompense for their damages. Accordingly, the Keepseagles respectfully submit that this Court should find that the remaining funds are property of the class members.

If this Court follows the "class property" approach, then it should favor a *pro rata* disbursement over a *cy pres* distribution. This is because it is feasible to distribute the remaining funds to successful claimants. "A *cy pres* distribution to a third party of unclaimed settlement funds is permissible 'only when it is not feasible to make further distributions to class members.'" *Klier*, 658 F.3d at 475 (quoting AM. LAW INST., PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION § 3.07 (ALI §3.07)). In this case, where $380 million in unclaimed settlement funds exist and the Claims Administrator and Class Counsel have means of notifying the successful claimants, a *cy pres* distribution is not appropriate. *In re BankAmerica Corp. Securities Litig.*, 775 F.3d 1060, 1064 (8th Cir. 2015).

The only exception to this principle is that additional payments are not appropriate if an additional distribution "would provide a windfall to class members with liquidated-damages claims that were 100 percent satisfied by the initial distribution." *Id*. at 1064 (citing *Klier*, 658 F.3d at 475). While this decision regarding the exception for liquidated-damages claims is not binding in this Circuit, the Court should still order a *pro rata* distribution amongst the successful claimants if it finds *In re BankAmerica Corp.* persuasive.

First, the Keepseagles submit that the damages in this action are not "liquidated damages" in the traditional sense of the term. As a starting point, the Keepseagles acknowledge that the Settlement Agreement refers to Track A payments as "Track A Liquidated Award[s]." *See* Settlement Agreement, Sec. II.SS. The Keepseagles also acknowledge that this Court has referred to similar damages as "liquidated damages." *See, e.g.*, *Abrams v. Vilsack*, 655 F. Supp. 2d 48, 51, n.3 (D.D.C. 2009). Nor do the Keepseagles dispute that these damages were not paid out in full by the settlement fund. However, the term "liquidated damages" is more applicable in the context of contract breaches or statutory provisions. *See Black's Law Dictionary* (10th ed. 2014) *available at* Westlaw BLACKS; *see also* Fair Labor Standards Act, 29 U.S.C. § 216(b). Liquidated damages are established prospectively, not in hindsight. The Track A awards in the present case vary substantially from the common understanding of liquidated damages because they were negotiated after injuries had already occurred.

However, should this Court find that the Track A awards are liquidated damages, the Keepseagles submit that this Court should still order a *pro rata* distribution because they dispute the assertion that a "windfall" would result from a *pro rata* distribution as the class members' actual damages likely exceed the Track A award.

Although the Settlement Agreement established damages for Track A claimants, and established a damages cap of $250,000 for Track B claimants, these damages are not of the same nature where this Court has disapproved a *pro rata* distribution on the basis of a windfall payment. For example, in *Diamond Chemical*, this Court held that a *pro rata* distribution of the remaining settlement funds was not equitable because "all claimants, who filed a timely notice of their claims received the full amount of settlement funds for each of their allowed claims," meaning additional payments would amount to a windfall. 517 F. Supp. 2d at 217. However,

Diamond Chemical was a Sherman Act case intended to compensate victims of antitrust activities, wherein the damages were uniform amongst the class members on a per-unit basis and established based on the amount that victims were overcharged for products. *Id*. at 214-15.

In contrast, the class members' damages are much harder to calculate due to the nature of discriminatory lending practices. The Settlement Agreement valued these damages at $50,000 for Track A claimants. However, unlike the overcharged prices in *Diamond Chemical*, the damages in the present case relate to lost financial opportunities, which are less clear-cut than a transactional injury. These lost opportunities, many of which resulted in the loss of farming and ranching opportunities and, thus, a means of generating an income, were devastating and humiliating for the victims. While determining the value of these losses is, in part, inherently predictive, it is not impossible to calculate because of the context in which lost opportunities occur. For instance, according to USDA estimates, the average price of agricultural real estate in 1980, the year preceding the relevant time period for this litigation, was $485/acre in the Northern Plains states and $284/acre in the Rocky Mountain states.[6,7] By 1999, the last year of the relevant time period in this litigation, average agricultural land values were $505/acre in the Northern Plains states and $422/acre in the Rocky Mountain states. In 2012, when the bulk of the claims were paid, average agricultural land values were $1,710/acre in the Northern Plains states and $974/acre in the Rocky Mountain states. Agricultural land, which in most cases represents

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[6] USDA Economics, Statistics and Market Information System (ESMIS), "Agricultural Land Values," *available at* http://usda.mannlib.cornell.edu/MannUsda/viewDocumentInfo.do;jsessionid=F154BA78C7C50C021C8CA924EDB72FD5?documentID=1446 (last viewed May 14, 2015).

[7] ESMIS defines the Northern Plains states as Kansas, Nebraska, North Dakota, and South Dakota. *See supra*, at 11, n.6. ESMIS defines the Rocky Mountain states as Arizona, Colorado, Idaho, Montana, Nevada, New Mexico, Utah, and Wyoming. *Id.*

the single greatest input cost for farmers and ranchers, nearly quadrupled during these intervening years. In any event, these damages, over time, likely exceed $50,000 per claimant when the rising price of farm land and inputs is considered. Many class members suffered financial injuries far in excess of $50,000 and have not been fully compensated for the damages that resulted from years of systematic discriminatory lending practices. *See* Exhibit H, Declaration of Marilyn Keepseagle, May 19, 2015, at ¶¶ 11-13.

Indeed, in most class actions, "few settlements award 100 percent of a class member's losses, and thus it is unlikely in most cases that further distributions to class members would result in more than 100 percent recovery." *In re Lupron Marketing and Sales Practices Litigation*, 677 F.3d 21, 32 (1st Cir. 2012) (internal quotations omitted). *Lupron* also noted that this presumption did not apply where class members have been fully compensated for their *actual* damages. *Id.* However, in *Lupron*, the class members' actual damages were easily ascertainable. *Id*. at 34 (damages are money paid above the market value of a drug sold at an inflated price). In the present case, the class members' actual damages are most likely in excess of their liquidated damages, thus, a *pro rata* distribution would not likely result in a windfall that exceeds the class members' damages.

Finally, this Court has the power and responsibility "to exercise equitable discretion to achieve substantial justice in the distribution of the funds." *In re Folding Carton Antitrust Litig.*, 557 F. Supp. 1091, 1105 (N.D. Ill. 1983). This authority includes ordering a *pro rata* distribution of the remaining funds when circumstances warrant. *See Beecher v. Able*, 575 F.2d 1010, 1013 (2d Cir. 1978). In *Beecher*, unclaimed settlement funds were distributed *pro rata* to successful claimants. *Id*. at 1014. The Second Circuit held that this supplemental distribution was not a windfall for the successful claimants because there was evidence that the actual

damages suffered by the class members may have exceeded the damages allowed for under the class's settlement agreement. *Id*. at 1016.

Like the class members in *Beecher*, the successful claimants in the present case most likely settled their claims for much less than their actual damages. When facing the question as to how the remaining funds should be distributed, this Court should exercise its equitable discretion and order a *pro rata* distribution to the successful claimants. This solution would better achieve the goals of this case and the Equal Credit Opportunity Act by distributing the remaining funds to the class members instead of third parties that were not injured by discriminatory lending practices. *See* ALI § 3.07 ("[I]n most circumstances distributions to class members better approximate the goals of the substantives laws than distributions to third parties that were not directly injured by the defendant's conduct."). Accordingly, this Court should order a *pro rata* distribution.

C. *Cy Pres* Distribution Is Not an Appropriate Solution

Because a better alternative exists – *pro rata* distribution to the successful claimants – this Court should not allow a *cy pres* distribution of the remaining settlement funds. A *cy pres* distribution of unclaimed settlement funds should be a secondary option employed only in the event that it is not feasible to distribute remaining funds to the class members. *In re BankAmerica Corp.*, 775 F.3d at 1064; *see also Newberg* § 12:32. A *cy pres* distribution to charitable organizations would not directly benefit the class members whose claims for damages serve as the basis for this action. As such, a *cy pres* distribution is an inferior choice for approximating the underlying compensatory and deterrence goals of the Equal Credit Opportunity Act.

As stated above (*supra* Argument, Sec. I.B), *cy pres* is not appropriate in this context

because the successful claimants are easily identifiable to the Claims Administrator and Class Counsel. The remaining funds, $380 million, are also certainly sufficient to provide for a meaningful *pro rata* distribution.

In addition to not providing direct benefits to the class members, it is uncertain how much a *cy pres* distribution, as proposed by Class Counsel, would indirectly benefit the class members. Class Counsel's proposal, which would direct 90% of the unclaimed settlement funds to a trust that would benefit Native American agriculture-oriented charities, would not terminate for a period of 20 years. This case, however, relates to injuries that occurred between 1981 and 1999. Unfortunately, many of the class members have already passed away. Many more will pass before the proposed trust would terminate in 2035. This calls into question whether a sufficient nexus exists between the underlying case and the indirect beneficiaries of the proposed trust. *See Lane v. Facebook, Inc.*, 696 F.3d 811, 821 (9th Cir. 2012) (requiring *cy pres* entities bear a "direct and substantial nexus" to the interests of absent class members).

Furthermore, appellate courts are increasingly calling the propriety of *cy pres* distributions into question. *See, e.g.*, *In re BankAmerica Corp.*, 775 F.3d at 1063; *Powell v. Ga. Pacific Corp.*, 119 F.3d 703, 706 (8th Cir. 1997); *Ira Holtzman, C.P.A. v. Turza*, 728 F.3d 682, 689-90 (7th Cir. 2013); *In re Baby Products Antitrust Litig.*, 708 F.3d 163, 172-73 (3d Cir. 2013); *In re Lupron*, 677 F.3d at 29-33; *Nachshin v. AOL, LLC*, 663 F.3d 1034, 1038-40 (9th Cir. 2011); *Klier*, 658 F.3d at 473-82; *In re Katrina Canal Breaches Litig.*, 628 F.3e 185, 196-98 (5th Cir. 2010); *Masters v. Wilhelmina Model Agency, Inc.*, 473 F.3d 423, 434-36 (2d Cir. 2007); *Southwest Airlines, Inc.*, 880 F.2d at 816. In addition, Chief Justice John Roberts recently noted in a denial of *certiorari* order that there are "fundamental concerns surrounding the use of [*cy pres*] remedies in class action litigation, including when, if ever, such relief should be

considered; how to assess its fairness as a general matter; whether new entities may be established as part of such relief; if not, how existing entities should be selected; what the respective roles of the judge and parties are in shaping a *cy pres* remedy; how closely the goal of any enlisted organization must correspond to the interests of the class; and so on." *Marek v. Lane*, 134 S.Ct. 8, 9 (2013). This rising trend in American jurisprudence of increasing scrutiny directed towards *cy pres* distributions in the class action context also weighs against the propriety of a *cy pres* distribution of $380 million in remaining funds.

D. This Court May Order a Second Claims Period

Should this Court find that a *pro rata* distribution, alone, is not a proper use of the remaining settlement funds, the Court has the equitable discretion to order a re-opening of the claims period. *See Dahingo v. Royal Caribbean Cruises, Ltd.*, 312 F. Supp. 2d 440, 446-47 (S.D.N.Y. 2004) (late-filed claims may be permitted based on equitable considerations). The Keepseagle class, as defined in Section II.E of the Settlement Agreement, includes class members who did not file a claim with the Claims Administrator, or, for any number of reasons, did not file a successful claim. Allowing a re-opening of the claims period would better approximate the goals of the Equal Credit Opportunity Act by ensuring that the settlement funds remain with the class members as opposed to a *cy pres* distribution to third parties.

The case law regarding allowance of late-filed claims, a very similar issue, is instructive in this matter. The primary factor courts consider when determining whether it is appropriate to accept late-filed claims by class members is whether such actions will affect the defendant. *Dahingo*, 312 F.Supp.2d at 445-46. Courts will not permit late-filed where the consequence is increasing the obligation of the defendant. *See Grace v. City of Detroit*, 145 F.R.D. 413, 417-18 (E.D. Mich. 1992). For instance, in cases where settlement agreements contain reversion

clauses, courts are reluctant to allow late-filed claims because it would result in a material change in the agreement that is detrimental to the defendant. *Id*. However, "where a change in the allocation of a settlement fund affects only the distribution among class members and not the obligations of the defendant, courts will exercise their equitable powers" to allow late-filed claims. *Dahingo*, 312 F. Supp. 2d at 446.

Here, re-opening the claims process will not be detrimental to USDA because it will not change its obligations under the Settlement Agreement.[8] The Settlement Agreement does not provide USDA with a right to reversion of the unclaimed settlement funds, nor does USDA have any reasonable expectation of a reversion of the remaining funds. *See supra*, Argument, Sec. I.A. Re-opening the claims period will only affect how the remaining settlement funds will be distributed amongst the class members – not the amount owed by USDA – which has already disgorged the funds. Thus, USDA will not be prejudiced by re-opening the claims period.

Re-opening the claims period is also superior to a *cy pres* distribution of the remaining funds because it ensures that the settlement funds remain with the class of individuals whose claims for damages resulting from discriminatory lending practices serve as the basis for this case. This would better approximate the goals of the Equal Credit Opportunity Act than distributing $380 million to third parties that were not the subject to discriminatory lending practices.

Re-opening the claims period for additional claimants is feasible. Although re-opening the claims period would require some expense, there would be no additional detriment to USDA.

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[8] Section IX.A, ¶ 11 of the Settlement Agreement directs USDA to issue Debt Relief Awards directly from the Secretary and not the Designated Fund. To ensure that a second claims period would not change USDA's financial obligations under the Settlement Agreement, Proposed Addendum B does not provide for Debt Relief Awards during the second claims period.

Under Proposed Addendum B, the Keepseagles propose that in the event the Claims Administrator's expenses exceed the remaining balance in the fund set aside for implementation of the Settlement Agreement, that the unclaimed settlement funds may be used to cover additional implementation costs. With $380 million in remaining settlement funds, this would provide a sufficient source of funding for implementation costs and have no impact on USDA's obligations under the Settlement Agreement.

Should this Court order a re-opening of the claims period, then it should also order that the settlement funds that remain after the second claims period be distributed to all successful claimants from both claims periods on a *pro rata* basis. This would ensure that the settlement funds remain with the class and, thus, best approximate the goals of the Equal Credit Opportunity Act.

II. THIS COURT HAS THE AUTHORITY TO MODIFY THE SETTLEMENT AGREEMENT

Rule 60(b) (5) and (6) of the Federal Rules of Civil Procedure provides this Court with authority to modify the terms of the Settlement Agreement.[9] Rule 60(b) grants district courts with authority to relieve parties from final judgments, orders, or proceedings when certain narrow circumstances exist. In this instance, $380 million in settlement funds remain. Without an amendment of the Settlement Agreement, this would be largest *cy pres* distribution in the history of American jurisprudence. This would lead to an unwarranted payout for charitable organizations at an unprecedented scale. Much less substantial abuses of the *cy pres* doctrine has

[9] The Keepseagles acknowledge that under the terms of the Settlement Agreement, modification is permitted "only with the written agreement of the Parties and with the approval of the District Court." *See* Settlement Agreement, Section XIV. However, this provision of the Settlement Agreement does not supersede this Court's authority under Rule 60(b). The plain text of the rule states that Rule 60(b) may relieve a party from a "final judgment" or "order," which includes the Settlement Agreement.

been widely criticized by a number of courts. *See supra*, Argument, Sec. I.C. To prevent this case from becoming the most glaring example of the class-action *cy pres* doctrine run amok, this Court has the authority to intervene under Rule 60(b) and ensure that the funds are equitably distributed.

A. The Keepseagles' Motion to Modify May Be Granted Under Rule 60(b)(5)

Under Rule 60(b)(5), this Court may relieve a party from a final judgment or order if "applying it prospectively is no longer equitable." Courts have applied this provision to the modification of class action settlement agreements after the entry of final judgment. *See Rufo v. Inmates of Suffolk County Jail*, 502 U.S. 367, 384-85 (1992); *New York State Ass'n for Retarded Children, Inc. v. Cary*, 706 F.2d 956, 969 (2d Cir. 2012); *Philadelphia Welfare Rights Organization v. Shapp*, 602 F.2d. 1114, 1120-21 (3d Cir. 1979).

This Court has held that modifications of final judgments or orders under Rule 60(b)(5) are appropriate if the movant can demonstrate "a significant change either in 'factual conditions or in law' that warrants revision" of the order. *In re Black Farmers Discrmination. Litig.*, 29 F.Supp.3d 1, 3 (D.D.C. 2014). This Court has also stated that reliance on Rule 60(b)(5) may be warranted when "the facts have changed and the changed factual conditions 'make compliance substantially more onerous,' [or] when an agreement 'proves to be unworkable because of unforeseen obstacles,' or when enforcement of the agreement without modification 'would be detrimental to the public interest.'" *In re Black Farmers Discrimination Litig.*, 950 F. Supp. 2d 196, 200 (D.D.C. 2013)(citation omitted).

The most instructive case on post-settlement modifications under Rule 60(b)(5) is *Rufo*, which calls for flexibility in administering the rule. Under *Rufo*, a party's first obligation is to demonstrate a significant change in "factual conditions or in law." 502 U.S. at 384.

Modification of a consent decree (or settlement agreement) can be warranted if changed factual conditions make compliance more onerous. *Id.* Furthermore, modification is appropriate if a settlement agreement is unworkable due to unforeseen obstacles. *Id*. (citing *New York States Ass'n for Retarded Children*, 706 F.2d at 969). The Supreme Court rejected any contention that Rule 60(b)(5) can be applied only in instances where a factual change is *both* "unforeseen and unforeseeable." *Id*. at 385.

Here, the wholly unexpected $380 million in unclaimed settlement funds is clearly a significant change in the factual circumstances of the case. None of the parties to the case anticipated that there would be unclaimed funds of this magnitude. *See* Dkt. No. 646, at 4, n.2 (noting that Class Counsel expected at least 10,000 Native American farmers and ranchers would file claims, instead of the less than 4500 that filed timely claims). This dramatic shortfall in timely claimants is clearly an unforeseen obstacle in achieving the ends of justice in this case.

Furthermore, the current *cy pres* provisions are onerous and unworkable given these changed facts regarding the size of the remaining funds. As Class Counsel has already noted, a sudden infusion of $380 million into the small universe of Native American agriculture-oriented charitable organizations that pre-dated the Settlement Agreement would fill their coffers with funds well beyond their commensurate needs. *See* Dkt. No. 646, at 8 (noting that the top-ten grant-making organizations in the United States contribute less than $41 million annually to organizations serving Native Americans, in general, and speculating that only a small fraction of those funds are likely to have funded programs related to agriculture). The relatively small number and typical operating budgets of charities serving Native American agriculture make the present *cy pres* provisions unworkable, inefficient, and onerous. Furthermore, both Class Counsel and USDA agree on this point. Dkt. No. 646, at 4-8; Dkt. No. 649, at 3.

Having established that (1) the remaining settlement funds is a significant change in facts that resulted from an unforeseen obstacle; and (2) the changed circumstances make the present Settlement Agreement onerous and unworkable, this Court must now turn to the remedy. In *Rufo*, the Supreme Court held that the district court's focus "should be on whether the proposed modification is tailored to resolve the problems created by the change in circumstances." 502 U.S. at 393.

How this Court should modify the Settlement Agreement is where Class Counsel and the Keepseagles diverge. Were this litigation premised on how to best disburse $380 million to charitable organizations serving the needs of Native American agriculture, then Class Counsel's proposal may have merit. However, this Equal Credit Opportunity Act class action was bought seeking compensation for the victims of USDA's discriminatory lending practices. The Keepseagles' proposed modification – distributing the remaining funds to class members – is much more clearly tailored to resolving the harms underlying this action.

B. The Keepseagles' Motion to Modify May Be Granted Under Rule 60(b)(6)

Rule 60(b)(6) of the Federal Rules of Civil Procedure permits relief from judgments or orders for "any other reason that justifies relief." This "catch-all" provision provides for relief from the judgments and orders when exceptional or "extraordinary" circumstances warrant. *Austin v. Donahoe*, 2014 WL 6779132, at *3 (D.D.C. 2014). Without question, the remaining $380 million in settlement funds – more than 55% of the settlement funds and the largest in the history of American class actions – constitutes exceptional circumstances.

Rule 60(b)(6) permits district courts to engage in judicial balancing of the need for finality and the need to do justice in the individual case. *See, e.g.*, *Ackerman v. United States*, 340 U.S. 193, 199 (1950). The Keepseagles understand that prior D.C. Circuit rulings have

approved *cy pres* disbursements to charitable organizations. *See, e.g., In re LivingSocial Marketing and Sales Practice Litigation*, 298 F.R.D. 1, 13 (D.D.C. 2013). However, this must be done in accordance with the principles of existing *cy pres* jurisprudence, which only allows *cy pres* distributions if it is not feasible to distribute the remaining funds to class members. Under the present *cy pres* provisions, the total sum of the remaining $380 million would ultimately be paid to charitable organizations, with a direct prohibition on direct benefits for class members. However, it was the individual class members, not the charitable organizations, that suffered the financial hardships and humiliation of discriminatory lending practices. The ends of justice demand that this money should be distributed to the class members instead of providing a historic and unwarranted payout for charitable organizations. As such, Rule 60(b)(6) also allows this Court to grant the Keepseagles' Motion to Modify the Settlement Agreement.

C. The Keepseagles' Motion to Modify Is Timely

The Keepseagles' Motion to Modify is timely. Rule 60(c)(1) requires that any motion filed under Rule 60(b)(5) or (6) be filed within a "reasonable time." District courts make case-by-case determinations regarding whether a Rule 60(b) motion was filed within a "reasonable time." *More v. Lew*, 34 F. Supp. 3d 23, 29 (D.D.C. 2014) (citing *Salazar v. District of Columbia*, 633 F.3d 1110, 1118 & n.5 (D.C. Cir. 2011)). Neither the Keepseagles nor this Court was notified that a majority of the settlement funds remained unclaimed until August 30, 2013, and Class Counsel did not present its Motion to Modify until September 24, 2014. *See* Dkt. Nos. 646, 709. On December 2, 2014, this Court directed Mrs. Keepseagle to retain independent counsel if she desired. Undersigned counsel was retained shortly thereafter, entering a notice of appearance on February 9, 2015. *See* Dkt. No. 755. The Keepseagles entered two procedural motions on March 13, 2015, and notified this Court that they intended to submit a motion to

modify the Settlement Agreement under Rule 60(b). *See* Dkt. Nos. 759, 760. This Court ruled on these preliminary motions and ordered the Keepseagles submit their motion seeking relief from the judgment. Dkt. No. 771.

All of these facts demonstrate that the Keepseagles' Motion to Modify is timely and filed in compliance with this Court's orders. Moreover, no prejudice will inure to any party. Class Counsel and USDA, notwithstanding any opposition to the Keepseagles' Motion to Modify, have no basis to assert that any party will be prejudiced. Accordingly, the Keepseagles' motion is timely.

CONCLUSION

For the foregoing reasons, the Keepseagles' Motion to Modify the Settlement Agreement to provide for a *pro rata* distribution of the remaining settlement fund to the successful claimants, which is contained in Proposed Addendum A, should be granted. In the alternative, this Court should adopt the Keepseagles' alternate proposal for modification of the Settlement Agreement pursuant to the terms of Proposed Addendum B.

Respectfully submitted this 19th day of May, 2015.

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