IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

In re BLACK FARMERS DISCRIMINATION LITIGATION	Misc. No. 08-mc-0511 (PLF)
This document relates to: ALL CASES	

THE COMPETITIVE ENTERPRISE INSTITUTE'S CENTER FOR CLASS ACTION FAIRNESS'S MOTION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF IN SUPPORT OF RETURNING UNCLAIMED SETTLEMENT FUNDS TO CLASS MEMBERS

Adam E. Schulman (DC Bar No. 1001606)
COMPETITIVE ENTERPRISE INSTITUTE,
CENTER FOR CLASS ACTION FAIRNESS
1899 L Street, NW, 12th Floor
Washington, DC 20036
Telephone: (610) 457-00856
Email: adam.schulman@cei.org

Attorneys for Amicus Curiae
Competitive Enterprise Institute,
Center for Class Action Fairness

In accordance with LCvR 7(o), and in response to this Court's Memorandum Opinion and Order dated September 3, 2015 soliciting briefing on this matter (Dkt. 430) and this Court's Memorandum Opinion and Order dated November 19, 2015 (Dkt. 438) resetting the briefing schedule, *amicus curiae* The Competitive Enterprise Institute's Center for Class Action Fairness ("CCAF")[1] seeks leave of this Court to file an *amicus* brief in support of distributing unclaimed settlement funds to Class Members in lieu of *cy pres*.[2] CCAF explains why modification of the settlement agreement is not necessary to distribute remaining funds to class members, and in the alternative, why modifying the Amended Settlement Agreement of September 17, 2014 (Dkt. 413) is available under Fed. R. Civ. P. 60(b). CCAF's 20 page proposed *amicus* brief is attached to this motion for leave to file.

Established in 2009, CCAF represents class members *pro bono* in class actions where class counsel employs unfair class action procedures to benefit themselves at the expense of the class. *See, e.g.*, *Pearson v. NBTY, Inc.*, 772 F.3d 778, 787 (7th Cir. 2014) (observing that CCAF "flagged fatal weaknesses in the proposed settlement" and demonstrated "why objectors play an essential role in judicial review of proposed settlements of class actions"); *In re Dry Max Pampers Litig.*, 724 F.3d 713, 716-17 (6th Cir. 2013) (describing CCAF's client's objections as "numerous, detailed, and

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[1] Prior to October, CCAF was a standalone 501(c)(3) non-profit public-interest law firm. On October 1, 2015, the Competitive Enterprise Institute ("CEI") merged with CCAF. CCAF has become a division within CEI's law and litigation program.

[2] *Amicus* sought consent to file the instant brief from all parties. Both Plaintiffs and Defendants do not oppose nor support *Amicus*'s motion for leave to file.

substantive.") (reversing settlement approval and certification); *Richardson v. L'Oreal USA, Inc.*, 991 F. Supp. 2d 181, 205 (D.D.C. 2013) (describing CCAF's client's objection as "comprehensive and sophisticated" and noting that "[o]ne good objector may be worth many frivolous objectors in ascertaining the fairness of a settlement.") (rejecting settlement approval and certification). CCAF's founder has been recognized as "the leading critic of abusive class action settlements." Adam Liptak, *When Lawyers Cut Their Clients Out of the Deal*, N.Y. TIMES, Aug. 13, 2013, at A12. CCAF attorneys have won numerous appeals, many of them landmark published decisions in support of the principles that settlement fairness requires that the primary beneficiary of a class-action settlement should be the class, rather than the attorneys or third party *cy pres* recipients; and that courts scrutinizing settlements should value them based on what the class actually receives, rather than on illusory measures of relief. *E.g.*, *In re BankAmerica Corp. Secs. Litig.*, 775 F.3d 1060 (8th Cir. 2015); *In re Baby Prods. Antitrust Litig.*, 708 F.3d 163 (3d Cir. 2013); *In re Bluetooth Headset Prod. Liab. Litig.*, 654 F.3d 935 (9th Cir. 2011).

CCAF's interest lies in advancing the interests of absent Class Members and vouchsafing that Rule 23 operates in a systematically fair manner. Distributing the remainder of this limited fund settlement to law school clinics or non-party non-profits does not serve those interests. This Court has broad equitable powers both under the settlement agreement and under operative law to shape equitable decrees for unclaimed class funds; it should use those powers to ensure that any unclaimed class funds are returned to Class Members—and possibly to *Pigford* class members to the extent practicable—not remitted to third-party *cy pres* organizations.

"In recent years, federal district courts have disposed of unclaimed class action settlement funds after distributions to the class by making *cy pres* distributions. Such distributions have been controversial in the courts of appeals" with many circuits "criticiz[ing] and severely restrict[ing] the practice." *BAC Secs.*, 775 F.3d at 1063 (internal quotations and footnote omitted). *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 (2010); John Beisner, et al., CY PRES: A NOT SO CHARITABLE CONTRIBUTION TO CLASS ACTION PRACTICE 13 (2010); Adam Liptak, *When Lawyers Cut Their Clients Out of the Deal*, N.Y. TIMES (Aug. 13, 2013); Nathan Koppel, *Proposed Facebook Settlement Comes Under Fire*, WALL ST. J. (Mar. 2, 2010); Adam Liptak, *Doling Out Other People's Money*, N.Y. Times (Nov. 26, 2007); Sam Yospe, *Cy Pres Distributions in Class Action Settlements*, 2009 COLUM. BUS. L. REV. 1014; Amanda Bronstad, *Cy pres awards under scrutiny*, NAT'L L. J. (Aug. 11, 2008); Theodore H. Frank, Statement before the House Judiciary Committee Subcommittee on the Constitution and Civil Justice, *Examination of Litigation Abuse* (Mar. 13, 2013) ("Frank Statement"). As the leading law review article notes, *cy pres* awards can "increase the likelihood and absolute amount of attorneys' fees awarded," "without directly, or even indirectly, benefitting the plaintiff." Redish, 62 FLA. L. REV. at 660-61. *Cy pres* "creates the illusion of class compensation." Id. at 623.

In *Marek v. Lane*, Chief Justice Roberts concurring in the denial of certiorari noted the possible need of the Supreme Court "to clarify the limits" of *cy pres* "including when, if ever, such relief, should be considered." 134 S.Ct. 8, 9 (2013) (citing Redish). Since then, at CCAF's urging two appellate courts have endorsed

Section 3.07 of the *ALI Principles*: "A cy pres award is supposed to be limited to money that can't feasibly be awarded to the intended beneficiaries, here consisting of the class members." *Pearson*, 772 F.3d at 784 (rejecting $1.13 million cy pres residual when distribution possible to 4.7 million class members); *accord BAC Secs.*, 775 F.3d at 1063-64 (rejecting cy pres of $2.7 million residual in lieu of third distribution to class members) (explicitly adopting *ALI Principles* § 3.07); *see also Klier v. Elf Atochem N. Am., Inc.*, 658 F.3d 468 (5th Cir. 2011). CCAF posits that ALI § 3.07 is correct; when possible, unclaimed settlement funds should be distributed to class members.

"An amicus brief should normally be allowed when a party is not represented competently or is not represented at all, when the amicus has an interest in some other case that may be affected by the decision in the present case (though not enough affected to entitle the amicus to intervene and become a party in the present case), or when the amicus has unique information or perspective that can help the court beyond the help that the lawyers for the parties are able to provide." *Youming Jin v. Ministry of State Sec.*, 557 F. Supp. 2d 131, 137 (D.D.C. 2008) (internal quotation omitted). All three criteria are satisfied here.

CCAF represents class members across the nation, for whom direct benefit matters. *See Baby Prods.*, 708 F.3d at 178. Circumscribing use of *cy pres* is thus a highly important issue to CCAF's constituency. Second, because of CCAF's extensive experience and familiarity with class action settlement and *cy pres* issues, its brief would aid this Court in determining what it can and should do with the leftover funds remaining in this settlement. *Amicus* can direct this Court to authority suggesting that further distributions to class members are both permissible and advisable. As the

Federal Judicial Center notes, "[i]nstitutional 'public interest' objectors may bring a different perspective...Generally, government bodies such as the FTC and state attorneys general, as well as nonprofit entities, have the class-oriented goal of ensuring that class members receive fair, reasonable and adequate compensation for any injuries suffered. They tend to pursue that objective by policing abuses in class action litigation." *Managing Class Action Litigation: A Pocket Guide for Judges*, 17 (3d ed. 2010).

CCAF's participation will be yet more helpful because neither the named plaintiffs, class counsel nor the defendant have staked out a position in favor of supplemental class distributions. Dkts. 442, 444. As a result, absent class claimants' preferred position, a supplemental distribution, is currently unrepresented and, as amicus, CCAF could provide a proper adversarial presentation of the issues. *See, e.g., Cardinal Chem. Co. v. Morton Int'l*, 508 U.S. 83, 104 (1993) (Scalia, J., concurring) ("[W]hen faced with a complete lack of adversariness" it is common practice for federal courts to "appoint[] an amicus to argue the unrepresented side." (listing Supreme Court cases); *Cicippio-Puleo v. Islamic Republic of Iran*, 353 F.3d 1024, 1030 (D.C. Cir. 2004).

Based on the foregoing, CCAF respectfully moves this Court for leave to file the brief attached to this motion, in support of returning unclaimed funds to the actual individual farmers who confronted discrimination.

Dated: December 31, 2015

Respectfully submitted,

/s/ Adam E. Schulman
Adam E. Schulman (DC Bar No. 1001606)
COMPETITIVE ENTERPRISE INSTITUTE,
CENTER FOR CLASS ACTION FAIRNESS
1899 L Street, NW, 12th Floor
Washington, DC 20036
Telephone: (610) 457-0856
Email: adam.schulman@cei.org

Attorneys for Amicus Curiae
Competitive Enterprise Institute,
Center for Class Action Fairness

Proof of Service

I certify that on December 31, 2015 I served a copy of the above on all counsel of record by filing a copy via the ECF system.

Dated: December 31, 2015

/s/ Adam E. Schulman
Adam E. Schulman