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	

BRIEF OF AMICUS CURIAE COMPETITIVE ENTERPRISE INSTITUTE'S CENTER FOR CLASS ACTION FAIRNESS

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Corporate Disclosure Statement

Amicus curiae Competitive Enterprise Institute is an IRC § 501(c)(3) non-profit corporation incorporated under the laws of Washington, D.C., with its principal place of business in Washington, D.C. Center for Class Action Fairness is a sub-unit within CEI. CEI does not issue stock and is neither owned by nor is the owner of any other corporate entity, in part or in whole. The corporation is operated by a volunteer Board of Directors.

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Introduction

As this Court recognizes, "the whole purpose of this litigation" is compensating individual class members "rather than providing…funds to disinterested third parties." *In re Black Farmers Discrimination Litig.*, 2015 U.S. Dist. LEXIS 117418, at *7 (D.D.C. Sept. 3, 2015). Very true, and the Court so states a principle of general applicability. The necessity of prioritizing class compensation derives from the nature of representational litigation under Rule 23 and the Due Process Clause of the Constitution; it derives from the nature of limited fund actions under Rule 23(b)(1)(B); it derives from equity given that it is class members' claims that are being exchanged for the settlement money; it even derives from the underpinnings Article III itself. *See, e.g., Ortiz v. Fibreboard Corp.,* 527 U.S. 815, 839 (1999) ("Here, the fund being less than the debts, the creditors are entitled to have all of it distributed among them according to their rights and priorities") (quoting *United States v. Butterworth-Judson Corp.*, 269 U.S. 504, 513 (1926)); *In re Pet Food Prods. Liab. Litig.*, 629 F.3d 333, 363 (3d Cir. 2010) ("Certainly, this law suit is not charitable.") (Weis, J., concurring and dissenting); *Broussard v. Meineke Disc. Muffler Shops*, 155 F.3d 331, 338 (4th Cir. 1998) ("The premise of a class action is that litigation by representative parties adjudicates the rights of all class members, so basic due process requires that named plaintiffs possess undivided loyalties to absent class members."); *see* Section I below.

So, there is a simple answer to the Court's first question: Yes, the Court should attempt to further the goal of class compensation. But can the Court permissibly do so? Again the answer is yes. The operative provisions of the Settlement permit the Court to use its discretion powers to reject *cy pres* proposals that violate § 3.07 of the *Principles of the Law of Aggregate Litigation* and then equitably reallocate the funds to class members. *See* Section II below. Nevertheless, if the Court disagrees that the settlement imbues the Court with such authority, then the Court should modify the settlement pursuant to Rule 60(b)(5). *See* Section III below.

Interest of Amicus Curiae

Amicus curiae Competitive Enterprise Institute ("CEI") is an IRC § 501(c)(3) non-profit corporation, and the Center for Class Action Fairness ("CCAF") is a sub-unit within CEI. (CCAF, which was founded in 2009, became part of CEI on October 1, 2015.) In CCAF's six-year history, CCAF attorneys have won numerous landmark 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 parties; and that courts scrutinizing settlements should value them based on what the class actually receives, rather than on illusory measures of relief. *E.g. Pearson v. NBTY*, *Inc.*, 772 F.3d 778 (7th Cir. 2014); *In re Dry Max Pampers Litig.*, 724 F.3d 713 (6th Cir. 2013) ("*Pampers*"); *In re Baby Prods. Antitrust Litig.*, 708 F.3d 163 (3d Cir. 2013) ("*Baby Prods.*"). Cabining inappropriate resort to *cy pres* has been a significant aspect of CCAF's mission. *See, e.g., In re BankAmerica Corp. Secs. Litig.*, 775 F.3d 1060 (8th Cir. 2015) ("*BAC Secs.*"); *Nachshin v. AOL, LLC*, 663 F.3d 1034 (9th Cir. 2011); *see also Marek v. Lane*, 134 S. Ct. 8 (2013).[1]

I. *Cy pres* is rife with conflicts of interest and is justifiably disfavored.

The legal construct of *cy pres* (from the French "*cy pres comme possible*"—"as near as possible") has its origins in trust law as a vehicle to realize the intent of a settlor whose trust cannot be implemented according to its literal terms. *Pearson*, 772 F.3d at 784. A classic example of *cy pres* comes from a 19th-century case where a court repurposed a trust that had been created to abolish slavery in the United States to instead provide charity to poor African-Americans. *Jackson v. Phillips*, 96 Mass. 539 (1867).

Imported to the class action context, *cy pres* has become an increasingly popular method of distributing settlement funds to non-class third parties—a "growing feature" that raises "fundamental concerns." *Marek*, 134 S. Ct. at 9 (Roberts, C.J., concurring in denial of *certiorari*). *Cy pres* distributions

[1] In accordance with Fed. R. App. P. 29(c)(5), as incorporated by LCvR 7(o)(5), *Amicus* states that no party's counsel authored the brief in whole or in part, nor has any person other than amicus contributed money that was intended to fund preparing or submitting the brief.

do not compensate class members, despite the fact that the funds belong to them, and thus such distributions are disfavored by courts and remain an inferior avenue of last resort. *See, e.g., BAC Secs.*, 775 F.3d at 1063 (observing that many courts have "criticized and severely restricted" class action *cy pres*); *Pearson*, 772 F.3d at 784 ("A *cy pres* award is supposed to be limited to money that can't feasibly be awarded to…the class members"); *Klier v. Elf Atochem N.A., Inc.*, 658 F.3d 468, 475 (5th Cir. 2011) ("[The *cy pres*] option arises only if it is not possible to put those funds to their very best use: benefitting the class members directly."); *Baby Prods.,* 708 F.3d at 173 ("*Cy pres* distributions imperfectly serve that purpose by substituting for that direct compensation an indirect benefit that is at best attenuated and at worse illusory."). "*Cy pres* distributions also present a potential conflict of interest between class counsel and their clients because the inclusion of a *cy pres* distribution may increase a settlement fund, and with it attorneys' fees, without increasing the direct benefit to the class." *Baby Prods.*, 708 F.3d at 173. Commentators have observed these same defects. *ALI Principles* § 3.07 *comment (b)* (rejecting position that "*cy pres* remedy is preferable to further distributions to class members"); 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); 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"), available at http://judiciary.house.gov/_cache/files/1eb82f79-6ee9-4c08-9ec9-e1b611aebd58/frank-testimony-house-justice-2015-february-12.pdf.

Preferring non-compensatory *cy pres* might be acceptable if the class were a free-floating entity, existing only as a figment of class counsel's imagination. But that is not how Rule 23 functions; Rule 23 is a complex joinder device that aggregates real individuals with real claims into a class if certain prerequisites are satisfied. *Shady Grove Orthopedic Assocs., P.A., v. Allstate Ins. Co.*, 559 U.S. 393, 408, 130 S. Ct. 1431, 1443 (2010) (class action is a "species" of joinder). Thus, "[t]he plaintiff-class, as an entity, [is] not Lead Counsel's client in this case. Rather, Lead Counsel continue[s] to have responsibilities to

each individual member of the class even when negotiating." *Piambino v. Bailey*, 757 F.2d 1112, 1144 (11th Cir. 1985) (internal quotation omitted).

"[A]s a growing number of scholars and courts have observed, the *cy pres* doctrine…poses many nascent dangers to the fairness of the distribution process." *Nachshin*, 663 F.3d at 1038 (citing authorities). When *cy pres* distributions are unmoored from class recovery or *ex ante* legislative or judicial standards,

> the selection process may answer to the whims and self interests of the parties, their counsel, or the court. Moreover, the specter of judges and outside entities dealing in the distribution and solicitation of settlement money may create the appearance of impropriety.

Nachshin, 663 F.3d at 1039 (citing authorities).

In cases where the charitable distribution is related to the judge, or left entirely to the judge's discretion, the ethical problems and conflicts of interest multiply. Class action settlements require judicial approval: one can readily envision a scenario where a judge might look more favorably upon a settlement that provides money for a judge's preferred charity than one that does not. Even when a judge divorces herself from such considerations, the parties may still believe that it would increase the chances of settlement or *cy pres* approval or a fee request to throw some money to a charity associated with a judge. Moreover, charities that know that a judge has discretionary funds to distribute can—and do—lobby judges to choose them, blurring the appropriate role of the judiciary. The "specter of judges and outside entities dealing in the distribution and solicitation of settlement money may create the appearance of impropriety." *Nachshin*, 663 F.3d at 1039 (citing authorities); Adam Liptak, *Doling Out Other People's Money*, N.Y. TIMES (Nov. 26, 2007) ("allowing judges to choose how to spend other people's money 'is not a true judicial function and can lead to abuses'" (quoting former federal judge David F. Levi)); *see also id.* (quoting Judge Levi as saying "judges felt that there was something unseemly about this system" where "groups would solicit [judges] for consideration as recipients of *cy pres* awards"); *Ira Holtzman, C.P.A. & Assocs. v. Turza*, 728 F.3d 682, 689 (7th Cir. 2013) ("*Turza*") (citing cases). In one notorious case, a district court judge *sua sponte* nominated the university at which he

lectured as a *cy pres* recipient. Rhonda Wasserman, *Cy Pres in Class Action Settlements*, 88 U.S.C. L. REV. 97, 124-25 n. 119 (2014). We have no reason to think there is any judicial impropriety in this case—quite the opposite given the Court's admirable *sua sponte* request for briefing on § 3.07. But it is worth noting that the fact that this settlement allows counsel to nominate the *cy pres* recipient (Settlement § V.E.13, Dkt. 405 at 2) does not preclude a judge from hypothetically steering counsel's nomination to—or even insisting upon—judicially preferred charities.

But the parties' selection of *cy pres* recipients can also cause conflicts of interest. For example, a defendant could steer distributions to a favored charity with which it already does business, or use the *cy pres* distribution to achieve business ends, rather than distributing the funds to recipients more closely aligned with the class' interests or even to the class itself. *Dennis v. Kellogg Co.*, 697 F.3d 858, 867-68 (9th Cir. 2012) (ruminating on these issues); *SEC v. Bear, Stearns & Co. Inc.,* 626 F. Supp. 2d 402, 415 (S.D.N.Y. 2009); Roger Parloff, *Google and Facebook's new tactic in the tech wars*, FORTUNE (Jul. 30, 2012) (noting criticism in *Google Buzz* case that *cy pres* is steered to organizations that are currently paid by Google to lobby for or to consult for the company); Pamela A. MacLean, *Competing for Leftovers*, CALIFORNIA LAWYER 15 (Sept. 2011). In one brazen example, Microsoft sought to donate numerous licenses for Windows software to schools as part of an antitrust class action settlement, essentially using the *cy pres* as a marketing tool that would have frozen out its competitors. *In re Microsoft Corp. Antitrust Litig.*, 185 F. Supp. 2d 519 (D. Md. 2002).

Alternatively, if the *cy pres* distribution is related to plaintiffs' counsel, it would result in class counsel being double-compensated: the attorney indirectly benefits from the *cy pres* distribution, and then makes a claim for direct compensation of attorneys' fees based upon the size of the *cy pres*. *Bear, Stearns,* 626 F. Supp. 2d at 415; Redish, 62 FLA. L. REV. at 661 (*cy pres* awards "can also increase the likelihood and absolute amount of attorneys' fees awarded without directly, or even indirectly, benefitting the plaintiff"); Liptak, *Doling Out, supra* ("Lawyers and judges have grown used to controlling these pots of money, and they enjoy distributing them to favored charities, alma maters and the like."). In another settlement where class counsel was already scheduled to receive $27 million,

cy pres was designated to a charity run by class counsel's ex-wife; the conflict was never disclosed to the district court, which approved the settlement. Frank Statement 9 (*citing In re Chase Bank USA, N.A. "Check Loan" Contract Litig.,* No. 09-md-02032 (N.D. Cal. Nov. 19, 2012)). Permitting class counsel to collect attorneys' fees based on unmoored *cy pres* awards "threatens to undermine the due process interests of absent class members by disincentivizing the class attorneys in their efforts to assure [classwide] compensation of victims of the defendant's unlawful behavior." Redish, 62 FLA. L. REV. at 666. Likewise, a distribution to a charity affiliated with the named plaintiff can result in a windfall for the class representative and potentially compromise adequacy of representation. *E.g., Nachshin*, 663 F.3d at 1038 (named plaintiff worked for charity that she selected as *cy pres* recipient).

As the Court is aware, the American Law Institute has proposed standards in its *Principles of the Law of Aggregate Litigation* to prevent *cy pres* abuse. *ALI Principles* § 3.07.[2] Section 3.07(b) states the last resort rule as it applies to leftover unclaimed funds: "If the settlement involves individual distributions to class members and funds remain after distributions…the settlement should presumptively provide for further distributions to participating class members unless the amounts involved are too small to make individual distributions economically viable or other specific reasons exist that would make such further distributions impossible or unfair." This rule follows from the precept that "[t]he settlement-fund proceeds, generated by the value of the class members' claims, belong solely to the class members." *Klier*, 658 F.3d at 474 (citing *ALI Principles* §3.07 cmt. (b)). In this case, the rightful preference for class compensation has even more force because of the Congressional will underlying the claims resolved by this settlement. *In re Black Farmers Discrimination Litig.*, 856 F. Supp. 1, 20 (D.D.C. 2011) (remarking that "[t]he sole function of the 2008 Farm Bill is to allow those farmers who were

[2] Although the D.C. Circuit has not yet opined on the issue, a consensus of sister circuits have endorsed § 3.07. *See BankAmerica*, 775 F.3d at 1063-64; *Turza*, 728 F.3d at 689-90; *Klier*, 658 F.3d at 474-75 & nn.14-16; *In re Lupron Mkt'g and Sales Practices Litig.*, 677 F.3d 21, 32-33 (1st Cir. 2012); *Nachshin*, 663 F.3d at 1039 n.2; *Masters v. Wilhelmina Model Agency, Inc.*, 473 F.3d 423, 436 (2d Cir. 2007); *Baby Prods.*, 708 F.3d at 173 (agreeing in part).

the subject of discrimination by the USDA and who meet other eligibility requirements to 'get paid'—*i.e.,* be compensated for their injuries.").

The nature of a limited fund Rule 23(b)(1)(B) settlement itself entails less than complete compensation and requires that all available funds be distributed to claimants. *See Black Farmers*, 856 F. Supp. at 18-19 (recognizing that "[t]o qualify as a limited fund justifying the certification of a plaintiffs' class, 'the whole of the inadequate fund' available for the payment of judgments must be dedicated 'to the overwhelming claims.'" (quoting *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 839 (2001)). As *Ortiz* explains the historical forebears of the limited fund action, "It went without saying that the defendant or estate or constructive trustee with the inadequate assets had no opportunity to benefit himself or claimants of lower priority by holding back on the amount distributed to the class." *Ortiz*, 527 at 839. *Cy pres* recipients are not only "claimants of lower priority," they are claimants of no priority. As such, there is no place for *cy pres* in a limited fund action. Thus, unsurprisingly, Amicus is aware of no (b)(1)(B) settlement ultimately upheld that included a *cy pres* remedy. *See In re Katrina Canal Breaches Litig.*, 628 F.3d 185 (5th Cir. 2010) (reversing one such agreement).

Class counsel and Defendant suggest in their response to the Court's order for briefing that the presumption against *cy pres* does not attach where a settlement has already been finally approved. Memorandum of Class Counsel Regarding *Cy Pres* Provisions of the Settlement Agreement and Order ("Class Counsel Mem.") (Dkt. 444) at 7-10; Defendant's Memorandum in Response to Court's Order ("Def. Mem.") (Dkt. 442) at 10. *BankAmerica* and *Klier* demonstrate otherwise. Although there is certainly a place for scrutiny of *cy pres* provisions at the time of settlement approval, there remains a need for vigilance after approval has been granted.

As of yet, there is no record evidence of what is the precise amount remaining in the settlement fund. Assuming, however, that this amount is more than $100,000,[3] it is not too small to redistribute to class members pro rata to the approximately 18,000 class claimants. Claimants would not be

[3] The government's brief asserts that the remainder is $9.5 million. Def. Mem. 2.

receiving a "windfall" just because they have claimed against the settlement fund already, given that the settlement compromised the class member's claims. *See BAC Secs.*, 775 F.3d at 1065 ("It is not true that class members with unliquidated damage claims in the underlying litigation are 'fully compensated' by payment of the amounts allocated to their claims in the settlement."); *Klier*, 658 F.3d at 479 ("The fact that the members of Subclass A have received payment authorized by the settlement agreement does not mean that they have been fully compensated.").

Class counsel and Defendant counter that a further distribution to claimants would be a windfall, when viewed from the baseline of the Farm Bill of 2008. *See* Class Counsel Mem. 10-12; Def. Mem. 15. The error here is that the underlying claims of class members here are non-liquidated damage discrimination claims, the same as in *Pigford*. *See* Class Counsel Mem. 11 n.7. Amicus does however agree with class counsel's suggestion in their now-withdrawn memorandum (Dkt. 436) that it would be most equitable to maintain parity between *Pigford* Track A claimants and class claimants here. But the right way to maintain parity is not to give all the money to unrelated charities; rather it is to allow *Pigford* claimants to share in the redistribution of excess funds.[4] It appears that the inclusion of *Pigford* claimants would not necessarily overtax the remaining funds. *See Pigford v. Glickman*, 206 F.3d 1212, 1216 n.5 (D.C. Cir. 2000) (observing that there were more than 20,000 Track A claims in *Pigford* and that of adjudicated claims to that point, slightly more than half were successful). Nevertheless, if the Court does not believe it has the authority to include *Pigford* claimants, or if administrative costs would

[4] Amicus understands that *Pigford* claimants are not class members here, and it is correct that under normal circumstances, no non-class-members should have access to class monies, but in this sui generis situation of two all-but-identical classes given the inequities raised by the settling parties, *Pigford* claimants should be grouped with the *BFDL* claimants.

Amicus's position is based on the understanding that the parties have effectively screened out widely reported attempts at fraudulent claims, so that any payments made do not amount to unjust extraction from taxpayers. *See* OFFICE OF INSPECTOR GENERAL, *IN RE BLACK FARMERS DISCRIMINATION*—ADJUDICATED CLAIMS, AUDIT REPORT 50601-0003-21 (Sept. 9, 2015), *available at* http://www.usda.gov/oig/webdocs/50601-0003-21.pdf. One hopes that the government is pursuing at least some criminal or disciplinary charges against attorneys responsible for such claims beyond simply denying the claims.

make it cost-prohibitive to include *Pigford* claimants, it remains preferable to allocate money to *BFDL* claimants rather than allow the money to flow to organizations who have absolutely no claim over the funds.

Finally, class counsel contends that *cy pres* is preferable because it benefits the class as a whole, whereas a secondary distribution would only benefit a portion of the class. Class Counsel Mem. 4-6. This is a false dichotomy; *cy pres* is not a benefit to class members at all, especially in a case where some not insubstantial part of the class is deceased, or has retired from farming over the past twenty years. *See Mirfasihi v. Fleet Mortg. Corp.*, 356 F.3d 781, 784 (7th Cir. 2004) ("There is no indirect benefit to the class from the defendant's giving the money to someone else."). Because the true choice is between monetary benefit to some class members and monetary benefit to none, as the ALI's scheme realizes, and federal courts have concluded, "Class members are not indifferent to whether funds are distributed to them or to *cy pres* recipients, and class counsel should not be either." *E.g. Baby Prods.*, 708 F.3d at 178.

The preceding discussion demonstrates the normative reasons why the Court should reject any *cy pres* proposed in lieu of further class recovery. Sections II and III below discuss why this Court has the authority to do that in this case.

II. Because the operative settlement provision employs *cy pres* contingent upon the discretionary approval of this Court, this Court has the authority to reject any *cy pres* proposals that transgress *ALI Principles* § 3.07.

As a general principle, this Court's "interpretative and enforcement authority depends on the terms of the decree and related court orders." *Pigford v. Veneman*, 292 F.3d 918, 925 (D.C. Cir. 2002).[5] Thus, we turn to the relevant language of the Settlement's *cy pres* provision (as amended by Dkt. 405):

> 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 Section V.E.12, Class Counsel may then move the Court to designate

[5] Jurisdictionally, Settlement § XVI grants the Court continuing jurisdiction to "oversee and enforce this agreement" for 200 days after the final accounting.

> "Cy Pres Beneficiaries" and propose an allocation of the available cy pres funds among such Cy Pres Beneficiaries...If a Subparagraph (a) Cy Pres Beneficiary is approved by the Court, then the Court shall determine the reasonable payment to be made to such Beneficiary from any balance in the Designated Account. Following any payment to a Subparagraph (a) Beneficiary, the Court shall designate the Subparagraph (b) Cy Pres Beneficiaries and determine how much of the available cy pres funds each such beneficiary shall receive. The Claims Administrator shall send to each Cy Pres Beneficiary, via first class mail, postage prepaid, a check in the amount of the Beneficiary's share."

Settlement § V.E.13, Dkt. 405 at 2.

This language is fundamentally precatory, not mandatory. The government's repeated assertions to the contrary[6] do not withstand scrutiny of the actual language. In important part V.E.13 says that "Class counsel ***may*** then move the Court" and discusses what then happens "***if*** a…Cy Pres Beneficiary is approved by the Court." (emphasis added). "The usual presumption is that 'may' confers discretion." *Zhu v. Gonzales*, 411 F.3d 292, 296 (D.C. Cir. 2005) (quoting *UAW v. Dole*, 919 F.2d 753, 756 (D.C. Cir. 1990)). Likewise, use of "if" implies that the Court is authorized to disapprove any *cy pres* beneficiary proposed, and prevent the subsequent machinery of the *cy pres* apparatus from kicking into gear. *In re TMI Gen. Pub. Utils. Corp.*, 67 F.3d 1103, 1116 (3d Cir. 1995) ("regulation would not use the conditional, 'if', if it was meant to specify that persons must…."); *cf. Cook v. FDA*, 733 F.3d 1, 9 (D.C. Cir. 2013) ("'if it appears' implies discretion").

It is the word "shall" (not "may" or "if") that "normally creates an obligation impervious to judicial discretion." *Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26, 35 (1998); *accord In re HP Inkjet Printer Litig.*, 716 F.3d 1173, 1181 (9th Cir. 2013) ("'shall' constitutes "language of command.") (quoting *Alabama v. Bozeman*, 533 U.S. 146, 153 (2011)). The parties may argue that § V.E.13 uses "shall" to place mandatory duties on the Claims administrator to send each Cy Pres

[6] Def. Mem. 9 ("the unambiguous language of the agreement…requires that any unclaimed funds be distributed to *cy pres* beneficiaries."); Def. Mem. 10 ("mandatory language"); Def. Mem. 11 ("unambiguous language"); Def. Mem 14 ("unambiguously calls for a *cy pres* distribution").

Beneficiary a check and the Court both to determine a reasonable payment and to designate a Subparagraph (b) beneficiary, but that argument fails to account for the fact for "the antecedent condition[s]" of proposing and approving initial *cy pres* beneficiaries, a condition to which "shall" does not apply. *Cook*, 733 F.3d at 7 (citing cases). Moreover, the use of "shall" throughout the settlement and even in "this very section" is strong evidence that "may" and "if" have a divergent meaning. *UAW v. Dole*, 919 F.2d at 756.

So what happens if the court rejects any proposed *cy pres* beneficiary, or class counsel makes no proposal? Then we have a leftover pot of money subject to a settlement that is silent as to what to do. In such a situation "[f]ederal courts have broad discretionary powers in shaping equitable decrees for distributing unclaimed class action funds. The district court's choice among distribution options should be guided by the objectives of the underlying statute and the interests of the silent class members." *Six (6) Mexican Workers v. Az. Citrus Growers*, 904 F.2d 1301, 1307 (9th Cir. 1990) (internal citation omitted); *see also Klier*, 658 F.3d at 476 n.21 ("Of course, the district court has inherent equitable authority to resolve any issues that are not covered by the terms of the settlement agreement.") (citing Federal Judicial Center, MANUAL FOR COMPLEX LITIGATION, § 21.66, at 334 (4th ed. 2004)); *In re Cendant Corp. Prides Litig.*, 233 F.3d 188, 194 (3d Cir. 2000) ("In addition to deriving its authority from the terms of the Stipulation itself, the District Court, as it cogently articulated, has the general equitable power to modify the terms of a class action settlement…[A] court retains special responsibility to see to the administration of justice…for the protection of class members").

Certainly, this settlement contemplates *cy pres* to a greater degree than did the *Klier* settlement but neither *Klier* nor this case are ones "where the settlement agreement itself provides that residual funds ***shall*** be distributed via *cy pres*." *Klier*, 658 F.3d at 476-77 (emphasis added); *contrast Keepseagle v. Vilsack*, No. 99-cv-3119 (D.D.C.), Dkt. 571-2, Settlement Agreement § IX.F.7 ("In the event there is a balance remaining in the Designated Account… the Claims Administrator ***shall*** direct any leftover funds to the Cy Pres Fund") (emphasis added) *with* Settlement § V.E.13.

The "may" language of this settlement is functionally identical to *BAC Securities*' settlement's language that said leftover funds "***may*** be contributed as a donation to one or more non-sectarian, not-for-profit 501(c)(3) organizations as determined by the Court in its sole discretion." *In re BankAmerica Corp. Secs. Litig.*, No. 4:99-md-01264-CEJ, Dkt. 450, at ¶ 20 (emphasis added); *accord* 775 F.3d at 1066 n.5 (rejecting class counsel's contention that the settlement made *cy pres* mandatory using "shall" language as "factually inaccurate.").[7] Of course the Eighth Circuit went further and determined that settlement language would be "void *ab initio*" if it contravened principles of the use of *cy pres* in class actions. 775 F.3d at 1066.

Another close comparator is *Masters v. Wilhelmina Model Agency, Inc.*, 473 F.3d 423 (2d Cir. 2007) where the district court was vested by the settlement with discretion to determine the disposition of leftover funds. There, the district court errantly believed that the settlement agreement's failure to specify treble damages meant that it was constrained to distribute excess funds via *cy pres* rather than to claimant class members. The Second Circuit reversed because the district court had not understood that a further distribution to class members was another permissible avenue for disposing of unclaimed funds. *Id.* at 435.

Beyond § V.E.13, there are other parts of the settlement that support the idea that class counsel should not even propose *cy pres* under its discretion. *See* Settlement § VIII.A.1 (Class counsel shall "Perform all duties set forth in Federal Rule of Civil Procedure 23, those ordered by the Court, and those provided for in this Agreement."); § VIII.A.2 (Class counsel shall "Provide representation without additional charge to Claimants who elect to submit claims under Track A").

Previously the Government has not opposed interpretative constructions consistent with the settlement agreement, ones that do not seek formal amendment of the agreement. *Black Farmers*, 950 F. Supp. 2d 196, 199 (D.D.C. 2013) (listing two such occasions). Interpreting § V.E.13 in the manner described above fits comfortably within that framework.

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[7] *Keepseagle* erroneously believed the *BAC Securities* settlement included compulsory "shall" language. *Keepseagle v. Vilsack*, 2015 U.S. Dist. LEXIS 97574, at *266-*267 (D.D.C. July 24, 2015).

There remains the issue of whether § 201(d) of the Claims Resolution Act of 2010, PUB. L. NO. 111-291, bars this Court from exercising the inherent equitable discretion it has under the *Six Mexican Workers* and *Klier* line of authority. *See* Def. Mem. 22-24. It does not, because using residual funds to afford further compensation to class members is an expenditure that "carr[ies] out the Settlement Agreement." § 201(d). *See* Defendant's Response to Class Counsel's Updated Motion for Fees, Dkt. 321, at 10 ("this Court and the Government have a fiduciary duty to ensure that these public funds are disbursed responsibly and reach those for whose express benefit Congress appropriated the funds – the class members.").

In passing the Claims Resolution Act, Congress was legislating against the backdrop of the ordinary process of Article III judicial review over class action settlements. Part of that process is a court's equitable discretion to issue orders when a settlement does not speak to an issue. The Claims Resolution Act should be read to incorporate that discretion, which should be exercised to discharge a court's "fiduciary" duty to absent class members. *See, e.g., In re NFL Players Concussion Injury Litig.*, 775 F.3d 570, 581 (3d Cir. 2014) ("a district court's management of a settlement class is different from a litigation class in that the court is acting as fiduciary to protect unnamed members of the class.") (internal quotation omitted). Section 201(d) does not eliminate that discretion; rather it instead serves to prevent the funds that have been appropriated from sitting in the qualified settlement fund for perpetuity in the event that class counsel does not propose a plan for distributing remaining funds, or in the event that the Court does not exercise its discretion to distribute the remainder in an equitable manner.[8] Moreover, Congress understands the background principle of a Rule 23(b)(1)(B) settlement:

[8] Even if the Court reads § 201(d) more stringently: to nullify the Court's discretion to return residual funds to class members, § 201(d) would still permit the Court to (A) reject *cy pres* proposals until the parties agreed to a mutual modification in accord with Settlement § XVIII.B or (B) reject *cy pres* proposals and revert the money to the Treasury. Although allotting remainder monies to class members is the most preferable solution, reverting it to the Treasury is a second best alternative because it avoids the endemic conflicts of interest that accompany *cy pres* awards.

Additionally, it is worth noting that Claims Resolution Act § 201(c) does not remove the Court's discretion either. That subsection dictates that the "express terms" of the settlement control

that the entirety of the fund will be dedicated to paying class members (with a common-fund fee to their counsel). *See Black Farmers*, 856 F. Supp. at 18-19 (quoting *Ortiz*); *accord* Defendant's Response to Class Counsel's Updated Motion for Fees, Dkt. 321, at 1 ("Thus, every dollar that is awarded to Class Counsel in fees is one less dollar that is available to pay successful claimants.").

For the foregoing reasons *cy pres* is not mandatory under the terms of settlement, and this Court should exercise its discretion to reject any efforts in that direction. At that point, the Court may order equitable reallocation to class members, or at the very least encourage the parties to request that course of action themselves.

III. In the alternative, if the Court believes that a secondary distribution to class members would conflict with § V.E.13, the Settlement can and should be modified to follow the *ALI*'s approach to disbursement of leftover funds.

Under Federal Rule of Civil Procedure 60(b), a "court may relieve a party . . . from a final judgment, order, or proceeding . . . [if] applying [the judgment] prospectively is no longer equitable." Fed. R. Civ. P. 60(b)(5). "[T]he district judge, who is in the best position to discern and assess all the facts, is vested with a large measure of discretion in deciding whether to grant a Rule 60(b) motion." *Twelve John Does v. District of Columbia*, 841 F.2d 1133, 1138 (D.C. Cir. 1988). To date, the plaintiffs have already obtained five orders granting amendments of the settlement on the basis of 60(b), with the Court rejecting two other such motions. *Contrast* Dkts. 304, 346, 381, 405, 413 (all granting motions to amend), *with* 950 F. Supp. 2d 196 (rejecting 60(b) motion where modification would deny Government the benefit of its bargain and the movant could point to no change of circumstances) *and* 29 F. Supp. 3d 1 (same).

Rule 60(b)(5) provides a means by which a party can ask a court to modify or vacate a judgment or order if there exists "a significant change either in factual conditions or in law" that makes

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the disposition of funds, but is necessarily inapplicable when the settlement is silent on an issue. These narrower readings of subsections 201(c) and (d) are also superior because they avoid a reading of the statute that is potentially unconstitutional. Congress may not dictate the Court's rule of decision in a pending case without altering the substantive underlying law. *United States v. Klein*, 80 U.S. 128 (1870); *In re Islamic Republic of Iran Terrorism Litig.,* 659 F. Supp. 2d 31, 72 (D.D.C. 2009).

prospective application of the decree inequitable. *Rufo v. Inmates of Suffolk Cty Jail*, 502 U.S. 367, 383-84 (1992); *accord Pigford v. Johanns*, 416 F.3d 12, 23 (D.C. Cir. 2005) ("A movant under Rule 60(b)(5) must demonstrate 'changed circumstances' since the entry of the judgment from which relief is sought."). A proper "inquiry makes no reference to the presence or absence of a timely appeal. It takes the original judgment as a given and asks only whether 'a significant change either in factual conditions or in law' renders continued enforcement of the judgment 'detrimental to the public interest.'" *Horne v. Flores*, 557 U.S. 433, 453 (2009).

"A consent decree must of course be modified if, as it later turns out, one or more of the obligations placed upon the parties has become impermissible under federal law." *Rufo*, 502 U.S. at 388; *see also Agostini v. Felton*, 521 U.S. 203 (1997) (60(b)(5) warranted modification where subsequent Establishment Clause jurisprudence had eroded initial judgment). "[W]hile a decision that clarifies the law will not, in and of itself, provide a basis for modifying a decree, it could constitute a change in circumstances that would support modification if the parties had based their agreement on a misunderstanding of the governing law." 502 U.S. at 390.

Since the initial settlement was negotiated more than five years ago, and since the settlement was approved four years ago, an evolution in the jurisprudence of class action *cy pres* doctrine has left any reading of Section V.E.13 that requires *cy pres* payments instead of a feasible redistribution to class members untenable, contrary to both law and the public interest. *See, e.g., BAC Secs.; Klier; Pearson; Turza; Baby Prods; see generally* Section I, *supra*. Most explicitly, *BAC Securities* suggested that a settlement that required *cy pres* when further distribution to the class was feasible was void *ab initio*. 775 F.3d at 1066. Although *Keepseagle* found no factual changed circumstances warranting modification of the settlement, it did not consider whether a change in the decisional law of *cy pres* could constitute changed circumstances and undergird a (b)(5) modification. 2015 U.S. Dist. LEXIS 97574, at *282. The answer is that it can. *See e.g., Rufo*, *supra*; *Brown v. Tenn. Dep't of Fin. & Admin*., 561 F.3d 542 (6th Cir. 2009) (reversing denial of 60(b)(5) relief based upon intervening precedent).

Keepseagle also concluded that Rule 60(b)(5) was inapplicable because the *cy pres* provision ultimately is "akin to unpaid damages" and is thus not prospective. 2015 U.S. Dist. LEXIS 97574, at *280; *see also* Def. Mem. 18. Amicus respectfully disagrees. As *Keepseagle* acknowledged, a "*cy pres* provision arguably has some characteristics of a prospective order…insofar as the distribution process requires Class Counsel to solicit and recommend *cy pres* recipients and creates an administrative task for the Court to approve the recommendations." *Id.* at *278-*79. There is no reason why such features of a *cy pres* scheme, also present in this case, do not suffice to constitute prospective application under the D.C. Circuit's test: if the judgment to be modified is "executory or involves the supervision of changing conduct or conditions" then it has prospective application. *Twelve John Does v. District of Columbia*, 841 F.2d 1133, 1139 (D.C. Cir. 1988) (citing *United States v. Swift & Co.*, 286 U.S. 106, (1932), and *State of Pennsylvania v. Wheeling & Belmont Bridge Co.*, 59 U.S. (18 How.) 421 (1856)). Executory means "that which is yet to be fully executed or performed; that which remains to be carried into operation or effect; incomplete; depending upon a future performance or event." WEST'S ENCYCLOPEDIA OF AM. LAW (2d ed. 2008), available at http://legal-dictionary.thefreedictionary.com/executory; *cf. also* BLACK'S LAW DICTIONARY 369 (8th ed. (2009)) (defining "executory contract" as: "[a] contract that remains wholly unperformed or for which there remains something still to be done on both sides, often as a component of a larger transaction"). The key facet of prospective relief is that it "is subject to the continuing supervisory jurisdiction of the court, and therefore may be altered according to subsequent changes in the law." *Miller v. French*, 530 U.S. 327, 347 (2000). Settlement § V.E.13 qualifies as both "executory" and "involving the supervision of changing conduct or conditions" because it contemplates counsel's designation of *cy pres* recipients, counsel's proposal of an allocation, and the Court's supervision over such proposals, as well as tasking the Court with designating certain beneficiaries on its own initiative.

Under *Rufo*'s second step, the Court must assure itself that any modification to account for changed circumstances "is suitably tailored to the changed circumstance." *Rufo*, 502 U.S. at 391. "Whatever tailoring method the district court ultimately adopts," the Circuit held, "must preserve the

essence of the parties' bargain." *Pigford*, 292 F.3d at 927. If the Court believes modification is necessary, Amicus suggests that a suitably tailored modification would be following the *ALI Principles* to afford secondary distributions to class members as long as they remain feasible, and resorting to *cy pres* only after further distribution is deemed infeasible. This option is less invasive than excising *cy pres* entirely as it would leave that last bit of remaining funds that cannot economically be distributed for worthy § V.E.13 charities. *See Keepseagle*, 2015 U.S. Dist. LEXIS 97574, at *286 (concluding that "deleting the entire *cy pres* provision that the parties included in the Agreement" was not suitably tailored to the changed circumstances); *see also* Settlement § XXII ("Should any non-material provision of this Agreement be found by a court to be invalid or unenforceable, then (A) the validity of other provisions of this Agreement shall not be affected or impaired, and (B) such provisions shall be enforced to the maximum extent possible.").

A modification of the settlement to return *cy pres* money back to class members is not the type of modification that harms any party's reliance interest. *Contrast Pigford v. Johanns*, 416 F.3d 12, 21-22 (D.C. Cir. 2005) (distinguishing case where modification would have deprived defendant of "certainty and finality as to its maximum liability as of the agreed upon date" with case where defendant would suffer no prejudice because the addition of claimants would have "no effect on the amount [the defendant] would pay to those aggrieved by its products" as its liability had been capped by a settlement agreement."). The Government here has already fully funded the settlement and has no uncapped liability nor potential reversion. And, in an earlier written submission to the Court, the Government itself recognized that "the Court and the Government share a fiduciary obligation to ensure that the funds that Congress appropriated to resolve these claims are responsibly disbursed to those for whom Congress and the United States Department of Agriculture intended the money—successful class members." Defendant's Response to Class Counsel's Updated Motion for Fees, Dkt. 321, at 2; *accord id.* at 10 (same) (citing *Black Farmers*, 856 F. Supp. 2d. at 34); *cf. also* PUB. L. 110-234, Farm Bill § 14012(d) (2008) ("It is the intent of Congress that [Section 14012] be liberally construed so as to effectuate its remedial purpose of giving full determination on the merits for each *Pigford* claim

previously denied that determination."). Class members' interest (and class counsel's transitive interest as their fiduciary), of course, is in obtaining maximum direct benefit for themselves as class members. *See, e.g., Baby Prods.; BAC Secs.*

Given this consensus, it would be most seamless if all parties voluntarily agree to an amendment to issue a secondary distribution to class members in lieu of *cy pres*. Such modification is available under Settlement § XVIII(B) which reads: "After the Preliminary Approval Date, this Agreement, including the attached exhibits, may be modified only with the written agreement of the Parties and with the approval of the Court, upon such notice to the Class, if any, as the Court may require." Still, even now that it does not seem that the parties will accede to a voluntary modification,[9] public policy would not permit Settlement § XVIII(B) to waive modifications available under Rule 60(b), and the fact that the Court has five times previously granted modifications without the written agreement of the parties demonstrates as much.

One final lurking issue related to 60(b): if the parties do not move for Rule 60(b) modification to issue further distributions to class members, and no class member intervenes to do so, may the Court grant 60(b) relief on its own motion? While Amicus can find no decision of this Circuit or District addressing the issue, the prevailing view among the six outside circuits that have address the issue is to allow such relief. *Ocean City Costa Rica Inv. Group, LLC v. Camaronal Dev. Group, LLC*, 571 Fed. Appx. 122, 127 (3d Cir. 2014) (Ambro, J.) (cataloguing 4 circuits in favor and 2 against, and

[9] From all outward appearances, class counsel and Defendant have no interest in modifying the *cy pres* provision to explicitly comport with the *ALI Principles*. Amicus agrees with the tenor of the Court's supplemental questions to Class Counsel (Dkt. 438 at 2). Class Counsel do have an ethical duty to argue that identifiable class members are entitled to the distribution of any excess funds, provided that said argument can be made in good faith. *See* Restatement (Third) of Agency § 8.01, cmt. b (2012) ("[T]he general fiduciary principle requires that the agent subordinate the agent's interests to those of the principal and place the principal's interests first as to matters connected with the agency relationship…Unless the principal consents, the general fiduciary principle…also requires that an agent refrain from using the agent's position or the principal's property to benefit the agent or a third party."); *Pierce v. Visteon Corp.*, 791 F.3d 782, 787 (7th Cir. 2015) ("it is unfathomable that the class's lawyer would try to sabotage the recovery of some of his own clients").

remarking without deciding the issue, that "much favors the well-reasoned decisions of the Second, Fourth, Fifth, and Ninth Circuits that allow a Court to grant *sua sponte* relief"); *see also United States v. Northshore Mining Co.*, 576 F.3d 840, 847 (8th Cir. 2009) (allowing *sua sponte* relief from judgment); *Golden Blount, Inc. v. Robert H. Peterson Co.*, 438 F.3d 1354, 1359 n.1 (Fed. Cir. 2006) (same).

If the Court's interpretation of § V.E.13 mandates preferencing *cy pres* ahead of absent class members, it should modify that portion of the agreement under Rule 60(b)(5) given the change in legal circumstances over the past five years.

IV. There should be a hearing scheduled to allow class members to voice their views provided that notice can be efficiently issued; Amicus is happy to appear if the Court believes oral argument would aid its deliberation.

If the Court is contemplating "material alterations to the settlement," "[c]lass members should be notified…and permitted to object to them." *Baby Prods.*, 708 F.3d at 176 n.10. Even if the Court decides against any modification, given the potential conflicts of interest that inhere in a *cy pres* distribution, the re-notification principle has substantial force when class members can participate in vetting proposed beneficiaries. "[U]nless the amount of funds to be distributed *cy pres* is *de minimis*, the district court should make a *cy pres* proposal publicly available and allow class members to object or suggest alternative recipients before the court selects a *cy pres* recipient. This gives class members a voice in choosing a "next best" third party and minimizes any appearance of judicial overreaching." *BAC Secs.*, 775 F.3d at 1066; *see also Baby Prods.*, 708 F.3d at 180 ("We are confident the Court will ensure the parties make their proposals publicly available and will allow class members the opportunity to object before it makes a selection."); *In re Lupron Mktg. & Sales Practices Litig.*, 677 F.3d 21, 27 (1st Cir. 2012) (noting that "the district court invited the public to comment on the [cy pres] proposals").

As in *Keepseagle*, the authority to issue supplemental notice and schedule a public hearing is two-fold. First, Fed. R. Civ. P. 23(d)(1)(B) permits the Court to "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." Second, in the unlikely event the parties reach a consensus to modify the settlement, the Settlement Agreement provides that the Court "may require" "notice to the Class" at its discretion.

Settlement § XVIII(B). *Accord Keepseagle v. Vilsack*, 2015 U.S. Dist. LEXIS 57986, at *178-*79 (D.D.C. May 4, 2015). The content and manner of the notice would be reasonable to follow the lead of that decided upon in *Keepseagle*. *Id.* at *180-*84. Amicus would only advise the Court to urge the parties to limit the costs of notice, to avoid unnecessary reduction of class members' remaining funds. Finally, if the Court does schedule a hearing and at all desires a more thorough examination of any of the issues discussed above, Amicus would be happy to appear through counsel at the hearing.

Conclusion

When this Court finally approved this accord in 2011, it expressed its unity of purpose with "all of those parties in hoping that [the settlement] will bring class members the relief to which they are entitled." *Black Farmers*, 856 F. Supp. 2d at 42. The Court can and should further the journey to that end by rejecting any use of settlement funds for *cy pres* distributions to non-class entities.

Dated: December 31, 2015

Respectfully submitted,

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Certificate 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
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