APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 16-5189

MARILYN KEEPSEAGLE, *et al.*,

Appellees

v.

SONNY PERDUE,

Appellee

DONIVON CRAIG TINGLE, SILENT CLASS MEMBER,

Appellant

Consolidated with 16-5190

Argued January 13, 2017 Decided May 16, 2017

Appeals from the United States District Court
for the District of Columbia
(No. 1:99-cv-03119)

William A. Sherman argued the cause for appellant. With him on the briefs were *Reed D. Rubinstein* and *James W. Morrison*.

D. Craig Tingle filed the briefs for appellant.

Joseph M. Sellers argued the cause for appellees Porter Holder; CLARYCA Mandan, on behalf of themselves and the plaintiff class. With him on the brief were *Christine E. Webber*, *Paul M. Smith*, *Jessica R. Amunson*, and *Amir H. Ali*.

Benjamin C. Mizer, Principal Deputy Assistant Attorney General, U.S. Department of Justice, and *Charles W. Scarborough* and *Carleen M. Zubrzycki*, Attorneys, were on the brief for federal appellee.

Marshall L. Matz and *John G. Dillard* were on the brief for plaintiff-appellee Marilyn Keepseagle. *Phillip L. Fraas*, *David J. Frantz*, *Stewart D. Fried*, and *Sarah M. Vogel* entered appearances.

Before: BROWN and WILKINS, *Circuit Judges*, and EDWARDS, *Senior Circuit Judge*.

Opinion for the Court filed by *Senior Circuit Judge* EDWARDS.

Concurring opinion filed by *Circuit Judge* WILKINS. Dissenting opinion filed by *Circuit Judge* BROWN.

EDWARDS, *Senior Circuit Judge*: In 1999, a class of Native American farmers and ranchers filed suit against the United States Department of Agriculture ("the Department"), contending that the Department discriminated against Native American applicants in their claims under farm credit and benefits programs. After more than a decade of contentious litigation, the District Court approved a Settlement Agreement ("the Agreement") in 2011 that created a $680 million compensation fund for the benefit of class members who participated in a non-judicial, administrative claims process.

At the conclusion of the claims process, $380 million still remained in the compensation fund. Under the

terms of the Agreement, any leftover funds were to be distributed to *cy-près* beneficiaries – *i.e.*, non-profit organizations that provided services to Native American farmers. Because the parties had not anticipated such a large remainder, they entered into negotiations to modify the Agreement. The parties' initial attempt at modification was unsuccessful. However, a second effort resulted in an addendum to the Agreement that is the subject of the dispute in this case. Under the terms of the addendum, the *cy-près* process would be reformed to distribute funds more efficiently and supplemental payments would be awarded to class members who had successfully recovered from the compensation fund.

The District Court approved the addendum to the Agreement, concluding that it was "fair, reasonable, and adequate" under Federal Rule of Civil Procedure 23(e)(2) ("Rule 23"). The District Court found that the addendum reflected a compromise between two competing goals: paying out more funds to claimants who successfully recovered through the claims process, and maintaining the *cy-près* distributions for the benefit of the class as a whole.

Two class members – class representative Keith Mandan ("Appellant Mandan") and class member Donivon Craig Tingle ("Appellant Tingle") – appealed to this court, raising four principal arguments. *First*, Appellant Mandan claims that under the Agreement's modification clause, the proposed addendum cannot be approved without his assent. *Second*, Appellant Mandan disputes that the addendum is "fair, reasonable, and adequate." *Third*, Appellant Mandan asserts that the *cy-près* provision of the Agreement is unconstitutional, in violation of the Appropriations Clause, and unlawful under the Judgment Fund Act. *Fourth*, Appellant Tingle alleges that class counsel and class

representatives breached their fiduciary duties to class members. Both Appellants, who successfully obtained payments through the claims process, contend that all of the $380 million still remaining in the compensation fund should be distributed *pro rata* to the successful claimants.

We affirm the judgment of the District Court. We reject the claim that the modification clause requires Appellant Mandan's assent before the Agreement can be amended. We further hold that the District Court did not abuse its discretion in finding that the addendum was fair, reasonable, and adequate. We decline to reach the merits of Appellant Mandan's legal challenges to the *cy-près* provision because these claims were *explicitly waived* before the District Court. The claims were also forfeited because Appellant Mandan never raised any legal challenges to the *cy-près* provision before the District Court despite clear opportunities to do so. And there are no good reasons at this late date in the litigation for this court to entertain Appellant Mandan's legal challenges to the *cy-près* provisions in the first instance. Finally, we find no merit in Appellant Tingle's breach of fiduciary duty claims.

I. BACKGROUND

In 1999, over two hundred Native American farmers and ranchers filed a class-action suit against the United States Department of Agriculture, contending that the Department discriminated against Native American applicants in their claims for credit and benefits under various government programs. Plaintiffs alleged violations of the Equal Credit Opportunity Act, the Administrative Procedure Act, and Title VI of the Civil Rights Act of 1964. In 2001, the District

Court found that the plaintiffs had satisfied the requirements of Rule 23(b)(2), and certified a class of

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

Keepseagle v. Veneman, No. 99-cv-3119, 2001 WL 34676944, at *6 (D.D.C. Dec. 12, 2001). The District Court declined to decide whether certification under Rule 23(b)(3), for monetary relief, was appropriate at the time. *Id.* at *14. However, the court noted that it "maintain[ed] the power to revisit the definition of the class at any point." *Id.*

A. *The Initial Settlement*

After more than a decade of extensive discovery practice, the parties reached agreement in 2010 and drew up a settlement agreement for the District Court's approval. *See* Motion for Preliminary Approval of Settlement, *Keepseagle v. Vilsack*, No. 99-cv-3119 (D.D.C. Oct. 22, 2010), ECF No. 571. The proposed Settlement Agreement provided both programmatic and monetary relief. *See* Settlement Agreement §§ IX, XII, Judicial Appendix ("JA") 405–23, 424–29. The programmatic relief included establishing the Council for Native American Farming and Ranching, requiring the Department to collect and evaluate data pertaining to its Farm Loan Program, and enhancing services and education for Native American farmers and ranchers. *Id.* § XII, JA 424–29. To provide monetary relief, the Agreement sought certification of a Rule

23(b)(3) opt-out class. *Id.* § IV(A), JA 400. The Agreement established a $680 million compensation fund financed by the Department of the Treasury. *Id.* § VII(F), JA 403. Under an administrative claims process set forth in the Settlement Agreement, claimants would receive either $50,000, if they had "substantial evidence" of certain circumstances required in the Agreement, or up to $250,000, if they met a higher evidentiary standard. *See id.* § II(SS), (VV), JA 398 (setting out the dollar amounts of awards); § IX, JA 405–23 (outlining the non-judicial claims process). Claimants were given 180 days from the effective date of the agreement to submit their claims. *Id.* § II(B), JA 392. Some funds were also allocated to the named class representatives as "service awards." *Id.* § XV(C), JA 433–34.

In the event that the $680 million compensation fund was not exhausted during the claims process, the Agreement contained a *cy-près* provision. *Id.* § IX(F)(7), JA 422–23. That provision created a "Cy Pres Fund," defined as "a fund administered by Class Counsel designated to hold any leftover funds" from the claims process. *Id.* § II(J), JA 393. The Cy Pres Fund was to be distributed in equal shares to *cy-près* beneficiaries designated by class counsel. *Id.* § IX(F)(7), JA 422–23. The Agreement limited *cy-près* beneficiaries to "any non-profit organization, other than a law firm, legal services entity, or educational institution" that served Native American farmers. *Id.* § II(I), JA 393.

The Agreement also contained a provision permitting modification of the settlement, but "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." *Id.* §

XXII, JA 438. The Agreement defined "Parties" as "the Plaintiffs and the Secretary," and "Plaintiffs" as "the individual plaintiffs named in *Keepseagle v. Vilsack*, . . . the members of the Class, and the Class Representatives." *Id.* § II(DD), (EE), JA 396.

The District Court received thirty-five letters objecting to the proposed Agreement. *See* Notice of Filing Objections and Opt Out Requests, *Keepseagle v. Vilsack*, No. 99-cv-3119 (D.D.C. Mar. 18, 2011), ECF No. 585. Neither Appellant Mandan nor Appellant Tingle submitted objections. Three letters related to the Cy Pres Fund: one objector offered up organizations he had started as potential *cy-près* beneficiaries, *id.* at Exhibit 2; another recommended that *cy-près* awards be used for outreach to farmers, *id.* at Exhibit 33; a third cautioned that it was "simply wrong" to distribute remaining funds to *cy-près* beneficiaries "as determined by class counsel," *id.* at Exhibit 32.

Class counsel responded to the objections in a motion seeking final approval of the settlement, and the District Court held a fairness hearing on April 28, 2011. The District Court found that the terms of the settlement were fair and reasonable and adequate pursuant to Rule 23(e), and approved the Agreement. *See* Order, *Keepseagle v. Vilsack*, No. 99-cv-3119 (D.D.C. Apr. 28, 2011), JA 589–91. The District Court entered final judgment dismissing the case, but retained continuing jurisdiction for five years for the limited purposes of overseeing compliance with the programmatic relief and the administrative claims process. *See* Final Order and Judgment, *Keepseagle v. Vilsack*, No. 99-cv-3119 (D.D.C. Apr. 29, 2011), JA 592–93. No party appealed from the District Court's final order.

The administrative claims process proved to be less than satisfactory. Far fewer people made claims than anticipated. At the conclusion of the claims process, only $300 million of the $680 million settlement fund had been paid out. Although the Agreement originally directed the remaining $380 million to be distributed to *cy-près* beneficiaries, class counsel informed the District Court that such a large *cy-près* disbursement was "not contemplate[d]" by the original Agreement and would be "impractical." Status Report at 4–5, *Keepseagle v. Vilsack*, No. 99-cv-3119 (D.D.C. Aug. 30, 2013), ECF No. 646. The parties agreed to confer over possible solutions.

B. *The First Modification Attempt*

In September 2014, class counsel filed an unopposed motion to modify the Settlement Agreement, citing Rule 60(b)(5) and the modification clause of the Agreement. *See* Plaintiffs' Unopposed Motion to Modify the Settlement Agreement Cy Pres Provisions, *Keepseagle v. Vilsack*, No. 99-cv-3119 (D.D.C. Sept. 24, 2014), ECF No. 709. Counsel proposed to act promptly to distribute $38 million of the leftover funds to non-profit organizations, and to use the remaining $342 million to create a trust that would distribute the latter sum, over 20 years, to non-profit organizations serving Native Americans. While class counsel and the Department agreed to the proposed modification, one of the class representatives – Marilyn Keepseagle – did not, and filed her own motion to modify the settlement. *See* Marilyn and George Keepseagle's Motion to Modify the Settlement Agreement, *Keepseagle v. Vilsack*, No. 99-cv-3119 (D.D.C. May 19, 2015), ECF No. 779. Keepseagle proposed a *pro rata* distribution of the leftover funds to the successful claimants – a supplemental payment of around $100,000 each. The District

Court held a hearing at which many class members testified in support of Keepseagle's proposal. Neither Appellant Tingle nor Appellant Mandan testified.

The District Court denied both class counsel and Keepseagle's motions to modify. *See Keepseagle v. Vilsack*, 118 F. Supp. 3d 98 (D.D.C. 2015), JA 1098–1167 ("First Modification Decision"). The court found that neither class counsel nor Keepseagle had met the requirements of Rule 60, in part because, in the court's view, the larger-than-expected remaining funds did not constitute "truly changed circumstances" warranting relief. *Id.* at 55–62, JA 1152–59. The court also found that class counsel's motion did not have the "agreement of the Parties," as required by the modification clause, because Keepseagle, a class representative, opposed the motion. *Id.* at 67–68, JA 1164–65. The District Court implored all parties to continue negotiating. *Id.* at 69, JA 1166.

C. *The Second Modification Attempt*

Class counsel, the Department, and Keepseagle reached a compromise in December 2015, and submitted a motion to amend the Agreement pursuant to the modification clause. *See* Plaintiffs' Unopposed Motion to Modify the Settlement Agreement Cy Pres Provisions, *Keepseagle v. Vilsack*, No. 99-cv-3119 (D.D.C. Dec. 14, 2015), ECF No. 824. The proposed compromise provided for an additional $18,500 payment to each of the 3,605 successful claimants and a corresponding payment to the Internal Revenue Service on each claimant's behalf. *See* Memorandum Opinion at 8, *Keepseagle v. Vilsack*, No. 99-cv-3119 (D.D.C. Apr. 20, 2016), JA 1454 ("Second Modification Decision"). Then, $38 million would be promptly distributed to non-profit organizations proposed by class counsel and approved by the District Court. After the named

representatives received additional "service awards" for their work in negotiations, the remaining funds (estimated to be $265 million) would be placed in a trust, to be paid out over twenty years, as contemplated by class counsel's previous motion.

The District Court directed class counsel to provide notice of the proposed modification to the class, reviewed written comments from class members, and held a hearing on February 4, 2016, at which many class members testified. Appellant Tingle wrote in opposition, claiming that the trustees of the proposed trust would enrich themselves instead of benefiting class members. *See* Letter from D. Craig Tingle (Jan. 4, 2016), JA 1201–02. Appellant Mandan also filed a letter with the District Court, arguing that the remaining funds should all go to successful claimants, who are "easily identifiable," and not to "third parties who have not suffered any injury and who have no claims against the United States." *See* Comments of Class Representative Keith Mandan (Jan. 20, 2016), JA 1197–99. Appellant Mandan also filed a separate submission arguing that the District Court could not approve the proposed modification without his assent, because the modification clause requires the "agreement of the Parties." Points and Authorities of Law at 1, *Keepseagle v. Vilsack*, No. 99-cv-3119 (D.D.C. Feb. 11, 2016), ECF No. 851. Appellant Mandan's objection cited the District Court's decision rejecting the first proposed modification and claimed that his objection presented "the same issue" as Keepseagle's objection. *Id.* at 3.

Counsel for Appellant Mandan, and Appellant Mandan himself, testified in support of fully distributing the remaining funds to successful claimants. *See* Tr. of Mot. Hr'g Proceedings at 68–74, 175, JA 1270–

76, 1377. At the February 4, 2016 hearing, District Court Judge Sullivan, who had been presiding over the case, asked Appellant Mandan's counsel about a separate lawsuit that he had filed on behalf of a different class member, William Smallwood. *Id.* at 21, JA 1223. Judge Sullivan noted that three days earlier, on February 1, 2016, Appellant Mandan's counsel had filed a complaint in the District Court challenging the legality of the proposed *cy-près* distribution. *Id.* Judge Sullivan stated that the complaint was initially marked as "related" to the *Keepseagle* proceeding, but had been reassigned to Judge Walton because the complaint challenged the initial settlement agreement, the merits of which were resolved in 2011. *Id.* at 21–22, JA 1223–24.

Even though the matter had not been raised in the *Keepseagle* proceeding, Judge Sullivan responsibly invited counsel to offer his views on whether Smallwood's challenges to the legality of the *cy-près* provision should be heard by the District Court in the *Keepseagle* proceeding as a related case. *Id.* at 22, JA 1224. Counsel declined this invitation, stating that he was "completely satisfied with where the case sits at this particular point." *Id.* at 70, JA 1272. Thereafter, counsel never raised, briefed, or otherwise pressed any legal challenges to the *cy-près* provision in the *Keepseagle* proceeding, and the District Court did not further address it. In the separate case, Judge Walton granted the Department's motion to dismiss for lack of standing on January 30, 2017. *Smallwood v. Yates*, No. 16-cv-161, 2017 WL 398334 (D.D.C. Jan. 30, 2017). An appeal was filed in that case on April 12, 2017.

The District Court approved the proposed compromise modification on April 20, 2016. *See* Second Modification Decision, JA 1447–75. The District Court

declined to construe the original Agreement's modification clause "to require unanimous consent of the class representatives." *Id.* at 19, JA 1465. The District Court also determined that the proposed modification was "fair, reasonable, and adequate," as required by Rule 23(e)(2). *Id.* at 19–27, JA 1465–73. Appellants Tingle and Mandan now appeal the District Court's grant of class counsel's motion to modify the settlement.

II. ANALYSIS

A. Standard of Review

We review the District Court's interpretation of the terms of the Settlement Agreement *de novo*. *See Nix v. Billington*, 448 F.3d 411, 414 (D.C. Cir. 2006). And we review the District Court's approval of the modification to the Settlement Agreement for abuse of discretion. *See Pigford v. Johanns*, 416 F.3d 12, 16 (D.C. Cir. 2005).

B. The District Court's Interpretation of the Modification Provision

The District Court correctly interpreted the modification provision in the Agreement because a "reasonable person in the position of the parties" would not have thought that the provision requires unanimous approval by class representatives. *See Richardson v. Edwards*, 127 F.3d 97, 101 (D.C. Cir. 1997). The modification provision states that the Agreement "may be modified only with the written agreement of the Parties." Settlement Agreement § XXII, JA 438. We find that "written agreement of the Parties" cannot reasonably be construed, as Appellant Mandan urges, to require the *unanimous* assent of class representatives.

"We interpret a settlement agreement under contract law." *Gonzalez v. Dep't of Labor*, 609 F.3d 451, 457 (D.C. Cir. 2010) (citing *T Street Dev., LLC v. Dereje & Dereje*, 586 F.3d 6, 11 (D.C. Cir. 2009)). We must first "determine whether the disputed language is unambiguous." *Armenian Assembly of Am., Inc. v. Cafesjian*, 758 F.3d 265, 278 (D.C. Cir. 2014). If we find that the relevant clause is subject to more than one reasonable interpretation, we consider "what a reasonable person in the position of the parties would have thought the disputed language meant." *Id.* (quoting *Tillery v. D.C. Contract Appeals Bd.*, 912 A.2d 1169, 1176 (D.C. 2006)).

We acknowledge that "the written agreement of the Parties" is ambiguous because "agreement" is reasonably susceptible to more than one construction. Nevertheless, in the context of this class action settlement, we do not believe that agreement means *unanimous* agreement, because such an interpretive gloss would yield absurd results. *See United States v. Winstar Corp.*, 518 U.S. 839, 907 (1996) (avoiding interpretation of contract that "would be absurd"); *Am. First Inv. Corp. v. Goland*, 925 F.2d 1518, 1521 (D.C. Cir. 1991) (avoiding interpretation that would "produce an absurd result").

The Agreement defines "Parties" as "the Plaintiffs and the Secretary," and defines "the Plaintiffs" as "the individual plaintiffs named in *Keepseagle v. Vilsack*, . . . the members of the Class, and the Class Representatives." Settlement Agreement § II(DD), (EE), JA 396. The terms of the Agreement allow modification upon the written agreement of the individual plaintiffs named in *Keepseagle v. Vilsack*, the members of the Class, the Class Representatives, and the Secretary. *Id.* § XXII, JA 438. If "agreement" were

construed to require unanimous assent, the Settlement Agreement could be modified only if every single class member – upwards of thousands of people – assented. There is no good reason to believe that the parties intended to impose such a stringent barrier to modification. The modification provision would become meaningless, which would make little sense. *See Beal Mortg., Inc. v. FDIC*, 132 F.3d 85, 88 (D.C. Cir. 1998) (describing "the cardinal interpretive principle that we read a contract to give meaning to all of its provisions" (citations and internal quotation marks omitted)). In order to avoid such an absurd construction and to give effect to the parties' intentions, we reject the argument that "the agreement of the Parties" was meant to require unanimity.

Furthermore, a central interpretive goal "in construing a contract is to give effect to the mutual intentions of the parties." *NRM Corp. v. Hercules, Inc.*, 758 F.2d 676, 681 (D.C. Cir. 1985). To effectuate the parties' intent, we must consider the "context." *Id.* at 681 n.10. Here, it is noteworthy that the Agreement resolved a class action. "Class actions are a form of representative litigation. One or more class representatives litigate on behalf of many absent class members, and those class members are bound by the outcome of the representative's litigation." WILLIAM B. RUBENSTEIN, NEWBERG ON CLASS ACTIONS § 1:1 (5th ed. 2016). Various class action procedures protect class members from being taken advantage of by class representatives, including the requirement that class representatives "fairly and adequately protect the interests of the class," FED. R. CIV. P. 23(a)(4), and the requirement that a court ensure that any settlement is "fair, reasonable, and adequate," FED. R. CIV. P. 23(e)(2).

These structural protections for class members diminish the need for unanimous decisionmaking in a class action. Requiring unanimity among class members, apart from being virtually impossible to achieve in a case of this sort, also invites gamesmanship by giving any class member the power to "hold out" and threaten to veto to seek a payoff. *See* Elizabeth Chamblee Burch, *Group Consensus, Individual Consent*, 79 GEO. WASH. L. REV. 506, 508 (2011) ("The holdout problem arises when defendants condition settlement on nearly unanimous consent . . . . [A hold out] threatens to derail the entire deal unless those claimants receive a disproportionately high payoff."). With these considerations in mind, we conclude that the modification provision, read in context – an Agreement resolving a representational proceeding – permits amendment of the Agreement without unanimous assent.

Finally, we can discern no good reason why the parties would require unanimity to *modify* the Settlement Agreement, when unanimity was not required to *approve* the settlement in the first instance. As we noted in *Thomas v. Albright*, 139 F.3d 227, 232 (D.C. Cir. 1998), "a settlement can be fair even though a significant portion of the class and some of the named plaintiffs object to it." Indeed, in this case, the District Court approved the original settlement over the objections of thirty five class members. We doubt that the parties intended for modification to be more difficult than approval. Thus, the District Court correctly found that

> [j]ust as it could not reasonably have been the intent of the parties to construe the modification provision to require the consent of all class members to any modification, it also

> could not reasonably have been the intent of the parties to construe the modification provision to require the unanimous consent of the class representatives.

Second Modification Decision at 19, JA 1465.

We are not persuaded by Appellant Mandan's one argument to the contrary. He claims that the District Court was bound by its decision rejecting the first modification proposal because it was the "law of the case." Br. for Mandan at 48. This claim is simply mistaken. The District Court's initial decision was not binding because it was not embodied in any final judgment. "When there are multiple appeals taken in the course of a single piece of litigation, law-of-the-case doctrine holds that decisions rendered on the first appeal should not be revisited on later trips to the appellate court." *LaShawn A. v. Barry*, 87 F.3d 1389, 1393 (D.C. Cir. 1996) (citation and internal quotation marks omitted). However, the law-of-the-case doctrine "does not apply to interlocutory orders . . . for they can always be reconsidered and modified by a district court prior to entry of a final judgment." *First Union Nat'l Bank v. Pictet Overseas Tr. Corp*., 477 F.3d 616, 620 (8th Cir. 2007) (citation omitted).

C. *The District Court's Fairness Determination*

The District Court reasonably determined that the modified agreement was fair, reasonable, and adequate. Appellants have not met their "burden on appeal of making a 'clear showing' that an abuse of discretion has occurred" in the District Court's approval of the modified settlement. *Pigford v. Glickman*, 206 F.3d 1212, 1217 (D.C. Cir. 2000) (quoting *Moore v. Nat'l Ass'n of Sec. Dealers*, 762 F.2d 1093, 1107 (D.C. Cir. 1985)).

The record reveals that the District Court conducted an impressive and thorough review of the proposed addendum. The District Court "directed class counsel to provide the class with notice of the proposed Addendum, allowed class members to submit written comments to the Court, and scheduled a hearing . . . to hear argument from counsel and oral statements from class members." Second Modification Decision at 11, JA 1457. During an eight-hour hearing in the ceremonial courtroom, which was used to accommodate the large number of class members present, the District Court heard testimony from over thirty class members. *See* JA 1203–1437 (transcript of hearing).

Following the hearing, the District Court concluded that the proposed addendum was a fair compromise. The addendum reformed the *cy-près* distribution provisions, which all parties agreed were unworkable. The initial Settlement Agreement required an equal distribution of funds to a restricted class of non-profit organizations approved by class counsel; the addendum eliminated the equal distribution requirement and expanded the class of non-profits eligible for the funds. *See* Plaintiffs' Unopposed Motion to Modify the Settlement Agreement Cy Pres Provisions at 6–8, *Keepseagle v. Vilsack*, No. 99-cv-3119 (D.D.C. Dec. 14, 2015), ECF No. 824. Most notably, the addendum placed the bulk of the *cy-près* funds in a trust overseen by trustees with "substantial knowledge of agricultural issues, the needs of Native American farmers and ranchers, or other substantive knowledge relevant to accomplishing the Trust's Mission." Trust Agreement § 13(f)(1), *Keepseagle v. Vilsack*, No. 99-cv-3119 (D.D.C. Dec. 14, 2015), ECF No. 824-3. And, rather than distributing all of the funds at once, the addendum established a process for the trust to be paid out over 20 years. *Id.* § 10. As the District Court

explained, these reforms, which offered greater flexibility and expertise in the management and distribution of funds, were necessary because of the "unexpectedly large amount of remaining funds." Second Modification Decision at 25–26, JA 1471–72.

The addendum also reflected a compromise regarding additional payments to class members who recovered in the first claims process. The two contending groups – one favoring distribution of all remaining funds to successful claimants, and one favoring no additional distribution – conceded to a middle ground: a limited distribution to successful claimants. The compromise provided for an additional $18,500 payment to successful claimants as well as a direct payment to the Internal Revenue Service to cover tax liability. As the District Court recognized, "[w]hile the amount of the payment is not as high as the class representatives and many class members would prefer, it is an additional payment that was not contemplated in the existing Agreement." *Id.* at 25, JA 1471.

As we have previously noted, "[a] claim that individual dissenters are entitled to more money is not, by itself, sufficient to reject the overall fairness of the settlement; . . . a settlement necessitates compromise." *Thomas*, 139 F.3d at 232. We have no good reason to second-guess the District Court's conclusion that, in providing both supplemental payments and reforming the *cy-près* process, the negotiated compromise fairly balances the parties' competing positions.

Appellant Mandan raises several procedural challenges to the District Court's fairness determination. He argues that the District Court erred by failing to recognize that it had the "equitable power" to distribute all of the funds marked for *cy-près* beneficiaries to the prevailing claimants. Br. for Mandan at 32–35. In

a related argument, Appellant Mandan claims that the District Court should not have approved the modified settlement "without first determining whether the prevailing claimants were readily identifiable and whether further distributions to them were economically viable." *Id.* at 35 (capitalization altered). Appellant Mandan's final procedural challenge is that the District Court did not provide a "reasoned explanation" for its approval of the modified settlement. *Id.* at 42. We find no merit in these claims.

First, the District Court was correct in finding that it was not authorized "to fashion a different resolution such as ordering that the remaining funds be paid to prevailing claimants," Second Modification Decision at 24, JA 1470, because the District Court's jurisdiction was limited to accepting or rejecting the proposed settlement agreement that was before it. "[D]istrict courts enjoy no free-ranging 'ancillary' jurisdiction to enforce consent decrees, but are instead constrained by the terms of the decree and related order." *Pigford v. Veneman*, 292 F.3d 918, 924 (D.C. Cir. 2002). In a previous decision in this case, we said: "The District Court's jurisdiction is drawn exceedingly narrowly . . . ." *Keepseagle v. Vilsack*, 815 F.3d 28, 36 (D.C. Cir. 2016). We recognized that the Agreement grants ongoing jurisdiction to the District Court only for specifically delineated, and narrow, circumstances, none of which apply here. Settlement Agreement § XIII, JA 429–30. District courts do not have freewheeling jurisdiction to modify settlements. "Who would sign a consent decree if district courts had free-ranging interpretive or enforcement authority untethered from the decree's negotiated terms?" *Pigford*, 292 F.3d at 925.

Second, the District Court did not err in approving the addendum without determining whether the

prevailing claimants were identifiable and whether paying out funds to them was feasible. As discussed above, this argument misconceives the role and authority of the District Court, which is very limited. Appellant Mandan's argument also misreads our case law. There is no precedent in this circuit to support the assertion that parties cannot negotiate a settlement providing for *cy-près* distribution where prevailing claimants are identifiable and dispersal of funds is feasible. In support of this claim, Appellant Mandan cites *Democratic Central Committee of the District of Columbia v. Washington Metropolitan Area Transit Commission*, 84 F.3d 451 (D.C. Cir. 1996). However, the decision in that case did not limit *cy-près* awards to situations where prevailing claimants are not easily identifiable. Rather, the decision merely stated a definition of *cy-près* – "permit[ting] such funds to be distributed to the 'next best' class when the plaintiffs cannot be compensated individually" – that "some courts have applied." *Id.* at 455. It does not limit *cy-près* distributions to certain prescribed circumstances.

The cases from other circuits cited by Appellant Mandan are inapposite. *See* Br. for Mandan at 38. Appellant Mandan primarily points to decisions in which district courts *sua sponte* made *cy-près* awards, not cases (like the one here) in which the parties' negotiated settlement agreement included a *cy-près* provision. Indeed, in a decision from the Third Circuit, the court explained that "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." *In re Baby Prods. Antitrust Litig.*, 708 F.3d 163, 172 (3d Cir. 2013). That decision distinguished cases in which the parties "agreed to" the *cy-près* distribution from cases in which trial courts

imposed a *cy-près* distribution "over the objections of the parties." *Id.* at 172 n.7. This case falls in the former category because the Settlement Agreement includes a *cy-près* provision. *See* Settlement Agreement § IX(F)(7), JA 422–23.

The other cases cited by Appellant Mandan involving decisions from our sister circuits are also plainly distinguishable. *See*, *e.g.*, *In re Lupron Mktg. & Sales Practices Litig.*, 677 F.3d 21 (1st Cir. 2012) (agreement gave district court full discretion to select recipients of *cy-près* fund); *Nachshin v. AOL, LLC*, 663 F.3d 1034 (9th Cir. 2011) (*cy-près* beneficiaries were completely unrelated to the objectives of the class action); *In re Katrina Canal Breaches Litig.*, 628 F.3d 185 (5th Cir. 2010) (agreement provided for appointment of special master to dispose of any remaining funds without any guidelines). All of these cases involved situations that are very different from this case.

Finally, Appellant Mandan's argument that the District Court failed to give a reasoned explanation for its acceptance of the addendum is belied by the record. As discussed above, throughout the extensive settlement process that was supervised by the District Court, as well as in its opinion disposing of this case, the court showed admirable patience, fairness, and good judgment in weighing the competing proposals for modification. *See* Second Modification Decision at 25–27, JA 1471–73 (explaining the court's reasoning). We not only do not reverse the District Court, we applaud its good efforts in bringing this case to conclusion.

D. *The Waived and Forfeited Claims Relating to the Appropriations Clause and the Judgment Fund Act*

The lawsuit in this case was filed in 1999. The parties reached settlement in 2010. The District Court approved the settlement in 2011. No appeal was taken by any party. And at no time during this twelve-year period did any party challenge the legality of the *cy-près* provision in the Agreement.

The initial Agreement contained a *cy-près* clause providing that "the Claims Administrator shall direct any leftovers funds to the Cy Pres Fund." Settlement Agreement § IX(F)(7), JA 422–23. Neither Appellant Mandan nor any other interested party objected to this provision. Quite the contrary, Appellant Mandan accepted the settlement and received a payout from the administrative claims process. *See* Comments of Class Representative Keith Mandan at 1 (Jan. 20, 2016), JA 1197 ("Keith Mandan, is both a Class Representative and a Prevailing Claimant . . . .").

Appellant Mandan (and other parties) had a second opportunity to challenge the legality of the *cy-près* provision in the Agreement during the first proceedings to modify the Agreement. At this point in the litigation, the claims process had concluded, leaving $380 million remaining to be directed to the *cy-près* fund. The issue regarding the distribution of funds pursuant to the *cy-près* provision was front-and-center at this stage of the proceedings before the District Court. Yet, neither Appellant Mandan nor any other interested party raised any objection to the legality of the *cy-près* provision in the Agreement.

Appellant Mandan's third opportunity to challenge the legality of the *cy-près* provision came when the

District Court considered the second proposal to modify the Agreement. Appellant Mandan contested the *cy-près* distribution, but he did not contest the legality of the *cy-près* provision. *See* Comments of Class Representative Keith Mandan at 3 (Jan. 20, 2016), JA 1199. Appellant Mandan's counsel clearly knew during the second modification proceeding that he could raise any constitutional or legal challenges to the *cy-près* provision. He knew because *he explicitly declined to pursue any such challenges*.

In February 2016, a few days before the District Court's fairness hearing concerning the second proposed modification, counsel for Appellant Mandan filed a new, separate lawsuit, on behalf of a different class member, challenging the legality of the *cy-près* provision. *See* Complaint, *Smallwood v. Lynch*, No. 16-cv-161 (D.D.C. Feb. 1, 2016), ECF No. 1. In that complaint, counsel for Appellant Mandan marked the case as related to the *Keepseagle* case, but the District Court determined that it did "not appear to be related within the meaning of our local rules." Tr. of Mot. Hr'g Proceedings at 22, JA 1224. However, at the February 2016 fairness hearing, Judge Sullivan, who was presiding over the *Keepseagle* proceeding, offered counsel for Appellant Mandan the opportunity to present his challenges to the legality of the *cy-près* provision. The District Court told counsel that the case "was reassigned to one of my colleagues, Judge Walton. He and I have not discussed this, and maybe I should have heard from counsel first as to whether the Court should keep the case and resolve it itself or not. I'm interested in your views about that." *Id.* But Appellant Mandan's counsel refused Judge Sullivan's invitation to raise the issue and explicitly declined to present his argument to the District Court, stating that "we are completely satisfied with where the case sits at this

particular point." *Id.* at 70, JA 1272. Judge Sullivan then told counsel that the case is "before Judge Walton, and so you can make your arguments to him." *Id.* at 71, JA 1273.

Counsel for Appellant Mandan thereafter argued before Judge Walton in the separate case challenging the legality of the *cy-près* provision. Judge Walton dismissed the complaint for lack of standing on January 30, 2017. *See Smallwood v. Yates*, No. 16-cv-161, 2017 WL 398334 (D.D.C. Jan. 30, 2017). The matter was never raised again in conjunction with the *Keepseagle* case until Appellant Mandan filed his appeal with this court. Judge Sullivan never had occasion to address the issue because Appellant Mandan's counsel *explicitly* declined to pursue the matter in this case. This procedural history, which Appellant Mandan did not mention in his briefs to this court, reveals that he knowingly declined to raise his claims with the District Court in the matter now under review in this court.

Appellant Mandan now advances, for the first time in this case, constitutional and statutory challenges to the Settlement Agreement's *cy-près* provision. He argues that the provision violates the Appropriations Clause, U.S. CONST. art. I, § 9, cl. 7, because it proposes to expend Treasury funds without a specific appropriation by Congress. Br. for Mandan at 21–32. And he contends that the provision violates the Judgment Fund Act, 31 U.S.C. § 1304(a)(3), because *cy-près* beneficiaries are "uninjured non-parties" who would not be able to recover judgments against the United States. Br. for Mandan at 26. In Appellant Mandan's view, these claims are inexorably tied together and they are presented together in his brief. *See*, *e.g.*, *id.* at 19. As noted above, these claims were

never raised with the District Court. We therefore decline to review the claims because they were waived or forfeited.

In *Greenlaw v. United States*, 554 U.S. 237, 243–44 (2008), the Supreme Court explained why appellate courts should be loath to address issues that were not raised with the district court in the first instance:

> In our adversary system, in both civil and criminal cases, in the first instance and on appeal, we follow the principle of party presentation. That is, we rely on the parties to frame the issues for decision and assign to courts the role of neutral arbiter of matters the parties present. To the extent courts have approved departures from the party presentation principle in criminal cases, the justification has usually been to protect a *pro se* litigant's rights. See *Castro v. United States*, 540 U.S. 375, 381–383 (2003). But as a general rule, "[o]ur adversary system is designed around the premise that the parties know what is best for them, and are responsible for advancing the facts and arguments entitling them to relief." *Id*., at 386. (SCALIA, J., concurring in part and concurring in judgment). As cogently explained:
>
> "[Courts] do not, or should not, sally forth each day looking for wrongs to right. We wait for cases to come to us, and when they do we normally decide only questions presented by the parties. Counsel almost always know a great deal more about their cases than we do . . . ." *United States v. Samuels*, 808 F.2d 1298, 1301 (C.A.8 1987) (R. Arnold, J., concurring in denial of reh'g en banc).

554 U.S. at 243–44.

"Although jurists often use the words interchangeably," *Kontrick v. Ryan*, 540 U.S. 443, 458 n.13 (2004), *waiver* is the "intentional relinquishment or abandonment of a known right," *United States v. Olano*, 507 U.S. 725, 733 (1993) (citation and internal quotation marks omitted), and "forfeiture is the failure to make the timely assertion of a right." *Id*. In this case, Appellant Mandan waived his claims and he forfeited any right that he might have had to raise the matters on appeal. Application of the waiver doctrine, alone, is sufficient to dispose of these issues.

Appellant Mandan explicitly waived his claims when his counsel told the District Court Judge that he did not wish to pursue any challenges to the *cy-près* provision. He did this after Judge Sullivan invited him to raise whatever concerns he had. "[A]fter expressing [a] clear and accurate understanding of the . . . issue, [Counsel] deliberately steered the District Court away from the question . . . . In short, [Counsel] . . . chose, in no uncertain terms, to refrain from interposing [any] 'challenge' [to the *cy-près* provision]." *Wood v. Milyard*, 132 S. Ct. 1826, 1835 (2012). In these circumstances, Appellant Mandan's claims regarding the legality of the *cy-près* provision were waived and they cannot be raised on appeal.

On the record before us, there is no doubt that Appellant Mandan *waived* his claims regarding the legality of the *cy-près* provision. Even if we take a different tack and consider whether Appellant Mandan forfeited (rather than waived) his claims, the result is the same. The case law is clear that he is foreclosed from belatedly challenging the legality of the *cy-près* provision for the first time on appeal because he never

raised his claims with the District Court in the first instance.

"It is well settled that issues and legal theories not asserted at the District Court level ordinarily will not be heard on appeal." *District of Columbia v. Air Florida, Inc.*, 750 F.2d 1077, 1084 (D.C. Cir. 1984). We have explained the reasons for this general principle: "Enormous confusion and interminable delay would result if counsel were permitted to appeal upon points not presented to the court below. Almost every case would in effect be tried twice under any such practice. While the rule may work hardship in individual cases, it is necessary that its integrity be preserved." *Id.* at 1084–85 (quoting *Johnston v. Reily*, 160 F.2d 249, 250 (D.C. Cir. 1947)).

Thus, under well-established law, a party forfeits a claim by failing to raise it below when the party "knew, or should have known" that the claim could be raised. *Laffey v. Nw. Airlines, Inc.*, 740 F.2d 1071, 1091 (D.C. Cir. 1984). In this case, Appellant Mandan knew, or should have known, that his constitutional and statutory claims could have been raised in 2011, when the District Court approved the Settlement Agreement containing the *cy-près* provision. Appellant Mandan does not dispute this.

By 2015, after the claims process concluded and the remaining funds were slated for *cy-près* distribution, there can be no doubt that Appellant Mandan was once again on notice of the opportunity to put forward his constitutional and statutory theories. As detailed above, during the February 2016 fairness hearing, Judge Sullivan offered counsel for Appellant Mandan the opportunity to present his legal challenges to the *cy-près* provision. Counsel expressly declined and

thereafter never pursued the claims with the District Court in this case.

In light of this record, it would be extraordinary for an appellate court to address these claims for the first time on appeal. As the Supreme Court said in *Greenlaw*, in "our adversary system . . . we follow the principle of party presentation. . . . [Appellate courts] should not, sally forth each day looking for wrongs to right. We wait for cases to come to us, and when they do we normally decide only questions presented by the parties." 554 U.S. at 243–44 (citation and internal quotation marks omitted).

It does not matter that Appellant Mandan's belated claims involve constitutional issues. The doctrines of waiver and forfeiture apply to constitutional objections. *See Curtis Pub. Co. v. Butts*, 388 U.S. 130, 143 (1967) ("[I]t is . . . clear that even constitutional objections may be waived by a failure to raise them at a proper time . . . ." (citing *Michel v. Louisiana*, 350 U.S. 91, 99 (1955)); *see also Eli Lilly & Co. v. Home Ins. Co.*, 794 F.2d 710, 717 (D.C. Cir. 1986) (finding that "appellants waived their constitutional claims by failing to raise them on their initial appeal to this court"); *Yakus v. United States*, 321 U.S. 414, 444 (1944); ("No procedural principle is more familiar to this Court than that a constitutional right may be forfeited in criminal as well as civil cases by the failure to make timely assertion of the right before a tribunal having jurisdiction to determine it.").

We would not only pervert the adversary process by addressing Appellant Mandan's newly raised claims, we would also be required to engage in unduly weighty and cumbersome decision-making without a decent record from the District Court. *See Air Florida, Inc.*, 750 F.2d at 1085 (pointing out the "serious problems"

that would be encountered if the court entertained complex issues on appeal "without prior consideration by the trial court").

Appellant Mandan's theories are novel and they rest on his view of legislative history that is beyond the record of this case. *See* Br. for Mandan at 26–29 (citing, *e.g.*, *Proposal to Expedite the Payment of Judgments against the United States*: *Hearing Before the Subcomm. of the Comm. on Appropriations*, 84th Cong. 883 (1956)). While some of Appellees' briefs touch on the merits of some of Appellant Mandan's claims, *see*, *e.g.*, Br. for Appellee Vilsack at 19–24, we lack the robust record necessary to properly evaluate the substance of these arguments. Indeed, as far as we can discern, Appellant Mandan's arguments have never been addressed by any federal appellate court, and they have been explored only tangentially in a single law review article. *See* Paul F. Figley, *The Judgment Fund: America's Deepest Pocket and its Susceptibility to Executive Branch Misuse*, 18 U. PA. J. CONST. L. 145, 194–97 (2015).

Even giving Appellant Mandan the benefit of the doubt, we certainly cannot say that "the proper resolution [of his claims] is beyond any doubt." *Singleton v. Wulff*, 428 U.S. 106, 121 (1976). If anything, his arguments regarding the Judgment Fund Act appear to be misguided. *See* Availability of Judgment Fund in Cases Not Involving a Money Judgment Claim, 13 Op. O.L.C. 98, 103 (1989) (focusing on the "underlying cause" leading to settlement, and not on the identity of the parties receiving settlement funds (citation omitted)).

Indeed, it is noteworthy that Appellant Mandan's arguments regarding the Judgment Fund Act stem principally from his policy concerns over the use of *cy-près* provisions, and not from any clear statutory

mandate. *See*, *e.g.*, Br. for Mandan at 28–29 ("*Cy pres* is a troublesome concept generally."). "This being so, injustice [is] more likely to be caused than avoided" if this court were to address the issues in the first instance before they have been properly raised and tried in the District Court. *Singleton*, 428 U.S. at 121.

Given the novelty and complexity of Appellant Mandan's claims, the materials that he asks us to review, and the policy arguments that he raises, it would be entirely inappropriate for this court to address the merits of his claims without the benefit of a full record, including a decision from the District Court in the first instance. As then-Judge Scalia explained,

> [t]he premise of our adversarial system is that appellate courts do not sit as self-directed boards of legal inquiry and research, but essentially as arbiters of legal questions presented and argued by the parties before them. . . . Failure to enforce this requirement will ultimately deprive us in substantial measure of that assistance of counsel which the system assumes—a deficiency that we can perhaps supply by other means, but not without altering the character of our institution.

Carducci v. Regan, 714 F.2d 171, 177 (D.C. Cir. 1983); *see also Hormel v. Helvering*, 312 U.S. 552, 556 (1941) ("[It] is essential . . . that parties may have the opportunity to offer all the evidence they believe relevant to the issues which the trial tribunal is alone competent to decide . . . ."). Departing from our established "principle of party presentation" would deprive the parties of a full opportunity to present their arguments and would place this court in the

unsuitable position of deciding novel legal issues in the first instance. This is not our role.

We understand that, in "exceptional circumstances," an appellate court may exercise discretion to address an issue that is subject to *forfeiture*. *Roosevelt v. E.I. Du Pont de Nemours & Co.*, 958 F.2d 416, 419 n.5 (D.C. Cir. 1992). The Supreme Court said as much in *Singleton*, 428 U.S. at 121. But the Court made it clear that this is the exception, not the rule, and it should be limited to situations "as where the proper resolution is beyond any doubt," or where "injustice might otherwise result." *Id*. (citation omitted). The record in this case does not come close to establishing exceptional circumstances that would militate in favor of this court considering, in the first instance, Appellant's legal challenges to the *cy-près* provision.

The truth here is that the "exceptional circumstances" exception to forfeiture is of little moment in this case because, before the District Court, Appellant Mandan *explicitly waived* the claims that he now seeks to raise with this court. And contrary to what the dissent implies, there is no authority to support a suggestion that Appellant Mandan's Appropriations Clause claims raise an Article III concern or call into question the jurisdiction of this court. The simple point here is that Appellant Mandan's Appropriations Clause claims were waived before the District Court and that is the end of the matter.

E. *Appellant Tingle's Arguments*

Appellant Tingle's arguments overlap significantly with Appellant Mandan's, and are unpersuasive for the reasons discussed above. However, Appellant Tingle raises two unique arguments: first, that "[c]lass counsel had a conflict of interest and breached its

fiduciary duty," Br. for Tingle at 30; and, second, that "[t]he class representatives breached their fiduciary duties," *id.* at 35. We reject both claims because Appellant Tingle offers no evidence in support of his allegations. He asserts that "divergent interests emerged within the class" such that class counsel "was simultaneously representing clients with conflicting interests." *Id.* at 31. He does not explain what those divergent interests were and how they resulted in breaches of fiduciary duties. Class representatives often must weigh competing claims in weighing the best interests of the class as a whole. This, without more, does not give evidence of a breach of fiduciary duties. Likewise, Appellant Tingle alleges that trusteeships overseeing the proposed trust were promised to certain class representatives "to incentivize a change in position." *Id.* at 36. Nothing in the record supports this accusation. Lastly, Appellant Tingle takes aim at the "incentive fees" (or service awards) provided by the Agreement for the class representatives' work in negotiating the Agreement and its modification. *Id.* at 37. However, "incentive awards have often been used to compensate a class representative," *Cobell v. Jewell*, 802 F.3d 12, 25 (D.C. Cir. 2015), and nothing in the record of this case suggests that the service awards served any nefarious purposes.

III. CONCLUSION

For the reasons set forth above, we affirm the judgment of the District Court.

WILKINS, *Circuit Judge*, concurring: I join the majority opinion in its entirety. I write separately to emphasize a few brief points.

The dissent spins a tale of corruption and conspiracy, in which the plaintiffs and the Government were complicit in bilking the nation's taxpayers to pay a political ransom. While this narrative may have been advanced in news accounts and scholarly articles, most of those statements and opinions have not been validated by the solemnity of the oath and "testing in the crucible of cross-examination," *Crawford v. Washington*, 541 U.S. 36, 61 (2004); nor are they found in the record, and it is the record upon which our decision must be based. Fed. R. App. P. 10(a).

What the record shows is that the District Court expressly found that the settlement "was attained following an extensive investigation of the facts and the law . . . [and] resulted from vigorous arms'-length negotiations, which were undertaken in good faith." Order, *Keepseagle v. Vilsack*, No. 99-cv-3119 (D.D.C. Apr. 28, 2011), JA 589-91. Unless we find clear error in the District Court's conclusion – and even the dissent does not claim to do so – that finding stands.

It is true that more than half of the settlement fund was not distributed through the claims process and is now poised to be distributed via the *cy-près* provision. But this was an unanticipated state of affairs, not an intended result. *See Keepseagle v. Vilsack*, 118 F. Supp. 3d 98, 102 (D.D.C. 2015) ("[N]o one anticipated such a large amount of excess funds."). As represented to the District Court, "the parties contemplated that no more than several million dollars in settlement funds would be unclaimed," based on an expectation that "over ten thousand class members would likely file . . . claims, and that most of those claims would be

successful." J.A. 718 & n.2. Instead of 10,000 claims, only 5,191 were received. J.A. 596.

The reason for this discrepancy is "unclear," *Keepseagle*, 118 F. Supp. 3d at 102, but the difference in the number of actual, versus estimated, claimants correlates closely with the amount of surplus settlement funds. The parties have offered several possible explanations, including that the deaths of eligible claimants (the claims process began 30 years after the first year covered by the settlement) left heirs with insufficient information to complete claim forms or that, perhaps, there were "simply fewer people with claims than Plaintiffs originally argued." *Id.* at 108 n.3. In addition to falling short of the expected number of claims, a large number of submitted claims were unsuccessful. Most strikingly, out of 146 Track B claimants, only fourteen were successful. *Compare* J.A. 596, *with* J.A. 716.

Regardless of the cause of this "monumental" failure in the claims process, *Keepseagle*, 118 F. Supp. 3d at 102, there is no occasion for considering the newly-resurrected claim that the *cy-près* provision – a feature of the Settlement Agreement since it was first unveiled seven years ago – violates the Appropriations Clause. The dissent apparently concedes that Appellant Mandan waived this claim before the District Court when he was asked whether he wished to pursue it. Yet, the dissent relies exclusively on cases involving *forfeiture* – not waiver – to argue that "exceptional circumstances" permit an appellate court to nevertheless consider the claim. The Supreme Court, though, has been clear: "Waiver is different from forfeiture." *United States v. Olano*, 507 U.S. 725, 733 (1993). While "[m]ere forfeiture . . . does not

extinguish an error," waiver may. *Id.* (internal quotation marks omitted).

Of course, some errors cannot be waived – subject matter jurisdiction chief among them. In an attempt to shoehorn this case into that category, the dissent hints that a federal court may be without jurisdiction to approve a settlement agreement that requires the Executive to make an unappropriated expenditure. No authority is cited for that proposition and the legal signposts in this area instead point in the opposite direction. *See Local No. 93 v. City of Cleveland*, 478 U.S. 501, 523 (1986) ("[T]he mere *existence* of an *unexercised* power to modify the obligations contained in a consent decree does not alter the fact that those obligations were created by agreement of the parties rather than imposed by the court."); *cf.* Authority of the United States to Enter Settlements Limiting the Future Exercise of Executive Branch Discretion, 23 Op. O.L.C. 126, 128 (1999) ("We do not believe . . . that Article III bars federal courts from entering consent decrees that limit executive branch discretion whenever such decrees purport to provide broader relief than a court could have awarded pursuant to an ordinary injunction.").

Even if the "extraordinary circumstances" standard cited in the dissent were applicable, its terms are not met. The dissent claims that the "proper resolution is not in doubt" because we are presented with a "fully briefed, purely legal question." *See* Dis. Op. at 16-17. But, of course, the proper resolution of even fully briefed, purely legal questions can be doubtful. Circuit splits happen.

Moreover, the question presented here is not purely legal. Congress has appropriated funds for the Executive to settle "claims . . . for defense of imminent

litigation or suits against the United States . . . [which] shall be settled and paid in a manner similar to judgments in like causes." 28 U.S.C. § 2414. Concededly, the nonprofit organizations that will receive *cy-près* distributions out of leftover settlement funds may not possess any claims against the United States. But there is no denying that the Settlement Agreement did in fact settle claims against the United States; namely, the claims of the members of the class. The question of whether this settlement was supported by a congressional appropriation turns on whether providing for *cy-près* distribution of unclaimed settlement funds is "similar to judgments in like causes." *Id.* That requires answering at least two questions that are not "purely legal": What are "like causes" to this one? And how are judgments in such causes settled and paid? The record offers no answers to these questions, nor should it, because Appellant Mandan told the District Court that this issue was off the table. Not only has there been no fact-finding on these questions, there has been no adversarial presentation; these questions are not "fully briefed." Nor can we say, without a proper factual record, that the proper resolution of the merits question is, in fact, "beyond any doubt," *Singleton v. Wulff*, 428 U.S. 106, 121 (1976).

These conclusions are not the product of "schadenfreude" or disrespect for the importance of separation of powers. Rather, they are mandated by a commitment to the proper role of the appellate court and the system of adversarial presentation. When properly presented in a case or controversy, courts vindicate the constitutional scheme of separation of powers. Otherwise, allegations of trespass onto Congress' constitutional curtilage must be addressed by Congress – not the courts – and Congress has ample weaponry with which to defend its turf.

BROWN, *Circuit Judge*, dissenting: $380,000,000 is, to use the late Senator Dirksen's wry phrase, "real money." That is what has been left on the table for private disbursement in this case. Perhaps one day, I will possess my colleagues' schadenfreude toward the Executive Branch raiding hundreds-of-millions of taxpayer dollars out of the Treasury, putting them into a slush fund disguised as a settlement, and then doling the money out to whatever constituency the Executive wants bankrolled. But, that day is *not* today.

The Constitution's Appropriations Clause ensures the People's elected representatives "hold the purse." *See* THE FEDERALIST NO. 58, p. 357 (Clinton Rossiter ed., 1961) (J. Madison). "No money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law." U.S. CONST. art. I, § 9, cl. 7. The Executive Branch may wish to favor certain interests on the taxpayer's dime. It may wish to use the Judicial Branch's enforcement of settlement agreements to avoid asking Congress for an appropriation. But the Constitution's design gives the People's elected representatives a means to thwart these "overgrown prerogatives." *See* THE FEDERALIST NO. 58, p. 357 (Clinton Rossiter ed., 1961) (J. Madison). By limiting the "judicial Power" to resolving "Cases" and "Controversies," U.S. CONST. art. III §§ 1–2, the Constitution ensures the Judicial Branch has "no influence over . . . the purse." *See* THE FEDERALIST NO. 78, p. 464 (Clinton Rossiter ed., 1961) (A. Hamilton). Expenditures toward the fulfilment of public policy are integral to policymaking itself, and policymaking is left to the legislature. *See id.* at 464, 467. In short, congressional control over the People's purse is a structural limit on both the Executive and Judicial Branches. *See Clinton v. City of New York*, 524 U.S. 417, 451 (1998) (Kennedy, J., concurring) ("Money is

the instrument of policy and policy affects the lives of citizens. The individual loses liberty in a real sense if that instrument is not subject to traditional constitutional constraints.").

But this case exposes a peril to the public fisc with which the drafters never reckoned: *cy pres*. Originating from the law of trusts and estates, *cy pres* refers to a court's power to reform the terms of a trust or gift that is otherwise impossible to effectuate. Rather than revert the unclaimed money or gift back to the defendant, a court may distribute the unclaimed sum for a purpose "as near as possible" to the objectives underlying the trust or gift. *See generally* Martin H. Redish, Peter Julian & Samantha Zyontz, *Cy Pres Relief and the Pathologies of the Modern Class Action: A Normative and Empirical Analysis*, 62 FLA. L. REV. 617, 624 (2010) [hereinafter Redish]. *Cy pres* seeped its way into class actions after a 1972 article proposed that courts distribute unclaimed settlement dollars to whatever non-parties fulfill the litigation's "purpose." *See id.* at 631–32. *Cy pres* took the judiciary "to the utmost verge of the law" even before it was applied to class actions. *See Jackson v. Phillips*, 96 Mass. 539, 574 (1867) (quoting the English jurist Lord Kenyon). Now in "class action litigation," its mere presence raises "fundamental concerns" about the nature of judicial power. *See*, *e.g.*, *Marek v. Lane*, 134 S. Ct. 8, 8–9 (2013) (statement of Roberts, C.J., respecting denial of certiorari).

Here, Congress only appropriated money for the Executive Branch to pay settled claims against the United States via the Judgment Fund Act. *See* 31 U.S.C. § 1304(a) (Judgment Fund Act); *see also* 28 U.S.C. § 2414 (authorizing the Justice Department to pay settled litigation claims using funds appropriated

via the Judgment Fund Act). Those claims have already been paid—every Native-American farmer who filed a viable claim of discrimination by the United States has been compensated. And yet, *more than half* of the Judgment Fund appropriation for this case—*more than $380,000,000*—remains. The Executive Branch and class counsel have devised a *cy pres* distribution scheme to send these taxpayer dollars to "nonprofits" and "charities" with no claims against the United States. But, the Executive Branch and class counsel tell us not to worry. According to their distribution scheme, these unidentified non-parties fulfill the "purpose" of having "provided agricultural, business assistance, or advocacy services to Native American farmers," JA 393 (Original Settlement Agreement, II.I.), and are thus entitled to receive the remaining taxpayer money. Congress, however, never appropriated money for this expense.

Unfortunately, no party before the Court really cares what Congress authorized. *Cy Pres* gives the Executive Branch a win-win: By agreeing to a settlement amount that vastly overstated the claimants' monetary damages, the Executive can use a large dollar amount to reap the political benefits of photo-op compassion towards a discriminated minority group. At the same time, the Executive's agreement to an overstated damages sum ensures enough money is left in the fund to pay favored third parties after the claimants are compensated. *See*, *e.g.*, Paul F. Figley, *The Judgment Fund: America's Deepest Pocket and Its Susceptibility to Executive Branch Misuse*, 18 U. PA. J. CONST. L. 145, 200 (2015) (explaining that the *Keepseagle* settlement was part of an Obama administration strategy "to neutralize the argument that the government favors black farmers over . . . Native American[s] . . . and to court key

constituencies") [hereinafter Figley, *The Judgment Fund*]. Class counsel gets a piece of the action too: By agreeing to *cy pres* distributions, the size of the settlement fund is inflated. The larger the settlement's size, the larger class counsel's fee award—regardless of how much of the settlement actually pays injured parties (better known as class counsel's *clients*). Even Appellant's protest of the *cy pres* scheme is not entirely altruistic. He wants the remaining money distributed to already-compensated class members, not returned to the U.S. Treasury. In short, everyone apparently presumed a bloodied-shirt party could be thrown at the taxpayer's expense. Why risk Congress being a killjoy? *See generally* Sharon LaFraniere, *U.S. Opens Spigot After Farmers Claim Discrimination*, N.Y. TIMES, (Apr. 25, 2013), http://www.nytimes.com/2013/04/26/us/farm-loan-bias-claims-often-unsupported-cost-us-millions.html [hereinafter LaFraniere, *Spigot*].

Nevertheless, the Constitution's limitations on judicial power remain, even if "the parties" before a court "cannot be expected to protect" them. *See Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 851 (1986). Judicial restraint becomes judicial abdication when the parties keep making mistakes and we keep them from being corrected. *Cf.* 33 G.K. CHESTERTON, *The Blunders of Our Parties*, *in* THE COLLECTED WORKS OF G.K. CHESTERTON 312, 312–16 (1990). Like the Constitution's other structural features, "[n]either Congress nor the Executive can agree to waive" the Appropriations Clause. *See Freytag v. Comm'r*, 501 U.S. 868, 880 (1991). When the Constitution's "structural principle[s]" limiting judicial power are "implicated in a given case, . . . notions of consent and waiver cannot be dispositive." *Schor*, 478 U.S. at 850–51.

If the Government wishes to achieve certain purposes by expending taxpayer money to people with no monetary claims against the United States, a legislative appropriation is required. No such appropriation exists here. Neither authorizing nor policing a *cy pres* distribution scheme in a class action settlement with the United States is consistent with constitutional limitations. Because the money was appropriated to pay claims, and those claims have been compensated, the more than $380,000,000 that remains here should be returned to the American People. But, *cy pres* permits the judiciary to take more than half the taxpayer money Congress authorized to pay claims in this case and appropriate the money for something else. This is not justice. It is not even law. I respectfully dissent.

I.
The Constitutionality of Cy Pres Distributions Is Before Us

The majority averts its gaze from the Constitution by invoking the waiver doctrine. But waiver is not proper simply because "[q]uestions may occur which we would gladly avoid." *Cf. Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 404 (1821) (per Marshall, C.J.). Waiver is a proper conclusion when we follow the doctrine's guideposts. If those guideposts tell us "we cannot avoid" a difficult question, then we must "exercise our best judgment, and conscientiously . . . perform our duty." *See id.* Here, the waiver doctrine provides no security blanket keeping us from *cy pres*'s constitutional problems.

There are two primary reasons why waiver is inapposite here: (1) this case presents "exceptional circumstances;" and (2) this case raises structural,

jurisdictional limitations on judicial power that cannot be waived.

Some background information is essential to grasping this case's exceptional circumstances and the structural constitutional limitations it raises:

The *Keepseagle* case is one of several class actions attempting to capitalize on successful litigation under the Equal Credit Opportunity Act ("ECOA"), where African-American farmers were treated unfairly in loan programs, crop payments, and disaster payments run by the U.S. Department of Agriculture. Congress facilitated these cases by amending ECOA's statute of limitations. *See* Stephen Carpenter, *The USDA Discrimination Cases:* Pigford, In re Black Farmers, Keepseagle, Garcia, *and* Love, 17 DRAKE J. AGRIC. L. 1, 15–16 (2012) (discussing the statute of limitations problem in *Pigford I*). The class litigation involving African-American farmers was incredibly successful—leading to, most notably, Congress appropriating a settlement payout of $2,000,000,000 for resolving the *Pigford II* litigation. *See*, *e.g.*, Figley, *The Judgment Fund*, 18 U. PA. J. CONST. L. at 189–92 (detailing the African-American farmers' class litigation).

The success of the African-American class litigation owed more to politics than law. *See*, *e.g.*, *id.* at 193 ("President Bill Clinton and President Barack Obama favored the farmers' claims, and their political appointees actively supported the settlements over the objections of some career officials."); LaFraniere, *Spigot* (quoting Congressman Steve King, who explained Congress's appropriation by saying, "[n]ever underestimate the fear of being called a racist"). *But*, no matter how political the Executive's litigation strategy may have been, "the [settlement] payments were made in a manner that respected the Judgment Fund."

Figley, *The Judgment Fund*, 18 U. PA. J. CONST. L. at 193. Congress "allowed" the African-American class litigation when it expanded ECOA's statute of limitations, and it "appropriated money . . . with full knowledge of the terms of the agreement" settling *Pigford II*. *See id; see also* Todd David Peterson, *Protecting The Appropriations Power: Why Congress Should Care About Settlements at the Department Of Justice*, 2009 B.Y. U. L. REV. 327, 362 (2009) ("Rather than leaping over or subverting the limitations imposed by Congress's control over the circumstances in which money judgments may be obtained against the United States, the Department of Justice went to Congress for the appropriate authority before it settled the case ")

Keepseagle, however, has all of these political motivations but none of the respect for Congress's control over the purse. The Executive Branch neither sought a specific appropriation for this case, nor did Congress *ever* authorize the Executive to send taxpayer money appropriated for settled lawsuits to non-injured third-parties with no claims against the United States. *See* Figley, *The Judgment Fund*, 18 U. PA. J. CONST. L. at 194–97. Why, you may ask, would the Executive Branch avoid asking Congress for a specific appropriation for *Keepseagle*? Congress, in writing a multi-billion dollar appropriation for *Pigford II*, demonstrated its willingness to pay large sums to resolve discrimination claims against the United States. But, the difference with *Keepeseagle* is the purpose of the settlement. This settlement—as the more than $380,000,000 remaining for *cy pres* distribution now confirms—went far beyond compensating injured Native-American farmers; it sought to ensure

favored "nonprofits" and "charities" were flushed with cash.[1]

As the majority acknowledges, when the *Keepseagle* class was first certified in 2001, it was certified *only* for injunctive relief—the district court deferred the question whether the class deserved monetary relief. *See Keepseagle v. Veneman*, 1:99-cv-03119, 2001 WL 34676944, at *14 (D.D.C. Dec. 12, 2001). Yet the Judgment Fund does not apply to injunctive relief. Without class certification for monetary relief, a large settlement payout was impossible; the *Keepseagle* plaintiffs would have to individually litigate any claims for monetary damages. But the claims of the class claimants were quite facile, and individually-litigated cases are seldom as lucrative as class actions.

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[1] Even outside its *cy pres* provisions, the *Keepseagle* settlement is generally less focused on compensating class members—and more focused on enacting agriculture policy and compensating class counsel—than the *Pigford* consent decree. *See* Carpenter, *The USDA Discrimination Cases*, 17 DRAKE J. AGRIC. L. at 25–26 & n.261 (explaining that, unlike *Pigford*, the *Keepseagle* settlement provides for "programmatic relief" that will: create a Federal Advisory Committee called the Council for Native American Farming and Ranching; create sub-offices within the Agriculture Department on Indian Reservations; provide for a review of loan making within the Agriculture Department in consultation with class counsel; require the Agriculture Department to collect data regarding Native American farming loans to identify disparities; and create an Ombudsman that will address concerns of "socially disadvantaged" farmers and raise them with the Council. Class counsel also received a bigger benefit in *Keepseagle*—the settlement allows class counsel's fee award to come from a percentage of the common settlement fund, rather than a flat fee credited against the class award). These arrangements gave class counsel an incentive to inflate the class claimants' damages, while incentivizing the Executive Branch to drop its strong legal arguments and settle in favor of enacting agriculture policy.

See LaFraniere, *Spigot* ("Depositions had revealed many of the individual farmers' complaints to be shaky. And federal judges had already scornfully rejected the methodology of the plaintiffs' expert, a former Agriculture Department official named Patrick O'Brien, in the [female farmers'] case."); *see also Garcia v. Veneman*, 224 F.R.D. 8, 16 (D.D.C. 2004) ("The history of the *Pigford* (black farmers) class action litigation amply demonstrates that . . . it is the questions affecting only individual members that predominate."); Barry Sullivan & Amy Kobelski Trueblood, *Rule 23(f): A Note on Law and Discretion in the Courts of Appeals*, 246 F.R.D. 277, 279 (2008) ("Where a class is not certified, the plaintiffs (and their lawyer) may not have the will—or the resources—to continue with a litigation that [may] yield only a small recovery and little basis for an award of substantial attorneys' fees.").

For most of this lawsuit's history, the Executive Branch was not helping class counsel out of this little conundrum. From the lawsuit's filing in 1999 to December 2009, the Executive Branch "hotly contested" the *mere existence* of monetary damages. *See Keepseagle v. Vilsack*, 118 F. Supp. 3d 98, 105–06 (D.D.C. 2015). Even after "nearly ten years" of "extensive and contentious discovery and motions practice," the Executive Branch insisted on the non-existence of money damages. *See id.* Discovery gave the Executive good reason to remain insistent—"this nearly decade-long battle resulted in a narrowing of the plaintiffs' claims." *See id.* In fact, in October 2009, the Executive Branch went so far as to tell the district court that the narrowing of Plaintiffs' "theory of the case and supporting law" was so "considerabl[e]" that it "call[ed] into question the previous class definition." *See* Gov't Mem. in Opposition to Plaintiffs' Mot. for

Order Regarding the Establishment of Class Membership at 4, *Keepseagle v. Vilsack*, No. 1:99-cv-03119 (D.D.C. Oct. 23, 2009), ECF 541. Yet, a mere six weeks later, even as the deadline for the Executive Branch's submission of a rebuttal expert report on damages approached, the Justice Department agreed to stay the case—concluding that "settlement discussions are appropriate at this time." *See* Joint Mot. to Stay at 2, *Keepseagle v. Vilsack*, 1:99-cv-03119 (D.D.C. Dec. 3, 2009), ECF 548.

In late 2009, the Executive Branch went from disputing the existence of money damages to embracing a settlement agreement that pays the Plaintiffs "nearly 90%" of their "estimated total damages," $776,000,000, $680,000,000 of which came from the Judgment Fund. *See Keepseagle*, 118 F. Supp. 3d at 106. Given the $380,000,000 remaining from the Judgment Fund appropriation after class claimants were compensated, we now know Plaintiffs' money damage estimates were wildly off-base.[2] Class counsel,

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[2] The dearth of class claimants that actually qualified to receive money damages confirms the inflation. As the Executive Branch acknowledges here, "[t]he claims process . . . allowed claimants to obtain substantial recoveries *by submitting minimal evidence*." Gov't Br. 27 (emphasis added). All that was required to "obtain $50,000 plus $12,500 in tax relief [under Track A]" was "a written statement without any further supporting documentation (save proof of Tribal membership, if applicable)." *Id.* at 27–28. Under Track B, a claimant could "obtain a cash payment of up to $250,000 by meeting a 'preponderance of the evidence' standard in an entirely non-adversarial process (meaning that any showing of discrimination went unrebutted even if the government could have rebutted the claim had it proceeded to litigation)." *Id.* at 28. Moreover, the Agriculture Department forgave any outstanding federal farm loan debt for any claimant that prevailed under either Track A or Track B, even if "the value of that debt relief far exceeded claimants' cash recoveries." *Id.*

though, received a $60,800,000 payday—roughly *four times* class counsel's actual expenses.[3] None of this should have surprised the Executive Branch. When it came before this Court to contest the deferral of class certification on monetary damages, the Justice Department said the following: "'This case is, at bottom, about compensatory relief for past wrongs,' *creating a threat of 'hydraulic' pressure to settle*" for a large sum. *See In re Veneman*, 309 F.3d 789, 794 (D.C. Cir. 2002) (quoting the Justice Department). Moreover, the Government's damages expert, Economics and Statistics Professor Gordon C. Rausser of the University of California, Berkeley, "produced a 340-page report stating that [Plaintiffs' expert's damages] conclusions were based 'in a counter-factual world' and

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Short of giving the settlement money away without any process at all, it is difficult to see how the Executive Branch could have made it any easier for class members to collect. Nevertheless, only 3,601 individuals prevailed in this process—a sliver of the more than 19,000 claimants predicted by the class complaint. *See* Fifth Amended Class Action Complaint at 163 ¶ 143, *Keepseagle v. Vilsack*, No. 1:99-CV-03119, 2001 WL 35985330 (D.D.C. June 27, 2001).

[3] Even the Executive Branch could not, initially, swallow the size of class counsel's fee award. In contesting this award, the Executive Branch acknowledged it was willing to pay attorney fees that roughly *doubled* its estimate of class counsel's actual expenses to settle the case, but it was not comfortable paying what class counsel ultimately received. *See*, *e.g.*, Gov't Resp. to Pls.' Mot. for Att'y Fees and Expenses and to Pls.' Mot. for Approval of Class Representative Incentive Awards at 2, 7, *Keepseagle v. Vilsack*, No. 1:99-cv-03119 (D.D.C. Mar. 18, 2011), ECF No. 586; *see id.* at 9 ("It is possible that Plaintiffs' billing records provide adequate support for the claimed expenditures, but it is difficult to imagine, for example, how money spent on 'conferences' or 'media services' is a reasonable and necessary litigation expense at that time, and none of the travel expenses are justified or described beyond 'travel.'").

that Native Americans had generally fared as well as white male farmers." LaFraniere, *Spigot.* "'If they had gone to trial, the government would have prevailed,' he said. 'It was just a joke,' he added. 'I was so disgusted. It was simply buying the support of the Native-Americans.'" *Id.* By settling, however, the Executive Branch never filed its rebuttal expert report.

Both the original settlement agreement and the addendum appealed here require court approval of the *cy pres* recipients class counsel will propose. *See* JA 393 (Original Settlement Agreement, II.I); JA 1170 (Proposed Settlement Agreement Addendum, II.A–B). Court approval is also required for the "awards" class counsel proposes that these *cy pres* recipients receive. *See* JA 423 (Original Settlement Agreement, IX.7); JA 1172 (Proposed Settlement Agreement Addendum, IV.A). No adjudicative standard is set forth for approving either the *cy pres* recipients or their distributions, other than that these recipients fulfill the "purpose" of having "provided agricultural, business assistance, or advocacy services to Native American farmers," *e.g.*, JA 393 (Original Settlement Agreement, II.I). The proposed addendum adds an equally-fraught twist: The "primary *cy pres* beneficiary" will be a newly-created "Native American Agriculture Fund." JA 1170 (Proposed Settlement Agreement Addendum, II.B). Class counsel will select the Trust Fund's Board of Trustees and its Executive Director, and a court will be tasked with approving those selections. *See id.*

Nothing prohibits class counsel from serving on the Trust Fund's Board (or as its Executive Director), nor is the Executive Branch in any way prevented from "suggesting" names for class counsel's nomination (nor, presumably, is a court so limited). Moreover, this Trust Fund will be tasked with using its taxpayer-

funded *cy pres* money to, among other things, "educate the public on agricultural issues, the needs of Native American farmers and ranchers, and other matters related to the Trust's Mission, including by advocating for a particular position or viewpoint" (the Trust Fund does purport to be a non-political nonprofit, however). JA 1180.

The settlement agreement here strongly suggests its exorbitant sum is *not* the result of, as the Executive Branch preposterously contends, "the level of sophistication and effectiveness of the lawyers representing the class's interests[,] . . . as well as the legal backdrop against which the parties negotiated." Gov't Br. 23. Rather, political calculations explain the settlement. *Cf. Keepseagle*, 118 F. Supp. 3d at 104 (suggesting the Government settled this case because it "implicate[s] deep-seated interests of justice" even if "the government's legal defense may be relatively strong"). An internal memorandum within the Department of Agriculture from March 2010 says *Keepseagle* was part of an Obama administration effort "to neutralize the argument that the government favors black farmers over Hispanic, Native American or women farmers." LaFraniere, *Spigot*; *see also id.* ("Sweeping settlements with the three groups, [Tony] West [Assistant Attorney General of the Justice Department's Civil Division], argued, would eliminate legal risks and smooth relations between the Agriculture Department and important constituencies."); Press Release, Agriculture Secretary Vilsack and Attorney General Holder Announce Settlement Agreement with Native American Farmers Who Claim to Have Faced Discrimination by USDA in Past Decades, Release No. 0539.10 (Oct. 19, 2010) https://www.usda.gov/wps/portal/usda/usdamediafb?contentid=2010/10/0539.xml&printable=true&contentidonly=true ("[S]hortly after

[Secretary Vilsack] took office he sent a memo to all USDA employees calling for 'a new era of civil rights' for the Department. In February 2010, Secretary Vilsack announced the *Pigford II* settlement with black farmers; the *Keepseagle* settlement continues as part of that new era. Meanwhile, Secretary Vilsack continues to pursue the resolution of all claims of past discrimination against USDA."). Reporting also indicates "the payouts pitted [the Secretary of Agriculture] and other political appointees against career lawyers and agency officials, who argued that the legal risks did not justify the costs" to the taxpayer. LaFraniere, *Spigot*.

My colleague suggests we should ignore this case's context because it is not "found in the record." Concurrence at 1. Of course, *the district court* not only acknowledged this context—it expressed sympathy with the Executive Branch's preference for political largess over legal defense.[4] *See Keepseagle*, 118 F. Supp. 3d at 104 ("The statements of the President, Secretary Vilsack, and then-Attorney General Holder make clear that the government in 2010 understood this dimension of the case. . . . The government['s] [lawyers] would do well to remove [their] legalistic blinders."); *but see Authority of the United States to Enter Settlements Limiting the Future Exercise of Executive Branch Discretion*, 23 Op. O.LC. 126, 137

[4] Moreover, the insistence that we must be willfully blind to context unless it is "test[ed] in the crucible of cross-examination" is especially puzzling. Concurrence at 1. The context of this case is not examined to make a factual determination—it helps explain why "exceptional circumstances" exist to address Mandan's constitutional arguments. It makes no sense to insist on a trial when, by design, "exceptional circumstances" are only invoked *on appeal* to consider an argument *not raised below*.

(1999) ("The Attorney General generally possesses the congressionally conferred power to settle on terms that would serve the best interests of the United States, but *the considerations and terms that inform and structure a settlement must be traceable, nonetheless, to a discernible source of statutory authority*." (emphasis added)) [hereinafter *Settlements Limiting the Future Exercise of Executive Branch Discretion*]. Despite the district court's obvious sympathy, it still questioned whether the Judgment Fund Act permitted a *cy pres* distribution:

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

Keepseagle, 118 F. Supp. 3d at 104. But the district court reasoned the parties' consent to the final judgment put the *cy pres* issue "beyond the realm of the law and into the realm of politics and policy." *Id*; *see also id.* at 121 ("[T]he [c]ourt is not persuaded that it has any authority to declare void portions of an agreement that was negotiated by the parties, approved by the [c]ourt pursuant to [Rule] 23, and finalized on appeal (either by affirmance of the Court of Appeals or by the lack of any timely appeal)."). In considering the *cy pres* amendment at issue here, both the district court and the majority continue to treat

the parties' consent as a means to circumvent constitutional limitations on judicial power.

A.
Exceptional Circumstances Are Present

"[A] federal court is more than 'a recorder of contracts' from whom parties can purchase [relief]." *Local Number 93, Int'l Ass'n of Firefighters v. Cleveland*, 478 U.S. 501, 525 (1986). Congress did not create the Judgment Fund for the Executive to dispense political favors, but to pay lost or settled litigation claims against the United States. *See* 31 U.S.C. § 1304(a) (appropriating money "to pay final judgments, awards, [and] compromise settlements," and limiting that appropriation to when: payment is not authorized by another source; the Treasury Department has certified the payment; and "the judgment, award, or settlement is payable" under a statute Congress designated for such payment). "The Framers fully recognized that nothing would so jeopardize the legitimacy of a system of government that relies upon the ebbs and flows of politics to 'clean out the rascals' than the possibility that those same rascals might perpetuate their policies simply by locking them into binding contracts." *U.S. Tr. Co. v. New Jersey*, 431 U.S. 1, 45 (1977) (Brennan, J., dissenting). Even the Executive Branch has acknowledged that, despite its "sweeping" power to settle lawsuits, "the Attorney General must, as a general matter, exercise her broad settlement discretion in a manner that conforms to the specific statutory limits that Congress has imposed upon its exercise." *Settlements Limiting the Future Exercise of Executive Branch Discretion*, 23 Op. O.LC. at 136.

When exceptional circumstances are present, "the courts of appeals" possess "the discretion" to decide "what questions may be taken up and resolved for the

first time on appeal." *Singleton v. Wulff*, 428 U.S. 106, 121 (1976). Exceptional circumstances are present when "the proper resolution is beyond any doubt, or where injustice might otherwise result." *Id.* (internal citation omitted). Here, such circumstances exist, justifying us in addressing Appellant's challenge to the settlement agreement's *cy pres* provisions.

i.

The Proper Resolution Is Not In Doubt

The Appellant, Keith Mandan ("Mandan"), argues that *cy pres* distribution violates the Appropriations Clause and the Judgment Fund Act. This is his lead argument within his opening brief. Both the Executive Branch and the Plaintiff-Appellees briefed this issue too. Moreover, the Executive Branch is right when it claims Mandan's argument challenges *cy pres* distributions in class action settlements with the United States *generally*—not just the *cy pres* distribution scheme proposed within the addendum to this settlement agreement.

See Gov't Br. 18; *cf.* Appellant Opening Br. 22–29. Poignantly, *the Executive Branch* set forth the proper remedy within its own brief. *See* Gov't Br. 24 ("If the remaining $3[8]0 million in taxpayer money indeed remains part of the public fisc and need not be distributed according to the terms of the 2011 settlement agreement, *then the most appropriate disposition of this unexpectedly large sum would be for it to revert to the Treasury*." (emphasis added)). This is, therefore, not a case where "the opposing party los[t] its opportunity to contest the merits," or where "an improvident or ill-advised opinion on the legal issues" is at risk. *See Se. Mich. Gas Co. v. FERC*, 133 F.3d 34, 42 n.3 (D.C. Cir. 1998). The result and issue are squarely raised before us.

"Deciding fully briefed, purely legal questions is a quotidian undertaking for an appellate court." *See Ass'n of Am. R.R. v. U.S. Dep't. of Transp.*, 821 F.3d 19, 26 (D.C. Cir. 2016). The concurrence claims the proper resolution of a fully briefed legal issue can still be in doubt, so "exceptional circumstances" cannot be invoked on that ground. *See* Concurrence at 3. This view does not follow from our precedent. *See Hodge v. Talkin*, 799 F.3d 1145, 1171 (D.C. Cir. 2015) ("The district court . . . did not reach Hodge's vagueness challenge. . . . Here, we find it appropriate to consider Hodge's vagueness claim. Not only does he ask us to address the challenge, but it raises pure questions of law. And the government joins issue with Hodge's arguments on the merits rather than suggesting that we forbear on the matter."). To be sure, the Executive Branch argues waiver. But as noted above, the Executive Branch also set forth a detailed response on the merits and identified the proper remedy. This is thus unlike the circumstance in which we declined addressing constitutional issues surrounding *cy pres*. *Cf. Democratic Cent. Comm. v. Wash. Metro. Area Transit Comm'n*, 84 F.3d 451, 455 n.2 (D.C. Cir. 1996) (declining to address the "controversial" use of *cy pres* distributions in class actions against the United States because, unlike here, "[t]his case . . . is not a class action; the constitutional challenges mentioned above are not at issue here."). We cannot be transgressing our discretion by resolving this issue.

ii.
Invoking Waiver Results In Injustice

By failing to consider Mandan's *cy pres* challenge, we permit a fundamental injustice: *cy pres* allows the Executive Branch to circumvent checks on its own power with the Judicial Branch's imprimatur. The

acceptability of circumventing the congressional appropriations process under the guise of Article III is "extraordinarily important and deserves a 'definitive answer.'" *See Al Bahlul v. United States*, 840 F.3d 757, 760 n. 1 (D.C. Cir. 2016) (en banc) (Kavanaugh, J., concurring) (quoting *Al Bahlul v. United States*, 767 F.3d 1, 62 (D.C. Cir. 2014) (en banc) (Brown, J., concurring in judgment and dissenting in part)). This issue raises the proper relationship of our Federal Government's three branches when dealing with the People's money. Moreover, "other cases in the pipeline require a clear answer to [this] question." *See id*. As Chief Justice Roberts recently noted, "[*c*]*y pres* remedies . . . are a growing feature of class action settlements." *Marek*, 134 S. Ct. at 9 (statement of Roberts, C.J., respecting denial of certiorari). Other legal commentators have also noted this trend. *See* Redish at 661 ("[T]he prevalence of class action *cy pres* awards has increased steadily by decade since the 1980s and has accelerated noticeably after 2000."). Additionally, *cy pres* distribution in this case is not merely dispensing a "residual" amount—it will dispose of *more than half* of this settlement fund. Even by *cy pres* standards (such as they are), this is exceptional. *See*, *e.g.*, *In re Baby Prods. Antitrust Litig.*, 708 F.3d 163, 174 (3d Cir. 2013) ("Barring sufficient justification, *cy pres* awards should generally represent a small percentage of [the] total settlement funds.").

In sum, if these circumstances are not exceptional, I do not know what defines "exceptional circumstances."

B.

Structural Constitutional Objections Are Present

The source of the "exceptional circumstances" here is its own basis for not invoking waiver: a "neither frivolous nor disingenuous" "constitutional challenge"

to "the validity of the . . . proceeding that is the basis for th[e] litigation." *See Freytag*, 501 U.S. at 879. Specifically, the structural issue before us is the district court's power to approve and police a *cy pres* distribution scheme without congressional appropriation.

The fact that Mandan consented to the 2011 agreement is immaterial. "[C]onsent" cannot "excuse an actual violation of Article III," *see*, *e.g.*, *Wellness Int'l Network, Ltd. v. Sharif*, 135 S. Ct. 1932, 1945 n.10 (2015), and that is what Mandan's Appropriations Clause claim presents.[5] We must be willing to assess claims that the Judicial Branch acted with power entrusted to another branch of the Federal Government. *See Freytag*, 501 U.S. at 879 ("[T]he disruption to sound appellate process entailed by entertaining objections not raised below does not always overcome what Justice Harlan called 'the strong interest of the federal judiciary in maintaining the constitutional

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[5] Mandan does not detail the Appropriations Clause's implications for judicial power to the same extent he does for *cy pres* distributions under the Judgment Fund Act. Still, Mandan *does* fully brief the implications of *cy pres* distributions for the separation of legislative, judicial, and executive powers. *See*, *e.g.*, Appellant Opening Br. 22– 29. We are thus well within our purview to detail the particular implications for judicial power. *See Kamen v. Kemper Fin. Servs.*, 500 U.S. 90, 99 (1991) ("When an issue or claim is properly before the court, the court is not limited to the particular legal theories advanced by the parties, but rather retains the independent power to identify and apply the proper construction of governing law."); *Carducci v. Regan*, 714 F.2d 171, 177 (D.C. Cir. 1983) (clarifying a panel is "*not* precluded from supplementing the contentions of counsel through [its] own deliberation[s] and research" (emphasis added)).

plan of separation of powers.'" (internal citation omitted)).[6]

Our Founders "lived among the ruins of a system of intermingled legislative and judicial powers." *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 219 (1995). Judges were under the King's thumb, while legislatures were often obstructed in their ability to make policy. *See generally* THE DECLARATION OF INDEPENDENCE (U.S. 1776). In response, the Founders created a judiciary "truly distinct from both the legislature and the executive." THE FEDERALIST NO. 78, p. 465 (Clinton Rossiter ed., 1961) (A. Hamilton). The "judicial [p]ower" was limited to "render[ing] dispositive judgments" in "cases" or "controversies" within the scope of federal jurisdiction. *See Plaut*, 514 U.S. at 218–19. The judiciary thus received "no influence over . . . the purse." THE FEDERALIST NO. 78, p. 464 (Clinton Rossiter ed., 1961) (A. Hamilton). As the Constitution gave the appropriations power to the American People's elected representatives, our founding document

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[6] The concurrence dismisses the cases saying structural, jurisdictional limitations on Article III are always before us, because those cases "involv[e] *forfeiture*—not waiver." Concurrence at 2. The concurrence says "[t]he Supreme Court . . . has been clear" on the difference between the two concepts. *See id.* I beg to differ. *See Freytag*, 501 U.S. at 894 n.2 (Scalia, J., concurring in part and concurring in the judgment, joined by O'Connor, Kennedy, & Souter, JJ.) ("[O]ur cases have so often used them interchangeably that it may be too late to introduce precision. . . . I shall try not to retain the distinction between waiver and forfeiture throughout this opinion, since many of the sources I shall be using disregard it."). What is clear, however, is the Supreme Court's admonition in *Schor*: constitutional limits on Article III are not to dangle at the mercy of artfully parsed relinquishment concepts. *See* 478 U.S. at 850–51 ("*notions of* consent and waiver cannot be dispositive" if Article III limitations are at issue (emphasis added)).

"assure[s] that public funds will be spent according to the letter of the difficult judgments reached by Congress as to the common good and not according to the individual favor of Government agents or the individual pleas of litigants." *OPM v. Richmond*, 496 U.S. 414, 427–28 (1990); *cf. Freytag*, 501 U.S. at 880 ("The structural interests . . . are not those of any one branch of Government but of the entire Republic.").

Cy pres distribution schemes in class actions against the United States confound judicial power; reverting us to the time when the King could circumvent the People's representatives through the judiciary. Ninth Circuit Judge Andrew Kleinfeld described the problem of *cy pres* in class actions rather ominously given *Keepseagle*'s facts:

> A defendant may prefer a *cy pres* award to a damages award, for the public relations benefit. And the larger the *cy pres* award, the easier it is to justify a larger attorneys' fees award. The incentive for collusion may be even greater where . . . there is nothing to stop [the lawyers for both sides] from managing the [*cy pres* recipient(s)] to serve their interests . . . .

Lane v. Facebook, Inc., 696 F.3d 811, 834 (9th Cir. 2012) (Kleinfeld, J., dissenting).[7] Some circuits

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[7] This reality of aligned interest bespeaks a broader problem of collusion within class actions—often at the expense of individual class members. *See* MAYER BROWN, DO CLASS ACTIONS BENEFIT CLASS MEMBERS? AN EMPIRICAL ANALYSIS OF CLASS ACTIONS 9 (2013), https://www.mayerbrown.com/files/uploads/Documents/PDFs/2013 /December/DoClassActionsBenefitClassMembers.pdf ("*Cy pres* awards and injunctive relief serve primarily to inflate attorney's fee awards—and benefit third parties with little or no ties to the putative class."); *see also Amchem Prods. v. Windsor*,

recognize this potential for conflicting interests and promise "careful scrutiny" of *cy pres* provisions. *See*, *e.g.*, *In re Baby Prods. Antitrust Litig.*, 708 F.3d at 175; *Mirfasihi v. Fleet Mortg. Corp.*, 356 F.3d 781, 785–86 (7th Cir. 2004). Other circuits attempt to implement *cy pres* distributions only where "it is not possible to put those funds to their very best use: benefitting the class members directly." *Klier v. Elf Atochem N. Am. Inc.*, 658 F.3d 468, 475 (5th Cir. 2011); *Masters v. Wilhelmina Model Agency, Inc.*, 473 F.3d 423, 436 (2d Cir. 2007); *In re Pharm. Indus. Average Wholesale Price Litig.*, 588 F.3d 24, 35 (1st Cir. 2009). But the fact remains: "It is *inherently dubious* to apply a doctrine associated with the voluntary distribution of a gift to the entirely unrelated context of a class action settlement, which a defendant no doubt agrees to as the lesser of various harms confronting it in litigation." *Klier*, 658 F.3d at 480 (Jones, C.J., concurring) (emphasis added). The reality Judge Jones identified is at play here. The Executive Branch saw an opportunity to exploit a large settlement award without having to ask Congress for money, class counsel saw the promise of a large fee award, and, suddenly,

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521 U.S. 591, 614, 617–18 (1997) (describing the class action device as "adventuresome" and fraught with questions of proper judicial administration). The class action device is supposed to be nothing more than a mere "species" of joinder. *See Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 408 (2010). When class actions attempt to circumvent the underlying substantive law, the device has gone beyond its strictures. *See Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 367 (2011) ("[T]he Rules Enabling Act forbids interpreting Rule 23 to abridge, enlarge, or modify any substantive right . . . ."). By breaking the bonds of a case or controversy, *cy pres* in a class action against the United States comes at the expense of the underlying substantive law meant to restrict Government action: Our Constitution.

doubtful claims for monetary damages became a class action worth more than half-a-billion taxpayer dollars.

Both the district court and Mandan consider the American Law Institute's *Principles of the Law of Aggregate Litigation* to set forth "reasonable" criteria to police *cy pres*'s use in class actions. *See Keepseagle*, 118 F. Supp. 3d at 116–17; Plaintiff-Appellant Opening Br. 39–40 (citing *Principles of the Law of Aggregate Litigation* § 3.07 (2010) ("*ALI Principles*")). Yet these principles suggest what the Appropriations Clause and Article III require: *Cy pres* should never be used in class action settlements with the United States.

The *ALI Principles* presume, first and foremost, a settlement fund's outstanding monies will fully compensate class members for their damages. *See ALI Principles* § 3.07(b). But that presumption is inapplicable when, as here, the class members have been fully compensated.

The *ALI Principles* prefer that outstanding monies are distributed to those "whose interests reasonably approximate those being pursued by the class." *Id.* § 3.07(c). This is achieved by reversion to the Treasury, where Congress can— through the appropriations process—approximate the interests of the class. Because Congress can reasonably approximate the class's interests, reversion to the Treasury is different in kind from reversion to a private defendant. *See ALI Principles* § 3.07(b) cmt. b (explaining reversion to the defendant "would undermine the deterrence function of class actions and the underlying substantive-law basis of the recovery by rewarding the alleged wrongdoer simply because distribution to the class would not be viable"). Congress has a long track record of reasonably approximating the interests of various classes through the creation of victim compensation

funds.[8] Moreover, allowing Congress the opportunity to reasonably approximate class interests *furthers* "the underlying substantive-law basis of the recovery" by honoring Congress's limits on the Judgment Fund Act. Reversion to the Treasury ensures public accountability, avoids conferring standing on non-injured third parties to contest *cy pres* distributions, and it comports with Congress deciding whether the Government should waive sovereign immunity and be liable for certain claims in the first instance.[9]

Cy pres distributions, given their range of potential beneficiaries, their attenuated relationships to actual class members, and their focus on fulfilling a general

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[8] The circumstances in which Congress has compensated victims are legion and varied. *See*, *e.g.*, 12 U.S.C. § 5219a (Home Affordable Modification Program, created by the Emergency Economic Stabilization Act of 2008 in response to the subprime mortgage crisis); 15 U.S.C. § 7246(a) (creating the "Fair Fund" established by the Sarbanes-Oxley Act of 2002 to distribute disgorgement penalties to defrauded investors); 49 U.S.C. § 40101 (creating the September 11th Victim Compensation Fund).

[9] Reversion to the Treasury is also distinct from escheating to the state, another alternative to *cy pres* distributions. Certain requirements must be met for monies deposited with the judiciary to escheat to the United States. *See* 28 U.S.C. § 2041. The issue here, however, is not that the settlement fund's remainder is unable to compensate a claimant for some reason. *Cf. id.* ("This section shall not prevent the delivery of any such money to *the rightful owners* upon security, according to agreement of parties, under the direction of the court." (emphasis added)). Rather, the "rightful owners," the class claimants, have already received what they rightfully own (their respective awards for compensatory damages), and Congress appropriated money for no other expenditure. The only other "rightful owners" are the American taxpayers, who own the remainder pending a decision by their elected representatives to additionally appropriate the remaining money.

"purpose" rather than remediating monetary damage, resemble legislative appropriation. *See*, *e.g.*, Redish at 624; Goutam U. Jois, *The* Cy Pres *Problem and the Role of Damages in Tort Law*, 16 VA. J. SOC. POL'Y & L. 258, 260 (2008); *cf. also* THE FEDERALIST NO. 75, at 449 (Clinton Rossiter ed., 1961) (A. Hamilton) (distinguishing legislative and executive power by inquiring into "the particular nature of the power" at issue, and identifying "[t]he essence of legislative authority" in the prescription of general rules for society). Yet Congress made no such appropriation here, and no part of the appropriations process is within the judicial power. *See Buckley v. Valeo*, 424 U.S. 1, 123 (1976) (per curiam) (holding Article III courts may not exercise "executive or administrative duties of a nonjudicial nature"); *In re BankAmerica Corp. Sec. Litig.*, 775 F.3d 1060, 1066 (8th Cir. 2015) ("Distribution of funds at the discretion of the court is not a traditional Article III function," rendering such a *cy pres* provision "void *ab initio*."); *In re Compact Disc Minimum Advertised Price Antitrust Litig.*, 236 F.R.D. 48, 53 (D. Me. 2006) ("Federal judges are not . . . accustomed to deciding whether certain nonprofit entities are more 'deserving' of limited funds than others; and we do not have the institutional resources and competencies to monitor that 'grantees' abide by the conditions we or the settlement agreements set."). Accordingly, regardless of the *cy pres* provision's form, approving recipients and distributions in class actions against the United States gives a court the very influence over the purse prohibited by Article III. *Cf.* THE FEDERALIST NO. 78, at 465 (Clinton Rossiter ed., 1961) (A. Hamilton).

Even in class actions where *cy pres* distributions are not made from the public fisc—and the comingling of legislative and judicial power is not implicated—*cy pres* is problematic for judicial power. A court risks

violating Article III justiciability requirements should it adjudicate disputes between *cy pres* recipients and would-be recipients, as none would possess an injury-in-fact. *See Lewis v. Cont'l Bank Corp.*, 494 U.S. 472, 577 (1990) (holding Article III prohibits federal courts from "decid[ing] questions that cannot affect the rights of *litigants* in the case before them" (emphasis added)); *see also Klier*, 658 F.3d at 481 (Jones, C.J., concurring) (explaining how *cy pres* distributions "transform[] the judicial process from a bilateral private rights adjudicatory model into a trilateral process"). In this trilateral process, there is no neutral, adjudicative standard by which a court can determine the "next best" recipient of settlement money—or what to do with the money when no "next best" recipient bears any relationship to the class. *See*, *e.g.*, *In re Motorsports Merch. Antitrust Litig.*, 160 F. Supp. 2d 1392, 1399 (N.D. Ga. 2001) (distributing, via *cy pres*, approximately $2 million remaining in a settlement pool from a consumer price-fixing lawsuit to nine different organizations, ranging from drug prevention programs, a breast cancer foundation, and a children's hospital, even though none of those organizations bore any relationship to the injured class—Georgia NASCAR fans).[10]

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[10] These problems are compounded by the "appearance of impropriety" created by "the specter of judges and outside entities dealing in the distribution and solicitation of large sums of money." *SEC v. Bear, Stearns & Co.*, 626 F. Supp. 2d 402, 415 (S.D.N.Y. 2009). As numerous press reports and cases indicate, *cy pres* distributions are littered with ethical issues. *See*, *e.g.*, Richard A. Epstein, Editorial, *The Deferred Prosecution Racket*, WALL ST. J. (Nov. 28, 2006, 12:01 AM), https://www.wsj.com/articles/SB116468395737834160 (criticizing a Bush administration settlement with Bristol-Myers Squibb that required the company's endowment of a—hold on to your hat—chair of ethics at

Keepseagle reveals that nothing short of the Constitution's enumerated limits on power can protect the taxpayer's money and the judiciary's integrity. The Executive Branch has an independent obligation to assess the constitutionality of its own conduct. In the first instance, politics should not have been allowed to permit what the Appropriations Clause would prohibit. Similarly, in the first instance, the district court should have never allowed the parties' consent to override its independent obligation to not approve agreements that transgress Article III's limits.[11] *See*, *e.g.*, *Freytag*, 501 U.S. at 896 (Scalia, J., concurring in part and concurring in the judgment) ("[A] litigant's prior agreement to a judge's expressed intention to disregard a structural limitation upon his power cannot have any *legitimating* effect—*i.e.*, cannot render that disregard *lawful*. Even if both litigants not only agree to, but themselves propose, such a course, the judge must tell them no."); *see also Se. Fed. Power Customers, Inc. v. Geren*, 514 F.3d 1316, 1321 (D.C. Cir. 2008) ("[T]he district court could hardly approve a

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Seton Hall Law School, the *alma mater* of the then-U.S. Attorney for the District of New Jersey); Editorial, *Holder Cut Left-Wing Groups in on $17 Bil BofA Deal*, INVESTOR'S BUSINESS DAILY (Aug. 27, 2014), http://www.investors.com/politics/editorials/holders-bank-of-america-settlement-includes-payoffs-to-democrat-groups/ (criticizing a Justice Department settlement with Bank of America as a "raft of political payoffs to Obama constituency groups"); Adam Liptak, *Doling Out Other People's Money*, N.Y. TIMES (Nov. 26, 2007), http://www.nytimes.com/2007/11/26/washington/26bar.html.

[11] For these reasons, it is inapposite to conclude that invoking waiver prevents Mandan from "sandbagging" either the Executive Branch or the district court. The rule of law is undermined if "sandbagging" includes a party raising constitutional problems that the Executive Branch and the district court were *obliged* to consider in the first instance.

settlement agreement that violates a statute . . . ."). But the violation to our Constitution's structure here is not merely *ex ante* to approving this settlement agreement's *cy pres* provisions. *This violation is ongoing and is jurisdictional*.

The parties have been squabbling over how to modify the *cy pres* provisions to their respective benefit for nearly four years—indeed, that dispute underlies this appeal. *See Keepseagle v. Vilsack*, 307 F.R.D. 233, 238 (D.D.C. 2014) (dating the "potential modification" of the *cy pres* provisions to at least August 2013). The Court's opinion today ensures this will continue, as approval of *cy pres* recipients and distributions—or any additional changes to the *cy pres* scheme—will rest solely on what led to the error in the first instance: substituting the parties' consent for constitutional requirements. This sort of Government-By-Autopilot cannot be reconciled with our Constitution. *Cf.* Randy Barnett, *The Origination Clause and the Problem of "Double Deference," The Volokh Conspiracy*, WASHINGTON POST (Mar. 12, 2014), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2014/03/12/the-origination-clause-and-the-problem-of-double-deference/?utm_term=.900b86fc81e1 ("[I]f the courts defer constitutional judgments to Congress, and Congress defers constitutional judgments to the courts, then no one is considering the Constitution itself. Double deference is a shell game.").

"Abdication of responsibility is not part of the constitutional design." *Clinton*, 524 U.S. at 452 (Kennedy, J., concurring). But as a result of the majority's reticence, the judiciary will now be distributing more than $380,000,000 of taxpayer money without congressional appropriation and outside the confines of a case or controversy. "[T]o permit the appellate court to

ignore" this jurisdictional, structural defect "because of waiver would be to give the waiver legitimating, as opposed to merely remedial, effect, *i.e.*, the effect of approving, *ex ante*, unlawful action by the appellate court itself." *Freytag*, 501 U.S. at 896–97 (Scalia, J., concurring in part and concurring in the judgment). The Executive Branch cannot continue to pursue this course, and the Judicial Branch had no more power to indulge it today than it had the power to approve the initial *cy pres* provisions. We had an opportunity to eliminate this constitutional breach before it results in material damage to the Constitution's limitations—the approval of *cy pres* recipients and *cy pres* distributions of taxpayer money. Waiving away these constitutional problems is a dereliction of duty.

II.

The Appropriations Clause and the Judgment Fund Act Bar a Cy Pres *Settlement Provision*

A.

Congress Only Appropriated Money To Pay "Claims" Against the United States

Turning to the merits of Mandan's claim, there is no doubt that the *Keepseagle* settlement reveals a dramatic dilution of Congress's power of the purse—and an abuse of the judiciary's limited role—in furtherance of the Executive Branch's political priorities.

Under our Constitution's Appropriations Clause, the American People's elected representatives possess "a *controlling influence* over the executive power." *See* 1 Joseph Story, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES, § 531, p. 384 (Thomas M. Cooley ed., 4th ed. 2011) (emphasis added). By holding this power, Justice Story explained, Congress "holds

at its own command all the resources by which a chief magistrate could make himself formidable." *Id.*

The Supreme Court is as stout-hearted as Justice Story. In its very first Appropriations Clause decision, the Court unanimously stated "[i]t is a well-known constitutional provision, that no money can be taken or drawn from the Treasury except under an appropriation by Congress." *Reeside v. Walker*, 52 U.S. (11 How.) 272, 291 (1850); *see also Cincinnati Soap Co. v. United States*, 301 U.S. 308, 321 (1937) (explaining the Appropriations Clause "was intended as a restriction upon the disbursing authority of the Executive department"). Even in more recent years, the Court has not wavered. *See*, *e.g.*, *United States v. MacCollom*, 426 U.S. 317, 321 (1976) (plurality opinion) ("The established rule is that the expenditure of public funds is proper only when authorized by Congress, not that public funds may be expended unless prohibited by Congress.").

Moreover, the Court has recognized the Clause as a limitation on the Executive Branch's disbursement authority in legal settlements. *See Richmond*, 496 U.S. at 427–28. The Executive Branch threatens the Constitution's structure if it "were able, by [its] unauthorized oral or written statements to citizens, to obligate the Treasury for the payment of funds." *Id.* at 428. In that circumstance, "control over public funds that the Clause reposes in Congress in effect could be transferred to the Executive." *Id.* The question here, therefore, is whether the Executive's "statements to citizens," *i.e.*, what it promised to private parties via settlement, were "authorized" by congressional appropriation. Any part of the Executive's agreement with the private party not "authorized" by congressional appropriation cannot be enforced.

Here, as Mandan explains, two congressional statutes effectuate all that Congress has authorized respecting the *Keepseagle* claims: the Judgment Fund Act and the settlements authority statute. 31 U.S.C. § 1304(a) (Judgment Fund Act); 28 U.S.C. § 2414 (settlements authority statute). These two appropriations are interrelated—the Judgment Fund Act authorizes the payment of "compromise settlements" under the settlements authority statute. *See* 31 U.S.C. § 1304(a)(3)(A) (citing 28 U.S.C. § 2414, permitting the "Payments of judgments and compromise settlements" from district courts and the Court of International Trade). The Judgment Fund is not to be used as another source of congressional appropriation to an agency's programs. Rather, it is designed to ensure claimants "receive prompt payment without awaiting a special appropriation." *United States v. Maryland*, 349 F.2d 693, 695 (D.C. Cir. 1965). The settlements authority statute is broad, but, as explained above, its use must "conform[]" to its "specific statutory limits." *See Settlements Limiting the Future Exercise of Executive Branch Discretion*, 23 Op. O.LC. at 136.

The settlements authority statute gives the Attorney General power to settle "*claims* . . . for defense of imminent litigation or suits against the United States," and such claims "shall be settled and paid in a manner similar to judgments in like causes." 28 U.S.C. § 2414 (emphasis added). The Government Accountability Office ("GAO") has illuminated some of these terms. It explains "for defense of imminent litigation or suits against the United States" means "[t]he agency must be confronted with a genuine disagreement or impasse . . . . There must be a legitimate dispute over either liability or amount." U.S. GOV'T ACCOUNTABILITY OFF., GAO-08-978SP, 3 PRINCIPLES OF FEDERAL APPROPRIATIONS LAW 14-35 (3d ed. 2008) (citing, *inter*

alia, opinions of the U.S. Attorney General finding that the compromising parties must have possessed a "*bona fide* dispute as to either a question of fact or of law") ("GAO, PRINCIPLES"). Further, "a compromise settlement which exceeds the authority of the official purporting to make it does not bind the government." *See id.* at 14-34 (citing *White v. U.S. Dep't of Interior*, 639 F. Supp. 82 (M.D. Pa. 1986), *aff'd mem.*, 815 F.2d 697 (3d Cir. 1987); *United States v. Irwin*, 575 F. Supp. 405 (N.D. Tex. 1983)).

Cy pres distribution in class actions against the United States cannot satisfy these requirements. As part of settling *Keepseagle*, agents of the Executive agreed to send taxpayer money to as-yet unidentified "nonprofits" and "charities" that possess no claims against the United States. But the Judgment Fund Act and the settlements authority statute require the *prompt* payment of settled *claims* against the United States. The "nonprofits" and "charities" that will receive taxpayer money via *cy pres* are—more than five years since the settlement agreement's entry[12]—unidentified. More fundamentally, they possess no claims against the United States.

As any potential *cy pres* recipient is neither involved in this litigation nor a party to the settlement agreement, the agreement settled no "*bona fide* dispute" between any potential *cy pres* recipient and the United

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[12] Delay results in a further perversion of the Judgment Fund Act. Interest accrued on the remaining amount in the settlement fund will be subject to *cy pres* distribution too. As of October 2014, more than $2.5 million in accrued interest was available for *cy pres* distribution. *See* JA 881–82. The longer it takes to "select" *cy pres* recipients, the more interest will accrue, and the more money will pass through *cy pres* distribution. Compensating class claims is truly ancillary to such a scheme.

States Government. *Cy pres* recipients will nevertheless receive access to the settlement fund, akin to being a "compromising party."

In reality, the eventual *cy pres* recipients are being tasked by the Executive Branch and class counsel to fulfill a certain "purpose:" advocate for and assist Native American farmers and ranchers. But, as the U.S. Comptroller General has concluded, when a congressional appropriation limits an agency's action to "remedying [a] violation," it cannot use that appropriation "to carry out other statutory goals of the agency," lest the agency "improperly augment its appropriations for those other purposes, in circumvention of the congressional appropriations process." *See* Rep. to H. Rep. Subcomm. On Oversight and Investigations, B-247155, 1993 WL 798227 at *2 (Comp. Gen. Mar. 1, 1993); *see also Availability of Judgment Fund in Cases Not Involving a Money Judgment Claim*, 13 Op. O.L.C. 98, 104 (1989) ("[A]ny conclusion that would permit the Judgment Fund to pay out settlements in cases in which it would not pay out judgments would provide agencies with an incentive to urge settlement of cases in order to avoid payment from agency funds. We would not lightly attribute to Congress an intent to create a structure that might encourage settlements that would not otherwise be in the interest of the United States.") [hereinafter *Availability of Judgment Fund*].

Congress intentionally separated Judgment Fund payments from agency appropriation payments. *See*, *e.g.*, VIVIAN S. CHU & BRIAN T. YEH, CONG. RESEARCH SERV., R42835, THE JUDGMENT FUND: HISTORY, ADMINISTRATION, AND COMMON USAGE 6 (2013) ("[T]he Judgment Fund is limited to *litigative awards*, meaning awards that were or could have been made in

a court. Litigative awards are distinguished from administrative awards because the latter are provided for by statute and are paid from an agency's appropriation." (emphasis added)). "Accordingly, settlements . . . could be paid from the Judgment Fund if a judgment *on that claim* would have been paid from the Fund and no other source was mandated by law to pay such settlements." Figley, *The Judgment Fund*, 18 U. PA. J. CONST. L. at 162–63 (emphasis added).[13]

A *cy pres* distribution is not an "award" the *Keepseagle* class claimants could have received by prevailing at trial. Had they proceeded to trial and prevailed on their claims for monetary damages, they would have received compensation for their damages. *Cf. Augustin v. Jablonsky*, 819 F. Supp. 2d 153, 177 (E.D.N.Y. 2011) (noting the "general legal tenet that compensatory damages should do no more than compensate a victim for [his] injury"). This compensation is, by definition, a money judgment payable from the Judgment Fund. But, had the *Keepseagle* class claimants prevailed at trial, they could not, by definition, receive "*cy pres* damages"—payments that do not compensate them directly but fulfill a "purpose" "as near as possible" to compensating them. A *cy pres* distribution is thus not equivalent to a money judgment at trial. This renders the Judgment Fund Act appropriation unavailable for *cy pres* distributions. *See Availability of Judgment Fund*, 13 Op. O.L.C. at 98–

[13] In attempting to turn what a "claim" is into a factual dispute, the concurrence looks for shadows where there are none. *See* Concurrence at 4 ("What are 'like causes' to this one? And how are judgments in such cases settled and paid?"). *Whether* one has stated a claim can be subject to factual argument, but *what* a "claim" is— or, if you prefer, what a "cause" of action is—and what kind of relief a claim is capable of yielding, rests on the law.

99 (concluding "final judgments . . . are payable from the Judgment Fund if they require the government to make direct payments of money *to individuals*, but not if they merely require the government to take actions that result in the expenditure of government funds" (emphasis added)); *see also* 31 U.S.C. § 1301(a) ("Appropriations shall be applied only to the objects for which the appropriations were made except as otherwise provided by law.").

The arguments set forth by the Executive Branch and the Plaintiff-Appellees in response cite no supporting legal authority. The Executive Branch all but concedes *cy pres* distributions are not, themselves, compensation for claims against the United States—it just thinks that concern is "irrelevant." *See* Gov't Br. 21 ("Because all of the payments contemplated by the agreement are intended to settle the claims of class members, it is irrelevant whether an entity that might receive a distribution itself has a claim against the government."). The Plaintiff-Appellee's make a similar argument. *See* Plaintiff-Appellee Br. 47 ("There is no independent, additional requirement that each specific payment within that judgment must separately qualify under the Judgment Fund Act."). My colleague apparently agrees. *See* Concurrence at 3–4 (admitting "the nonprofit organizations that will receive *cy pres* distributions out of leftover settlement funds may not possess any claims against the United States," while excusing this because "the Settlement Agreement did in fact settle claims against the United States"). These contentions have no basis in law.

On the Executive Branch's reading, the Attorney General's settlement authority allows him to make a mockery of Congress's specific statutory limitations. For example, the Executive Branch could enter into a

$1 billion settlement agreement fully aware only 1% of appropriated Judgment Fund dollars will be paid to class claimants, while 10% will go to class counsel and the remaining 89% will be distributed via *cy pres*. The Executive Branch, the reasoning would go, was not "legally required to have entered into a less generous agreement" simply because nearly all of the settlement fund will pay for something other than money damage claims against the United States. *See* Gov't Br. 23. If class counsel's "sophistication and effectiveness" can sweeten a settlement by letting the Executive use the settlement to further the Executive's political goals instead of compensating class claimants, the sky is the limit. *See id.* We are nearly there in this case, where the majority of taxpayer dollars will not compensate class members but will pay *cy pres* recipients. This robs the Appropriations Clause of any force by undermining its presumption: Rather than expend public funds "only when authorized by Congress" in an express appropriation, "public funds" may be expended from the Judgment Fund "unless prohibited by Congress." *But see MacCollom*, 426 U.S. at 321 (plurality opinion). Such a view "increase[s] the power of the President beyond what the Framers envisioned, . . . compromis[ing] the political liberty of our citizens, liberty which the separation of powers seeks to secure." *Clinton*, 524 U.S. at 452 (Kennedy, J., concurring).

By binding the United States to these *cy pres* provisions, the Executive Branch arrogated the appropriation power from Congress to itself. *See Richmond*, 496 U.S. at 427–28. The *cy pres* provisions of the parties' settlement agreement therefore exceed the Executive Branch's bargaining authority; they cannot bind the Government. *See* GAO, PRINCIPLES, at 14-34; *cf. Int'l Ass'n of Firefighters*, 478 U.S. at 526 ("[T]he

fact that the parties have consented to the relief contained in a decree does not render their action immune from attack on the ground that it violates . . . the Fourteenth Amendment."); *Settlements Limiting the Future Exercise of Executive Branch Discretion*, 23 Op. O.LC. at 140 (concluding the Attorney General "may not enter into a decree that would require unconstitutional government action . . . ."). Most relevant for our purposes, "Article III federal courts may not enforce unauthorized executive branch settlements." *See id.* at 148. A court cannot effectuate this settlement's *cy pres* provisions (*i.e.*, it cannot approve *cy pres* recipients or distributions), nor can a court approve the addendum to the *cy pres* scheme at issue here—or any other addendum permitting *cy pres* recipients and distributions.

B.
Remedies Going Forward

The more than $380,000,000 remaining in this settlement fund should revert to the U.S. Treasury. This remedy respects Congress's appropriations power, "corrects the parties' mutual mistake" (if we want to call it that) "as to the amount required to satisfy the class members' claims," and it ensures the judiciary does not "effectuate transfers of funds from [the Government] beyond what [it] *owe*[*s*] *to the parties* in judgments or settlements." *See Klier*, 658 F.3d at 482 (Jones, J., concurring). The Executive Branch concedes that this is the proper remedy. *See* Gov't Br. 24. Mandan responds by saying "[t]here is no language in the Settlement Agreement to support a reverter[,] and courts have consistently rejected requests by defendants for reverter of residual settlement funds." Plaintiff-Appellant Reply Br. 12. But none of Mandan's cited cases deal with *cy pres*'s constitutional

infirmities in class actions against the United States Government.

Our Court does, and should, "decline[] to adopt [Appellant's] suggestion to distribute unclaimed funds to those individuals who make claims; such a procedure would result in those class members receiving a windfall from the public fisc and is inconsistent with the general legal tenet that compensatory damages should do no more than compensate a victim for [his] injury." *Augustin*, 819 F. Supp. 2d at 177. But by affirming the district court's approval of the *cy pres* addendum, the majority proves itself a faint-hearted friend of the public fisc. Even if this Court will not look after the People's money, that does not mean the Justice Department— and Congress—lack means to do so. *Cf. Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618, 661 (2007) (Ginsburg, J., dissenting), *superceded by statute*, Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, 123 Stat. 5 ("Once again, the ball is in Congress'[s] court. As in 1991, the Legislature may act to correct this Court's parsimonious reading of Title VII.").

Before the *cy pres* process begins, the Justice Department should consider a motion under Federal Rule of Civil Procedure 60(b)(4) to strike the *cy pres* provisions within the settlement agreement as void. No party has raised a Rule 60(b)(4) challenge in this case, and it is not subject to the finite time constraints restricting other Rule 60(b) motions. *See* FED. R. CIV. P. 60(c)(1). This course could remove the *cy pres* provisions before recipients are approved and distributions begin. This should not affect the settlement agreement's applicability between the class members and the United States—the class members have already been compensated, and the *cy pres* provisions

may be severed from the rest of the agreement. *See* JA 438 (Original Settlement Agreement, XXVI. Severability). Indeed, the parties' agreement prohibits any of its provisions from "impos[ing] on the Secretary [of Agriculture] any duty, obligation, or requirement" that "would be inconsistent with federal statutes or federal regulation in effect at the time of such performance." *See id.* (Original Settlement Agreement, XXIII. Duties Consistent with Law and Regulations).

The Justice Department can argue, as explained above, that the Executive Branch lacked the constitutional and statutory authority to enter into these *cy pres* provisions. It cannot be required to continue to ask the judiciary to approve and police a *cy pres* distribution scheme that violates the Appropriations Clause and Article III limitations. As the Executive Branch said when contesting class counsel's proposed attorney fee award in this case, "the government has an interest in ensuring . . . that funds coming ultimately from federal coffers are not expended in an unnecessary or unreasonable manner." Gov't Resp. to Pls.' Mot. for Att'y Fees and Expenses and to Pls.' Mot. for Approval of Class Representative Incentive Awards at 2, *Keepseagle v. Vilsack*, No. 1:99-cv-03119 (D.D.C. Mar. 18, 2011), ECF No. 586. What was true then is true now. As objections rooted in the Constitution's structural, jurisdictional limits on judicial power cannot be waived or consented to, and no *cy pres* process has occurred yet, objecting to the provisions before the Judicial Branch effectuates them is certainly "within a reasonable time" for purposes of Rule 60(b)(4). *See* FED. R. CIV. P. 60(c)(1); *Karsner v. Lothian*, 532 F.3d 876, 886 (D.C. Cir. 2008) (explaining that, "before a judgment may be deemed void within the meaning of [Rule 60(b)(4)], it must be determined that the rendering court was powerless to enter it").

More broadly, the Justice Department should consider setting forth specific settlement guidelines disapproving the use of *cy pres* in class settlements with the United States. These guidelines could provide a prelude to congressional action.

As for Congress, it should consider amending the Judgment Fund Act to explicitly bar *cy pres* distribution schemes in class action settlements with the United States. As Mandan points out, "the Executive Branch may not do indirectly what it is barred from doing directly." Plaintiff-Appellant Opening Br. 29 (citing *United States v. Bowman*, 341 F.3d 1228, 1240 (11th Cir. 2003)). But this lawsuit reveals the degree to which implicit limitations on power are contingent upon the good faith of those exercising power. *Cf. Clinton*, 524 U.S. at 452–53 (Kennedy, J., concurring) ("The Framers of the Constitution could not command statesmanship. They could simply provide structures from which it might emerge. The fact that these mechanisms, plus the proper functioning of the separation of powers itself, are not employed, or that they prove insufficient, cannot validate an otherwise unconstitutional device."). Further, to ensure the Executive Branch is not letting political calculations supplant legal judgments at the taxpayer's expense, Congress should also consider authorizing the Comptroller General to review and report to Congress on any class action settlement in excess of $100 million.

III.

More than a century ago, Yale Professor William Graham Sumner famously discussed "The Forgotten Man." *See* William Graham Sumner, *The Forgotten Man*, *in* THE FORGOTTEN MAN AND OTHER ESSAYS 465 (Albert Galloway Keller ed., 1919). The Forgotten Man is the one left behind in the Government's rush to

"right" every perceived "wrong." Sumner eloquently set forth the formula embraced by the social engineers of every age:

> As soon as A observes something which seems to him to be wrong, from which X is suffering, A talks it over with B, and A and B then propose to get a law passed to remedy the evil and help X. Their law always proposes to determine what C shall do for X, or, in the better case, what A, B, and C shall do for X.

Id. at 466. "C," of course, is "The Forgotten Man." He is "the hidden taxpayer, the average citizen—not someone who received, rather someone who paid in." Amity Shlaes, THE FORGOTTEN MAN: A NEW HISTORY OF THE GREAT DEPRESSION 128 (2007). As Sumner says of "C," "He works, he votes, generally he prays—but he always pays—yes, above all, he pays." Sumner, *The Forgotten Man*, *in* THE FORGOTTEN MAN AND OTHER ESSAYS 491 (Albert Galloway Keller ed., 1919).

Keepseagle is Sumner's formulation come to life, and our decision today only entrenches the American People's status as the Forgotten. The Executive Branch saw a wrong to correct— discrimination against Native-American farmers. It talked it over with class counsel, eager to receive a big payday. They then worked together to ensure a vastly-overinflated settlement amount that would leave a huge sum to "remedy the evil" via *cy pres*. Lost in the midst of their self-congratulation is the plight of "C," the American People that pay for the Executive Branch's outsized misadventure and class counsel's fee feast.

To the extent discrimination occurred against Native-American farmers by the Department of Agriculture, it was *the Department of Agriculture, not*

the taxpayers of the United States, that engaged in discrimination. Those allegedly discriminated against have been compensated by the public fisc, and that payment occurred via a process that—while ripe with politics and folly—was ultimately permitted by law. But, to the extent the Government would like to *additionally* account for this discrimination by funding nonprofits and charities that work to end discrimination against Native Americans, this should be the decision of the People and their elected representatives. It should *not* be the decision of Justice Department lawyers, class counsel, and the judiciary.

John Adams's observation, "[o]ur Constitution was made only for a moral and religious People" and is "wholly inadequate to the government of any other," is often quoted. *See* Letter from John Adams to Massachusetts Militia, 11 October 1798, *Founders Online*, NATIONAL ARCHIVES, https://founders.archives.gov/documents/Adams/99-02-02-3102. Few, however, explain what he meant. In the same passage, Adams admonished an America that "assume[d] the Language of Justice and moderation while it is practicing Iniquity and Extravagance." *Id.* In such a nation, he warned, "Avarice, Ambition [and] Revenge or Galantry, would break the strongest Cords of our Constitution as a Whale goes through a Net." *Id.* Jurist Thomas Cooley arrived at the same sentiment when he wrote a constitution cannot be completely understood by its words, but must also make reference to "that body of rules and maxims in accordance with which the powers of sovereignty are habitually exercised." THOMAS M. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION 2 (1868). There are, in short, *norms* upon which self-government depends. The Constitution presumes

them, but the character of our people determines whether we keep them. *See* THE FEDERALIST NO. 1, at 27 (Clinton Rossiter ed., 1961) (A. Hamilton) ("[I]t seems to have been reserved to the people of this country, *by their conduct and example*, to decide the important question, whether societies of men are really capable or not of establishing good government from reflection and choice, or whether they are forever destined to depend for their political constitutions on accident and force." (emphasis added)). The conduct of those in this case proves how little the Constitution will matter when good character ceases to be informed by adherence to one's oath of office, and is primarily defined by how generous you are willing to be with someone else's money.

I respectfully dissent.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

[Filed: May 16, 2017]

No. 16-5189

MARILYN KEEPSEAGLE, *et al.*,

Appellees

v.

SONNY PERDUE,

Appellee

DONIVON CRAIG TINGLE, SILENT CLASS MEMBER,

Appellant

Consolidated with 16-5190

September Term, 2016

Appeals from the United States District Court
for the District of Columbia
(No. 1:99-cv-03119)

Before: BROWN and WILKINS, *Circuit Judges,* and EDWARDS, *Senior Circuit Judge*

JUDGMENT

These causes came on to be heard on the record on appeal from the United States District Court for the District of Columbia and were argued by counsel. On consideration thereof, it is

ORDERED and ADJUDGED that the judgment of the District Court appealed from in these causes be affirmed, in accordance with the opinion of the court filed herein this date.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/ Ken Meadows
Ken Meadows
Deputy Clerk

Date: May 16, 2017

Opinion for the court filed by Senior Circuit Judge Edwards. Concurring opinion filed by Circuit Judge Wilkins. Dissenting opinion filed by Circuit Judge Brown.

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

[Filed 04/20/16]

Civil Action No. 99-3119 (EGS)

MARILYN KEEPSEAGLE, *et al.*,

Plaintiffs,

v.

TOM VILSACK, Secretary,
U.S. Department of Agriculture,

Defendant.

MEMORANDUM OPINION

Pending before the Court is the plaintiffs' unopposed motion to modify the *cy pres* provisions of the Settlement Agreement (Agreement) that was entered in this case in 2011. The Agreement created a $680,000,000 fund and included precise terms regarding the distribution of this fund to individual class members who could prove their claims in a non-Judicial Claims Process. In 2013, after the entire distribution process had been completed, class counsel notified the Court that approximately $380,000,000 remained in the fund. The Agreement mandates that any excess be distributed pursuant to a *cy pres* provision.

The proposed modification (Addendum) before the Court: (1) provides a supplemental monetary award to every claimant who had filed a successful claim in the initial claims distribution process; (2) subjects the

remaining funds to an amended *cy pres* distribution procedure; and (3) provides a supplemental service award to three of the nine original class representatives for their assistance in reaching an agreement on the proposed Addendum. Although the motion is entitled "unopposed," Keith Mandan, a class representative and prevailing claimant, obtained independent counsel and filed an objection to the motion to modify the Agreement. Class member William Smallwood, Jr. filed an identical objection. Marilyn Keepseagle, lead plaintiff and class representative, filed separate pleadings supporting the proposed Addendum.

Upon consideration of the parties' submissions, oral argument heard on February 4, 2016, the oral and written submissions of class members, the applicable law, and the entire record, the pending motion to modify the Agreement is GRANTED.[1]

I. Background

The facts of this case have been fully recounted in prior opinions of this Court, see *e.g., Keepseagle v. Vilsack ("Keepseagle IV"),* 118 F. Supp. 3d 98, 105-114 (D.D.C. 2015), but relevant facts are summarized below.

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[1] Following the February 4, 2016 hearing, the Court received an "Opposition to Unopposed Motion to Modify the Settlement Agreement or in the Alternative Remand for Further Negotiations with Instructions from the Court" filed by attorneys representing class members Blake Larmon, Jason Cole Larmon, Jana J. Haynes, Larry A. Million, Alfred R. Million, Garry Million, Vernon D. Sellers, J.R. Sellers, Anthony Snell, Justin Earp, Jamie Earp, Edward Crittenden, and Curtis Snell. This motion is addressed in Part III, *infra.*

A. The 2011 Settlement Agreement

On November 24, 1999, plaintiffs filed this lawsuit, on behalf of themselves and those similarly situated, alleging that the U.S. Department of Agriculture (USDA) had discriminated against Native Americans in its provision of farm loans and benefits programs. *Id.* at 105. The Court certified the matter as a class action as to the claims for declaratory and injunctive relief on December 12, 2001. *See Keepseagle v. Veneman,* No. 99- CIV-3119, 2001 WL 3467944, at *15 (D.D.C. Dec. 12, 2001).

After nearly ten years of significant discovery and motions practice, on October 19, 2010, the parties informed the Court they had reached a settlement. *See* Notice of Settlement and Proposed Settlement Agreement, ECF No. 570. Among other provisions, the Agreement created a $680,000,000 compensation fund for the benefit of the class. *See id.* at 15. This award amounted to nearly 90% of the total damages estimated by the plaintiffs' experts. Pls.' Supp. Br., ECF No. 572 at 4. Class members participating in the claims process acknowledged that they "forever and finally release[d] USDA from any and all claims and causes of action that have been or could have been asserted . . . in the Case arising out of the conduct alleged therein." Notice of Filing, ECF No. 576-1 at 63. The Agreement also provided that leftover funds, if any, would be distributed pursuant to a *cy pres* provision, which reads as follows:

> In the event there is a balance remaining in the Designated Account after the last check has been cashed, the last check has been invalidated due to passage of time, and after the passage of time set forth in paragraph 7 of Section IX.A, the Claims Administrator

> shall direct any leftover funds to the Cy Pres Fund. Class Counsel may then designate Cy Pres Beneficiaries to receive equal shares of the Cy Pres Fund. The Claims Administrator shall send to each Beneficiary, via first class mail, postage prepaid, a check in the amount of the Beneficiary's share of the Cy Pres Fund. Designations shall be for the benefit of Native American farmers and ranchers, upon recommendations by Class Counsel and approval by the Court.

Agreement, ECF No. 621-2 at 33-34. The Agreement defines *cy pres* beneficiaries as:

> [A]ny non-profit organization, other than a law firm, legal services entity, or educational institution, that has provided agricultural, business assistance or advocacy services to Native American farmers between 1981 and the Execution Date [of the Agreement].

Id. at 2-3. The Agreement provided that the Court would retain limited supervisory jurisdiction over the case only with respect to five specifically-enumerated areas, and "only for a period of five years from the date of final approval" of the Agreement. *Id.* at 40-42. After notice to the class members, and a fairness hearing held on April 28, 2011, the Court granted final approval of the Agreement and entered a final order and judgment on April 29, 2011. *See* ECF Nos. 606, 607. No party appealed the Court's decision.

B. Previous Motions to Modify the Agreement

The Agreement left the Court largely uninvolved in the claims process following the entry of final judgment. On August 30, 2013, however, class counsel filed a status report notifying the Court that the

claims process had concluded and that approximately $380,000,000 remained available for *cy pres* distribution. Status Report, ECF No. 646 at 3. Thereafter, class counsel filed a motion to modify the settlement agreement's *cy pres* provisions. *See* Pl.'s Unopposed Mot. to Modify the Settlement Agreement Cy Pres Provisions, ECF No. 709. Class counsel stated that "[w]hile the cy pres funds would go to non-profit organizations serving Native American farmers and ranchers under both the original agreement and the proposed Addendum, changes in the mechanism for distributing funds, and refinement in the eligible groups, will better accomplish the aims of the original agreement." *Id.* at 1.

Marilyn and George Keepseagle, lead named plaintiffs and class representatives, opposed class counsel's proposed modification. The Keepseagles retained counsel and filed their own motion to modify the settlement agreement wherein they proposed that

> the Court order a *pro rata* distribution of the remaining settlement funds to successful claimants, or, in the alternative re-open the claims process for class members that did not receive payment in the initial claims process and, upon completion of this claims process, provide a *pro rata* distribution to all successful claimants.

Marilyn and George Keepseagle's Mot. to Modify the Settlement Agreement, ECF No. 779.

After a day-long hearing on the two pending modification proposals on June 29, 2015, the Court denied the motions in a Memorandum Opinion issued July 24, 2015. *See generally Keepseagle IV,* 118 F. Supp. 3d 98 (D.D.C. 2015). Though sympathetic to the concerns

of both class counsel and Mrs. Keepseagle, the Court concluded that there was no basis to approve the modifications under the law governing the disposition of unclaimed settlement funds nor under Federal Rule of Civil Procedure 60(b) (5) or 60(b) (6). *Id.* at 114-31 (citing *Kokkonen v. Guardian Life Ins. Co.,* 511 U.S. 375, 379-80 (1994); *Pigford v. Venemen,* 292 F.3d 918, 924 (D.C. Cir. 2002)). Because class counsel asserted that its proposal could be approved based on the modification provision in the Agreement itself, the Court briefly addressed that argument, but concluded that there was no consensus on the two proposed unilateral modifications pending before the Court within the meaning of the Agreement. *See Keepseagle IV,* 118 F. Supp. 3d at 103.

C. The Pending Motion to Modify the Agreement

On December 11, 2015, class counsel, counsel for Mrs. Keepseagle, and counsel for the government informed the Court that after engaging in protracted yet constructive discussions, they had reached an agreement on a proposed Addendum to the Agreement that would modify the existing Agreement's *cy pres* provision. Thereafter, class counsel filed the "Unopposed Motion to Modify the Settlement Agreement" now pending before the Court. *See* Pls.' Mot., ECF No. 824. According to class counsel, at the time the motion was filed, Mr. Mandan had not stated whether he agreed with the proposed Addendum. Transcript of Feb. 4, 2016 Hearing, ECF No. 854 at 36. Thereafter, Mr. Mandan filed his Opposition to the Motion. *See* Class Representative Mandan Comments, ECF No. 833.

D. Terms of the Proposed Addendum

The proposed Addendum is a compromise between class counsel's and Mrs. Keepseagle's prior proposals. It would provide for: (1) a supplemental award to claimants who prevailed in the original claims process; and (2) an amended process through which the *cy pres* funds will be distributed. Pls.' Mot., ECF No. 824 at 4.

1. Supplemental Award

The proposed Addendum provides for a supplemental payment of $18,500 to all 3,605 prevailing claimants, plus $2,775 in direct payments to the Internal Revenue Service on each prevailing claimant's behalf. *Id.* This supplemental payment totals approximately $77,000,000.

2. *Cy Pres* Distribution and Creation of a Trust

The proposed Addendum modifies the *cy pres* distribution process by creating a Trust to help ensure the remaining funds are "distributed in an effective and accountable way." *Id.* at 5. Because it will take a certain amount of time to set up the Trust, an initial distribution of $38,000,000 would be made to "eligible non-profit groups after approval by the Court and upon recommendation by class counsel within 180 days of the Court's approval of this process." *Id.* at 8.

The remaining funds – about $265 million or 70% of the *cy pres* funds available – would endow a Trust which would distribute the funds over a period not to exceed 20 years. *Id.* at 5-6, 9.

The mission of the Trust would be "to make grants to Eligible Grant Recipients . . . to fund the provision

of business assistance, agricultural education, technical support, and advocacy services to Native American farmers and ranchers to support and promote their continued engagement in agriculture." Trust Agreement, Pls.' Ex. B, ECF No. 824-4, § 7. The proposed Addendum expands the types of organizations eligible to receive grants to include, among other things, organizations that may not have existed when the Agreement was initially executed in 2010. *Id.* § 8. Additionally, certain instrumentalities of tribal governments would be eligible to receive distributions from the Trust so long as the funds are used for charitable and educational purposes in support of Native American farmers and ranchers. *Id. §* 8(a)(4).

There would be between nine and sixteen Trustees. *Id. §* 13. At least two-thirds of the Trustees must "have substantial knowledge of agricultural issues, the needs of Native American farmers and ranchers, or other substantive knowledge relevant to accomplishing the Trust's Mission." *Id.* At least one Trustee must have professional finance and investment experience, and another professional grant making experience. *Id.* The Trustees would hold staggered terms and no Trustee could serve more than two consecutive terms, or three terms overall. *Id.* Class counsel has nominated fourteen initial Trustees. *Id.* Following these initial nominations, any subsequent Trustees appointed to fill vacancies would be appointed by the existing Trustees by majority vote. *Id.*

3. Service Awards *to* Three Class Representatives

The Addendum also provides for service awards of $100,000 to be paid to class representatives Marilyn Keepseagle, Claryca Mandan, and Porter Holder. Pls.'

Mot., ECF No. 824 at 8. The factual basis for the service awards is as follows:

> Each of these Class Representatives has devoted countless hours to addressing the disposition of the *cy pres* funds, including: (a) joining numerous phone calls with Class Counsel as [Class Counsel was] evaluating what could be done and negotiating with the USDA; (b) responding to dozens, if not hundreds, of phone calls from class members interested in the decision, and (c) participating in several of the meetings held throughout the summer of 2014 at which class members were invited to attend to learn about the possible trust for *cy pres* funds, and to express their views.

Id.

4. The Court's Continuing Jurisdiction

Under the proposed Addendum, the Court would retain jurisdiction over this action for an additional 180 days following final approval of the Agreement by the Court solely for the purpose of: (1) supervising the distribution of supplemental awards; (2) supervising distribution to the Initial Cy Pres Beneficiaries; and (3) ruling on appointment of Trustees or any other matter regarding the initial implementation of the *cy pres* fund. Addendum to Settlement Agreement, ECF No. 824-2 at 1.

E. February 4, 2016 Hearing

Without deciding or expressing any opinion about whether Federal Rule of Civil Procedure 23(e) applied to the resolution of this motion, *see generally Keepseagle v. Vilsack,* 102 F. Supp. 3d 306 (D.D.C.

2015), the Court directed class counsel to provide the class with notice of the proposed Addendum, allowed class members to submit written comments to the Court, and scheduled a hearing for February 4, 2016 to hear argument from counsel and oral statements from class members. *See* Order, ECF No. 825; Amended Order, ECF No. 828.

The Court received many submissions from class members; those timely received were reviewed and uploaded to the Court's docket. *See* Letters, ECF Nos. 835-839, 842-850, 865. Many class members expressed their support for the proposed Addendum, but many did not. *See generally id.* Of those who opposed the proposed Addendum, there were two main objections. First, many class members stated that all of the remaining funds should be distributed to the class members who filed successful claims during the initial claims period and that none of the remaining funds should be distributed to non-profit entities. *Id.* Second, many individuals who were unsuccessful during the initial claims period stated that the claims process should be reopened to allow them another opportunity to submit claims. *Id.*

On February 4, 2016, the Court held a second day-long hearing in the Court's Ceremonial Courtroom. Once again, everyone present who wished to address the Court was given an opportunity to do so. *See generally* Hr'g Tr., ECF No. 854. The Court heard many more disturbing accounts of alleged discrimination suffered by class members and their families. *See generally* id. Many class members asked the Court to reject the proposed Addendum, stating that successful claimants from the initial claims process should be entitled to a larger supplemental award than that in

the proposed Addendum, if not a *pro rata* distribution of the entire remaining funds. *Id.*

At the close of the hearing, Mrs. Keepseagle's attorney pointed out that the comments made at the hearing reflected two points of agreement: First, the commenters agreed there should be a second distribution of funds, although they disagreed on the amount – whether it should be the $21,500 in the proposed Addendum or $100,000, which would be the approximate *pro rata* distribution of the remaining funds to the successful claimants. Second, no one defended the *status quo* under which the entire $380,000,000 would be distributed pursuant to the existing *cy Ares* provision. Hr'g Tr., ECF No. 854 at 211-212.

II. Discussion

To resolve the pending motion to modify the Agreement, the Court must address two questions: (1) whether the proposed Addendum was properly reached pursuant to the modification provision of the Agreement, [2] and if so; (2) whether the proposed Addendum is fair, reasonable and adequate.

A. The Proposed Addendum Was Properly Reached

The plaintiffs move the Court to approve the proposed Addendum pursuant to the modification

[2] As the Court noted in *Keepseagle IV,* the Court's jurisdiction extends to approving a modification to the settlement agreement that is properly reached. *Keepseagle v. Vilsack,* 118 F. Supp. 3d 98, 129 (D.D.C. 2015). ""[D]istrict 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 v. Vilsack,* 815 F.3d 28, 33 (D.C. Cir. 2016) (citations omitted).

provision of the Agreement, which provides as follows: "This Settlement Agreement may 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." Agreement, ECF No. 621-2 at 53. The Agreement defines the "Parties" as "the Plaintiffs and the Secretary." Agreement, ECF No. 621-2 at 9. The Agreement further defines the "Plaintiffs" as the "individual plaintiffs named in Keepseagle v. Vilsack, No. 1:99CV03119 (D.D.C.), the members of the Class, and the Class Representatives." Agreement, ECF No. 621-2 at 9.

The plaintiffs argue that because the Court can approve a settlement agreement in a class action lawsuit over the objections of class representatives and class members, this "[a]greement cannot be read to require the consent of individual Class Representatives as a condition of modifying the Agreement." ECF No. 853 at 2-3. At the hearing, class counsel argued that the "parties" are "counsel representing the class and the USDA" because Rule 23(g) provides that class counsel is "ultimately responsible for representing the interest of the class." Hr'g Tr., ECF No. 854 at 39.

Class counsel also informed the Court that although there were nine class representatives when the Agreement was approved in 2011, only four remain active today. *See* Hr'g Tr., ECF No. 854 at 33-35. Class counsel explained that of the five who are no longer active, three are deceased, one is incapacitated, and one ceased to be a class representative. *Id.* Further, class counsel stated that class representatives Marilyn

Keepseagle, Claryca Mandan, and Porter Holder support the proposed Addendum. *See* id at 7: 11-18; Pls.' Mot., ECF No. 824-1 at 21.[3]

Mr. Mandan opposes the proposed Addendum, asserting that it "is not in the best interest of the Prevailing Claimants and that the remaining funds should be distributed to the Prevailing Claimants in equal amounts." Class Representative Mandan Comments, ECF No. 833 at 1. Mr. Mandan argues that the Court is in the same position that it was in July 2015 when it declined to approve the then-pending class counsel proposal over the objections of at least two class representatives. Class Representative Mandan Points and Authorities, ECF No. 851 at 1-4. Thus, according to Mr. Mandan, under the law-of-the-case doctrine, the Court should reach the same result here. *Id.* at 4-5. Mr. Mandan also asserts that "his consent is required" to amend the agreement. Keith Mandan's Reply, ECF No. 867 at 4. At the February 4, 2016 hearing, Mr. Mandan's counsel informed the Court that "anything less than the total distribution per capita to the prevailing claimants is unacceptable. And if that is something that influences this Court to

[3] Mr. Mandan asserts that Mrs. Keepseagle and Ms. Mandan's support for the proposed Addendum is "tepid at best." Class Representative Mandan Points and Authorities, ECF No. 851 at 4. Mrs. Keepseagle refutes Mr. Mandan's assertions with a declaration in which she explains her role in the negotiations that culminated in the proposed Addendum. Specifically, Mrs. Keepseagle states "While I had proposed a larger supplemental distribution, I support the proposed Addendum because it is the best available compromise and the best option available for improving the terms of the Settlement Agreement in a timely manner." Marilyn Keepseagle's Response to Points and Authorities Submitted by Keith Mandan, ECF No. 856 at 2; ECF No. 856-1, ¶ 7.

deny the proposed addendum, he's willing to live with the consequences and stand on those principles." Hr'g Tr., ECF No. 854 at 230.

Contrary to Mr. Mandan's assertions, the Court's decision in *Keepseagle IV* does not dictate how the Court must interpret the Agreement's modification provision.[4] In *Keepseagle IV,* the Court was asked to amend the terms of the Agreement in response to two competing unilateral proposals. Because class counsel invoked the Agreement's modification provision as a ground for approving its unilateral proposal, the Court briefly addressed that argument. The motion pending before the Court today is entirely different. It seeks approval of a proposal negotiated and agreed to by three of the four remaining class representatives and the defendant. Whether this proposed Addendum was properly reached under the Agreement has now been briefed and the issue is squarely before the Court.

Class counsel's position is that "the parties" means class counsel and the USDA. While class counsel plays a critical role in class action lawsuits, *see* Federal Rule of Civil Procedure 23(g), the Agreement does not define the parties to include class counsel. The Court therefore rejects this reading of the Agreement.

Mr. Mandan's position is that "the parties" have not agreed to the terms of the proposed Addendum because the class representatives have not unanimously agreed to the proposed Addendum. For the reasons explained

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[4] The Agreement's modification provision was also invoked in 2012 when the plaintiffs filed a motion to amend the settlement agreement to make certain changes to the distribution of a portion of the funds. Pls.' Expedited Unopposed Mot. to Amend the Settlement Agreement, ECF No. 621. There was no opposition to that motion, and the Court approved the modification. Minute Order, Aug. 1, 2012.

below, the Court does not accept Mr. Mandan's reading of the Agreement.

The Agreement is a contract between the parties and as with any contract the meaning of the provision at issue depends upon the intention of the parties at the time it was signed consistent with applicable legal principles. RICHARD A. LORD, WILLISTON ON CONTRACTS § 30.2 (4th ed. 2012). Thus the question is, given that the Agreement settled a class action lawsuit, what did the parties intend when they agreed that the Agreement could be modified only with the written agreement of the parties.[5]

Because the Agreement settled a class action lawsuit, the modification provision must be construed within the context of the representational nature of class actions:

> Class actions are a form of representative litigation. One or more class representatives litigate on behalf of many absent class members, and those class members are bound by the outcome of the representative's litigation. Ordinarily, such vicarious representation would violate the due process principle that "one is not bound by a judgment *in personam* in a litigation in which he has not been made a party by service of process." However, the class action serves as an exception to this

[5] "To be effective a modification requires assent of all parties to the agreement" because "there is no such thing as a unilateral modification." HOWARD O. HUNTER, MODERN LAW OF CONTRACTS § 5.20 (2016 Edition). The proposed modification is not unilateral because it has been agreed to by all but one of the remaining active class representatives and the defendant.

> maxim so long as the procedural rules regulating class actions afford absent class members sufficient protection.

WILLIAM B. RUBENSTEIN, NEWBERG ON CLASS ACTIONS § 1 : 1 (5th ed. 2015) .

With these principles in mind, the Court is aware that it can approve a settlement agreement in a class action lawsuit over the objection of one or more class representatives. *See Lazy Oil Co. v. Witco Corp.,* 166 F.3d 581, 589 (3rd Cir. 1999) (noting that "In many class actions, one or more class representatives will object to a settlement."); *Thomas v. Albright,* 139 F.3d 227, 232 (D.C. Cir. 1998)(settlement can be fair even if "a significant portion of the class and some of the named plaintiffs object to it"); *Maywalt v. Parker & Parsley Petroleum Co.,* 864 F. Supp. 1422, 1430 (S.D.N.Y. 1994)("To empower the Class Representatives with what would amount to an automatic veto over the Proposed Settlement does not appear to serve the best interests of Rule 23 and would merely encourage strategic behavior 'designed to maximize the value of the veto rather than the settlement value of their claims.'") Thus, "a class representative cannot alone veto a settlement." MANUAL FOR COMPLEX LITIGATION (4th) § 21.642 (2015). Unanimity among the class representatives is thus not required at a critical stage of class action proceedings – the point at which the Court determines whether the settlement is fair, reasonable, and adequate, and not the product of collusion between the parties.

In view of the representational nature of class action lawsuits and noting that unanimity among class representatives is not necessary for a court to approve a class action settlement agreement, the Court declines to construe the modification provision at issue

here to require unanimous consent of the class representatives. The Court finds that the parties did not intend to give a single class representative veto power over a modification to the Agreement. Just as it could not reasonably have been the intent of the parties to construe the modification provision to require the consent of all class members to any modification, it also could not reasonably have been the intent of the parties to construe the modification provision to require the unanimous consent of the class representatives. The Court therefore finds that the proposed Addendum was properly reached pursuant to the modification provision in the Agreement.

B. The Proposed Addendum is Fair, Reasonable, and Adequate

Having determined that the proposed Addendum was properly reached, the Court now turns to whether the proposed Addendum is fair, reasonable, and adequate. *See, e.g., Int'l Union, United Auto., Aerospace, & Agr. Implement Workers of Am. v. Ford Motor Co.,* No. 07-CIV-14845, 2009 WL 3757040, at *12 (E.D. Mich. Nov. 9, 2009))(the "fair, reasonable, and adequate" standard set forth in Fed. R. Civ. P. 23(e)(2) "applies when considering an amendment to a previously-approved class settlement agreement" and collecting cases). "[T]he district court must consider the objections raised by the named plaintiffs . . . It is the obligation of the district court . . . to evaluate the fairness of the settlement to the class as a whole." *Thomas v. Albright,* 139 F.3d at 233.

1. Arguments Presented to the Court

The plaintiffs argue that the Court should approve the proposed Addendum because: (1) the supplemental distribution will benefit prevailing claimants as they

will receive a supplemental distribution; (2) the supplemental service awards to class representatives are supported by legal authority and the factual record; and (3) the *cy pres* distribution will be more effective, accountable, transparent, and beneficial. Pls.' Mot., ECF No. 824-1 at 13-14. With regard to the *cy pres* distribution, plaintiffs state that

> [u]se of a Trust governed by community leaders and authorized to distribute the cy pres funds over an extended time period better serves the interests of the Class than the current terms of the Settlement Agreement that provide that the funds be disbursed in equal amounts and within a brief period of time to recipients selected by Class Counsel.

Id. at 14. Plaintiffs argue that this structure for distributing the remaining funds "serves the same goal as the *Keepseagle* litigation" because

> Whereas many Native American farmers and ranchers currently receive little or no assistance with their businesses, the resources that they would receive from the Trust over a multi-year period could dramatically change that dynamic and ensure that Native American farmers and ranchers have a significant and sustained connection to national, regional, and local non-profit groups that deliver critically needed services education, advocacy and assistance.

Id. at 16.

Plaintiffs also note that case law supports the proposition that the Court may approve a class action settlement agreement over the objection of named plaintiffs. Pls.' Mot., ECF No. 8241 at 16-21.

According to class counsel, in deciding whether to approve the proposed Addendum, the Court's role is to "tak[e] into account the recommendations of the parties, which we view as the class counsel representing the class and USDA, and the views of the class representatives, each of them individually." Hr'g Tr., ECF No. 854 at 40. Furthermore, according to class counsel, as there is no list of the members of the class, the Court cannot undertake a mathematical calculation to determine the amount of support for and opposition against the proposed Addendum, nor does the Court need to do so under applicable law. Hr'g Tr., ECF No. 854 at 40.

Mr. Mandan[6] asks the Court to reject the proposed Addendum, objecting to any modification that allows for payment to "third parties who have not suffered any injury and who have no claims against the United States" and noting that "despite the existence of undistributed settlement funds that could easily and equitably be distributed to Prevailing Claimants, the government is refusing to do so without valid reasons." Class Representative Mandan Comments, ECF No. 833 at 3. Mr. Mandan is concerned that: (1) the proposed Addendum "does not disclose the total amount of remaining undistributed funds;" (2) "does not disclose the amount of interest that has accrued on those funds;" and (3) "newly formed organizations with no experience or track record assisting Native Americans" will be eligible to receive funds thereby "creat[ing] an incentive for new organizations to be formed with the objective of capturing the available

[6] Class member Smallwood's opposition is identical to that of Mr. Mandan, having been filed by the same counsel. See Class Member Smallwood Comments, ECF No. 834.

funds rather than assisting Native Americans." *Id.* at 2-3.

Mrs. Keepseagle, through her own counsel, voices her support for the proposed Addendum, and, among other things, argues that Mr. Mandan's position is irrational:

> Mr. Mandan, via counsel, advised the Court that if all remaining settlement funds are not distributed on a *pro rata* basis, then he prefers to implement the cy pres provisions of the original Settlement Agreement. This would result in no supplemental payments to class members and distribution of more than $380 million in equal shares to charities selected by Class Counsel and approved by the Court. He is the only class member that has advocated this position.

Marilyn Keepseagle's Response to Points and Authorities Submitted by Keith Mandan, ECF No. 856 at 5.

Mr. Mandan responds that "[i]n advocating for a per capita distribution of the remaining funds to Prevailing Claimants, Mr. Mandan seeks continued negotiations between the parties, not a return to the status quo of the original Keepseagle Settlement Agreement." Keith Mandan's Reply, ECF No. 867 at 3.

The government does not oppose class counsel's motion and states that "[t]he proposed addendum strikes a fair balance between compensating the subset of the class comprised of successful claimants and providing relief to other members of the class through the *cy pres* funds . . ." Gov't Resp., ECF No. 859 at 4.

2. Findings

This case was settled five years ago and the Court approved the Settlement Agreement and entered a final judgment. *See* Final Order and J., ECF No. 607. The Court retained continuing jurisdiction for a period of five years for the limited purposes set forth in the Agreement. *See id.* Those limited purposes do not include authorizing the Court to fashion a different resolution such as ordering that the remaining funds be paid to prevailing claimants on a *pro rata* basis. Nor do those limited purposes authorize the Court to order the parties to conduct additional negotiations.[7] If the Court were to find that the proposed Addendum is not fair, reasonable, and adequate, then the provisions of the original Agreement would remain in place and the entire $380,000,000 of remaining funds would be distributed pursuant to what everyone now agrees is an unworkable *cy pres* provision.

With this context in mind, the Court turns to the terms of the proposed Addendum and finds that those terms are fair, reasonable, and adequate, and not the product of collusion between the parties.

First, the proposed Addendum provides for an additional payment to each prevailing claimant. While the amount of the payment is not as high as the class representatives and many class members would prefer, it is an additional payment that was not contemplated in the existing Agreement pursuant to which claimants agreed that the terms set forth would settle "forever and finally" their claims against the USDA.

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[7] As the Court observed, not a single person during the day long February 4, 2016 even raised the option of returning to the bargaining table. Hr'g Tr., ECF No. 854 at 204.

The Court finds that the additional payment to prevailing claimants is fair, reasonable, and adequate.

Second, the Trust created to distribute the bulk of the remaining funds is intended to serve the interests of the class as a whole: The mission of the Trust is "to make grants to Eligible Grant Recipients . . . to fund the provision of business assistance, agricultural education, technical support, and advocacy services to Native American farmers and ranchers to support and promote their continued engagement in agriculture." Trust Agreement, Pls.' Ex. B, ECF No. 824-4 § 7. The Trustees, who are empowered to decide which entities will receive the funds, are required to "have substantial knowledge of agricultural issues, the needs of Native American farmers and ranchers, or other substantive knowledge relevant to accomplishing the Trust's Mission." *Id. §* 13. A new process for distributing the funds is necessary because the existing *cy pres* provision is unworkable due to the unexpectedly large amount of remaining funds. The Court finds that with the creation of this Trust, governed by community leaders with relevant expertise, the process for distributing those funds will be fair, reasonable, and adequate.

Finally, the proposed Addendum provides for supplemental service awards to three of the class representatives who worked on the negotiations that lead to the proposed Addendum. The Court credits class counsel's representations and finds that the service awards are justified based on these class representatives' service to the class. Hr'g Tr., ECF No. 854 at 42-43. The Court also notes that Mr. Mandan did not wish to participate in the service award. Hr'g Tr., ECF No. 854 at 71.

It is clear that the proposed modification is a compromise that was reached after hard-fought negotiations, and is certainly not the product of collusion between the parties. It is also clear that not everyone agrees with the proposal. As Mrs. Keepseagle's attorney observed at the hearing, "You're not going to get 3,605 people to agree." Hr'g Tr., ECF No. 354 at 59. Many who submitted letters and who spoke at the hearing support a *pro rata* distribution of the remaining funds to the 3,605 successful claimants and many also disagree with the creation of the Trust to distribute the remaining funds. While the Court is sympathetic to the position of the successful claimants, under the terms of the Agreement, the Court is not authorized to fashion a different resolution. Further, the Court is obligated "to evaluate the fairness of the settlement to the class as a whole." *Thomas v. Albright,* 139 F.3d at 233. The Court finds that the proposal is a compromise designed to serve the class as a whole. The 3,605 successful claimants, out of as many as 30,000 members of the class, will receive an additional distribution of funds that was not contemplated in the original Agreement. Further, the initial *cy pres* distribution of $38,000,000 and the creation of the Trust will result in the settlement funds being made available to serve the class as a whole.

III. Larmon Plaintiffs' Motion to Modify Settlement Agreement

Following the February 4, 2016 hearing, the Court received an "Opposition to Unopposed Motion to Modify the Settlement Agreement or in the Alternative Remand for Further Negotiations with Instructions from the Court" filed by attorneys representing class

members Blake Larmon, Jason Cole Larmon, Jana J. Haynes, Larry A. Million, Alfred R. Million, Garry Million, Vernon D. Sellers, J.R. Sellers, Anthony Snell, Justin Earp, Jamie Earp, Edward Crittenden, and Curtis Snell ("the Larmon plaintiffs"). *See* Larmon Motion, ECF No. 852. The Larmon plaintiffs ask the Court to void the 2011 Settlement Agreement or in the alternative to "remand" the case to engage in further settlement negotiations with limitations. *Id.*

In their motion, the Larmon plaintiffs make a number of unsubstantiated allegations that the Court rejects largely for the reasons set forth in Mrs. Keepseagle's response, *see generally,* Marilyn Keepseagle's Response, ECF No. 857, as well as the Plaintiffs' response, *see* Reply in Support of Modification, ECF No. 858 at 11-25.

To the extent the Larmon plaintiffs ask the Court to void the 2011 Agreement nearly five years after the entry of final judgment, the Court finds that there is no basis in the record of this case to do so. As for the Larmon Plaintiffs' alternative request that the Court "remand" this action for further negotiations, as explained *supra,* the Court lacks the authority to order the parties to conduct additional negotiations. Finally, to the extent the Larmon Plaintiffs request that the Court *sua sponte* order the distribution of a greater percentage of the *cy pres* funds to the class members, the Court has explained *supra* that it is unable to do so.

IV. Conclusion

Accordingly, for the foregoing reasons, the Plaintiffs' motion to modify is hereby GRANTED, and the Larmon Plaintiffs' motion to reject the initial settlement, the proposed addendum or in the alternative remand for

further negotiations is hereby DENIED. An appropriate order accompanies this Memorandum Opinion.

SO ORDERED.

Signed: Emmet G. Sullivan
United States District Judge
April 20, 2016

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

[Filed 04/20/16]

Civil Action No. 99-3119 (EGS)

MARILYN KEEPSEAGLE, *et al.*,

Plaintiffs,

v.

TOM VILSACK, Secretary,
U.S. Department of Agriculture,

Defendant.

ORDER

For the reasons stated in the accompanying Memorandum Opinion, it is hereby

ORDERED that [824] plaintiffs' motion to modify the Settlement Agreement cy pres provisions is GRANTED; it is

FURTHER ORDERED that the Addendum to the Settlement Agreement is APPROVED; it is

FURTHER ORDERED that the Trust Agreement is APPROVED; it is FURTHER ORDERED that the Service Awards are APPROVED in the amount of $100,000 each; it is

FURTHER ORDERED that the proposed Trustees are APPROVED and APPOINTED; and it is

FURTHER ORDERED that [852] motion to reject the initial settlement, the proposed addendum or in

the alternative remand for further negotiations is DENIED.

SO ORDERED.

Signed: Emmet G. Sullivan
United States District Judge
April 20, 2016

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 16-5189
Consolidated with 16-5190

MARILYN KEEPSEAGLE, *et al.*,

Appellees

v.

SONNY PERDUE,

Appellee

DONIVON CRAIG TINGLE, Silent Class Member,

Appellant

September Term, 2017
1:99-cv-03119-EGS
Filed On: September 20, 2017

BEFORE: Garland, Chief Judge; Henderson, Rogers, Brown*, Tatel, Griffith, Kavanaugh, Srinivasan, Millett, Pillard, and Wilkins, Circuit Judges; Edwards, Senior Circuit Judge

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* Circuit Judge Brown was a member of the en banc court but retired prior to disposition of the petitions for rehearing en banc.

ORDER

Upon consideration of Donivon Craig Tingle's petition for rehearing en banc styled as "petition for reconsideration en banc and petition for rehearing en banc," and Keith Mandan's petition for rehearing en banc, the responses thereto, and the absence of a request by any member of the court for a vote, it is

ORDERED that the petitions be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Michael C. McGrail
Deputy Clerk

APPENDIX D

U.S. CONST. art. I, § 9, cl.7 provides:

No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law; and a regular Statement and Account of the Receipts and Expenditures of all public Money shall be published from time to time.

U.S. CONST. art. III, § 1 provides:

> The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at states Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

APPENDIX E

31 U.S.C. § 1304 provides:

(a) Necessary amounts are appropriated to pay final judgments, awards, compromise settlements, and interest and costs specified in the judgments or otherwise authorized by law when–

(1) payment is not otherwise provided for;

(2) payment is certified by the Secretary of the Treasury; and

(3) the judgment, award, or settlement is payable–

(A) under section 2414, 2517, 2672, or 2677 of title 28;

(B) under section 3723 of this title [31 USCS § 3723];

(C) under a decision of a board of contract appeals; or

(D) in excess of an amount payable from the appropriations of an agency for a meritorious claim under section 2733 or 2734 of title 10, section 715 of title 32, or section 20113 of title 51.

(b)

(1) Interest may be paid from the appropriation made by this section–

(A) on a judgment of a district court, only when the judgment becomes final after review on appeal or petition by the United States Government, and then only from the date of filing of the transcript of the judgment with the Secretary of the Treasury through the day before the date of the mandate of affirmance: or

(B) on a judgment of the Court of Appeals for the Federal Circuit or the United States Court [United States Court of Federal Claims] under section 2516(b) of title 28. only from the date of filing of the transcript of the judgment with the Secretary of the Treasury through the day before the date of the mandate of affirmance.

(2) Interest payable under this subsection in a proceeding reviewed by the Supreme Court is not allowed after the end of the term in which the judgment is affirmed.

(c)(1) A judgment or compromise settlement against the Government shall be paid under this section and sections 2414, 2517, and 2518 of title 28 when the judgment or settlement arises out of an express or implied contract made by–

(A) the Army and Air Force Exchange Service;

(B) the Navy Exchanges:

(C) the Marine Corps Exchanges;

(D) the Coast Guard Exchanges; or

(E) the Exchange Councils of the National Aeronautics and Space Administration.

(2) The Exchange making the contract shall reimburse the Government for the amount paid by the Government.

28 U.S.C. § 2414 provides:

Except as provided by chapter 71 of title 41 [41 USCS §§ 7101 et seq.], payment of final judgments rendered by a district court or the Court of International Trade against the United States shall be made on settlements by the Secretary of the Treasury. Payment of final judgments rendered by a State or foreign court or tribunal against the United States, or against its agencies or officials upon obligations or liabilities of the United States, shall be made on settlements by the Secretary of the Treasury after certification by the Attorney General that it is in the interest of the United States to pay the same.

Whenever the Attorney General determines that no appeal shall be taken from a judgment or that no further review will be sought from a decision affirming the same, he shall so certify and the judgment shall be deemed final.

Except as otherwise provided by law, compromise settlements of claims referred to the Attorney General for defense of imminent litigation or suits against the United States, or against its agencies or officials upon obligations or liabilities of the United States, made by the Attorney General or any person authorized by him, shall be settled and paid in a manner similar to judgments in like causes and appropriations or funds available for the payment of such judgments are hereby made available for the payment of such compromise settlements.

APPENDIX F

Rule 40.5 of the Local Rules of the United States District Court for the District of Columbia provides:

(a) DEFINITION.

A related case for the purpose of this Rule means as follows:

(1) Criminal cases are deemed related when (i) a superseding indictment has been filed, or (ii) more than one indictment is filed or pending against the same defendant or defendants, or (iii) prosecution against different defendants arises from a common wiretap, search warrant, or activities which are a part of the same alleged criminal event or transaction. A case is considered pending until a defendant has been sentenced.

(2) If a civil forfeiture proceeding is filed concerning a criminal defendant, or a defendant is charged in a criminal case while a civil forfeiture proceeding is pending concerning that defendant, the civil and criminal cases are to be deemed related.

(3) Civil, including miscellaneous, cases are deemed related when the earliest is still pending on the merits in the District Court and they (i) relate to common property, or (ii) involve common issues of fact, or (iii) grow out of the same event or transaction or (iv) involve the validity or infringement of the same patent. Notwithstanding the foregoing, a case filed by a *pro se* litigant with a prior case pending shall be deemed related and assigned to the judge having the earliest case. However, if a judge in the interest of judicial economy, consolidates a significant number of similar *pro se* prisoner complaints, or has a single case with a significant number of *pro se* prisoner plaintiffs,

and any of those prisoners later files a new complaint which is unrelated to the subject matter of the consolidated cases or the multiple plaintiffs' case, the judge who receives the new case as related may, if he or she chooses, refer the new case to the Calendar and Case Management Committee for random assignment.

(4) Additionally, cases whether criminal or civil, including miscellaneous, shall be deemed related where a case is dismissed, with prejudice or without, and a second case is filed involving the same parties and relating to the same subject matter.

(b) NOTIFICATION OF RELATED CASES.

The parties shall notify the Clerk of the existence of related cases as follows:

(1) At the time of returning an indictment the United States Attorney shall indicate, on a form to be provided by the Clerk, the name, docket number and relationship of any related case pending in this Court or in any other United States District Court. The form shall be mailed to all defense counsel along with the notification of the arraignment. Any objection by the defendant to the related casedesignation shall be served on the U.S. Attorney and filed with the Clerk within 14 days after arraignment.

(2) At the time of filing any civil, including miscellaneous, action, the plaintiff or his attorney shall indicate, on a form to be provided by the Clerk, the name, docket number and relationship of any related case pending in this Court or in any other United States Court. The plaintiff shall serve this form on the defendant with the complaint. Any objection by the defendant to the related case designation shall he filed and served with the defendant's first responsive pleading or motion.

(3) Whenever an attorney for a party in a civil, including miscellaneous, or criminal action becomes aware of the existence of a related case or cases, the attorney shall immediately notify, in writing, the judges on whose calendars the cases appear and shall serve such notice on counsel for all other parties. Upon receiving information from any source concerning a relationship between pending cases, the Clerk shall transmit that information in writing to the judges on whose calendars the cases appear and to all parties to the proceeding.

(c) ASSIGNMENT OF RELATED CASES.

Related cases noted at or after the time of filing shall be assigned in the following manner:

(1) Where the existence of a related case in this Court is noted at the time the indictment is returned or the complaint is filed, the Clerk shall assign the new case to the judge to whom the oldest related case is assigned. If a judge who is assigned a case under this procedure determines that the cases in question are not related, the judge may transfer the new case to the Calendar and Case Management Committee. If the Calendar and Case Management Committee finds that good cause exists for the transfer, it shall cause the case to be reassigned at random. If the Calendar and Case Management Committee finds that good cause for the transfer does not exist, it may return the case to the transferring judge.

(2) Where the existence of related cases in this Court is revealed after the cases are assigned, the judge having the later-numbered case may transfer that case to the Calendar and Case Management Committee for reassignment to the judge having the earlier

case. If the Calendar and Case Management Committee finds that good cause exists for the transfer, it shall assign the case to the judge having the earlier case. If the Calendar and Case Management Committee finds that good cause for the transfer does not exist, it may return the case to the transferring judge.

(3) Where a party objects to a designation that cases are related pursuant to subparagraphs (b)(1) or (b)(2) of this Rule, the matter shall be determined by the judge to whom the case is assigned.

(d) MOTIONS TO CONSOLIDATE.

Motions to consolidate cases assigned to different judges of this Court shall be heard and determined by the judge to whom the earlier-numbered case is assigned. If the motion is granted, the later-numbered case shall be reassigned in accordance with section (c) of this Rule.

(e) REFERRALS TO A SINGLE JUDGE BY THE CALENDAR AND CASE MANAGEMENT COMMITTEE.

Upon a finding by the Calendar and Case Management Committee that two or more cases assigned to different judges should be referred for a specific purpose to one judge in order to avoid a duplication of judicial effort, the Calendar and Case Management Committee may enter such an order of referral. The order shall be with the consent of the judge to whom the cases will be referred and shall set forth the scope of authority of said judge. Unless otherwise provided, such an order shall not transfer any cases nor affect the assignment of future cases.

COMMENT TO LCvR 40.5(c)(3): The Court has eliminated the provision in this Rule that permitted a

party to appeal to the Calendar and Case Management Committee an individual judge's decision with respect to whether cases are related because the Court does not believe it is appropriate for a party to be able to seek review of a decision of one judge of this Court by three of that judge's co-equal colleagues. As amended, the Rule would make the individual judge's decision final.

FED. R. CIV. P. 23 provides:

(a) Prerequisites. One or more members of a class may sue or be sued as representative parties on behalf of all members only if:

(1) the class is so numerous that joinder of all members is impracticable:

(2) there are questions of law or fact common to the class:

(3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and

(4) the representative parties will thirty and adequately protect the interests of the class.

(b) Types of Class Actions. A class action may be maintained if Rule 23(a) is satisfied and if:

(1) prosecuting separate actions by or against individual class members would create a risk of:

(A) inconsistent or varying adjudications with respect to individual class members that would establish incompatible standards of conduct for the party opposing the class; or

(B) adjudications with respect to individual class members that, as a practical matter, would be diapositive of the interests of the other members not parties to the individual adjudications or would substantially impair or impede their ability, to protect their interests.

(2) the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole: or

(3) the court finds that the questions of law or fact common to class members predommate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy. The matters pertinent to these findings include:

(A) the class members' interests in individually controlling the prosecution or defense of separate actions;

(B) the extent and nature of any litigation concerning the controversy already begun by or against class members;

(C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and

(D) the likely difficulties in managing a class action.

(c) Certification Order; Notice to Class Members; Judgment; Issues Classes; Subclasses.

(1) *Certification Order.*

(A) Time to Issue. At an early practicable time after a person sues or is sued as a class representative, the court must determine by order whether to certify the action as a class action.

(B) Defining the Class; Appointing Class Counsel. An order that certifies a class action must define the class and the class claims, issues, or defenses, and must appoint class counsel under Rule 23(g).

(C) Altering or Amending the Order. An order that grants or denies class certification may he altered or amended before final judgment.

(2) *Notice.*

(A) For (b)(1) or (b)(2) Classes. For any class certified under Rule 23(b)(1) or (b)(2), the court may direct appropriate notice to the class.

(B) For (b)(3) Classes. For any class certified under Rule 23(b)(3), the court must direct to class members the best notice that is practicable under the circumstances. including individual notice to all members who can be identified through reasonable effort. The notice must clearly and concisely state in plain, easily understood language:

(i) the nature of the action;

(ii) the definition of the class certified:

(iii) the class claims, issues, or defenses;

(iv) that a class member may enter an appearance through an attorney if the member so desires:

(v) that the court will exclude from the class any member who requests exclusion;

(vi) the time and manner for requesting exclusion; and

(vii) the binding effect of a class judgment on members under Rule 23(c)(3).

(3) *Judgment.* Whether or not favorable to the class, the judgment in a class action must:

(A) for any class certified under Rule 23(b)(1) or (b)(2), include and describe those whom the court finds to be class members: and

(B) for any class certified under Rule 23(b)(3), include and specify or describe those to whom the Rule 23(c)(2) notice was directed, who have not requested exclusion, and whom the court finds to be class members.

(4) *Particular issues.* When appropriate, an action may be maintained as a class action with respect to particular issues.

(5) *Subclasses.* When appropriate, a class may be divided into subclasses that are each treated as a class under this rule.

(d) Conducting the Action.

(1) *In General.* In conducting an action under this rule, the court may issue orders that:

(A) determine the course of proceedings or prescribe measures to prevent undue repetition or complication in presenting evidence or argument;

(B) require—to protect class members and fairly conduct the action—giving appropriate notice to some or all class members of:

(i) any step in the action;

(ii) the proposed extent of the judgment; or

(iii) the members' opportunity to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses. or to otherwise come into the action;

(C) impose conditions on the representative parties or on intervenors:

(D) require that the pleadings be amended to eliminate allegations about representation of absent persons and that the action proceed accordingly; or

(E) deal with similar procedural matters.

(2) *Combining mid Amending Orders.* An order under Rule 23(d)(1) may be altered or amended from time to time and may be combined with an order under Rule 16.

(e) Settlement, Voluntary Dismissal, or Compromise. The claims, issues, or defenses of a certified class may be settled, voluntarily dismissed, or compromised only with the court's approval. The following procedures apply to a proposed settlement, voluntary dismissal, or compromise:

(1) The court must direct notice in a reasonable manner to all class members who would be bound by the proposal.

(2) If the proposal would bind class members, the court may approve it only after a hearing and on finding that it is fair, reasonable, and adequate.

(3) The parties seeking approval must file a statement identifying any agreement made in connection with the proposal.

(4) If the class action was previously certified under Rule 23(b)(3), the court may refuse to approve a settlement unless it affords a new opportunity to request exclusion to individual class members who had an earlier opportunity to request exclusion but did not do so

(5) Any class member may object to the proposal if it requires court approval under this subdivision (e); the objection may be withdrawn only with the court's approval.

(f) Appeals. A court of appeals may permit an appeal from an order granting or denying class-action certification under this rule if a petition for permission to appeal is filed with the circuit clerk within 14 days after the order is entered. An appeal does not stay proceedings in the district court unless the district judge or the court of appeals so orders.

(g) Class Counsel.

(1) *Appointing Class Counsel.* Unless a statute provides otherwise. a court that certifies a class must appoint class counsel. In appointing class counsel, the court:

(A) must consider:

(i) the work counsel has clone in identifying or investigating potential claims in the action:

(ii) counsel's experience in handling class actions, other complex litigation, and the type[s] of claims asserted in the action,

(iii) counsel's knowledge of the applicable law: and

(iv) the resources that counsel will commit to representing the class:

(B) may consider any other matter pertinent to counsel's ability to fairly and adequately represent the interests of the class:

(C) may order potential class counsel to provide information on any subject pertinent to the appointment and to propose terms for attorney's fees and nontaxable costs;

(D) may include in the appointing order provisions about the award of attorney's fees or nontaxable costs under Rule 23(h); and

(E) may make further orders in connection with the appointment.

(2) *Standard for Appointing Class Counsel.* When one applicant seeks appointment as class counsel, the court may appoint that applicant only if the applicant is adequate under Rule 23(g)(1) and (4). If more than one adequate applicant seeks appointment. the court

must appoint the applicant best able to represent the interests of the class.

(3) *Interim Counsel.* The court may designate interim counsel to act on behalf of a putative class before determining whether to certify the action as a class action.

(4) *Duty of Class Counsel.* Class counsel must fairly and adequately represent the interests of the class.

(h) Attorney's Fees and Nontaxable Costs. In a certified class action, the court may award reasonable attorney's fees and nontaxable costs that are authorized by law or by the parties' agreement. The following procedures apply:

(1) A claim for an award must be made by motion under Rule 54(d)(2), subject to the provisions of this subdivision (h), at a time the court sets. Notice of the motion must be served on all parties and, for motions by class counsel, directed to class members in a reasonable manner.

(2) A class member, or a party from whom payment is sought. may object to the motion.

(3) The court may hold a hearing and must find the facts and state its legal conclusions under Rule 52(a).

(4) The court may refer issues related to the amount of the award to a special master or a magistrate judge, as provided in Rule 54(d)(2)(D).

APPENDIX G

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

[Filed 12/14/15]

Civil Action No. 1:99CV03119 (EGS)

MARILYN KEEPSEAGLE, *et al*.,

Plaintiffs,

v.

TOM VILSACK, Secretary,
United States Department of Agriculture,

Defendant.

Judge: Emmet G. Sullivan
Magistrate Judge: Alan Kay

ADDENDUM TO SETTLEMENT AGREEMENT

I. INTRODUCTION

This is an addendum to the Settlement Agreement approved by the Court in *Keepseagle v. Vilsack,* No. 1:99CV03119 (D.D.C.) on April 29, 2011, as revised by the parties and approved by the Court on August 1, 2012. Except where otherwise specified and defined herein, all terms used in this Addendum shall have the same meanings as set forth in the Settlement Agreement. The purpose of this Addendum is to modify the *cy pres* provisions set forth in the Settlement Agreement. Thus, the provisions of this Addendum will govern in place of the following portions of the original

and revised Settlement Agreement: sections II.I, II.J, IX.F.6 and IX.F.7 (original Settlement Agreement), IX.F.9 (revised Settlement Agreement).

This Addendum also modifies Settlement Agreement section XIII.A. The Court shall retain jurisdiction over this action until 180 days after the Effective Date set forth below solely for the purpose of (a) supervising the distribution of supplemental awards described in section III below; (b) supervising distribution to Initial Cy Pres Beneficiaries pursuant to section IV.A below; and (c) ruling on appointment of Trustees or any other matter arising with respect to implementation of sections IV.B and C below. In all other respects the Court's jurisdiction is limited as set forth in section XIII.A of the Settlement Agreement.

This addendum shall be operative and binding on the parties as if its terms had been included in the Settlement Agreement referenced above upon execution (in one document or in counterparts) by counsel for the parties on the signature lines set forth below and approval by the Court.

II. DEFINITIONS

A. "Initial Cy Pres Beneficiary" is any non-profit organization that (i) has provided business assistance, agricultural education, technical support, or advocacy services to Native American farmers or ranchers between January 1, 1981 and November 1, 2010 to support and promote their continued engagement in agriculture, (ii) is either a tax-exempt organization described in Section 501(c)(3) of the Internal Revenue Code ("Code"); educational organization described in Section 170(b)(1)(A)(ii) of the Code; or an instrumentality of a state or federally recognized tribe, including a non-profit organization chartered under

the tribal law of a state or federally recognized tribe, that furnishes assistance designed to further Native American farming or ranching activities, provided, however, that the use of any grant funds by such grant recipient shall be restricted exclusively to charitable and educational purposes described in Section 170(c)(2)(B) of the Code; and (iii) is proposed by Class Counsel and approved by the Court.

B. "Primary Cy Pres Beneficiary" is a trust created for the purpose of distributing the *cy pres* funds after the distribution of Supplemental Liquidated Awards to the Prevailing Claimants. The trust (referred to as "The Trust" or the "Native American Agriculture Fund") shall seek recognition as a nonprofit organization under §501(c)(3). The trust document is attached hereto as Exhibit A. Establishment of the trust will be dated as of six months after the Court approves this Addendum, including the Trust Agreement, and the time to appeal expires without appeal of the order approving the Addendum, or any appeal from that order is finally resolved without further opportunity for appeal. The initial members of the Board of Trustees for the Trust, as well as the Executive Director, shall be nominated by Class Counsel and approved by the Court.

C. A "Prevailing Claimant" is one of the people who received either a Track A or Track B Liquidated Award pursuant to the original Settlement Agreement or the Revised Settlement Agreement, or the Legal Representative of the Estate of any prevailing claimant who is deceased. If a prevailing claimant has died since the last payments were issued, the Legal Representative of the Estate shall be determined in the manner set forth in Section, IX.A.7 of the original agreement, and the Estate will have the same right to

any further payment as the prevailing claimant would have.

D. "Supplemental Liquidated Award" is a payment of $18,500 to each Prevailing Claimant.

E. "Supplemental Liquidated Tax Award" is a payment equal to 15% of the Prevailing Claimant's Supplemental Liquidated Award, or $2775.

F. "Effective Date" is the date upon which an order providing final approval of this Addendum becomes non-appealable, or, in the event of any appeals, upon the date of final resolution of said appeals.

III. DISTRIBUTION OF SUPPLEMENTAL LIQUIDATED AWARDS

A. Within fourteen calendar days after this Addendum is approved by the Court, the Claims Administrator shall prepare an accounting of all payments made to Prevailing Claimants and submit it to Class Counsel and the Secretary. Class Counsel will have fourteen calendar days to serve on the Settlement Administrator any objections to the accuracy of the list of Prevailing Claimants, after which the accuracy of the accounting will be deemed confirmed.

B. Within 60 days of the Effective Date of this Addendum, the Claims Administrator shall send to each Prevailing Claimant a check payable to the Prevailing Claimant in the amount of the Supplemental Liquidated Award, paid from the funds remaining in the Total Compensation Fund. All checks distributed under this Section will be valid for 180 calendar days from the date of issue. The funds corresponding to any check that remains uncashed 181 calendar days from its date of issue will be added to the Trust.

C. For each Prevailing Claimant who receives a Supplemental Liquidated Award, the Claims Administrator shall send a payment of the individual's Supplemental Liquidated Tax Award from the funds remaining in the Total Compensation Fund to the IRS. The Claims Administrator shall provide the Prevailing Claimant notice that such payment has been made by issuing a Form 1099. Along with payment of the Supplemental Liquidated Tax Awards to the IRS, the Claims Administrator shall provide to the IRS the name, address, and Social Security or Taxpayer Identification Number of each Prevailing Claimant on whose behalf the payment is being made.

D. Subject to the Court's approval, the parties agree that Supplemental Class Representative Service Awards may be awarded. Class Counsel intend to recommend awards from the Total Compensation Fund in the following amounts:

1. Porter Holder shall receive $100,000.

2. Marilyn Keepseagle shall receive $100,000.

3. Claryca Mandan shall receive $100,000.

The Secretary reserves the right to comment on the amount of the Service Awards. Any payments awarded to these Class Representatives shall be subject to approval by the Court, and any modification or reduction of any award sought by such a Class Member shall not affect the validity of the other terms of this Agreement.

E. The Claims Administrator shall be compensated for this additional distribution from the remaining Settlement Administration Fund to the extent the amount of funds in that Fund is sufficient for such

compensation. To the extent the amount of funds in that Fund is not sufficient for such compensation, any costs for such compensation that cannot be covered by the funds currently in that Fund shall be paid from interest accrued on the Cy Pres Fund.

IV. DISTRIBUTION OF CY PRES FUND

A. Within 180 days after this Addendum is approved by the Court, Class Counsel will propose awards to Initial Cy Pres Beneficiaries which, in the aggregate, will total $38 million from the Total Compensation Fund. Awards to Initial Cy Pres Beneficiaries shall be for the benefit of Native American farmers and ranchers, upon recommendation by Class Counsel and are subject to approval by the Court. Awards to Initial Cy Pres Beneficiaries may not be used for litigation, lobbying, or political activity as those terms are defined by the Internal Revenue Code. Once the Court has approved the Initial Cy Pres Beneficiaries, the Claims Administrator shall send to each Initial Cy Pres Beneficiary, via secure method of disbursement (either wire transfer or a check sent via overnight, trackable, delivery) the amount of the Beneficiary's share of the Cy Pres Fund.

B. After payments described in section III and in section IV.A are made, and after the Court approves the Trust Document and the Trust's first Board of Trustees and Executive Director, the remainder of the Total Compensation Fund except for any unspent interest that accrued on the settlement funds, will be transferred to the Native American Agriculture Fund (also referred to herein as the Trust).

C. Interest earned on the Total Compensation Fund or Cy Pres Fund, prior to such funds being transferred to the Primary Cy Pres Beneficiary, may

be used to pay any outstanding expenses associated with management of the Total Compensation Fund as well as the administrative and operating expenses of the Trust until the funds referred to in paragraph IV.B above are transferred to the Trust. Until such time as all expenses and taxes associated with creation of the Trust and management of the Total Compensation or Cy Pres Fund have been paid, the interest will be retained in a separate account in order to defray such outstanding expenses, after which the remaining interest will be transferred to the Trust. In the event counsel seek an award of attorneys' fees and costs for work involved in establishing the Trust and modifying the Agreement, such award may be made from interest that has accrued from the Total Compensation Fund, and may only be with approval by the Court upon a properly noticed motion. The Secretary reserves the right to oppose or respond to any motion for an award of attorneys' fees and expenses, and in particular reserves the right to address the entitlement to fees, the amount of fees, or both entitlement and amount, in any opposition or response. After payment of any funds awarded and/or due under this subparagraph are made, any balance in the Total Compensation Fund will be transferred to the Native American Agriculture Fund (also referred to herein as the Trust).

V. PROCEDURES

A. Upon execution of this Addendum, the plaintiff class and Ms. Keepseagle will withdraw their pending appeals.

B. Concurrent with the presentation of this Addendum to the Court for approval, class counsel will submit to the Court for approval the Trust Document and the nominees to serve on the first Board of

Trustees for the Trust, as well as an Initial Executive Director.

C. Class counsel will request that the District Court finally approve this Addendum pursuant to the Settlement Agreement. The Parties agree to take all actions necessary to obtain approval of this Addendum.

December 14, 2015

Respectfully submitted,

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Dated: 12/14/15

APPENDIX H

[1] UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 99-3119

MARILYN KEEPSEAGLE, *et al.*,
Plaintiffs,

v.

ANN M. VENEMAN, *et al.*,
Defendants.

February 4, 2016
10:30 a.m.
Washington, D.C.

TRANSCRIPT OF MOTION HEARING
PROCEEDINGS BEFORE THE HONORABLE
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DISTRICT COURT JUDGE

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[4] MORNING SESSION, FEBRUARY 4, 2016

(10:29 a.m.)

THE COURTROOM CLERK: Your Honor, this is Civil Action 99-3119, *Marilyn P. Keepseagle, et al., versus Ann M. Veneman, et al.*

Will all parties please come forward to the lectern and introduce yourselves for the record, please?

MR. SELLERS: Good morning, Your Honor. Joseph Sellers representing the plaintiff class.

THE COURT: Good morning, Counsel.

MR. SELLERS: Good morning.

MR. MATZ: Marshall Matz, M-A-T-Z. I am representing Mrs. Keepseagle.

THE COURT: Morning, Counsel.

MS. WEBBER: Good morning, Your Honor. Christine Webber representing the plaintiff class.

THE COURT: Good. Morning, Counsel.

MR. FRANTZ: Good morning, Your Honor. David Frantz, also class counsel.

THE COURT: Good morning, Counsel.

MR. DILLARD: Good morning, Your Honor. John Dillard representing Marilyn Keepseagle.

THE COURT: Good morning, Counsel.

MS. VOGEL: Good morning, Your Honor. Sarah Vogel representing the plaintiff class.

* * *

[21] country and the deprivation that you suffered at the hands of the United States Government that's been rectified, that's been resolved by this agreement. So thank you for sharing your life stories with me. They were very touching.

Keith Mandan, the fourth active class representative and the only active class representative who objects to the modified agreement, as far as the Court can determine, falls into the first camp, arguing that no money should be given to third parties. He's represented by William Sherman, an attorney and counsel at Dinsmore & Shohl. And I believe that's spelled S-H-O-H-L.

MR. SHERMAN: I apologize for not making my presence known on the record; but I am William Sherman, counsel for Keith Mandan.

THE COURT: All right. Welcome to the Court. How are you this morning? Good.

And Mr. Sherman also represents Mr. William Smallwood, Jr., who objects to the settlement on the same grounds.

On Monday, February the 1st, Mr. Smallwood filed what appears to be a class action complaint against Secretary Vilsack and Attorney General Lynch arguing that – or alleging that the payment of $380 million by way of the cy-près provision is an unconstitutional

ultra vires action. That's Complaint Number 16, Civil Action 161. It came to this Court – it was assigned to me as a related case to the *Keepseagle* case. The Court determined [22] initially that it's not related within the meaning of our local rules because the merits of this case were determined a couple of years ago when the Court approved the agreement that resolved the claims set forth in the plaintiffs' complaint; and, therefore, the Court sent it back to return the case to the calendar committee.

It was reassigned to one of my colleagues, Judge Walton. He and I have not discussed this, and maybe I should have heard from counsel first as to whether the Court should keep the case and resolve it itself or not. I'm interested in your views about that. If it appears that in hindsight the Court should resolve the case itself, I'll give that further consideration. But it does not appear to be related within the meaning of our local rules because the merits have long since been determined. This case, this active case, has been closed for a couple of years, at least.

The lawsuit filed by Mr. Smallwood alleges that the *Keepseagle* judgment fund only authorizes payments to injured parties; and that, by agreeing to a cy-près distribution of funds to noninjured parties, the executive branch has exceeded its authority in violation of the appropriations clause. And that's at 13 U.S. Code 1304, et cetera, et cetera, et cetera. The lawsuit seeks to certify a class comprised of all successful claimants in the initial *Keepseagle* claims distribution process.

Another critique concerns representation on the proposed [23] board of directors for the trust. In one form letter, submitted by at least 100 individuals, certain class members object to having four members

on the – and I hope I'm not mispronouncing; if I am, someone correct me – is it the Oglala?

MS. KEEPSEAGLE: Oglala.

THE COURT: – Oglala Sioux Tribe on the board, and suggests reducing their representation to one individual, and filling the other three positions with members of other reservations and regions. And I have to say that doesn't strike me as imminently unreasonable, but I'll hear from the parties. I don't know why there's four members of the same tribe on the board, maybe to the exclusion of other qualified members of other tribes who should be on the board, but the parties can address that.

The Court's also received a packet from the nonprofit organization, the Native American Women in Agriculture Leadership and Entrepreneurship Program, asking to be considered for a grant with the remaining funds should the Court approve the proposed agreement.

I did not file that proposal on the docket because I just didn't think it was appropriate to do so. But I did receive it, and it's in chambers. I'm not quite sure what to do with it. I didn't want to return it. I did want the organization to know I have received it.

In addition, I've received a stack of approximately 400

* * *

[68] MR. SELLERS: Okay. Thank you.

THE COURT: All right. Let me hear from the three gentlemen who wanted to – let me hear from counsel first.

MR. SELLERS: I'm sorry, let me just note one other thing. Ms. Mandan has joined us by phone. I just wanted the Court to be aware of that.

THE COURT: Great. Thank you. All right.

All right. Counsel.

MR. SHERMAN: Your Honor, I've been –

THE COURT: Let me have everyone state their name for the benefit of the court reporter. There are a lot of folks here today. I want to make sure the record's clear. Counsel, you introduced yourself earlier.

Again, for the record.

MR. SHERMAN: Your Honor, for the record, my name is William Sherman, from the law firm of Dinsmore & Shohl. I'm here representing class representative Keith Mandan.

THE COURT: All right. All right, Counsel.

MR. SHERMAN: Your Honor, a request has been made of me to allow one of the chiefs to speak before I do because he has an appointment on the Hill. And if it pleases the Court, I would concede that he might speak before I do.

THE COURT: All right. For a few minutes I'll hear from him very briefly. All right.

MR. SHERMAN: He's gone? Okay.

[69] He's gone, apparently.

THE COURT: Oh, all right.

MR. SHERMAN: Your Honor, thank you for allowing me to appear and speak here. First, I'm not here at all to be critical of a decade of work on a very difficult case.

THE COURT: On a decade?

MR. SHERMAN: Absolutely.

THE COURT: It's been two decades.

MR. SHERMAN: Absolutely. I'm not here to be critical. And I think that counsel should probably be commended for sticking in there, hanging in there as long as they did and getting, what I think is, a good result.

What we're currently faced with, however, is whether or not that result is satisfactory. Counsel, as he was up here, indicated the old adage that a good settlement is one in which everyone walks away equally dissatisfied.

THE COURT: We're past the settlement case. The case has been settled. There's a valid contract that's been judicially approved. So the only question before me is whether or not – whether or not an addendum to – a proposed addendum to the contract should be approved.

MR. SHERMAN: And the Court raises, you know, the issue as to whether or not – how much weight should be given to the fact that my client, Keith Mandan, who is a class representative, opposes, as well as a great number of the other prevailing [70] claimants in this matter oppose this proposed amendment to the settlement agreement.

It comes to my attention, and the Court asked the question concerning the lawsuit, the proposed class action that we filed where Billy Smallwood, who's also a prevailing claimant in the Keepseagle case, has filed a class action, and whether or not it was a related case. To our understanding, Your Honor, and the reason we applied for related case status was, according to the

local rule, a related case on a dismissed matter – and this is a dismissed matter – is one that involves the same parties and the same subject party. Your Honor, we are completely satisfied with where the case sits at this particular point, but our reasons for doing so was first –

THE COURT: You mean with Judge Walton?

MR. SHERMAN: Yes.

THE COURT: All right. Go ahead.

MR. SHERMAN: – our reasons for doing so was out of an abundance of caution in complying with the rules.

THE COURT: That's fine, that's fine.

MR. SHERMAN: But more importantly because our allegations in that lawsuit potentially have a direct impact on whether what is being proposed here can actually be done lawfully. And so we served, not only the government, we served an early courtesy copy – we also served a courtesy copy on –

THE COURT: I don't want to get too much involved on a [71] related case that's not even before me. I sent it back to the calendar committee. In my opinion, it's not related within the meaning of the local rule. It's before Judge Walton, and so you can make your arguments to him.

MR. SHERMAN: The other concern that the Court raised – and I'm not sure it was a concern, it was more of an observation – was the lack of any compensation for Mr. Mandan. What I will say to that is it was clear, or Mr. Mandan attempted to make it clear – whether he and counsel came to some understanding or not, is obviously left open to debate – but Mr. Mandan made

it clear that he did not agree with the proposed settlement, and that he felt that –

THE COURT: Oh, settlement or –

MR. SHERMAN: The proposed addendum to the settlement. And he felt that it was his obligation on behalf of all of those who, like him, did not agree, that he take that position and let that position be known.

When the questioning came up as to whether or not he should be compensated, he was asked to produce time sheets and to document every hour that he had spent. And my client simply refused to do so. Again, it is the nature of a proud people that sometimes maybe even gets in the way of communication, and certainly at times gets in the way of what is perceived to be cooperation.

The other thing that I want to address, Your Honor, is [72] that we have a situation here, as I mentioned at the beginning, where the parties have been at this for quite some time. And both counsel for the class and counsel for Ms. Keepseagle stated that Ms. Keepseagle proposed that the entire fund be distributed per capita to the prevailing claimants, and that that was not approved.

While that may be the case, I think it misses a step. And the step is that it was rejected by the government; and, therefore, it could not be approved. And I think it's worthwhile to point out that there were negotiations going on, and it wasn't that it magically was not approved. There is resistance on the part of the government from making a substantial supplemental distribution to the prevailing claimants.

Secondly, Your Honor, you have countless stories from these individuals. And I've read a lot about this

case, and I've read transcripts from Mrs. Keepseagle. And what Mrs. Keepseagle continually says, and what she said today, is that what she and her people have lost is significant. We can talk about the loss of farms, the loss of ranches, the loss of cattle, the loss of machinery and equipment, but the thing that she keeps coming back to is that she has nothing to leave to anyone. And that she and her husband, and many of these prevailing claimants who are similarly situated, have lost their dreams. They've lost a lifetime of work. And so I think that it is clear that full compensation has not been granted to them. A settlement, I [73] believe, in and of itself, suggests that full compensation has been foregone.

My sort of end on this point, Mr. Mandan believes he represents the majority of the prevailing claimants in opposing the addendum. I went to Bismarck, North Dakota, and I met with Mr. Mandan. Since the time I was contacted some four or five months ago, I have spoken with numerous, countless almost, individuals who are part of the prevailing claimant class. Their stories are remarkably similar to that that you hear from Ms. Keepseagle.

The proposed amount – both counsel have said that this is an impoverished community, an impoverished nation of people within our nation – $18,500 is not going to cure that. $100,000 would go a lot further to cure that, but would not cure it. And it's my position, and the position of my client and those who are similarly situated, that the full amount should be distributed to them because they are the ones who suffered the injury. They are the ones who had legitimate claims against the government. They are the ones who provided substantial evidence, enough for their claims to be respected and paid by the

government. And they are the ones who deserve to be additionally compensated because they were not fully compensated under the settlement agreement, and that they would not still be fully compensated if every dime of the remaining funds were paid to them. They don't dream, Your Honor, of riches. They dream of justice. That's what – the [74] dream they're seeking. Now, they've lost the other ones. But if they are somehow afforded the dream of justice, maybe there would be a substantial gain of full compensation in this case. Thank you.

THE COURT: All right. Thank you, Counsel.

All right. There were three individuals who wanted to – yes, sir.

MR. VELIE: Hi, Your Honor.

THE COURT: Good afternoon.

MR. VELIE: I'm Jon Velie. I'm here on behalf of ten Cherokee individuals. I just had a *pro hac vice*, I think, approved yesterday, so I'm very late to this case.

THE COURT: Welcome to the Court, though.

MR. VELIE: Thank you, Your Honor. First to Mr. Sellers and your parties, I totally recognize the difficulty in winning or settling a $680 million case on behalf – against the U.S. Government. I've been litigating for 23 years on behalf of Seminole and Cherokee Freedmen against the U.S. Government, and my cases are still ongoing. I get giving your entire lifetime, or could be part of your professional lifetime, to taking on one of these cases. And it was a great victory.

However, Your Honor, I'm here because of a very

interesting situation. It was weird walking into this case, to be honest. I'm here on behalf of 12 Cherokees. We call them the Cherokee 12. I met with them in Tahlequah, Oklahoma.

* * *

[175] actions regularly. Thank you, Judge.

THE COURT: Thank you, sir.

Good afternoon, sir.

MR. MANDAN: Good afternoon, Your Honor. My name is Keith Mandan, and I'm one of the lead plaintiffs in the Marilyn Keepseagle lawsuit. I come here on behalf of myself and a few others. Today, although this case is historic, all right – I mean that in the sense – that there's absolutely too much money left over to go into some cy-près fund. This is absolutely unheard of. To me that's what makes it historic. Most cases that I've seen – you can review some of them – but the most I've seen is like $12 million at the most. Now, I object to giving any funds to nonprofit organizations, I really do. And I and Mr. Sellers parted company on that very statement. He was for it, and I didn't want it. So I said, "No, it shouldn't happen this way," and that's where I stand today on this.

And I just drove 1,700 miles to come down here, and now I got to drive back, but I think that's – I take that stance very strongly, and I would really appreciate that the justice get served here. If you would not meet us halfway but all the way, Your Honor.

THE COURT: All right.

MR. MANDAN: And with that I'll conclude.

THE COURT: Thank you very much.

[176] MR. MANDAN: Thank you very much.

THE COURT: How long did it take to you drive here?

MR. MANDAN: 17 hours.

THE COURT: 17 hours? And when are you leaving?

MR. MANDAN: I'm not sure. I have to visit first.

THE COURT: Well, travel safely. All right.

MR. MANDAN: Okay. Thank you.

THE COURT: Thank you.

FROM THE FLOOR: (Applause.)

MR. WILSON: Your Honor.

THE COURT: Yes.

MR. WILSON: Your Honor, my name is Rollie Wilson. I'm an attorney with Fredericks, Peebles & Morgan. My firm represents the estates of Basil Alkire and John Fredericks, Jr., named plaintiffs and class representatives in the *Keepseagle v. Vilsack* litigation; two of them are named plaintiffs.

I also have with me today Janet Alkire-Thomas, the daughter of Basil Alkire.

THE COURT: All right.

MR. WILSON: On behalf of these named plaintiffs and class representatives, we oppose this motion to modify the settlement agreement of cy-près provisions. We oppose this motion for four main reasons.

First, any cy-près funds should be fully distributed to the class. This is the only way to ensure that funds benefit the

* * *

APPENDIX I

OFFICE OF THE ATTORNEY GENERAL
WASHINGTON, DC 20530

June 5, 2017

MEMORANDUM FOR ALL COMPONENT
HEADS AND UNITED STATES ATTORNEYS

FROM: The Attorney General

SUBJECT: Prohibition on Settlement Payments to Third Parties

Our Department is privileged to represent the United States and its citizens in courts across our country We take this responsibility seriously. In the course of this representation, there may come a time when it is in the best interests of the United States to settle a lawsuit or end a criminal prosecution. Settlements, including civil settlement agreements, deferred prosecution agreements, non-prosecution agreements, and plea agreements, are a useful tool for Department attorneys to achieve the ends of justice at a reasonable cost to the taxpayer. The goals of any settlement are, first and foremost, to compensate victims, redress harm, or punish and deter unlawful conduct.

It has come to my attention that certain previous settlement agreements involving the Department included payments to various non-governmental, third-party organizations as a condition of settlement with the United States. These third-party organizations were neither victims nor parties to the lawsuits.

The Department will no longer engage in this practice. Effective immediately, Department attorneys may not enter into any agreement on behalf of the United States in settlement of federal claims or charges,

including agreements settling civil litigation, accepting plea agreements, or deferring or declining prosecution in a criminal matter, that directs or provides for a payment or loan to any non-governmental person or entity that is not a party to the dispute.

There are only three limited exceptions to this policy. First, the policy does not apply to an otherwise lawful payment or loan that provides restitution to a victim or that otherwise directly remedies the harm that is sought to be redressed, including, for example, harm to the environment or from official corruption. Second, the policy does not apply to payments for legal or other professional services rendered in connection with the case. Third, the policy does not apply to payments expressly authorized by statute, including restitution and forfeiture.

This policy applies to all civil and criminal cases litigated under the direction of the Attorney General and includes civil settlement agreements, *cy pres* agreements or provisions, plea agreements, non-prosecution agreements, and deferred prosecution agreements. Existing resources, including the U.S. Attorneys' Manual, should be revised to conform to this policy. This memorandum is not intended to, does not, and may not be relied upon to create any rights, substantive or procedural, enforceable at law by any party in any matter civil or criminal.

Thank you for your continued hard work on behalf of our country.