

1 Richard W. Kuhling
PAINE HAMBLEN LLP
2 717 West Sprague Avenue, Suite 1200
Spokane, WA 99201
3 (509) 455-6000

4 Lori Jordan Isley
COLUMBIA LEGAL SERVICES
6 South Second Street, Suite 600
5 Yakima, WA 98901
(509) 575-5593

6 Joachim Morrison
COLUMBIA LEGAL SERVICES
7 300 Okanogan Avenue, Suite 2A
Wenatchee, WA 98801
8 (509) 662-9681

The Honorable Robert H. Whaley

9
10
11 UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

12 JOSE GUADALUPE PEREZ-FARIAS,
13 *et. al.*,

14 Plaintiffs,

15 vs.

16 GLOBAL HORIZONS, INC., *et. al.*,

17 Defendants.

CLASS ACTION

No. CV-05-3061-RHW

18 PLAINTIFFS' REPORT ON
DISTRIBUTION OF CLASS FUNDS
19 AND MOTION FOR INCENTIVE
PAYMENTS AND
CY PRES DISTRIBUTION

2/4/2014

With Oral Argument: 1:00 p.m.
Yakima

20 **I. INTRODUCTION**

21 After six months of diligent efforts, counsel for the Workers has fully
22 compensated 57 % of the class members for violations of their FLCA rights. The
23 Workers propose, consistent with Ninth Circuit guidelines, that the remaining

1 funds be distributed in three distinct disbursements. First, each of the three class
2 representatives deserves a modest incentive payment for over eight years of service
3 to the Court and their fellow farm workers in the Yakima Valley. Second, counsel
4 for the Workers should be reimbursed for their costs in connection with the
5 distribution efforts as previously stipulated by the parties. And finally, the
6 remaining unclaimed FLCA funds should be distributed pursuant to the *cy pres*
7 doctrine amongst four non-profit entities that provide direct community education
8 and litigation services to Yakima Valley farm workers regarding their FLCA
9 rights.
10

11 **II. REPORT ON CLASS DISTRIBUTION EFFORTS**

12
13 Counsel for Plaintiffs (CLS) is administering the claims process as ordered
14 by the Court. Through the efforts described below, CLS has received 376 claims
15 and distributed \$1,195,595.04 to these class members. *Isley Decl.* at 1 ¶ 2.
16 Approximately \$813,500 remains unclaimed. *Id.*

17 The claims process was approved by this Court in 2009. [ECF No. 1127](#).
18 The parties were permitted to amend the procedures as necessary. *Id.* CLS
19 followed the claims process as proposed with minor amendments to reflect
20 subsequent court decisions, the judgment collected, and other changes over the six
21 year interim period. CLS updated the notices to the class to reflect the damages
22 awarded and made other minor changes. *Isley Decl.* at 2 ¶ 7. CLS exceeded the
23

1 published notice requirements approved by the Court. *Id.* at 5-6 ¶¶ 21-26;
2 *Declaration of Victor H. Lara* at 4-5.

3 CLS also contracted for additional services to reach class members. CLS
4 worked with Rust Consulting, Inc. to conduct address searches using Lexis-Nexis
5 and the National Change of Address (NCOA) databases. *Id.* at 4-5 ¶¶ 17-19. CLS
6 contracted for three series of address searches, immediately prior to the
7 distribution, following the first mailing, and a final search in November. *Id.* CLS
8 also requested vehicle ownership and driver's record information from the
9 Washington State Department of Licensing to obtain additional updated addresses.
10 *Id.* at 8 ¶¶ 31-32. CLS worked with a transnational organization to help collect
11 claim forms and conduct outreach in Mexico. *Isley Decl.* at 7 ¶ 28; *Declaration of*
12 *Griselda Vega* at 2-4 ¶¶ 4-6. Finally, CLS hired additional temporary staff to
13 support the class distribution, including staffing a designated phone line, posting
14 notice at various community locations and making personal visits to reach class
15 members. *Id.* at 7-9 ¶¶ 27, 34-35 & 38. In the opinion of an experienced class
16 action litigator who reviewed CLS's efforts to reach class members, CLS exceeded
17 the normal standard of practice for locating class members and distributing funds.
18 *Id.* at 9 ¶ 37, Ex. G.

19 CLS stipulated to engage a third-party to independently review CLS's
20 distribution efforts and provide a report to the Court. [ECF No. 1347 at 4 ¶ 7.3](#).

1 After consulting with counsel for the Grower Defendants and obtaining their
2 approval, CLS selected attorney Victor H. Lara. *Isley Decl.* at 9 ¶ 36. Mr. Lara's
3 report is filed as Exhibit I to Ms. Isley's Declaration. CLS proposes to retain
4 \$100,000 for an additional year to compensate any class members who come
5 forward between January 1, 2014 and December 31, 2014.
6

7 Grower Defendants agreed that a maximum of \$50,000 of the costs and fees
8 associated with the distribution process could be paid from the judgment proceeds.
9 [ECF No. 1347 at 4 ¶ 7.4](#). The costs to distribute the judgment are \$25,258.51.
10 *Isley Decl.* at 10 ¶ 39, Ex. H. Plaintiffs propose to apply \$20,000 from the FLCA
11 surety bond to cover the majority of these costs. See [ECF No. 1310](#).
12

13 III. LEGAL AUTHORITY & REQUEST

14 Where a judgment has been entered and the only question is how to
15 distribute the damages, "the interests affected are not the defendant's but rather
16 those of the silent class members." *Six (6) Mexican Workers v. Arizona Citrus*
17 *Growers*, 904 F.2d 1301, 1307 (9th Cir. 1990).
18

19 A. **The Court Should Award a Modest Incentive Payment to the Class** 20 **Representatives for Years of Service to the Class.**

21 Incentive awards to class representatives are typical and courts have
22 discretion to make such awards. *Rodriguez v. W. Publ'g Corp.*, 563 F.3d 948, 958-
23 59 (9th Cir. 2009). Such awards are generally sought after a favorable settlement

1 or verdict has been achieved. *Id.* at 959. When evaluating a request for an
2 incentive payment, the district court must use “relevant factors includ[ing] the
3 actions the plaintiff has taken to protect the interests of the class, the degree to
4 which the class has benefitted from those actions, ... the amount of time and effort
5 the plaintiff expended in pursuing the litigation ... and reasonabl[e] fear[s of]
6 workplace retaliation.” *Staton v. Boeing Co.*, 327 F.3d 938, 977 (9th Cir. 2003)
7 (citing cases approving incentive awards between \$2,000-\$10,000).
8

9 In light of the eight-year commitment made by each of the representative
10 plaintiffs to this class action, an incentive fee is appropriate. Each class
11 representative spent scores of hours assisting the Workers’ counsel with the initial
12 investigation, providing answers to written discovery, testifying at lengthy video-
13 taped depositions and during the jury trial, and consulting and attending multiple
14 meetings during the several years this case has been on appeal. *Isley Declaration*,
15 ¶¶ 40-43. Attorneys for the Workers respectfully suggest that each of the class
16 representatives meets the above test and this Court should award \$7,500 per
17 representative out of any residual funds that have not been distributed to class
18 members.
19
20
21
22
23

1 **B. *Cy Pres* Funds Are Properly Awarded to Organizations Dedicated to the**
2 **Advancement of Goals Consistent with the Underlying Purposes of the**
3 **Statute that Gave Rise to the Class Recovery.**

4 The “*cy pres* doctrine allows a court to distribute unclaimed or non-
5 distributable portions of a class action settlement fund to the ‘next best’ class of
6 beneficiaries.” *Nachshin v. AOL, LLC*, 663 F.3d 1034, 1036 (9th Cir. 2011).
7 Reversion of unclaimed funds to the defendant is inappropriate where deterrence is
8 a goal of the underlying statute. *Six (6) Mexican Workers v. Arizona Citrus*
9 *Growers*, 904 F.2d 1301, 1308 (9th Cir. 1990)(“In light of the deterrence objective
10 of FLCRA and the nature of the violations, we find that reversion of the funds to
11 the defendants is not an available option.”) The Washington Supreme Court
12 recently ruled that one of the purposes of FLCA is to deter future violations. *See*
13 *Perez-Farias v. Global Horizons, Inc.*, 175 Wash.2d 518, 530 (2012). There
14 should be no reversion to the Defendants consistent with Ninth Circuit precedent
15 as elaborated in *Six Mexican Workers*.

16 In *Dennis v. Kellogg Co.*, 697 F.3d 858 (9th Cir. 2012), the Ninth Circuit set
17 forth a three-part test for determining the proper recipients of *cy pres* awards. First,
18 all *cy pres* awards must be guided by and consistent with the “objectives of the
19 underlying statute” used to generate the funds. *Id.* at 865. Second, courts must
20 consider the “interests of silent class members.” *Id.* And third, courts must not
21 approve *cy pres* awards to entities that are “too remote from the plaintiff class,” *id.*
22
23

1 (citations omitted), meaning that *cy pres* beneficiaries must be reasonably “tethered
2 to the nature of the lawsuit and the interests of the silent class members.” *Id.* at
3 867.

4 Applying this three-part standard, the Ninth Circuit reviewed the underlying
5 consumer protection statutes at issue in *Dennis* and ruled that they were enacted to
6 protect the public from “nefarious” and “deceptive” business practices. *Id.* at 697.
7 In striking down the proposed *cy pres* awards in that case (donating food and funds
8 to unnamed charities) the Ninth Circuit concluded the *cy pres* awards were
9 “divorced from the concerns embodied in consumer protection laws.” *Id.* at 867.
10

11 The gravamen of this lawsuit is that Kellogg *advertised* that its
12 cereal *did* improve attentiveness. Those alleged
13 misrepresentations are what provided the Plaintiffs with a cause
14 of action under the [California consumer protection laws]
15 Thus, appropriate *cy pres* recipients are not charities that feed
the needy, but organizations dedicated to protecting consumers
from, or redressing injuries caused by, false advertising.

16 *Id.* (emphasis in original).

17 Both *Six (6) Mexican Workers* and *Nachshin* further illustrate the governing
18 standard for awarding *cy pres* funds. In *Six (6) Mexican Workers*, the Ninth
19 Circuit rejected a *cy pres* distribution, in part because the proposed recipient had
20 virtually no track record or guidelines as to how the funds would be spent, thus
21 requiring court monitoring “to ensure that the funds are distributed in accordance
22
23

1 with the goals of the remedy.” 904 F.2d at 1308. The Ninth Circuit ordered the
2 district court to locate an appropriate *cy pres* organization.

3 In *Nachshin*, the Ninth Circuit also rejected the district court’s proposed *cy*
4 *pres* distribution to three separate organizations as they “ha[d nothing] to do with
5 the objectives of the underlying statutes on which Plaintiffs base[d] their claims.”
6 663 F.3d at 1040. Additionally, two of the three operated solely in Los Angeles,
7 yet the class consisted of AOL subscribers from around the country. *Id.* at 1041
8 (“no indication” absent class members outside Los Angeles would benefit from
9 donations).
10

11
12 **C. The Court Should Order the Distribution of *Cy Pres* Funds to Non-Profits Dedicated to Promoting and Enforcing FLCA.**

13 The gravamen of this lawsuit is that Yakima Valley farm workers were
14 denied access to employment through a variety of illegal schemes that violated
15 FLCA. Of the 650 class members, 95% at one time resided in the Yakima Valley.
16 *Isley Decl.* at 3 ¶13. This Court also found that class members were from the
17 Yakima area. [ECF No. 1083 at 27-28](#). Thus, under Ninth Circuit law, appropriate
18 *cy pres* recipients are organizations dedicated to educating class members (and
19 people like class members) about their FLCA rights and organizations that enforce
20 those rights in court in the Yakima Valley.
21
22
23

1 For the reasons detailed below, under the test set by the Ninth Circuit, the
2 Workers propose that residual funds in this case should be distributed as follows:
3 Of the remaining \$785,784 in unclaimed funds, \$285,784 should be dedicated to
4 non-profit organizations that primarily provide outreach services to farm workers
5 regarding FLCA. The balance of the funds (\$500,000) should be dedicated to CLS
6 as the primary organization that regularly enforces FLCA and other statutes
7 protecting farm workers through legal representation. As stated above, CLS would
8 reserve \$100,000 for an additional year to compensate any outstanding class
9 member who presents a valid claim during 2014.
10

11 **1. The Proposed *Cy Pres* Award Is Consistent with the Objectives of**
12 **FLCA.**

13 Applying the Ninth Circuit's test in *Dennis*, the Workers first turn to the
14 statutory objectives of FLCA. *Dennis*, 697 F.3d at 866-67. The Washington
15 Court of Appeals ruled that the "legislative history shows that the Legislature
16 intended the Act [FLCA] to protect exploited agricultural workers." *Cascade*
17 *Floral Products, Inc. v. Dept. of Labor and Industries*, 142 Wash. App. 613, 622
18 n.13 (2008). The Washington Supreme Court ruled that FLCA is intended to (1)
19 promote enforcement of the statute, and (2) deter future violations. *Perez-Farias v.*
20 *Global Horizons, Inc.*, 175 Wash.2d at 530.
21
22
23

1 To promote enforcement of a statute, exploited farm workers must be aware
2 of laws that protect their rights. Because many farm workers lack formal
3 education and have low literacy rates, the primary methods for informing workers
4 of their FLCA rights is through direct outreach and the radio. To enforce the
5 statute and deter future violations, legal representation in court is necessary by
6 lawyers familiar with the laws protecting farm workers and who are willing to
7 work with farm worker populations who face significant barriers to our judicial
8 system. The proposed distribution is appropriate in light of the dual objectives of
9 FLCA as elaborated by the Washington Supreme Court, and the requirement in
10 *Dennis* to closely adhere to the statute underlying the case.
11

12
13 **2. The Proposed Cy Pres Award Will Serve the Interests of Silent Class Members.**

14 The second *Dennis* prong requires this Court to ensure the interests of silent
15 class members will be served. 697 F.3d at 865. Silent class members who are
16 unable to receive their statutory damage awards have an interest in future
17 education related to farm worker rights and an interest in having lawyers willing,
18 able, and available to enforce those rights in court. As outlined above, the vast
19 majority of absent class members who failed to respond to class notice at one time
20 resided in the Yakima Valley. The Yakima Valley remains a vibrant agricultural
21 region where farm workers will continue to work and live and require direct
22
23

1 outreach services and direct legal representation on issues related to FLCA.

2 Because the Ninth Circuit requires that potential *cy pres* organizations work and
3 provide direct services to farm workers in the area where absent class members
4 resided (*Nachshin*, 663 F.3d at 1041; *Six (6) Mexican Workers*, 904 F.2d at 1307),
5 the Workers request that all entities receiving funds provide direct services to farm
6 workers living or working in the Yakima Valley region.

7
8 **3. The Proposed *Cy Pres* Recipients Work to Achieve the Same Goals and**
9 **Are Directly Tethered to the Interests of the Worker Class.**

10 The final prong of the Ninth Circuit’s test requires *cy pres* beneficiaries to be
11 “tethered to the nature of the lawsuit and the interests of the silent class members.”
12 *Dennis*, 697 F.3d at 867. Consistent with our recommendation outlined above, the
13 Workers propose below four entities to receive *cy pres* funds, all of which have
14 lengthy track records providing outreach services and legal representation to farm
15 workers in eastern Washington.

16
17 **a) Outreach Entities**

18 The Northwest Justice Project (“NJP), Radio KDNA, and the Laurel Rubin
19 Farm Worker Justice Project are the proposed entities to receive *cy pres* funds to
20 conduct future FLCA outreach to farm workers in the Yakima Valley. NJP has
21 primary responsibility for coordinating outreach to farm workers in Washington
22 State. *Declaration of Michele Besso* at ¶5. NJP’s Farm Worker Unit has its office
23

1 in Yakima. *Id.* at ¶2. NJP also engages in litigation on behalf of individual farm
2 workers, but is prohibited from filing class actions and engaging in legislative
3 advocacy. *Id.* at ¶3.

4
5 Radio KDNA has been a staple of the Yakima Valley, educating farm
6 workers about their rights since 1979. *Declaration of Jorge Madrazo-Cuéllar* at
7 ¶1 & 5. Radio KDNA is the only non-profit media outlet in the Yakima Valley
8 that regularly provides educational programming to farm workers regarding their
9 legal rights, including labor laws. *Id.* at ¶3, 6-7. This Court regularly approves
10 class notification in farm worker class actions through Radio KDNA. *Declaration*
11 *of Lori Isley* at ¶¶24-25 and 47. Radio KDNA was used to communicate with class
12 members in this litigation and is an invaluable resource for the farm worker
13 population in the Yakima Valley. *Id.* at ¶¶ 47-49; *Declaration of Michele Besso* at
14 ¶11.

15
16 The Laurel Ruben Farm Worker Justice Project has been funding summer
17 law students to provide direct outreach services to farm workers since 1999.
18 *Declaration of Zavala-Suarez*, ¶ 3. Over a 15-year period, these law students have
19 spent thousands of hours visiting farm workers throughout the Yakima Valley and
20 other parts of Washington State to inform them of their legal rights. *Id.* ¶¶ 2-3.
21 These law students have also provided key research and litigation support on farm
22 worker cases. *Declaration of Michele Besso* at ¶¶ 8-10; *Isley Declaration* at ¶ 46.
23

1 **b) Litigation Entity**

2 Columbia Legal Services (“CLS”) respectfully requests that it receive the
3 balance of any unclaimed funds to ensure silent class members have legal
4 representation to protect their FLCA and related rights in court, particularly class
5 action advocacy. CLS has a lengthy track record enforcing the legal rights of farm
6 workers. *Declaration of Aurora Martin* at ¶3; *Besso Declaration* at ¶¶ 3-4. CLS’s
7 predecessor organization was the non-profit law firm that represented farm
8 workers in the state legislature when FLCA was overhauled in 1985. Farm worker
9 clients represented by CLS have filed multiple class action suits under FLCA for
10 violations emanating from the Yakima Valley. *Besso Declaration* at ¶4. CLS has
11 been the primary referral source for farm worker litigation involving FLCA as CLS
12 does not have funding restrictions similar to those that prevent NJP from taking on
13 class actions. *Besso Declaration* at ¶3. Moreover, CLS would be the primary
14 entity involved in legislative activity around FLCA as NJP is limited in that
15 advocacy as well. *Id.* Finally, CLS is committed to continued representation of
16 farm workers in the Yakima Valley to enforce the farm worker protections
17 embodied in FLCA. *Martin Declaration* at ¶¶4, 7-8.

18 Courts routinely direct *cy pres* awards to legal services programs. *Gomez v.*
19 *H & R Gunlund Ranches, Inc.*, CV F 10-1163 LJO MJS, 2011 WL 5884224, *3
20 (E.D. Cal. Nov. 23, 2011)(farm worker class action based on FLSA violations
21
22
23

1 where court approved 50-50 split of *cy pres* funds with half going to legal
2 services); *see also*, *Cosgrove v. Citizens Auto. Fin., Inc.*, CIV.A. 09-1095, 2011
3 WL 3740809, *8 (E.D. Pa. Aug. 25, 2011) (equal *cy pres* division to two separate
4 legal services programs as both “will help to redress the types of wrongs alleged in
5 this litigation”); *Wiles v. Sw. Bill Tel. Co.*, 09-4236-CV-C-NKL, 2011 WL
6 2416291, *1 (W.D. Mo. June 9, 2011) (over \$575,000 in *cy pres* funds distributed
7 between four different legal aid organizations).

8
9 Using the Ninth Circuit’s guidance in *Dennis*, district courts have also
10 specifically targeted *cy pres* funds to legal services entities that specialize in labor
11 law representation that meets the underlying goal of the labor law statute involved
12 in the class litigation. *Eddings v. Health-Net, Inc.*, 2013 WL 169895, *4 (C.D. Cal.
13 Jan. 16, 2013) (court approved *cy pres* award to Legal Aid Society – Employment
14 Law Section where mission was to redress injuries from labor laws and regularly
15 engaged in class-action litigation on behalf of workers with wage claims); *Greko v.*
16 *Diesel U.S.A., Inc.*, 10-CV-02576 NC, 2013 WL 1789602, *6 (N.D. Cal. Apr. 26,
17 2013)(Legal Aid Foundation of Los Angeles employment unit appropriate *cy pres*
18 recipient as it provides employment law representation regarding violations of the
19 statutes alleged in the underlying class action complaint and two thirds of the class
20 members reside in Southern California where the foundation would provide
21 services).

1 In light of the above declarations and case law, the Workers respectfully
2 request this Court to approve the proposed *cy pres* distributions.

3 **IV. CONCLUSION**

4 Counsel for the Workers, in conjunction with professional service providers,
5 have gone the extra mile to locate and compensate farm workers for the violations
6 of their FLCA rights. Consistent with Ninth Circuit precedent, the remaining
7 funds should be distributed as outlined above: \$5,258.51 costs; \$22,500 incentive
8 payments to class representatives; \$285,784 to the outreach entities; the remainder
9 of approximately \$500,000 to CLS (holding \$100,000 until December 31, 2014 for
10 any additional class claimants).
11

12
13 RESPECTFULLY SUBMITTED this 6th day of January 2014.

14 COLUMBIA LEGAL SERVICES

PAINÉ HAMBLÉN LLP

15 s/ Lori Jordan Isley

s/ Richard W. Kuhling

16 Lori Jordan Isley, WSBA #21724

Richard W. Kuhling, WSBA #7927

17 Attorneys for Plaintiffs

Attorneys for Plaintiffs

COLUMBIA LEGAL SERVICES

PAINÉ HAMBLÉN, LLC

18 6 South Second Street, Ste. 600

717 W. Sprague Ave., Ste 1200

Yakima, WA 98901

Spokane, WA 99201

19 Phone: (509) 575-5593, ext.217

Phone: (509) 455-6000

lori.isley@columbialegal.org

richard.kuhling@painehamblen.com

CERTIFICATE OF SERVICE

I hereby certify that on this 6th day of January, 2014, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following:

Matthew S. Gibbs gibbsatty@aol.com, gibbsatty@gmail.com

Gary E. Lofland glofland@glofland.net

Brendan V. Monahan brendan.monahan@stokeslaw.com,
kim.trout@stokeslaw.com,
lori.busby@stokeslaw.com


Richard W. Kuhling richard.kuhling@paineambly.com,
shari.smith@paineambly.com

Gregory S. Johnson gjohnson@paineambly.com,
suzette.kerbs@paineambly.com

Joachim Morrison joe.morrison@columbialegal.org,
rachael.pashkowski@columbialegal.org

Amy L. Crewdson amy.crewdson@columbialegal.org

And I hereby certify that I have mailed by United States Postal Service the document to the following non-CM/ECF participants: None.


Arasele Bueno