No. _____

**In The**

**SUPREME COURT OF THE UNITED STATES**

MARILYN KEEPSEAGLE, et al.,
Petitioners,

v.

SONNY PERDUE, Secretary, United States Department of Agriculture,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

# PETITION FOR WRIT OF CERTIORARI

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## QUESTIONS PRESENTED FOR REVIEW

Section 23(e)(1)(C) of the Federal Rules of Civil Procedure requires that all class action settlements are fair, reasonable, and adequate. Appellate federal authority imposes a fiduciary duty upon the district court to ensure such.

A plurality of federal circuits have held against the continued use of *cy pres* in the settlement of class action lawsuits, or strict compliance with Rule 23(e) and ALI Section 3.07 cmt.b.

1. Whether the application of *cy pres* to this class action settlement is inappropriate because the class members have not been adequately compensated and whether this adequate compensation is best accomplished by awarding all settlement funds to the class.

2. Whether the district court failed to meet its obligation pursuant to FRCP 23(e)(1)(C) by ensuring a fair, reasonable, and adequate distribution to the class members.

3. Whether the class representatives and the class counsel engaged in self-dealing, collusion, and fraud; as well as, breaches of fiduciary duty to the class and whether those breaches should result in disgorgement of fees and incentive awards.

4. Whether it is time to set aside *cy pres* in class action settlement agreements because such provisions promote hidden objectives, give unfettered authority to non-parties, are unfair as a general matter, and the goals of selected entities fail to correspond to the interests of the class.

## LIST OF PARTIES

Petitioners who were the Appellants below consist of Donivon Craig Tingle and other class members that are not representatives of the class and who have timely objected to the order entered by The Honorable Emmett Sullivan, Judge in Case No.: 1999-CV-03119 (EGS).

Respondents were the Appellees below, Sonny Perdue, Secretary, United States Department of Agriculture, and Marilyn Keepseagle, along with other representatives of the class.

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## OPINIONS BELOW

The opinion of the United States District Court for the District of Columbia is reported at 102 F.Supp. 3d 205. The final order of that court is dated April 20, 2016. The case number is: (No. 1:99-cv-03119). That final order was timely appealed. See Appendix A attached.

On appeal to the United State Court of Appeals for the District of Columbia the Petitions of two appellants were consolidated, those were: No. 16-5189 (this petitioner) and 16-5190. Those cases were argued on January 13, 2017, and decided on May 16, 2017. The opinion of the Court of Appeals may be found at 856 F.3d 1039. See Appendix B attached.

A petition for rehearing and reconsideration was filed on June 26, 2017. That petition was denied on September 20, 2017. See Appendix C attached.

## JURISDICTION STATEMENT

Appellant Tingle asserts jurisdiction under 28 U.S.C. Sec. 1331. This Court has jurisdiction pursuant to 28 U.S.C. Sec. 1291. This is an appeal from a Final Order entered on April 20, 2016. That Order is Document Number 871, Case Number 1:99-cvg-03119-EGS. The Appellant filed a timely Notice of Appeal on June 15, 2016. That document number is 879. This

Petition is brought based upon the decision rendered by the United States Court of Appeals for the District of Columbia and the subsequent Petition for Rehearing and Reconsideration En Banc.

## CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, ORDINANCES, AND REGULATIONS

Appellant Tingle asserts jurisdiction under 28 U.S.C. Sec. 1331 and 28 U.S.C. Sec. 1291.

## STATEMENT OF THE CASE

This appeal is brought because an unnamed, absent, and silent class member who previously objected to the *cy pres* distribution hereby asserts that the district court improperly approved the settlement, particularly the *cy pres* distribution (See ECF No. 839, Filed on January 29, 2016, Letter 39 of 70, Donivon Craig Tingle's **Re: Keepseagle v. Vilsack, Cy Pres Settlement Opposition**.)

In or around 1999 this cause of action now on Writ of Certiorari was brought as a class action lawsuit against the United States Department of Agriculture (USDA) by a class of Native American farmers and ranchers represented by several class representatives. This cause of action alleged systemic racial discrimination by the USDA. Over the course of many years of discovery, ultimately, a settlement was reached. This settlement created a fund of over $680,000,000.00.

A portion of the Settlement Agreement contained a *cy pres* provision that was set forth to create a fund for any residue remaining and a distribution scheme that paid over those funds to unnamed third-party charities through the supervision of a then unspecified board of trustees, which ultimately would not be overseen by the district court. The Settlement Agreement was prepared and presented by class counsel in such a way that the unnamed class members could not consider the terms and respond knowingly and timely.

Those class members that could successfully "prove up" their claim were awarded payments from the Settlement Fund (Fund). Approximately 3,600 class members received a distribution from the Fund. Upon payment to the class members, the Fund still held $380,000,000.00. It is this Fund remainder that has given rise to this crisis.

Such an amount as large as $380,000,000.00 cannot reasonably be construed as a residue. That amount represented over one half of the total settlement. A majority of anything cannot be reasonably construed to be a residue and currently, those funds presently earmarked for *cy pres* distribution consist of more money than the distribution made to the class members.

I say crisis because there has been and remains acutely divided positions regarding how these funds should be distributed. The Settlement Funds belong to the class members. The class

members reject the *cy pres* distribution by such an overwhelming super majority that if a ballot vote had been taken, it would have exceeded 90%. In fact, numerous "listening conferences" were held to allow class members to voice their opinions regarding the *cy pres* distribution scheme. Apparently, no one at the listening conferences was willing to listen because the tension, hostility, and resentment between the absent, silent, and unnamed class members and their class counsel and their class representatives was palpable. The class was so diametrically split that no one counselor could represent the parties present. Class counsel repeatedly and consistently sided with its own point of view reinforced by the assistance of employees of the USDA and the advancement of the split caused by certain class representatives.

It was abundantly clear to the class counsel and anyone else in attendance that the class members overwhelmingly favored a second round of payment from the Fund. Many absent, silent, and unnamed class members presented themselves and offered anecdotal evidence that the initial payments were insufficient to compensate them for the lost benefit of their bargain. At least some of those who spoke at listening conferences were able to demonstrate that even a $50,000.00 payment was insufficient to satisfy the equity requirements to attain this lost benefit of their bargain. Once again, class counsel and class representatives were unmoved by the desperate pleas of the absent, silent, and unnamed class members, despite the fact that

every fiduciary relationship includes the duties of obedience and loyalty.

During the settlement conferences and at every other opportunity, class counsel and most class representatives continued to steadfastly oppose the will of the majority of class members. In fact, on numerous occasions, class counsel stated that the USDA would demand its money back if the planned *cy pres* distribution was not carried out. The absent, silent, and unnamed class members bringing this action relied, reasonably so, upon the statements of its counsel. However, it is now known and is supported by ample federal appellate authority that once a settlement has been struck, the defendant no longer owns the funds and has no voice in the application of the settlement funds. Class counsel should have made the court aware of the tension within the class and made it clear that it could no longer advance the interests of the class because of the conflict. Rather than doing so, it simply picked a side, the side that it favored, and pushed through the district court's final order.

Additionally, the court abused its discretion by either not conducting an in-depth fairness hearing or being denied access to information regarding the undisclosed self-dealing conduct of at least three of the named class representatives. These individuals received a staggering amount of additional payouts, cloaked as "incentive payments," as well as coveted positions on the Board of Trustees. With respect for the Board of Trustees, no operating agreement exists. Therefore, no court in any

fairness hearing has been able to consider this document. If that instrument provides the board president with veto power, then a former employee of the USDA could block any funding that does not support the ideology of the USDA. This is but one example of how unfair this arrangement could be. In fact, at least one of these individuals was adamantly opposed to the application of the *cy pres* distribution, favoring a payout of the remaining funds to class members. Remarkably, she completely reversed her position and shortly thereafter an additional position on the Board of Trustees was created for her, as well as a $100,000.00 payment. Furthermore, one Board of Trustee position and one Senior Officer position (President) have gone to individuals who previously worked for the defendant in this action, a defendant, that was sued for racial discrimination against the very people that are now being represented.

Now, despite all of the foregoing, one needs to recognize the fact that the *cy pres* portion of the Settlement Agreement is of no effect. That is because all of the Courts (as far as I can tell) that have opined on this seem to agree that when there are class members that are identifiable and ascertainable that all remaining funds should be distributed to the class members, so long as it is feasible to do so. That is except for the United States Court of Appeals for the District of Columbia, which has now created a conflict among the circuits which should be resolved. Presently, all of the class members, or in some cases, their heirs, can be located. The amount in question is at least $380,000,000.00 and is probably over

$400,000,000.00; this is not a residual amount. Those funds are personal property of the class members and they should be distributed in accordance with the instructions of the class members. Moreover, the courts have a strong preference in favor of providing left-over funds to the class members.

This matter presents an appalling number of improper acts, self-dealing, collusion, breaches of fiduciary duty, conflicts of interests, misfeasance, and malfeasance as to demand a remand back to the trial court with instructions to conduct a detailed, in-depth, fairness hearing into the conduct of the class counsel and class representatives. Moreover, it is time for the United States Supreme Court to strike down the use of *cy pres* provisions in class action settlement agreements. This is the first time that a court is being asked to consider a *cy pres* distribution where the fund is as large or larger than the distribution to the class members, where the class members are readily identifiable and ascertainable, where the distribution would not result in an inappropriate level of compensation for the class members, and finally where the class counsel was compensated for $680,000,000.00 worth of value, but has merely delivered less than $250,000,000.00 in value. This over compensation should be taken into account and that excess compensation should be disgorged.

## REASONS WHY CERTIORARI SHOULD BE GRANTED

The settlement proceeds belong to the Plaintiffs which are all successful claimants or class members. Appellate federal case law overwhelmingly supports this fundamental position. Both the class counsel and the trial court went out of their respective ways to introduce an undeserving collection of third parties to take and benefit from this settlement.

There has been no windfall bestowed upon any class member. No farming or ranching family could ever be made whole by such a distribution and therefore the amount is not adequate. Moreover, by the manifest offering of an additional payout of $18,500, plus a tax payment of $2,175, all parties have in effect agreed that the first round of payment could not have made the claimants whole because any amount offered by a second disbursement would be in essence a windfall. All parties agree that no windfall exists. Consequently, any amount offered short of the full amount of the residual settlement proceeds is an arbitrary award because it has not been tied to any findings of fact.

Other actions include: self-dealing; breaches of fiduciary duty; and possibly collusion, either by class counsel, class representatives, and perhaps, both. Class counsel knew or should have known that when such a conflict of interest arose that it could not adequately represent both factions. Class counsel chose a course of action that was more in line with its personal desires. The drafting of the

settlement, its contents, and the availability of the instrument, and the timing of the settlement and the disbursements of the proceeds took place in such a way as to eliminate any opposition to the Settlement Agreement provisions and to disable the District Court and prevent it from exercising its duty to the class.

At a very minimum, the actions of the class counsel and class representatives give rise to the inference of self-dealing and collusion and that is sufficient to reverse and remand. More importantly for Supreme Court review, it illustrates the impropriety of *cy pres* provisions in class action settlements.

**1. C*y Pres* is Improper.**

Application of the *cy pres* provisions of the Settlement Agreement constitutes an improper act by the district court. All of the class members are identifiable and ascertainable. The Fund is a property right and should be distributed to the class members. Appellate courts have provided great latitude to district courts regarding this decision; nevertheless, findings of fact are necessary so that the district court can explain its award in such a way that an appellate court may undertake its review. See Waters v. International Precious Metals Corp., 190 F.3d 1291, 1293 (11th Cir. 1999), citing McKenzie v. Cooper, Levins & Pastko, Inc., 990 F.2d 1183, 1184 (11th Cir. 1993).

**a. All Settlement Funds Should Be Awarded to Class Members.**

With respect to funds left over after a first-round distribution to class members, the ALI principles express a policy preference that residual funds should be redistributed to class members until they recover their full losses, unless such further distributions are not practical. See, *Virginia Journal of Social Policy and the Law,* Vol. 21:2 Page 280. The class members have a greater claim to the Settlement Funds than a charity. Settlement Funds are the private personal property of the class members. Only when further distributions to class members are no longer feasible does the court have the discretion to order *cy pres* distribution. *Virginia Journal of Social Policy at 280.* See also Klier v. Elf Atochem North America, Inc., 658 F.3d 468 (5th Cir. 2011). The court held that it was an abuse of the trial court's discretion to order substantial Settlement Funds distributed via *cy pres* when there was an identifiable sub-class to which the remaining proceeds could be distributed. The court was too quick to move to the *cy pres* provision when ascertainable beneficiaries were available. Id. at 480. Because the settlement was generated by the value of the class members' claims, claims which belong solely to the class members as a result of their losses, the Settlement Funds belong solely to the class members. Id. at 474. In the present case, because the Settlement Funds are the property of the class, a *cy pres* distribution is not permissible when it is feasible to make further distributions to class members. *Cy pres* only exists as an option

when it is not possible to put those funds to their very best use; which is, benefitting the class members directly. Id. at 475. Regardless of *cy pres*, the court's discretion remains tethered to the interests of the class, the entity that generated the funds. Id. at 476. The *cy pres* provisions are secondary to the controlling effect given to the interests of the class members. Id. at 478. The district court must act for the benefit of the class as a whole. Id. *Cy pres* recovery is used where the individuals are not likely to come forward and prove their claims or cannot be given notice of the case. Mace v. Van Ru Credit Corp., 109 F.3d 338, 345 (7th Cir. 1997), citing, Simer v. Rios, 661 F.2d 655,675 (7th Cir. 1981). *Cy pres* recovery is thus ideal for circumstances in which it is difficult or impossible to identify persons to whom damages should be assigned or distributed. Further, there is no reason, when the injured parties can be identified, to deny them in favor of disbursement through some other means. *Cy Pres* recovery is reserved only for those unusual situations where victims are unidentifiable; the disbursement of damages to victims would be impossible or inappropriate. Mace at 347. See also Hughes v. Kore of Indiana Enterprise, Inc., 731 F.3d 672 (7th Cir. 2013), [s]uch a decree of awards to charity are only appropriate if a distribution to class members is infeasible. Id. at 675.

The existence of a large, unclaimed damage fund does not make a class action unmanageable. Class actions have been found to be manageable even where there exists the prospect of substantial unclaimed funds. See Perry v. Beneficial Finance

Co. of New York, 81 F.R.D. 490, 497 (W.D.N.Y. 1979). Where the goal of the underlying statute is compensatory, a class action resulting in substantial unclaimed funds will not further that goal. Six (6) Mexican Workers v. Arizona Citrus Growers, 904 F.2d 1301, 1307 (9th Cir. 1990). Following up on the holding in Six (6) Mexican Workers, the Ninth Circuit went on to set aside a *cy pres* distribution because the district court did not apply the correct legal standard and thus abused its discretion in approving the settlement. In the present case, no particular *cy pres* beneficiaries have been selected. We neither know how much money will be distributed to them nor understand what criteria will be applied in awarding cash disbursements. We do know that it is virtually certain that no class member will benefit and any entity or person that benefits will have to curry favor with both the Board of Trustees and the charity that receives the funding. Knowing tribal entities, most of the money will be spent on dubious "administrative expenses" with little left over for whatever Native American farmers and ranchers that might be able to snake their way through the maze of procedural requirements. Even then, those that do work their way through will only be the well-heeled and well-placed Indians. Surely, this is not how the Court would intend that $400,000,000.00 of class members' money should be spent. I think the court in Kellogg said it best, stating, "[c]lass counsel and Kellogg ask us for the impossible - a verdict before the trial." They essentially say, "Just trust us. Uphold the settlement now, and we'll tell you what it is later." But that is not how appellate review works. The

settlement provides no assurance that the charities to whom the money and food will be distributed will bear any nexus to the plaintiff class…and therefore violates our well-established standards governing *cy pres* awards. Dennis at 869. See also Hunt v. Perryman In Re Easysaver Rewards Litigation, (9th Cir. 2015) D. C. No. 3:09-cv-02094-AJB-WVG, court vacated and remanded the district courts approval of the settlement, including *cy pres* as an abuse of discretion. See Molski v. Gleich, 307 F.3d 1155 (9th Cir. 2002), overruled on other grounds by Dukes v. Wal-Mart Stores, Inc., 603 F.3d 571 (9th Cir. 2010), the court set aside settlement and the *cy pres* distribution because distribution of damages would neither be burdensome nor costly. Id. at 1173. The use of *cy pres* is appropriate only when the distribution of damages would be costly or the proof of individual claims costly. Nachshin v. AOL, LLC, 663 F.3d 1034, 1038 (9th Cir. 2011). Presently, all of this work has been completed.

At this point, it is worth mentioning again that the overwhelming majority of the class members, particularly the absent, silent, and unnamed class members, opposed the distribution of the Settlement Funds through a *cy pres* distribution. When an overwhelming percentage and number of the class members object, the district court, the class counsel, and the class representatives should listen. In TBK Partners, Ltd. v. Western Union Corp., 675 F.2d 456, 462 (2d Cir. 1982) the court opined: "But although a majority rule should not necessarily be a litmus test for the fairness of a proposal settlement, the opposition to a settlement by a majority of a

class is significant." See also Pettway v. American Cast Iron Pipe Co., 576 F.2d 1157 (5th Cir. 1978) disapproving settlement opposed by 70% of subclass, cert. denied, 439 U.S. 1115, 99 S.Ct. 1020, 59 L.Ed. 2d 74 (1979). "Majority opposition to a settlement tends to indicate that the settlement may not be adequate since class members presumably know what is in their own best interests." TBK Partners at 462. See Gardner v. GC Services, LP, Case No. 10-cv-0997 (S.D. Cal. 2012).

The district court has an important and meaningful role to play in the settlement of a class action. In particular, the district judge has a fiduciary duty to safeguard the interests of the absent class members. See e.g., Sullivan v. D.B. Investments, Inc., 667 F.3d 273, 319 (3d Cir. 2011). The district court must be assured that the settlement secures an advantage for the class in return for the surrender of litigation rights against the defendants. See In Re Katrina Canal Breaches Litigation, 628 F.3d 185 (5th Cir. 2010) citing to In Re Compact Disc Minimum Advertised Price Antitrust Litigation, 216 F.R.D. 197, 221 (D. Me. 2003). The district court abuses its discretion in approving a *cy pres* provision that awards a majority of the funds to a third-party charity because the purpose of the fund was to compensate victims not unanticipated, incidental charities.

**b. *Cy Pres* is Wrong.**

Numerous listening conferences were held and absent, silent, and unnamed class members

repeatedly stated that they had not been fully compensated and provided anecdotal evidence in support of the incomplete compensation. The goal of the class members was not to get a payout, but to engage in agribusiness aided in part by a loan. The damages generated by these myriad causes of action, compounded by decades of inability to pursue farming or to expand operations, caused the damages to grow exponentially. The district court, class counsel, and the class representatives all had a hand in forgetting who the Settlement Funds belonged to and how those funds came about. This class action consisted of thousands of individual causes of action aggregated into a class, but it was the individual class members that suffered the losses and they are in the best position to determine the extent of those losses. You cannot authorize a *cy pres* by simply declaring that all class members submitting claims have been satisfied in full. See Marshall v. National Football League, 787 F.3d 502 (8th Cir. 2015) concurring, In Re Bank of America Corp. Securities Litigation, 350 F.3d 747, 752 (8th Cir. 2003) The Marshall court held that a court may approve a settlement that proposes a *cy pres* remedy. However, the court must apply the following criteria in determining whether a *cy pres* award is appropriate. If individual class members can be identified through reasonable effort, and the distributions are sufficiently large to make individual distributions economically viable, settlement proceeds should be distributed directly to individual class members. See also the *concurrence* in Marshall, *cy pres* is appropriate only when it is not feasible to make further distributions to class

members. As stated before, no silent class member has been fully compensated in part because collecting $50,000.00 was never their intent. Rather, expanding or beginning a venture in agribusiness was the goal. What is particularly troubling is that no one ever took the time to ask an absent, silent, and unnamed class member what their expectations were and when the information was volunteered to class counsel and some class representatives, no one was paying attention. As set forth in ALI Section 3.07, cmt. b (" few settlements award 100 percent of a class member's losses, and thus it is unlikely in most cases that further distributions to class members would result in more than 100 percent recovery for those class members"). See also, Oetting v. Green Jacobson, P.C (In Re Bank of America Corp. Securities Litigation), 775 F.3d 1060, 1065 (8th Cir. 2015) also holding, [t]hat "because settlement funds are the property of the class, a *cy pres* distribution to a third party of unclaimed settlement funds is permissible only when it is not feasible to make further distributions to class members." A *cy pres* distribution is not authorized by declaring as class counsel and the district court have in this case, that "all class members have been satisfied in full." Oetting at 1065. The Fifth Circuit arrived at the same conclusion stating, "[i]t is not true that class members with unliquidated damage claims in the underlying litigation are "fully compensated" by paying the amounts allocated in the settlement". See Klier v. Elf Atochem North America, Inc., 658 F.3d 468, 479 (5th Cir. 2011), The fact that the members of [one subclass] have received the payment authorized by the settlement

agreement does not mean that they have been fully compensated. See Masters v. Wilhelmina Model Agency, Inc., 473 F.3d 423, 434-435 (2d Cir. 2007). The core construct of Federal Rules of Civil Procedures 23 is that each class member has a constitutionally recognized property right in the claim or cause of action that the class action resolves.

The United States Court of Appeals was wrong to affirm the district court and erred in approving a settlement that would result in funds being distributed to one or more *cy pres* recipients in lieu of fully compensating members for their losses. See In Re Baby Products Antitrust Litigation, 708 F.3d 163 (3rd Cir. 2013). A direct distribution to the class members is preferred over *cy pres* distributions. Id. at 173. Private causes of action aggregated into a class action were created by Congress to allow plaintiffs to recover compensatory damages for their injuries. Id. at 173 restating 15 U.S.C. § 15.

To account for the inferiority of *cy pres,* the ALI has published guidelines limiting them to instances where further individual distributions are infeasible. The guidelines provide in pertinent part: "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 further distributions impossible." Baby

Products at 173. *Cy pres* awards should generally represent a small percentage of the total settlement barring sufficient justification. Id. at 174. In the case on appeal, the *cy pres* award is greater than the benefit to the class members because the Settlement Fund was $680,000,000.00 before $250,000,000.00 was distributed to class members who could prove up a claim, which left $380,000,000.00.

**c. *Cy Pres M*ust be Narrowly Tailored to Benefit the Class.**

The *cy pres* doctrine takes its name from the Norman French expression, "*cy pres comme possible*" which means "as near as possible". In Re Airline Ticket Com'n Antitrust Litigation, 307 F.3d 679, 682 (8th Cir. 2002). In that case, the court rejected the district court's *cy pres* distribution because it was not narrowly tailored to the purpose of the litigation. Id. at 684. The purpose of the litigation in Keepseagle, the sole purpose of the litigation, was to compensate Native American Farmers and Ranchers that experienced discrimination in the lending process with the Department of Agriculture. That action was not a community effort shared by Native Americans, tribal entities, and Not-For-Profits benefitting Native Americans. Rather, the Keepseagle class action was an aggregation of individual private causes of action. Therefore, the entire benefit of the Settlement Funds only belong to the class members who have proven up a claim. See Wilson v. Southwest Airlines, Inc., 880 F.2d 807 (5th Cir. 1989). The court reversed and remanded because the district court abused its discretion in

applying *cy pres* because there existed class members with rights to the fund. See Ira Holtzman, C.P.A. & Associates Ltd. v. Turza, 728 F.3d 682 (7th Cir. 2013). Money from a class settlement would be used by the class to the extent feasible.

The *cy pres* distribution must be guided by (1) the objectives of the underlying statute and (2) the interests of the silent class. See Six (6) Mexican Workers v. Arizona Citrus Growers, 904 F.2d 1301 (9th Cir. 1990). The district court ordered that any unclaimed funds be distributed through a *cy pres* award to the Inter-American Fund (IAF) for indirect humanitarian assistance in Mexico. The Ninth Circuit rejected this award explaining that (1) the proposal benefits a group too far removed from the plaintiff class, (2) the plan…fails to provide adequate supervision over the distribution, and (3) although the plan permits distributions to areas where class members live,…there is no reasonable certainty that any member will be benefitted. Id. at 1308-1309. The present *cy pres* distribution plan fails to meet any of the guiding standards in Six (6) Mexican Workers. First, the plaintiffs in the present case are identifiable and ascertainable. Second, the charities are too far removed from the silent class members. Indeed, it is not even known which charities shall receive this enormous benefit. Third, the plan fails to provide adequate supervision over the *cy pres* funds. Already, some trustees have engaged in undisclosed self-dealing and at least one trustee and one officer (the president) previously worked for the

defendant. Fourth, there is reasonable certainty that no silent class member will ever benefit from the *cy pres* funds.

No matter how deserving a charity might be, the district court does not have the discretion to award *cy pres* funds unless they are narrowly tailored to the purpose of the class action lawsuit. In Re Airline Ticket at 684. If the court finds [after conducting a hearing and setting forth findings of fact] that individual distributions are not viable, then, and only then, may a settlement use a *cy pres* approach. If, and only if, no recipient whose interests reasonably approximate those being pursued by the class can be identified after thorough investigation and analysis, a court may approve a recipient that does not reasonably approximate the interests being pursued by the class. See Marshall v. National Football League, (8th Cir. 2015).

Improper distribution to non-relevant third parties creates the appearance of impropriety. When selection of *cy pres* beneficiaries is not tethered to the nature of the lawsuit and the interests of the silent class members, the selection process may answer to the whims and self-interests of the parties, their counsel, or the court. It may also create the appearance of impropriety. Nachshin v. AOL, LLC, 663 F.3d 1034, 1040 (9th Cir. 2011). A proposed *cy pres* distribution must meet the qualifying standards whether fashioned by the court or the parties. See also, Dennis v. Kellogg Co. 697 F.3d 858 (9th Cir. 2012). In that case, the only connection between Kellogg and a charity feeding

the poor is that both dealt with food in some way. Id. at 863. Nor was the concerns of the court placated by the settlement provisions that the charities would be identified at a later date and approved by the court. Id. at 867. "Not just any worthy recipient can qualify as an appropriate *cy pres* beneficiary. To avoid the "many nascent dangers to the fairness of the distribution process", we require there be a driving nexus between the plaintiff class and the *cy pres* beneficiaries." See also Nachshin, Test Parts (1) & (2) and Six (6) Mexican Workers test. We do not even have that. The charities will be selected by a board of trustees, some with direct ties to the defendant and others who have engaged in demonstrable, undisclosed, self-dealing with no supervision by the court. The current *cy pres* distribution all but ensures continuing conflicts of interests, graft, self-dealing, and other forms of nefarious behavior for nearly the next quarter century. When the plan for *cy pres* does not adequately target the plaintiff class and fails to provide adequate supervision over distribution, a trial court's application of *cy pres* is improper. Six (6) Mexican Workers at 1309. "Even where *cy pres* is considered, it will be rejected when the proposed distribution fails to provide the "next best" distribution. See City of Philadelphia v. American Oil Co., 53 F.R.D. 45, 72 (D. NJ 1971). This difficulty has in part, motivated the courts which have rejected the notion. See e.g. In Re Hotel Charges, 500 F.2d 86 (9th Cir. 1974) and Eisen v. Carlisle & Jacquelin, 479 F.2d 1005, 1013 (2nd Cir. 1971), vacated on other grounds 417 U.S. 156, 94 S.Ct. 2140, 40 L.Ed. 2d 732 (1974). See Six (6)

Mexican Workers at 1312. See also In Re Katrina Canal Breaches Litigation, 628 F.3d 185 (5th Cir. 2010), citing to In Re Compact Disc Minimum Advertised Price Antitrust Litigation, 216 F.R.D. 197, 221 (D. Me. 2003), the court struck down settlement because *cy pres* was not the next best use of the funds and that the settlement was inconsistent with the nature of the underlying action of making victims of discrimination whole. Notably, these funds do not belong to just any person who claims Indian ancestry. These Settlement Funds belong to a private class of people who *happen to be Native Americans*. These class members are still individuals with an identity that is separate and distinct from the supposed *cy pres* beneficiaries. See also Jewish Guild for the Blind v. First National Bank in St. Petersburg, 226 So.2d. 414 (Fla. 2d DCA 1969), "[t]he very purpose of *cy pres* is when the very intent fails and cannot be executed, the equitable doctrine will permit a court to execute as closely as possible the general intent of the settlement or in this matter the will." See also In Re Pharmaceutical Industry Average Wholesale Price Litigation, 588 F.3d 24, 34 (1st Cir. 2009)

**2. Class Counsel Had a Conflict of Interest and Breached its Fiduciary Duty.**

The elements of a breach of fiduciary duty claim are: (1) the existence of a fiduciary relationship; (2) a breach of a fiduciary duty; (3) and damages or harm from the breach. See Advanced Nano Coatings, Inc. v. Hanafin, 478 F. App'x 838 (5th Cir. 2012). It can be said that a breach of fiduciary

duty exists when the defendant or breaching party places his interests above the principal. See Gerdes v. Estate of Cush, 953 F.2d 201, 206 (5th Cir. 1992). Class counsel had a fiduciary obligation to all the class members. However, once the cash disbursement took place and it was determined that substantial funds were still available, class counsel determined that the class members should acquiesce to the determination of class counsel to distribute those remaining funds via *cy pres*. From that moment on, every meeting (despite being advertised as listening conferences) was held to convince, cajole, and deceive the class members into accepting the *cy pres* provision of the Settlement Agreement, despite the fact that the Settlement Agreement as it pertained to *cy pres* was and is a monumental failure, as so stated by the district court.

In Radcliffe v. Experian Information Solutions, Inc., 715 F.3d 1157 (9th Cir. 2013), the court held that conflicted representation provides independent grounds for reversing the settlement. Because the settlement is reversed, so too must the award of attorney's fees and costs. See In Re Bluetooth, 654 F.3d 935, 940 (9th Cir. 2011) the court also reversed because the district court abused its discretion by not considering "whether class counsel has properly discharged its duty of loyalty to absent class members." Adequate representation depends upon "an absence of antagonism [and] a sharing of interests between representatives and absentees." See Molski v. Gleich, 318 F.3d 937, 955 (9th Cir. 2003), overruled on other grounds by Dukes v. Wal-Mart Stored, Inc,, 603 F.3d 571 (6th Cir. 2010). The

entire handling of the *cy pres* matter has resulted in class counsel and class representatives taking or switching sides against the absent class members.

Class counsel has a fiduciary duty to the class as a whole "and it includes reporting potential conflict issues" to the district court, Rodriguez v. West Publishing Corp., 563 F.3d 948 (9th Cir. 2009), quoted by Radcliffe at 1167. Absolutely no impropriety can be condoned in this relationship. "The responsibility of class counsel to absent class members whose control over their attorney is limited does not permit even the appearance of divided loyalties of counsel." Radcliffe at 1167 quoting, Kayes v. Pacific Lumber Co., 51 F.3d 1449, 1465 (9th Cir. 1995). As soon as divergent interests emerged within the class, counsel was simultaneously representing clients with conflicting interests. Radcliffe at 1169. The Radcliffe court held that the district court abused its discretion in approving a settlement where class representatives and class counsel did not adequately represent the interests of the class. "Such adherence to self-interests, coupled with the obvious fundamental disregard of responsibilities to all class members who had little or no real voice or influence in the process should not find favor or be rewarded at any level. Although within the discretion of the district court in the first instance, the court opined that class counsel should be disqualified from participating in any fee award ultimately approved by the district court upon resolution of the case on the merits." Id. at 1169.

The settlement of a class action must be fair, adequate, and reasonable, see Federal Rules of Civil Procedures 23(e)(1)(C). An absence of material conflicts of interests between the named plaintiffs and their counsel with other class members is central to that adequacy and, in turn, to due process for absent members of the class. See Hanlon v. Chrysler Corp., 150 F.3d 1011, 1020 (9th Cir. 1998). Class counsel not only forced *cy pres* upon the absent class members, but they also colluded with at least a few to several class representatives to force through their own agenda, including a statement that the funds would be forfeited. Of course, now it is abundantly clear, that this was a false and misleading statement. See Tennille v. Western Union Co., D. C. No. 1:09-cv-00938 JLK-KMT, No. 14-1432 (10th Cir. 2015). A settling defendant has no interest in the amount of the attorney fees awarded when those fees are paid from the class recovery rather than the defendants coffers. See also Boeing v. Van Gemert, 444 U.S. 472 n.7 (1980) and Copeland v. Marshall, 641 F.2d 880 (C.A.D.C. 1980). In common fund cases, the losing party no longer continues to have an interest in the fund.

A class lawyer's decision to support or oppose a settlement must be made in the best interests of the class. The lawyer may not favor the claims of some class members because they are named plaintiffs, have individually retained the lawyer, or threatened to block a desirable settlement. See County of Suffolk v. Long Island Lighting, Co., 907 F.2d 1295, 1325 (2d Cir. 1990); Parker v. Anderson, 667 F.2d 1204, 1210-1211 (5th Cir. 1982); and

Kleiner v. First National Bank of Atlanta, 751 F.2d 1193, 1207 n.28 (11th Cir. 1985).

Ultimately, the district court has the final fiduciary responsibility of ensuring that the *cy pres* distribution is appropriate in all respects and meets with all the required tests. See Maywalt v. Parker & Parsley Petroleum, Co., 67 F.3d 1072, 1078 (2d Cir. 1995) noting that the district court has a fiduciary responsibility to ensure that the settlement is fair and not a product of collusion and that the class members were represented adequately. The *cy pres* provisions in a class action settlement require courts to give greater scrutiny to such settlements because of the possibility that class counsel could be compromised by conflicts of interest. See In Re Baby Products Antitrust Litigation, 708 F.3d 163 (3rd Cir 2013); see also In Re Easysaver Rewards Litigation, 921 F.Supp. 2d 1040 (S.D. Cal. 2013). Because class actions are rife with potential conflicts of interests between class counsel and class members, district judges presiding over such actions are expected to give careful scrutiny to the terms of proposed settlement agreements in order to make sure that class counsel is behaving as an honest fiduciary for the class as a whole. In Re Baby Products quoting In Re Gen Motors, 55 F.3d 768, 820 (3d Cir. 1995).

If the *cy pres* award were to be upheld, then class counsel should have its fees reduced accordingly to account for the reduced benefit conferred upon the class members. "Awarding attorney's fees based on the entire settlement rather than the individual distributions creates a potential

conflict of interest between absent class members and their counsel by decoupling class counsels' financial incentives from those of the class." In Re Baby Products at 178. When appropriate, a class action may be divided into subclasses. The option to utilize subclasses is designed to prevent conflicts of interest in class representation. In Re Pet Food Products Liability Litigation Jim W. Johnson and Dustin Turner, 629 F.3d 333 (3rd Cir. 2010) citing In Re Cendant Corp. Securities Litigation, 404 F.3d at 202 (3rd Cir. 2004). See also Pearson v. NBTY, Inc., 772 F.3d 778 (7th Cir. 2014). The appellate court held that administrative costs and *cy pres* set asides could not reasonably be included in an attorney fee award because they provide no benefit to the class members. Id. at 784.

**3. The Class Representatives Breached Their Fiduciary Duties.**

A class action lawsuit is not a free for all that permits named parties to act in their own exclusive best interests. Class representatives owe a fiduciary duty to the unnamed class members. Fiduciary duties can be formal or informal; formal being principal and agent or attorney and client, and informal arising from a confidential relationship where one person trusts in and relies upon another whether the relation is moral, social, domestic, or merely personal. See Hogget v. Brown, 971 S.W. 2d 472, 487 Tex App Houston [14 Dist.] 1997. It can be said that a breach of fiduciary duty is said to exist when the defendant or breaching party places his interests above the principal. See Gerdes v. Estate

of Cush, 953 F.2d 201, 206 (5th Cir. 1992). In fact, in class actions, there is a greater level of fiduciary care imposed upon a class representative. The class must have a "conscientious representative plaintiff". See Rand v. Monsanto, Co., 926 F.2d 596, 599 (7th Cir. 1991) overruled on other grounds by Chapman v. First Index, Inc., 796 F.3d 783 (7th Cir. 2015) and the court must be certain the representatives will fairly and adequately protect the interests of the class; see Hill v. Western Electric Co., 672 F.2d 381,388 (4th Cir. 1982) cert denied, 459 U.S. 981, 103 S.Ct. 318, 74 L.Ed. 294 (1982) (Emphasis supplied).

As case law shows, these class representatives have a duty to act for all class members. Therefore, seats on the Board of Trustees, some of which were created by class counsel to incentivize a change in position, and cash payouts are not acceptable. In Ortiz v. Fibreboard Corp., 527 U.S. 815, 119 S.Ct. 2295, 144 L.Ed. 2d 715 (U.S. 1999), remanded by 527 U.S. 1031, 119 S.Ct. 2387, 144 L.Ed 2d 789 (1999), a class representative has a fiduciary duty to protect the interests of the class, including making appropriate settlement decisions affecting the class. This obligation requires a duty of loyalty to the class and obedience to or at least observance of the wishes of the class. In the case on appeal, the absent class members are overwhelmingly against the *cy pres* distribution. See Regions Bank v. Lee, 905 So. 2d 765 (Ala. 2004), the court refused to uphold a settlement because class representatives failed in their fiduciary responsibility to fully litigate the overwhelming unpopular *cy pres* provision of the Settlement Agreement. Potential conflicts of

interests among the class must be considered very carefully. See Anthem Products, Inc., v. Windsor, 521 U.S. 591, 117 S.Ct. 2231, 138 L. Ed 2d 689 (1997).

District court judges are required to give careful scrutiny of these types of provisions. Because class actions are rife with potential conflicts of interest between class counsel and class members, district judges presiding over such actions are expected to give careful scrutiny to the terms of proposed settlements in order to make sure that class counsel are behaving as honest fiduciaries for the class as a whole. In Re Gen Motors, 55 F.3d at 820 (3rd Cir. 1995). A settlement by a defendant and an agreement not to object cannot relieve the district court of its duty to assess fully the settlement. In Re Bluetooth Headset Products Liab. Litig. … Michael Jones, 654 F.3d 935, 943 (9th Cir. 2011). Moreover, there can be no collusion, not even a hint. See Crawford v. Honig, 37 F.3d 485, 487 (9th Cir. 1995), court reversed and remanded striking down the settlement in part because of the inadequacy (collusion) between class counsel and class representatives. See also Chavez v. PVH Corp., 13-cv-01797-LHK (N.D. Cal. 2015); Pena v. Taylor Farms Pac., Inc., 2:13-cv-01282-KJM-AC (E.D. Cal. 2015); and Radcliffe v. Experian Information Solutions, Inc., 715 F.3d 1157(9th Cir. 2013).

It is abundantly clear that there was a great deal of interaction between the class counsel and the class representatives that gives the reasonable jurist reason to pause, if not gasp, and this requires a

great deal of further analysis. In Hanlon v. Chrysler Corp., 150 F.3d 1011, 1020 (9th Cir. 1998) the court held that an absence of material conflicts of interests between the named plaintiffs and their counsel with other class members is central to adequacy and, in turn, to due process for absent members of the class.

Incentive awards can create an unacceptable disconnect between the interests of the contracting representatives and class counsel on the one hand and members of the class on the other. See Radcliffe at 1164. See In Re Synthroid Marketing Litigation, 264 F.3d 937, 959 (9th Cir. 2003). It is particularly troubling that these payments were not disclosed when they should have been and where it was plainly relevant to do so. See Rodriguez v. West Publishing Corp., 563 F.3d 948 (9th Cir. 2009). The district court has a primary role in ensuring a fair settlement. In Maywalt v. Parker & Parsley Petroleum, Co., 67 F.3d 1072, 1078 (2d Cir. 1995) noting that the district court has a fiduciary responsibility to ensure that the settlement is fair and not a product of collusion and that the class members were represented adequately.

It is not so much the existence of incentive awards that is problematic, but rather the application of those awards and the amount of those awards. In Keepseagle incentive awards have been used to cajole class representative and to alter outcomes, not to simply compensate class representatives for their efforts. Moreover, the amounts have been excessive amounting in totality

to ten times the amount granted to rank and file class members. Sometimes even more.

**4. The Attorney General Supports the Elimination of *Cy Pres*.**

The U.S. Attorney General issued a policy memorandum directing that *cy pres* is no longer permitted in settling lawsuits with the federal government. See Memorandum for All Component Heads and United States Attorneys, Appendix D attached.

In so doing, Attorney General Sessions brings the Justice Department in line with the fifth, seventh, eighth and ninth federal circuits. This provision is also in line with the intent of the ALI comments on this matter. In so doing, the class must be fully compensated first.

His policy can be and should be applied to this matter. The funds in questions have not been disbursed and need not be disgorged or otherwise recaptured. All that is needed to direct those funds to the rightful owner is for a court of competent jurisdiction to so order it. Such a course of action is consistent with the guidance in the letter because it compensates for harm to the parties of litigation and eliminates payments to undeserving third parties.

### 5. This Case Addresses All the Concerns of *Cy Pres* in Class Action Settlements.

When this Court denied the Writ of Certiorari in Marek v. Lane, 134 S.Ct. 8 (2013), it primarily did so because there were issues involving *cy pres* that could not be addressed in that case. Keepseagle affords this Court the opportunity to address all of the issues concerning *cy pres* provisions in class action settlements. Those provisions have been elucidated by this Court and include: (i) whether members of the party being sued should be permitted to serve on the *cy pres* board of directors; (ii) concerns regarding unfettered discretion over *cy pres* funds; (iii) how to address fairness as a general matter; (iv) whether new entities may be established as part of such relief; (v) selecting new entities; (vi) the judges role in shaping a *cy pres* remedy; and (vii) how closely the goals of any enlisted organization must correspond to the interests of the class. Id. at 9.

There is a multi-faceted confluence of issues that can only be resolved by this Court. First, we have a conflict among the federal circuits. Second, we have the Attorney General who has created a policy that is inconsistent with civil practice not involving the federal government. Lastly, we have this Court's own concern that *cy pres* is perhaps an issue that should be visited, if not completely struck down.

## CONCLUSION

This Honorable Court should repudiate the district court's order and remand with instructions to follow the guidelines set forth by the majority of the appellate courts in the federal circuits. In fact, this Court should strike down the application of *cy pres* in all class action settlements. At the very least this Court should insist that the ALI principles be strictly conformed to in applying *cy pres*. Moreover, this court should reverse the decision of the Court of Appeals.

The *cy pres* distribution is improper because all the class members can be identified and located. The amount remaining is not a residual amount, but rather constitutes the majority of the Settlement Funds.

The *cy pres* distribution will not benefit the absent class members. The distribution must be narrowly tailored to the intent of the compensatory lawsuit "as near as possible."

The entire matter should be remanded with instructions because there was either collusion between class counsel and the class representatives or at least enough peculiar activity as to demand a highly scrutinized hearing and analysis by the district court. The actions of class counsel and class representatives certainly have the appearance of self-dealing, deceit, manipulation of class representatives, failure to obey class members, and more. At a minimum, the class representatives were

not conscientious and the class counsel did not steer clear of the appearance of impropriety. For these reasons, the lower court ruling should be reversed and remanded with further instructions.

The June 5, 2017, Memo echoes the concerns set forth herein and should be recognized and implemented. The Funds discussed herein belong to class members who have not been fully compensated and those damages and property should be distributed to them. The Department of Justice and class counsel, along with the district court, all recognize that the distribution of these funds would not constitute a windfall, as demonstrated by their proposed second round of payments.

The matter brought before this Court by Writ of Certiorari presents all of the "missing issues" sought in the denial of certiorari in Marek v. Lane, 134 S.Ct. 8 (2013). Keepseagle shows the problems presented with unfettered discretion in *cy pres*. It demonstrates the inherent problems of having USDA senior employees on the board of trustees, indeed as President of the board of trustees. It addresses all the fundamental concerns specific to *cy pres* in class action lawsuit settlement, as well as the fairness as a general matter. It addresses whether new entities should be allowed and the role of the judge in *cy pres*. It also provides a platform to address how closely selected entities must conform to the interests of the class.

If the Court does not grant Cert here and now, it may be decades before a case comes to this Court with so many *cy pres* issues.

Based on the foregoing, Petitioners respectfully submit that this Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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