IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

FINAL REPORT TO COURT ON PAYMENTS FROM THE KEEPSEAGLE SETTLEMENT FUND AND MOTION FOR APPROVAL OF FINAL PAYMENTS INCLUDING SUPPLEMENTAL ATTORNEYS FEES

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After nearly nineteen years since this case began, and seven years since settlement was approved, this litigation is finally coming to an end. Plaintiffs have previously submitted reports to the Court regarding the claims process and the initial awards (Dkts. 617, 618, 634, 646). Plaintiffs submit this final report to summarize the disbursements from the settlement proceeds. Plaintiffs also request a supplemental award of fees for work that was not anticipated or encompassed in Plaintiffs' 2011 fee petition.

I. DISBURSEMENT OF SETTLEMENT PROCEEDS

In 2011, Defendant transmitted $680 million to the Keepseagle Settlement Fund. Since that time, these funds have been disbursed as follows:

Purpose	Amount
Initial payment to prevailing claimants,[1] $50,000 each Track A; up to $250,000 Track B	$182,108,594.02
Supplemental payment to prevailing claimants,[2] $18,500 each	$66,293,147.98
Payments made to the IRS on behalf claimants (from both the initial and supplemental award distribution, and including tax payments made in connection with debt forgiveness)	$65,449,470.10
Service Awards to the Class Representatives	$950,000.00
Supplemental Service Awards to three Class Representatives following modification	$300,000.00

[1] Among the prevailing claimants in 2012, 11 were deceased and no one ever established that he or she was the legal representative of the estate, and five other prevailing claimants never cashed their checks. In addition, some claimants were subject to backup withholding which required withholding part of their claim and paying that to the IRS; those funds are reported under taxes paid, not under payments to claimants. In addition, one prevailing claimant was found to have engaged in fraudulent activity, and has been making restitution payments in varying amounts. Thus, the total amount disbursed to claimants from the initial settlement payments is not the round number previously reported based upon the number of claims approved for payment.

[2] Some of these claimants were also subject to backup withholding, which was treated the same way as in the initial distribution, described in n.1 above. The amount reported here assumes all checks will be cashed. There are currently approximately 300 checks that have not yet been cashed, and based on the experience from the 2012 distribution, there will likely be a few uncashed checks at the end of this process despite efforts to locate individuals. If suitable efforts to encourage cashing checks are unsuccessful, the proceeds from those checks will be added to the remaining interest and transferred to the Trust.

Attorneys' Fees and Costs awarded in April 2011	$60,800,000.00
Initial cy pres beneficiary payments	$38,000,000.00
TOTAL	**$413,901,212.10**

Thus, $266,098,787.90 of the principal remains in the Settlement Fund. This amount will be transferred to the Trust once the Trust has established its accounts so that the transfer can be completed. It is expected that the transfer for most all of these funds will happen by the end of August. There are some Certificates of Deposit held through the CDARS investments which do not come due until September or October. Rather than pay a penalty for early withdrawal, those funds will be transferred to the Trust as they reach their maturity dates.

II. INTEREST EARNED TO DATE

Class counsel's management of the Settlement Fund has been guided by the terms of the Settlement Agreement approved by the Court, their obligation to invest the funds in a manner that protected the principal while earning interest consistent with this obligation and ensuring the funds remained available to satisfy the claims made pursuant to the Settlement Agreement. In prior reports, Plaintiffs' described the identification of a bank, as well as the addition of three Native-owned banks using the CDARS program. Declaration of Joseph M. Sellers in Support of Plaintiffs' Final Report, attached hereto as Ex. 1, at ¶¶ 2-8; Dkt. 603, 604, 610, 611, 612. Counsel also previously described the investment strategy, explaining that the Settlement Fund would be invested in a range of interest bearing accounts (including money market accounts and certificates of deposit) as well as short-term U.S. Treasury Securities, Agency paper and highly-rated commercial paper. Dkt. 603 at 5; Ex. 1, Sellers Decl. ¶¶ 9-12. The strategy was designed to: 1) preserve capital; 2) manage the timing of liquidity; 3) obtain a market rate of return; 4) minimize fees/costs; and, 5) reduce income tax liability. Ex. 1, Sellers Decl. ¶ 12.

As of July 18, 2018, Oppenheimer has reported $10,546,631.02 in interest earned, a weighted average yield of 1.93%. Ex. 1, Sellers Decl. ¶ 13a. The CDARS invested through

three Native-owned banks will, at final maturity, yield interest of $771,638.50, which is 1.54% of the $50 million invested in CDARS. *Id.* at ¶ 13b. The total interest earned to date is $11,318,269.52, although this will continue to grow slightly between the July report from Oppenheimer and when the transfer of the principal to the Trust takes place in August.

III. EXPENSES PAID FROM INTEREST OVER THE LIFE OF THE SETTLEMENT

There were several expenses associated with the settlement that were paid from interest earned, the most significant of which was taxes paid on the income earned by the Settlement Fund.

Purpose	**Amount**
Federal taxes on income of the Settlement Fund	$2,442,780.31
State taxes on income of the Settlement Fund	$811,116.04
Accountants to prepare tax returns	$85,594.00
Legal fees paid to counsel for management and oversight of investment process (none to class counsel)	$407,986.06
Legal fees paid to counsel who drafted Trust Agreement (none to class counsel)	$109,241.21
Tax Seminars for Claimants	$50,000.00
Listening Sessions and Report	$201,202.54
Fast-track Cy Pres Process	$122,675.11
Total to date	**$4,230,595.27**

Tax payments and money management: The tax payments were, of course, required by law to be made, and the accountants were essential to accurately calculate taxes due and prepare returns. Legal fees were paid to Patton Boggs for their expertise in money management. They vetted candidates to serve as the fund depository and investment advisor, as well as investment strategies, and presented recommendations to class counsel. They also assisted with oversight of the tax preparation. Ex. 1, Sellers Decl. ¶ 15a. Legal fees were paid to Morgan Lewis for work drafting the Trust Agreement which will govern disposition of the majority of the unclaimed settlement funds. *Id.* at ¶ 15b.

Tax Advice to Class Members: In response to concerns expressed by a significant

number of class members about how to handle tax treatment of the funds they received from this settlement and whether those funds should be treated differently than other revenue they generated from farming or ranching on trust lands, class counsel retained individuals with expertise in taxation, especially for farmers and ranchers, who prepared written materials and presented a seminar in over forty locations for class members throughout Indian Country. The seminar was also recorded and available for review online. This project was supported by Extension Risk Management Education, Rural Tax Education, several state university extension programs, and the Intertribal Agricultural Council. By arranging for these experts to discount substantially the rates at which they charged for their time, this project was completed for $50,000. Ex. 1, Sellers Decl. ¶ 15c.

Listening Sessions: As previously reported to the Court, Class Counsel engaged the Indigenous Food and Agriculture Project at the University of Arkansas to convene multiple listening sessions – eight in person and three by telephone – to discuss with members of the class their views about disposition of the unclaimed settlement funds and appropriate leaders for the Trust and to report summaries of those sessions for the Court. Dkt. 709-6. The cost of staffing those sessions, renting the facilities where the sessions were held, the webinar/conference calls and travel expenses totaled just over $200,000. Ex. 1, Sellers Decl. ¶ 15d.

Fast Track Funds Distribution Process: As Plaintiffs reported more fully in connection with their recommendations for distribution of the initial $38 million "fast track" fund, Dkt. 883, they retained Echo Hawk Consulting to help design and implement an appropriate grant application and review process. The costs associated with this work were $122,675.[3] Ex. 1,

[3] In addition, there were travel and food costs associated with the October 2016 in person meeting to formulate recommendations that were paid by Class Counsel and included in the request below for reimbursement of additional expenses.

Sellers Decl. ¶ 15e.

Initial Costs of Set Up and Operation of Trust: As the Addendum to the Settlement Agreement required, expenses incurred in the set up and the initial meeting of the Trust have been paid from the interest, and additional expenses are expected before the final transfer of funds to the Trust. To date, $14,989.67 has been paid for the lodging of the Trustees, who convened in Washington, D.C. for their first meeting of the Trust. Ex. 1, Sellers Decl. ¶ 15f.

Balance of Accrued Interest: The balance remaining on the interest accrued from the unclaimed settlement funds, after deduction of expenses paid to date, is $7,072,684.58.

IV. EXPENSES NOT YET PAID

Pursuant to the Addendum to the Settlement Agreement, the class anticipates incurring additional expenses that must be defrayed from the accrued interest. Specifically, additional expenses associated with the Trustees' first meeting have been incurred but not yet billed for airfare, food and incidental travel expenses, as well as charges from Morgan Lewis, counsel for the Trust. In addition, the Trust will be obligated to pay in 2019 federal and District of Columbia taxes on income received during 2018 along with the charges for the services provided by the accountants to prepare the final tax returns.

V. SUPPLEMENTAL REQUEST FOR ATTORNEYS' FEES AND COSTS

Plaintiffs seek a supplemental award of attorneys' fees and costs to compensate for services rendered and defray expenses incurred in addressing disposition of the unexpectedly large amount of unclaimed settlement funds. The need for these services and costs, which were expended after the Settlement Agreement was negotiated and approved in April, 2011 and after the award of attorneys' fees and costs, was not foreseen and these services and costs were not compensated by the earlier award of attorneys' fees and costs. *Compare* description of services included in the prior fee petition, Dkt. 581 at 2 *with* description of services for which

compensation is sought in this supplemental award, *infra* at 9-10, 17-19.

A. Counsel Completed Substantial Work for the Benefit of the Class That Was Not Contemplated by the Initial Fee Award.

Plaintiffs seek fees for work performed after the claims process concluded, work which was not contemplated in the initial fee petition. The Addendum to the settlement, which was approved by this Court, provides that counsel may move for fees for the work involved in modifying the agreement and establishing the Trust, provided that any payment approved by the Court be made only from accrued interest, and only after Defendant has the opportunity to respond to the fee request. Dkt. 824-2 at IV.C. Although the requested fees would be paid only from accrued interest and not from the principal paid by the USDA to settle this action and the balance of the interest remaining would be transferred to the Trust rather than distributed to the claimants, class counsel will nonetheless post a copy of this report and the fee request on the case website, www.indianfarmclass.com, in order to provide notice to the class consistent with Rule 23(h). Further, the Trustees of the Trust have been informed of the intention to seek this supplemental award of attorneys' fees and the general amount of the fees requested and did not object to the request.

1. The work for which the supplemental fee request is sought was not encompassed by the initial award of attorneys' fees in this case

In addition to seeking compensation for work performed over the prior twelve years, the initial petition for an award of attorneys' fees in this action sought compensation for work yet to be performed at that time: implementing the settlement claims process and the programmatic terms of the settlement. In particular, the initial fee petition, filed in January 13, 2011 provided: "Class counsel will also undertake considerable work and incur substantial expenses in implementing the monetary and programmatic terms of the Settlement over the next five years and providing assistance to class members who file claims. Class counsel projects that future

fees and expenses for such work will total approximately $8.65 million. The fee award here will be class counsel's only compensation for this prospective work." Dkt. 581 at 2. As that initial fee petition explained in detail, the additional work for which compensation was sought involved the notice process, the claims process, answering class member questions, and participating in the implementation of the programmatic relief. Dkt. 581 at 16-18. While this work required expenditure of considerably more time than was estimated in the fee petition, Plaintiffs do not seek any further award of fees related to those areas of work which were covered by the initial fee petition.[4]

The work for which the Plaintiffs seek compensation in this supplemental petition, however, was not contemplated or described in the 2011 fee petition. The need for this work arose only after an unexpectedly large amount of settlement funds were unclaimed, which the Settlement Agreement provided be distributed in a cy pres distribution.[5] As a result, the peculiar nature of this supplemental work was wholly distinct from the work that was contemplated by, and encompassed within, the initial fee petition.

This supplemental work entailed extensive negotiations with the USDA over disposition of these unclaimed settlement funds and then, at the Court's direction, renewed negotiations with

[4] Plaintiffs' fee petition estimated that class counsel would devote $650,000 to the claims process and settlement administration, in addition to the $6.5 million for hiring temporary counsel and staff for the duration of the claims process. Dkt. 581 at 18. In fact, Cohen Milstein alone devoted over $2.5 million in lodestar to the claims process and expected settlement administration tasks, four times the amount anticipated at the time of the initial fee petition, and other class counsel similarly devoted far more lodestar than anticipated to the claims process and settlement administration, not counting the time included in this request for a supplemental award of fees. Declaration of Joseph M. Sellers in Support of Plaintiffs' Request for a Supplemental Award of Attorneys' Fees and Expenses, attached hereto as Ex. 2, ¶ 17 (total lodestar from 2011 to present including that sought here was over $4.5 million).

[5] The unanticipated nature of this work is discussed in the briefing supporting modification of the Settlement Agreement. (Dkt. 709 at 3, 14-15)

the USDA and counsel for Mrs. Keepseagle over disposition of these unclaimed funds. Supplemental notice to the class along with three telephone sessions and eight multi-hour listening sessions convened across Indian Country to inform the class of amount of unclaimed funds and solicit their views about the disposition and candidates to lead the Trust that was ultimately created. Multiple briefings and hearings were required to address the authority to modify the cy pres provision of the Settlement Agreement. Substantial work was undertaken to formulate and negotiate the terms of the Trust Agreement that is governing the Trust, to which the majority of the unclaimed funds have been disbursed and which represents the largest philanthropic organization exclusively dedicated to serving Native Americans. And a process was designed and conducted to distribute $38 million from a "fast track" fund. None of this work was anticipated at the time the plaintiffs originally applied for attorneys' fees. But this work was nonetheless necessary to ensure that the $380 million in unclaimed settlement funds was distributed in a manner that would benefit the entire plaintiff class and serve the purposes for which this action was originally brought. *See* Ex. 2, Sellers Decl. at ¶¶8-14.

This work required over five thousand hours to complete and was undertaken from the spring, 2012 to the present. The work is described in further detail in the supporting declarations of Joseph M. Sellers, Ex. 2 at ¶¶ 8-14; David Frantz, Ex. 3 at 2-3; Jessica Amunson Ring, Ex. 4 at ¶¶ 9-12; Sarah Vogel, Ex. 5 at ¶ 8; and Phil Fraas, Ex. 6 at ¶ 4. At current hourly rates, this supplemental and wholly unanticipated work expended by class counsel for the benefit of the class is compensable at market rates in an amount totaling $3,220,035.85. Exs. 2-6. In addition, counsel have advanced $45,656.50 in expenses for travel, transcripts, and similar such costs. Ex. 2, Sellers Decl. at ¶ 23; Ex. 4 Amunson Decl. at ¶ 24; Ex. 5, Vogel Decl. at ¶¶ 11-12; Ex. 6, Fraas Decl. at ¶ 8. The records of the time for which the supplemental fee award is sought were

maintained contemporaneously with the work performed, and are attached to the declarations submitted on behalf of each firm. Exs. 2-6.

B. Legal Authority and Equity Support a Supplemental Award of Fees

1. Supplemental Fee Awards Have Been Approved in Cases Where Class Counsel Performs Substantial Post-Settlement Work

Where class counsel perform additional work post-settlement that was not encompassed by the initial fee petition, courts have granted a supplemental award of attorneys' fees. For example, in *Fears v. Wilhelmina Model Agency, Inc.*, class counsel sought a supplemental fee award for over 2700 hours of additional work overseeing the claims process, successfully obtaining the extension of some deadlines and overcoming obstacles defendant raised to implementation. *Fears v. Wilhelmina Model Agency, Inc.*, No. 02 CIV 4911 HB, 2007 WL 1944343, at *6 (S.D.N.Y. July 5, 2007), *vacated on other grounds*, 315 F. App'x 333 (2d Cir. 2009).[6] As the court explained:

> The Court may award supplemental fees to counsel for work performed in relation to the litigation or settlement following counsel's initial fee application. *See Olick v. Parker & Parsley Petroleum Co.*, 145 F.3d 513, 515, 516 (2d Cir. 1998) (affirming district court's award of supplemental fees to class counsel for time and expenses spent defending the settlement), citing *Orchano v. Advanced Recovery, Inc.*, 107 F.3d 94, 98 (2d Cir. 1997); *cf. West v. Manson*, 163 F.Supp.2d 116 (D. Conn. 2001) (plaintiff's class counsel in civil rights lawsuit awarded supplemental fees for post-settlement work in conjunction with monitoring of compliance with consent decree). Accordingly, as Plaintiffs' counsel has performed a benefit to the class with its additional post-settlement work, I will supplement my original May 5, 2005 award of counsel fees with an award of fees for supplemental work performed since the original fee application.

[6] The Second Circuit did not disturb the supplemental fee award. Instead, it overturned the district court's decision as to the initial fee award, holding the district court had not adequately explained why the initial fee award for pre-settlement work was not higher.

Id.; see also *In re Agent Orange Prod. Liab. Litig.*, 611 F. Supp. 1296, 1341-42, 1351 (E.D.N.Y. 1985) (in this lengthy litigation, supplemental petitions were permitted, covering a year of work implementing the settlement, and were granted in same ruling which addressed modification of the initial fee award for pre-settlement work). Supplemental awards of fees to compensate for post-settlement work effectuating the settlement have also been approved in this district. *Pray v. Lockheed Aircraft Corp.*, No. CIV. A. 75-0874, 1987 WL 9757, at *2 (D.D.C. Apr. 3, 1987) (approving supplemental award of attorneys' fees, even where the compensated work was foreseeable, unlike the present case); *see also Goldenberg v. Marriott PLP Corp.*, 33 F. Supp. 2d 434, 441-42 (D. Md. 1998) (noting 14 unpublished orders from other courts which, like that court, approved supplemental awards of fees to class counsel for administration of the settlement); *West v. Manson*, 163 F. Supp. 2d 116, 117 (D. Conn. 2001) ("It is well established that prevailing civil rights plaintiffs are entitled to reasonable attorneys' fees for post-judgment monitoring.") (collecting cases). The Supreme Court has also approved the award of post-judgment attorneys' fees for supplemental work expended in a case, like the present matter, which arises under a fee shifting statute. *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air*, 478 U.S. 546, 559 (1986) ("post-judgment monitoring of a consent decree is a compensable activity for which counsel is entitled to a reasonable fee.")

While the work for which the supplemental award of attorneys' fees is sought was not devoted to monitoring the settlement agreement, as the initial award of attorneys' fees provided compensation for that service, this authority amply supports the award of attorneys' fees for work expended in service of the class after a settlement has been reached and judgment entered.

Courts generally consider whether the post-settlement work provided a benefit to the class, and if so, whether funds for such an award are available. *Cassese v. Wash. Mut., Inc.*, 27

F. Supp. 3d 335, 339 (E.D.N.Y. 2014). Here, the work for which compensation is requested benefitted the class by ensuring that the cy pres funds were handled in a manner most likely to benefit the entire class, including a supplemental award to prevailing claimants. While in *Cassese* the initial fee award did not fully compensate for the lodestar expended, *id.*, supplemental awards have been made where the pre-settlement work was fully compensated. *Pray*, 1987 WL 9757, at *2, awarded fees even though the prior award had exceeded the total lodestar. *See Pray v. Lockheed Aircraft Corp.*, 644 F. Supp. 1289, 1308 (D.D.C. 1986) (awarding $1.8 million in fees on $1.5 million in lodestar); *see also Goldenberg v. Marriott PLP Corp.*, 33 F. Supp. 2d 434, 439 n.6, 442 (D. Md. 1998) (noting initial fee award was 3.6 times lodestar, but still awarding supplemental fees).

2. The Supplemental Fee Award Requested Is Reasonable and Warranted

As the Supreme Court has held, a prevailing plaintiff "should ordinarily recover an attorney's fee unless special circumstances would render such an award unjust." *Hensley v. Eckerhart*, 461 U.S. 424, 429 (1983) (quoting S. Rep. No. 94-1011, at 4 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5912). The Court defined prevailing parties as parties that "succeed on any significant issue in litigation which achieves some of the benefit the parties sought in bringing suit." *Hensley*, 461 U.S. at 433. The Supreme Court further explained that, "[t]he touchstone of the prevailing party inquiry must be the material alteration of the legal relationship of the parties in a manner which Congress sought to promote in the fee statute." *Texas State Teachers Ass'n v. Garland Indep. Sch. Dist.*, 489 U.S. 782, 792-93 (1989). Here, Plaintiffs not only prevailed in obtaining the initial settlement, which was memorialized in a judgment of this Court, but also they prevailed in obtaining a modification of the settlement agreement to better benefit the class, and defended that "material alteration of the legal relationship" on appeal. The Equal Credit Opportunity Act that underpins this litigation provides that prevailing plaintiffs may be awarded

a reasonable fee. 15 U.S.C. §1691e(d).

As this Court has held with respect to establishing a reasonable fee:

> The starting point for determining a reasonable fee is the "lodestar method," which "is the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate." *Hensley v. Eckerhart*, 461 U.S. 424, 433, 103 S.Ct. 1933, 76 L.Ed.2d 40 (1983). "[T]he lodestar method produces an award that roughly approximates the fee that the prevailing attorney would have received if he or she had been representing a paying client who was billed by the hour in a comparable case[.]" *Perdue*, 130 S.Ct. at 1672. There is a "strong presumption" that the lodestar figure represents a reasonable attorney's fee, *id*. at 1673, because "'the lodestar figure includes most, if not all, of the relevant factors constituting a 'reasonable' attorney's fee,'" *id*. at 1667 (quoting *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air*, 478 U.S. 546, 566, 106 S.Ct. 3088, 92 L.Ed.2d 439 (1986)).

Heller v. District of Columbia, 832 F. Supp. 2d 32, 37–38 (D.D.C. 2011) (Sullivan, J.). As set forth below, Plaintiffs' counsel seek the payment of a lodestar fee award for work that was reasonably and necessarily performed in service to the class at rates prevailing in this market.

3. Counsel's Rates Are Reasonable

Class Counsel rely upon their regular hourly rates, which are reasonable and appropriate. As this Court has held, "an attorney's usual billing rate is presumptively the reasonable rate, provided that this rate is 'in line with those prevailing in the community for similar services by lawyers of reasonably comparable skill, experience, and reputation.'" *Heller* 832 F. Supp. 2d at 38 (quoting *Kattan ex rel. Thomas v. District of Columbia*, 995 F.2d 274, 278 (D.C. Cir. 1993)). The declarations submitted in support of this request attest that the rates requested are the usual billing rate of counsel, and describe the skill, experience and reputation of counsel upon which these rates are established and regularly reviewed. Evidence that other courts have accepted these rates is provided in the declarations. Exs. 2-6. After 18 years of litigation, the Court is also personally familiar with the quality of work performed by counsel.

In addition, the rates sought are consistent with the prevailing rates for experienced counsel handling complex civil rights litigation in Washington, DC. *See* Declaration of Jennifer Klar, attached hereto as Ex. 7. Ms. Klar is an experienced civil rights lawyer who is familiar with rates charged by her firm to fee paying clients and received pursuant to court awards, as well as rates charged by other firms practicing in this area. Klar Decl. ¶¶ 6-14. Ms. Klar attests that the rates requested by Cohen Milstein are consistent with the relevant Washington, DC market. *Id.* ¶¶ 16-22.

Further, the rates are consistent with the LSI Laffey Matrix. The Laffey Matrix provides one form of evidence of the prevailing rates in the Washington, DC legal market. It is commonly used in cases within the D.C. Circuit, especially in cases, such as this matter, which involve complex litigation. *Texas v. United States*, 247 F. Supp. 3d 44, 50 (D.D.C. 2017). Because the Laffey Matrix was developed to reflect prevailing rates for work done in 1981–1982 in *Laffey v. Nw. Airlines, Inc.*, 572 F. Supp. 354, 371 (D.D.C. 1983), *aff'd in part, rev'd in part on other grounds*, 746 F.2d 4 (D.C. Cir. 1984), *overruled in part on other grounds, Save Our Cumberland Mountains, Inc. v. Hodel*, 857 F.2d 1516 (1988), it must be updated to reflect current rates. *Id.* There are two versions of the Laffey Matrix, which have been updated in different ways. The USAO Laffey Matrix is updated by the United States Attorney's Office for the District of Columbia, using the Consumer Price Index for All Urban Consumers (CPI–U) of the United States Bureau of Labor Statistics, measuring prices across commodities for the Washington DC area. *Id.* The LSI Laffey Matrix is updated using the Legal Services Index of the Bureau of Labor Statistics, which provides data on the rate of increase in national legal rates. *Id.*, see also LSI Laffey Matrix, available at http://www.laffeymatrix.com/see.html (last visited August 2, 2018).

The LSI Laffey Matrix has been widely accepted in this circuit, particularly in civil rights cases, in the absence of evidence that "the fee applicants were part of a submarket in which attorneys' rates were generally lower." *Texas,* 247 F. Supp. 3d at 50-51 (adopting the LSI Laffey Matrix in a voting rights case). *See also Salazar ex rel. Salazar v. District of Columbia.*, 809 F.3d 58, 64-65 (D.C. Cir. 2015) (affirming district court's use of the LSI Laffey Matrix in case of complex federal litigation, where billing survey showed national law firm rates were closer to the LSI Laffey than to USAO Laffey, and district court found the LSI Laffey Matrix was conservative); *Makray v. Perez*, 159 F. Supp. 3d 25, 46-48 (D.D.C. 2016) (accepting the LSI Laffey Matrix with support of declaration from experienced practitioner comparing LSI Laffey to prevailing market in DC); *Hernandez v. Chipotle Mexican Grill, Inc.*, 257 F. Supp. 3d 100, 114-16 (D.D.C. 2017), appeal dismissed, No. 17-7115, 2017 WL 5258351 (D.C. Cir. Sept. 25, 2017) (same); *Young v. Sarles*, 197 F. Supp. 3d 38, 47 (D.D.C. 2016) (same); *Elec. Privacy Info. Ctr. v. U. S. Dep't of Homeland Sec.*, 218 F. Supp. 3d 27, 48-49 (D.D.C. 2016) (accepting the LSI Laffey Matrix with support of billing rate survey); *Salazar v. District of Columbia*, No. CV 93-452 (GK), 2014 WL 12695696, at *2 (D.D.C. Jan. 30, 2014) (endorsing the LSI Laffey Matrix and explaining why the rate of inflation in legal services is more appropriate to use than the general rate of inflation); *Bricklayers & Trowel Trades Int'l Pension Fund v. Conn. Stone Indus., LLC*, No. CV 17-2341 (ABJ), 2018 WL 3381314, at *4–5 & n.4 (D.D.C. July 11, 2018) (finding rate based on LSI Laffey Matrix reasonable because lower than what the court routinely awards).

While courts have noted that when a fee matrix, including the LSI Laffey Matrix, is submitted to establish rates prevailing in the community, some evidence of the matrix's reliability is needed, that evidence may be found from other court opinions holding the proffered

matrix is a reasonable measure of the market. *Covington v. District of Columbia*, 57 F.3d 1101, 1109-10 (D.C. Cir. 1995) (burden to show market rate is met by submitting updated Laffey Matrix; in the district court counsel submitted their own declarations as to their experience, the Laffey Matrix with declarations about updating to current rates,[7] and citation to court opinions accepting the matrix); *Texas*, 247 F. Supp. 3d at 51 (finding LSI Laffey Matrix was appropriate based on the extensive analysis in *Salazar*, *supra*, and the qualifications and experience of counsel); see also *Bricklayers*, 2018 WL 3381314, at *4–5 & n.4 (finding rate based on LSI Laffey Matrix reasonable because lower than what the court routinely awards). Given the undisputed complexity of this litigation, and the lack of evidence that class counsel operate in a submarket with lower rates, the number of recent decisions finding the LSI Laffey Matrix is a fair, or even conservative, representation of the Washington legal market, and the Klar Decl., Ex. 7, ¶ 21 (stating that the LSI Laffey Matrix is lower than the market rate for experienced civil rights counsel in Washington), Plaintiffs have satisfied their burden to establish that the rates at which they seek compensation are reasonable.

4. The Amount of Time for Which Compensation is Sought was Reasonable and Necessary to Obtain the Result Achieved

Only time that was reasonably expended to serve the class should be compensated. *Heller,* 832 F. Supp. 2d at 38. In determining whether the amount of time for which compensation is sought was reasonable, counsel are expected to exercise "billing judgment." *Hensley*, 461 U.S. at 434. In exercising such judgment, counsel "should make a good faith effort to exclude from a fee request hours that are excessive, redundant, or otherwise unnecessary." *Id*. Counsel have engaged in a line by line review of their time records to eliminate redundant or

[7] Now that updates of the Laffey Matrix are published each year, parties need not provide their own update to the matrix, as in *Covington*.

excessive time, time which was inadequately documented, or which mixed small amounts of time spent on the cy pres projects with larger amounts of time devoted to the claims administration work that was excluded from this supplemental fee request. Ex. 2, Sellers Decl. at ¶ 20; Ex. 4, Amunson Decl. at ¶ 17; Ex. 5, Vogel Decl. at ¶ 9; Ex. 6, Fraas Decl. at ¶ 5. The time encompassed by this request was reasonably necessary in order to ensure that cy pres funds were disbursed in a manner most likely to benefit the class as a whole.

Class counsel have expended 5,082.2 hours work for which they seek compensation. The work began in 2012 with research about options for the disposition of the unexpectedly large amount of unclaimed settlement funds. Negotiations over disposition of these funds with the USDA began in 2012 and were particularly intensive throughout 2013-14, and resumed again in mid-2015. The work included submission of substantial briefing to this Court including (i) the August 30, 2013 status report (Dkt. 646); (ii) opposition to the motion to intervene by the Choctaw Nation seeking $40 million for the Jones Academy (Dkt. 650), and response to the subsequent appeal filed by the Choctaw; (iii) opposition to the motion to intervene by the Great Plains Claimants (Dkt. 659); (iv) briefing the first motion to modify the settlement (Dkts. 709, 792);[8] (v) opposing a motion to remove Porter Holder and Claryca Mandan as class representatives (Dkts. 762, 768); (v) responding to a motion for discovery (Dkt. 764); (vi) responding to Mrs. Keepseagle's motion to modify the settlement (Dkt. 782) and her subsequent

[8] Although the Court did not grant the first motion to modify, much of the work that went into that motion was re-used in the subsequent motion to modify that the Court did approve. Thus, this is unlike the situation described in *Hensley*, 461 U.S. at 434-35 in which the Court held that unrelated claims should be treated as if in separate cases where plaintiff prevails only on one claim. Instead, this circumstance is governed by *Hernandez*, 257 F. Supp. 3d at 109 (citing *Fox v. Vice*, 563 U.S. 826, 834 (2011)) (awarding fees for two motions on which plaintiff was unsuccessful, as those motions were filed in furtherance of a claim on which plaintiff was ultimately successful).

appeal; (vii) preparing the second motion to modify the settlement agreement and responding to objections (Dkts. 824, 853, 858, 866); (viii) defending the settlement modification on appeal in the D.C. Circuit, including rehearing petitions and two petitions for certiorari. In addition to the negotiations and formal briefing, substantial additional time was necessarily expended on other tasks, which included convening and participating in person in eight multi-hour listening sessions convened throughout Indian Country and in three multi-hour telephonic listening sessions held in the summer 2014, ongoing communications with Native American community leaders and class members alike, working with trust counsel and negotiating with defendant the language of the Trust Agreement, and researching and evaluating potential trustees and submitting their nominations to the Court. Moreover, counsel developed and implemented the process to solicit applications for the $38 million "fast track" cy pres fund, evaluate those applications, and prepare recommendations for the Court.

In addition, Class Representative Marilyn Keepseagle is seeking an award of attorneys' fees generated by counsel, Olsson Frank Weeda Terman Matz PC (OFW Law), whom she retained separately in order to assist her in seeking an additional award of damages from the unclaimed settlement funds to class members who were successful in their initial claims. Mrs. Keepseagle retained Marshall Matz, a principal at OFW Law, after the Court invited her to retain separate counsel to assist her efforts to modify the Settlement Agreement to distribute more of the remaining funds directly to class members who were successful in their initial claims. Mr. Matz and OFW Law were retained based on the firm's unique background in Indian law, USDA administrative matters, and complex litigation. OFW Law is seeking compensation for services rendered on behalf of Mrs. Keepseagle as lead class representative beginning with her Motion to Modify the Settlement Agreement. This includes representing Mrs. Keepseagle's interests in

negotiations that ultimately lead to the Addendum to the Settlement Agreement, defending the Addendum at the U.S. Court of Appeals for the D.C., and opposing writs of certiorari before the U.S. Supreme Court. OFW Law also participated in status conferences, met with class members to generate support for the amendments to the Settlement Agreement, and regularly communicated with class members on behalf of Mrs. Keepseagle. On behalf of Mrs. Keepseagle, OFW Law played an integral role in prompting the settlement negotiations that led to the amendments to the Settlement Agreement. In particular, OFW Law advocated for additional direct compensation for successful claimants. As a result of these negotiations, the parties agreed to provide approximately $77 million in additional payments to class members. OFW Law and Mrs. Keepseagle also expressed support in Indian Country for the other provisions of the Addendum, in particular, the Native American Agriculture Fund.

For the services rendered on behalf of Mrs. Keepseagle as lead class representative, OFW Law is seeking $566,537.50 in fees computed at lodestar rates. In addition, OFW Law is seeking payment for $6,987.56 in unreimbursed expenses associated with representing Mrs. Keepseagle. In support of Mrs. Keepseagle's request for an award of fees and expenses, Marshall Matz's declaration is included as Exhibit 8.

5. The Lodestar Award Sought Is Reasonable

Plaintiffs submit that a supplemental award of fees based on the above hours, which were reasonably expended, and the above rates, which are reasonable and appropriate, would be amply justified. *Heller*, 832 F. Supp. 2d at 37–38 (there is a strong presumption that lodestar calculated from reasonable hours and reasonable rates is a reasonable fee). Therefore, Plaintiffs request that $3,220,035.85 in fees be awarded to Class Counsel,[9] and Mrs. Keepseagle requests $566,537.50

[9] Computation of this supplemental fee award is based upon counsel's lodestar, which is compensable pursuant to the fee-shifting provisions of ECOA, rather than as a percentage of the

in fees be awarded to her counsel, OFW.

6. Reimbursement of Plaintiffs' Additional Expenses Is Appropriate

Plaintiffs also seek reimbursement of $45,656.50 in expenses, virtually all of which are for travel costs incurred in meeting with clients around the country, and for online legal research. Exs. 2-6. Mrs. Keepseagle requests reimbursement of $6,987.56 in expenses incurred by her counsel. Ex. 8.

VI. TERMINATION OF COURT'S JURISDICTION AND DISPOSITION OF REMAINING ACCRUED INTEREST

Pursuant to the Addendum to the Settlement Agreement, this Court's jurisdiction ends on September 22, 2018 – 180 days after the Effective Date of the Addendum on March 26, 2018. As the amounts of taxes owed on revenue generated from the invested, unclaimed funds in 2018 is unknown at this time, as is the cost of the accounting work to prepare the tax returns and any other incidental costs associated with the Trust, Plaintiffs cannot determine at this time the amount of final expenses that must be defrayed in order to discharge all obligations associated with managing the unclaimed settlement funds. As the Addendum provides, class counsel will retain the remaining accrued interest in a separate account following transfer of the principal to

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common fund created by the settlement on which the initial fee award was based. Therefore, the size of the common fund originally created by the settlement has no relevance to award of the attorneys' fee sought here. Nor should the proportion of the common fund that was disbursed in the claims process have any bearing on the supplemental award of attorneys' fees sought here. As the Supreme Court explained in upholding an award of attorneys' fees from a common fund in *Boeing Co. v. Van Gemert*, the award of fees should be based on the total fund created, rather than the amount actually claimed, because class members' "right to share the harvest of the lawsuit . . . whether or not they exercise it, is a benefit in the fund created by the efforts of the class representatives and their counsel." 444 U.S. 472, 480 (1980). That is particularly true here where *all* of the funds are being expended for the benefit of the class as a whole, even though some of those benefits will flow through the cy pres awards to non-profit organizations serving Native farmers and ranchers, rather than paid directly to class members as supplemental awards of damages. None of the funds will revert to the USDA.

the Trust, until these final expenses are paid, and then transfer the remaining interest to the Trust. See Addendum IV.C. Plaintiffs will comply with the direction of the Addendum and any further order of this Court in disbursing the remaining accrued interest, even after the Court's jurisdiction ceases.

VII. CONCLUSION

For the foregoing reasons, Plaintiffs' Counsel request that the Court award $3,220,035.85 in supplemental attorneys' fees and $45,656.50 in additional expenses to be paid from interest accrued on the unclaimed settlement funds, and Mrs. Keepseagle requests that the Court award her counsel $566,537.50 in fees and $6,987.56 in expenses. Following the final tax payments and costs for accountants, Counsel will then transmit the balance of the interest earned, along with any uncashed checks from the supplemental distribution, to the Trust.

August 3, 2018

Respectfully submitted,

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Attorneys for Plaintiffs

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

DECLARATION OF JOSEPH M. SELLERS IN SUPPORT OF PLAINTIFFS' FINAL REPORT TO THE COURT

1. I am a partner in the Washington, D.C. office of Cohen Milstein Sellers & Toll PLLC ("Cohen Milstein"), and lead counsel in the above-captioned case. The statements set forth in this Declaration are based on first-hand knowledge, about which I could and would testify competently in open Court if called upon to do so, and on records contemporaneously generated by, or produced to, and kept by my Firm in the ordinary course of its law practice. This Declaration is submitted in support of Plaintiffs' Response to the Motion of the Great Plains Claimants to Intervene in this action.

Investment of the Settlement Fund

2. Our management of the Settlement Funds has been guided by the terms of the Settlement Agreement approved by the Court, our obligation to invest the funds in a manner that protected the principal while earning interest consistent with this obligation and ensuring the funds remained available to satisfy the claims made pursuant to the Settlement Agreement.

3. The Settlement Agreement provided, in relevant part, that the settlement funds would be deposited in a "Designated Account" at a "Designated Bank." Settlement Agreement, Section VII. The Agreement defined these terms:

> "Designated Account" means any bank account, set up by Class Counsel and held for the benefit of the Class, at a Designated Bank that is (1) insured by the Federal Deposit Insurance Corporation up to the applicable limits, (2) a segregated trust account that is not subject to claims of a bank's creditors, or (3) invested in U.S. Treasury securities.
>
> "Designated Bank" means a bank that has a Veribanc (www.veribanc.com) rating of Green with three stars and one for which neither the bank nor any of its senior officers appear in the Excluded Parties List System (www.epls.gov), which is a list of entities and individuals suspended or debarred from doing business with the federal government.

Settlement Agreement Section II.N-O.

4. Even prior to the Court's Final Approval of the Settlement Agreement on April 28, 2011 Class Counsel began the search for a Designated Bank. We asked Sean Clancy, a corporate tax partner at the firm of Squire Patton Boggs (US) LLP, where co-counsel for the plaintiff class Anu Varma was also a partner, to assist us with investigating and evaluating appropriate candidates to serve in this capacity.

5. On behalf of class counsel, Mr. Clancy conducted research of national banking institutions with a principal focus on factors including asset size, total deposit base, geographic footprint/diversity, whether they were a participant in the Troubled Asset Relief Program and a number of other tangible and intangible factors including customer service, escrow/settlement fund expertise and Community Reinvestment Act performance/scoring. In addition, we asked Mr. Clancy to identify and solicit proposals from Native-owned financial institutions with the goal of ensuring as much of the settlement funds as possible would be deposited with Native institutions.

6. Mr. Clancy then issued a request for proposal ("RFP") to national banking institutions. The RFP sought written proposals addressing the Settlement Fund's required depository and asset management/investment needs. The RFP indicated that proposals would be evaluated principally on the following criteria:

a. Comprehensiveness of Services Provided: Overall capabilities of the bank to meet the required service levels described in the RFP.

b. Settlement Trust Experience and Resources: The bank's experience in providing services to trusts/custodial accounts generally and qualified settlement trusts specifically, as well as dedicated resources and personnel.

c. Strength and Stability (Safety & Soundness): The bank's financial standing and the associated credit quality ratings. Audited financial statements and most recent bank regulatory report were requested.

d. Charges for Services: The amount of any proposed charges/fees and pricing increases in subsequent years.

e. Service Enhancements: The bank's efforts to understand the Fund's banking needs and "partnering" with the Class to adopt and implement effective treasury and investment policies and procedures consistent with the limits of the Settlement Agreement.

f. The bank's demonstrated service to the community.

7. In addition, class counsel, with the assistance of Mr. Clancy, identified Native American-owned banks that could qualify as Designated Banks as well. Having concluded that the settlement funds should primarily be deposited in a single institution in order to permit easy management of the funds, Class Counsel selected BB&T as the primary custodial bank. The

process for selecting the primary custodial bank is described in the Plaintiffs' Motion Requesting Approval of the Designated Bank, Dkt. No. 603, and supplemental memoranda addressing the same subject. *See* Dkt. Nos. 604, 610, 611.

8. As Plaintiffs explained in their supplemental memorandum (Dkt. 611), funds were also deposited in three Native American-owned banks through use of the CDARS program. CDARS is an acronym for the Certificate of Deposit Account Registry Service. CDARS provides smaller banks with the ability to extend FDIC insurance coverage beyond $250,000 up to $50 million by allocating the deposited funds among multiple member banks participating in the CDARS Program. Although the projected return on the funds invested with these banks through the CDARS Program was likely to be lower than the return expected on funds deposited with the primary custodial bank, Class Counsel concluded it was important to invest a significant amount of the settlement funds in institutions owned by Native Americans. A total of $50 million in settlement funds was deposited in Native American-owned banks in this manner.

9. In the same filings, Plaintiffs briefed the Court on their planned investment strategy, explaining that the settlement funds would be invested in a range of interest bearing accounts (including money market accounts and certificates of deposit) as well as short-term U.S. Treasury Securities, Agency paper and highly-rated commercial paper. Dkt. 603 at 5. As we explained, limits on the amounts on deposit that would receive FDIC insurance precluded deposits of such large sums in interest bearing accounts. *Id.*

10. Having been informed of this approach to the investment of the settlement funds, the Court stated: "The Court commends plaintiffs for their hard work in selecting and designating depository institutions which, in class counsel's judgment, will not only minimize

risk and obtain a fair return, but which also have a history of demonstrable ownership by or service to Native Americans." Dkt. 612 at 3-4.

11. Class Counsel undertook a similar process, again with the assistance of Mr. Clancy, to select an investment advisor. Mr. Clancy issued an RFP to several potential advisors and received written proposals in June 2011. I, along with other class counsel, met with two finalists for in-person meetings. Ultimately, we selected Oppenheimer as the financial advisor for the Settlement Fund.

12. Class Counsel, with the assistance of Mr. Clancy and in consultation with Oppenheimer, established a written investment strategy which was designed to: 1) preserve capital; 2) manage the timing of liquidity; 3) obtain a market rate of return; 4) minimize fees/costs; and, 5) reduce income tax liability.

13. Summary of investments and earnings received:

a. The bulk of the settlement fund, approximately $618 million, was invested through Oppenheimer and earned a total of $10,546,631.02 as of July 18, 2018. Of course, the amount being managed by Oppenheimer changed significantly in 2012 when nearly $290 million was transferred to the Operating Account in order to pay successful claimants and the IRS.

b. In addition, $50 million was invested in CDARS through three Native American owned banks: Bank2, Oklahoma State Bank and F&M Bank. These funds, at maturity, will have earned interest totaling at least $771,638.50, assuming the CDs are not liquidated prior to their maturity dates which range from August 30, 2018 to October 11, 2018. Due to a limitation on the amount that could be invested in CDARS at one

time, by one bank, one of the banks returned $1,231,273 in 2014. This money was transferred to the BB&T account to be invested with the other settlement funds.

c. Thus, the settlement funds have generated a return totaling $11,318,269.52.

Disbursement of the Principal

14. The principal has been disbursed as follows:

Paid from Principal		$680,000,000
Initial Claims Paid	$182,108,594.02	
Supplemental Claims	$66,293,147.98	
Taxes paid on behalf of claimants	$65,286,970.10	
Service Awards	$950,000.00	
Supplemental Service Awards	$300,000.00	
Attorneys' Fees/Costs	$60,800,000.00	
Initial Cy Pres	$38,000,000.00	
TOTAL	**$413,738,712.10**	
Transfer to Trust		**$266,261,287.90**

Disbursements from the Interest

15. There have been numerous expenses paid from the interest earned over the years, which are detailed below:

a. Interest earned by the Qualified Settlement Fund are subject to taxation. The largest expenditure from the interest earned has been paying those taxes, totaling $2,442,780.31 in federal and $811,116.04 in DC taxes. Accountants who prepared the tax return charged another $85,594.00 to date. In addition, $407,986.06 in legal fees were paid to Patton Boggs for their expertise in investment management. They did the work of evaluating banks and investment advisors, as well as investment strategies and

presented recommendations to class counsel. They also assisted with oversight of the tax preparation.

b. The legal work of drafting the Trust Agreement which will govern the majority of the cy pres funds was performed by Morgan Lewis. Their fees totaled $109,241.21.

c. There was significant concern among class members regarding tax issues arising out of the settlement, particularly because a number of class members whose income arose only from farming or ranching on trust lands relied on a tax exemption specific to trust lands, and other class members, particularly among the elderly, had income so low they were not required to file tax returns. In order to ensure that class members did not lose the benefit of the settlement to disputes with the IRS, individuals with expertise in taxation and issues common to farmers and ranchers prepared written materials and presented a seminar in over forty locations throughout Indian Country for class members. The seminar was also recorded and available for review online. This project was supported by Extension Risk Management Education, Rural Tax Education, several state university extension programs, and the Intertribal Agricultural Counsel. With many experts discounting their time substantially, this project was completed for $50,000.

d. As previously reported to the Court, Class Counsel engaged the Indigenous Food and Agriculture Project at the University of Arkansas to convene many listening sessions with claimants – eight in-person and three by telephone – to discuss the cy pres funds and prepare a report that was submitted to the Court. Dkt. 709-6.

Including facilities rental, the cost of the webinar/conference calls, staff time and travel expenses, this project cost $201,202.54.

e. As reported to the Court with Plaintiffs' recommendations for the initial $38 million cy pres distribution, Dkt. 883, Plaintiffs' retained Echo Hawk Consulting to help design and implement an appropriate grant application and review process. The costs associated with this work were $122,675.

f. Pursuant to the Addendum, expenses for the Trust have been paid from the interest, and additional expenses are expected before the final transfer of funds to the Trust. So far $14,989.67 has been paid for hotel rooms for the Trustees for their first meeting.

I declare under penalty of perjury that the forgoing is true and correct.

/s/ Joseph M. Sellers
Joseph M. Sellers

August 3, 2018
Date

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

DECLARATION OF JOSEPH M. SELLERS IN SUPPORT OF PLAINTIFFS' REQUEST FOR A SUPPLEMENTAL AWARD OF ATTORNEYS' FEES AND EXPENSES

I, Joseph M. Sellers, hereby declare as follows:

1. I am a partner in the Washington, D.C. office of Cohen Milstein Sellers & Toll PLLC. ("Cohen Milstein"), and lead counsel in the above-captioned case. The statements set forth in this Declaration are based on first-hand knowledge, about which I could and would testify competently in open Court if called upon to do so, and on records contemporaneously generated and kept by my Firm in the ordinary course of its law practice. This Declaration is submitted in support of Plaintiffs' Request for a Supplemental Award of Attorneys' Fees and Expenses.

2. On January 14, 2011, I submitted a declaration summarizing my firm's involvement in this litigation through 2010. Dkt. 581-2. That work and work performed thereafter to administer the claims process as well as implementation of the injunctive relief was compensated by an award of attorneys' fees and costs issued on April 28, 2011 (Dkt. 606). This declaration describes work undertaken subsequently by class counsel generally and this firm specifically to address the management and disposition of the unclaimed settlement funds and the development of a modification to the settlement agreement to govern the disposition of the unclaimed funds (the Addendum) that was approved by the Court and made final just this year.

Qualifications of Counsel Support Their Regular Rates

3. I am the head of the Civil Rights & Employment practice group at Cohen Milstein, where I have worked since 1997. Prior to joining Cohen Milstein, I served as head of the Employment Discrimination Project of the Washington Lawyers' Committee for Civil Rights and Urban Affairs for over 15 years. I have served as class counsel in more than 50 civil rights and employment class actions, including *Jock, et al v. Sterling Jewelers* (Arb)(class of about 70,000 women employees alleging sex discrimination in pay and promotions); *Sanchez, et al. v. McDonald's Corp.,* (LA Cty Ct)(successful trial on behalf of class of hourly workers claiming violations of wage and hour law); *Breen, et al. v. Chao* (D.D.C.)(claims brought on behalf of more than 500 Flight Service Controllers alleging lay offs due to age discrimination); *Stanley, et al. v. Barbri,* (N.D.Tex.)(class of people with sight impairments who claimed on line material was inaccessible, in violation of the ADA); *Beck. v. Boeing Company* (W.D. Wash.) (class of more than 28,000 women employees alleging sex discrimination in pay and overtime decisions); *Conway, et al. v. Deutsch* (E.D. Va.) (class of all female undercover case officers at the CIA alleging sex discrimination in promotions and job assignments); *Dukes v. Wal-Mart Stores, Inc.* (N.D. Cal.) (class of more than 1.5 million women employees at Wal-Mart stores alleging sex discrimination in promotions and pay decisions); *Johnson, et al. v. Freeh* (D.D.C.) (class of African-American FBI special agents alleging racial discrimination in promotion and job assignments); *Neal v. Director, D.C Dept. of Corrections* (D.D.C.) (the first sexual harassment class action tried to a jury); and *Trotter, et al. v. Perdue Farms* (D.Del.) (company-wide collective action brought under the Fair Labor Standards Act). I have been recognized as one of the top 10 plaintiffs' employment lawyers in the country, and in 2010 was named one of "The Decade's Most Influential Lawyers" by *The National Law Journal*. I have also been active in legislative and academic matters: I have testified more than 20 times before

Committees of the United States Senate and House of Representatives on various civil rights and employment matters, and have taught at Washington College of Law at American University and Georgetown University Law Center. I also served as a Co-Chair of the Task Force of the D.C. Circuit on Gender, Race and Ethnic Bias upon appointment by judges of the D.C. Circuit and the U.S. District Court for the District of Columbia.

4. Christine E. Webber is also a partner in the Civil Rights & Employment practice group at Cohen Milstein, where she has worked since 1997. Ms. Webber graduated from Harvard University with a B.A. in Government (*magna cum laude*, 1988) and the University of Michigan Law School (J.D., *magna cum laude*, 1991, Order of the Coif). Following law school, she clerked for the Honorable Hubert L. Will, United States District Judge for the Northern District of Illinois. She then received a Women's Law and Public Policy fellowship for 1993-94 which was the first of her four years at the Washington Lawyers' Committee for Civil Rights and Urban Affairs in their Equal Employment Opportunity Project. Ms. Webber's legal practice since 1993 has consisted almost exclusively of representing plaintiffs in employment and civil rights class actions, including employment discrimination and wage and hour cases. She has been lead counsel in cases such as *Hnot v. Willis Group Insurance* (S.D.N.Y.), representing a class of women vice presidents in Willis' Northeast region, who complained of sex discrimination, a case that settled in 2007 for $8.5 million plus attorneys' fees, an average payment of $50,000 per woman, and *In re Tyson Foods FLSA MDL*, (No. 07-md-1854, M.D. Ga.), a settled collective action involving FLSA claims of 17,000 workers at over 40 Tyson chicken processing plants, and has also been among the class counsel in *Dukes v. Wal-Mart Stores, Inc.* (N.D. Cal.) (class of more than 1.5 million women employees at Wal-Mart stores alleging sex discrimination in promotions and pay decisions) and several regional class cases pursued against Wal-Mart following decertification in *Dukes*.

5. The other Cohen Milstein attorneys who were principally involved in this litigation have extensive experience in litigating civil rights class action lawsuits. Such experience allowed Cohen Milstein attorneys to litigate this case efficiently and effectively. The background, relevant qualification and experience of counsel from my firm who were principally involved in this litigation are provided in the brief biographies attached hereto as Exhibit A.

6. The lodestar calculation is made based upon Cohen Milstein's current rates, or the latest applicable rate for those no longer with the firm. These rates are the usual and customary hourly rates set by Cohen Milstein annually, based on awards of attorneys' fees by courts around the country.

7. Cohen Milstein's hourly rates have been approved for payment by federal and state courts in other litigation. *Chesemore v. All. Holdings, Inc.*, No. 09-CV-413-WMC, 2014 WL 4415919, at *6 (W.D. Wis. Sept. 5, 2014), *aff'd sub nom. Chesemore v. Fenkell*, 829 F.3d 803 (7th Cir. 2016) (finding rates ranging between $395 for lower-level associates to $895 for higher-level partners were "on par with market rates charged by other plaintiffs' firms handling ERISA breach of fiduciary cases"); *Dooley v. Saxton*, No. 1:12-cv-01207-MC, ECF No. 187 (D. Or. Oct. 19, 2015) (approving unopposed motion for final approval of ERISA class action settlement and request for fees including lodestar cross check based on rates presented in the unopposed motion ranging from $375 to $790 per hour); *Slipchenko v. Brunel Energy, Inc.*, No. CIV.A. H-11-1465, 2015 WL 338358, at *19 (S.D. Tex. Jan. 23, 2015) (approving class counsel's unopposed motion for approval of attorneys' fees in COBRA and ARRA class action, finding lodestar analysis supported request for fees, which were based on "$240–$260 for paralegals, $415–$530 for associates, and $635–$775 for partners"); *Parker v. Dish Network, L.L.C.*, No. 4:11-cv-1457, ECF No. 63 (N.D. Cal. Feb. 13, 2012), granted, ECF No. 87 (Apr. 17, 2012) (granting plaintiffs' unopposed motion for an award of

attorney fees, expenses in a contract case, premised on $530 to $710 for CMST partners and $350 for CMST associates); *In re The Mills Corp. Sec. Litig.*, 265 F.R.D. 246, 260 (E.D. Va. 2009) (approving CMST's request for fees, based on lodestar cross check, with rates ranging from $440 to $775 for partners and $295 to $525 for associates in class action alleging accounting fraud in violation of federal securities laws); *Tuten v. United Airlines, Inc.*, No. 12-cv-1561-WJM-MEH, 2014 WL 2057769, at *4 (D. Colo. May 19, 2014) (granting unopposed motion for attorneys' fees in USERRA action with lodestar cross-check based on the number of hours class counsel reported working, and their estimate that the number of hours ultimately expended will result in a lodestar multiplier at or below 2, where the lodestar was calculated by counsel based on Cohen Milstein's 2013 standard rates.); *In re Beacon Assocs. Litig.*, No. 09 CIV. 3907 CM, 2013 WL 2450960, at *15 (S.D.N.Y. May 9, 2013) (Cohen Milstein's rates were approved as part of lodestar crosscheck of a common fund award); *Tomkins v. Amedisys*, (D. Conn. 2016) (Cohen Milstein presented rates, including Ms. Webber's rate, as part of a lodestar cross check for a common fund award, in an unopposed motion that was ultimately approved by the court); *Ochoa v. McDonalds*, 3:14-cv-02098-JD (N.D. Cal. Aug. 4, 2017).

Cohen Milstein's Work on the Disposition of Cy Pres Funds

8. I have continued to coordinate the work of the several firms and attorneys representing the class. In doing so, I have endeavored to represent the interests of the plaintiffs in the fullest and most efficient way possible. Attorneys from Cohen Milstein were primarily responsible for research and drafting briefs in the district court, while Jenner & Block assumed primary responsibility for preparing the appellate briefing. Other members of the class counsel team, in addition to assisting with the briefing, were particularly involved in researching appropriate cy pres

mechanisms, identifying the range of non-profit organizations in Indian Country, and maintaining communication with leaders of the Native American community and class members.

9. After the claims process concluded and it was apparent that a much larger portion of the settlement funds would be unclaimed than had been expected, Class Counsel worked to address disposition of these unclaimed funds. None of this work was foreseen when the original settlement was negotiated or when the original fee application was submitted. This work began in 2012 with research about options for disposition of these funds and best practices and, after consultations with class representatives, negotiations with the USDA over disposition of the remaining funds that began in 2012 and were particularly intensive throughout 2013. After the Court denied the initial request to modify the settlement agreement, multiple negotiation sessions conducted in person and telephonically transpired with the USDA and counsel for Mrs. Keepseagle, culminating in the agreement memorialized in the Supplemental Addendum that the Court approved and is currently in effect.

10. The work also included submission of more than 13 briefs in this Court that addressed disposition of the unclaimed settlement funds. They included (i) the August 30, 2013 status report (Dkt. 646); (ii) opposition to the motion to intervene by the Choctaw Nation seeking $40 million for the Jones Academy (Dkt. 650); (iii) opposition to the motion to intervene by the Great Plains Claimants (Dkt. 659); (iv) multiple briefs addressing the first motion to modify the settlement (Dkts. 709, 792); (v) multiple briefs opposing motion to remove Porter Holder and Claryca Mandan as class representatives (Dkts. 762, 768); (v) briefing on a motion for discovery (Dkt. 764); (vi) briefing in response to Mrs. Keepseagle's initial motion to modify the settlement (Dkt. 782); (vii) briefing in support of the renewed motion to modify the settlement agreement and responses to objections, including briefing in 2016 in response to positions taken by Mr. Mandan regarding disposition of the

unclaimed funds (Dkts. 824; 853, 858, 866). In addition, class counsel prepared multiple briefs before the D.C. Circuit and in response to a petition for certiorari, in which review was sought of the orders governing disposition of the unclaimed funds.

11. In addition to the negotiations and briefing over disposition of the unclaimed funds, Class Counsel was engaged in multiple forms of outreach in Indian Country to inform members of the class about the options available for disposition of the unclaimed funds and to solicit their views about how to proceed. These listening sessions, which were conducted at the urging of the Court, were convened in person by class counsel at eight different locations in Indian country, each of which lasted between four and eight hours during the summer of 2014. In addition, class counsel convened three multi-hour listening sessions telephonically during that period, in order to accommodate the needs of class members unable to attend the sessions in person. In addition, class counsel conducted ongoing communications with Native American community leaders and class members alike about the disposition of the unclaimed funds.

12. In addition, class counsel retained counsel expert in the creation and operation of trusts to assist in the formulation of terms of the trust, to assist the parties in their negotiations of the terms of the trust, and to draft the Trust Agreement. Class counsel also solicited and vetted candidates to serve as trustees and as the executive director and prepared submissions of their nominations to the Court.

13. Class counsel also devised and implemented the process for recommending to the Court the allocation of the $38 million in funds designated for a “fast track” distribution. In doing so, class counsel devised and implemented a process for soliciting applications from qualified non-profit organizations, convening an advisory panel of Native leaders to recommend to class counsel the allocation of the funds and participated in the review and analysis of the 166 initial applications

and 50 full applications submitted and, thereafter, prepared the submission for the Court's consideration.

14. Class counsel have also provided advice and assistance to the Trust, as it was launched and hosted the first meeting of the Trustees in July, 2018.

Cohen Milstein's Timekeeping

15. Cohen Milstein's compensation for the services rendered in this case and reimbursement of expenses have been and are wholly contingent on the outcome.

16. Throughout the time we worked on this matter, our timekeepers have been required to keep daily time-records, providing both amounts of time spent on discrete tasks and descriptions of that work. These records are entered into a computer database, checked, and maintained in computer-readable format. The time records for 2011 to the present were exported into an Excel spreadsheet, where they were sorted between time entries related to the claims process, programmatic relief, and other aspects of settlement administration contemplated at the time of the initial fee petition, all of which are excluded from this request, and those time entries related to addressing disposition of the cy pres funds, which are included in this request. In addition, records which included travel had the hours reduced by half of the travel time, in order to account for the D.C. Circuit rule requiring travel time be billed at half the regular rate. Those portions of the time for which we seek a fee award are attached as Ex. D to this declaration.

17. Through July 30, 2018, Cohen Milstein seeks an award based on 2881 hours of attorney, law clerk, and paralegal time spent on this matter. These hours were actually expended, in the exercise of professional judgment, by the lawyers, paralegals and clerks involved in this matter, in connection with the disposition of unclaimed funds. Our total lodestar from 2011 to the present, encompassing the claims process and other work contemplated by the 2011 fee petition, is

$4,513,206.60 for over 7954 hours. Thus, the lodestar sought here represents just over a third of the time worked since January 2011.

18. Cohen Milstein charges for the services of its attorneys, paralegals, and law clerks on the basis of hourly rates which reflect, among other things, years of practice and experience. The lodestar calculation is made based upon current hourly rates for all current attorneys and staff, and, for those who are no longer employed by Cohen Milstein, upon the billing rates for such attorneys and paralegals in his or her final year of employment by the firm. The current (or last) hourly rates for Cohen Milstein attorneys and staff who worked on this matter range from $260 to $290 for law clerks, from $250 to $290 for paralegals, and from $485 to $940 for attorneys.

19. Computed at their current or last hourly rates, Cohen Milstein attorneys, paralegals, and law clerks have incurred $1,958,013.50 in lodestar fees on the work for which a supplemental award is sought. Exhibit B identifies individuals who recorded time at this stage of this matter, the hours they expended, and their current or last hourly rates. Of this lodestar, $240,478 of the total was due to the "fast track" work distributing $38 million.

20. In calculating the above lodestar fee, we excluded hours billed by one attorney and two paralegals, who each spent fewer than 10 hours on this case: Matt Axelrod, Christopher Scherman and Abby Fu. We also reviewed each time entry and excluded those that seemed inadequately documented, duplicative, or inefficient, and those entries in which time was expended, even in part, on claims administration. In particular, because multiple paralegals worked on this matter, I exercised my billing judgment to remove multiple time entries related to new paralegals familiarizing herself or himself with the case. In addition, the vast majority of paralegal time responding to class member queries about the case status in 2014-18 were excluded. In total, we have cut over 250 hours of time from time expended on addressing disposition of the unclaimed

funds; this time represented over $79,000 in lodestar. I believe, with those reductions, that the remaining time was reasonably and necessarily expended on behalf of the class in order to address disposition of the unclaimed settlement funds.

21. Cohen Milstein's lodestar figures are based upon the firm's billing rates, which do not include charges for expense items. Expense items are billed separately and such charges are not duplicated in the firm's billing rates.

22. The expenses incurred in this action are reflected in Cohen Milstein's expense records. These records are prepared from expense vouchers, check records and other source materials and are an accurate record of the expenses incurred.

23. On behalf of the class, Cohen Milstein has incurred a total of $29,022.73 in unreimbursed expenses in connection with this phase of the litigation. These expenses were reasonably and necessarily incurred in the pursuit of work devoted to addressing the disposition of the unclaimed settlement funds in this litigation. Exhibit C provides a summary of the expenses incurred in connection with the work at this stage of the litigation. Where the expenses could be readily attributable to work expended during this stage of the litigation, such as specific travel, or Westlaw research in connection with particular briefs, they were included among the costs for which reimbursement is sought. But we have excluded all copy costs, long distance telephone charges, and postage, none of which we could be sure were devoted exclusively to this stage of the litigation rather than to the claims process or other settlement administration.

24. I have reviewed the declarations of other class counsel attesting to the fees and expenses incurred by their firms for work related to the disposition of the unclaimed settlement funds. The following table reports the time expended by each firm and the amount of attorneys' fees and expenses sought by each firm.

Firm	**Hours**	**Fees**	**Expenses**
Cohen Milstein Sellers & Toll PLLC	2,881.00	$1,958,013.50	$29,022.73
Conlon, Frantz & Phelan LLP	94.60	$57,600.00	$0
Sarah Vogel Law Partners	1,215.70	$607,850.00	$10,065.92
Phillip Fraas and Stinson Morrison Hecker	337.40	$187,078.60	$2,410.44
Jenner & Block LLP	553.50	$410,333.75	$4,157.41
Total	**5,082.20**	**$3,220,035.85**	**$45,656.50**

25. Class counsel's total fees and expenses encompassed by this supplemental fee request are $3,265,692.35.

I declare under penalty of perjury under the laws of the District of Columbia that the foregoing is true and correct to the best of my knowledge and that this Declaration was prepared in the District of Columbia on August 3, 2018.

/s/Joseph M. Sellers
Joseph M. Sellers