

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS  
COUNTY DEPARTMENT, CHANCERY DIVISION

**PENELOPE BAIM BLOCK, BRIJ M. SHARMA, CHARANJIT SINGH, LISA M. BERTINI, VANDANA MAKKER, BALA M. KRISHNA, TY C. GERHARDT, and JEFFREY ZIMMERMAN, et al.,**

Plaintiffs,

v.

**McDONALD'S CORPORATION,**

Defendant.

01 CH 9137

*Judge Richard Siebel*

CLASS ACTION

**AMICUS CURIAE BRIEF OF MATTHEW BALL, GENE BAUSTON, LORRI BAUSTON, JONATHAN CAMP, LAWRENCE CARTER-LONG, SARAH CLIFTON, SARAH FARR, MARY FINELLI, ANNE GREEN, PATRICK KWAN, BARBARA LOMOW, GAVERICK MATHENY, JACK NORRIS, LAUREN ORNELAS, MIYUN PARK, WILL POTTER, BOB SCHWALB, PAUL SHAPIRO, RYAN SHAPIRO, AND BERNARD UNTI, LEADERS IN THE U.S. VEGETARIAN COMMUNITY, OBJECTING TO THE PROPOSED DISTRIBUTION**

NOW COME Matthew Ball, Gene Bauston, Lorri Bauston, Jonathan Camp, Lawrence Carter-Long, Sarah Clifton, Sarah Farr, Mary Finelli, Anne Green, Patrick Kwan, Barbara Lomow, Gaverick Matheny, Jack Norris, Lauren Ornelas, Miyun Park, Will Potter, Bob Schwalb, Paul Shapiro, Ryan Shapiro, and Bernard Unti, members of the class certified in this lawsuit and leaders in the U.S. vegetarian community, by and through counsel, to file this *amicus curiae* brief in opposition to the distribution of the *cy pres* fund proposed by some of the class members and McDonald's.

### **Grounds for the Opposition**

The proposed distribution (1) does not represent the mutual agreement of the parties, as is required by the settlement agreement (“the Settlement”) and (2) does not distribute the fund according to the percentage terms required by the Settlement. Furthermore, (3) the recipients were not selected according to the governing principles outlined in the Settlement, and (4) groups that had protested against McDonald’s were not considered, although no such restriction was agreed upon in the Settlement. Therefore, this Court should not approve the proposed distribution. Instead, this Court should direct the parties to come to a mutual agreement that accords with the Settlement, require mediation, or declare an impasse and appoint a special master to determine the appropriate allocation of the *cy pres* fund.

### **Factual Background**

1. Matthew Ball, Gene Bauston, Lorri Bauston, Jonathan Camp, Lawrence Carter-Long, Sarah Clifton, Sarah Farr, Mary Finelli, Anne Green, Patrick Kwan, Barbara Lomow, Gaverick Matheny, Jack Norris, Lauren Ornelas, Miyun Park, Will Potter, Bob Schwalb, Paul Shapiro, Ryan Shapiro, and Bernard Unti are all members of the class certified by this court.

2. They are all vegetarians for ethical reasons. All have a serious commitment to ethical vegetarianism and are leaders in the vegetarian community. *See* Exhibit A (List of Objectors). While many of them (although not all) are affiliated with vegetarian organizations, they are filing this objection in their own capacity as class members and not as representatives of those organizations.

3. Approximately 600 class members objected to the Settlement. A substantial number of these objections were due to the proposed distribution of the fund. *See* Memorandum Order and Opinion, October 30, 2002.

4. Upon information and belief, at least six of the ten Representative Plaintiffs oppose the proposed distribution of the fund.

5. Upon information and belief, one of the counsels for the Washington and California plaintiffs opposes the proposed distribution on behalf of the class.

6. Upon information and belief, the Department of Nutrition of the University of North Carolina at Chapel Hill is not a vegetarian organization.

7. Upon information and belief, Tufts University is not a vegetarian organization.

8. Upon information and belief, the Preventive Medicine Research Institute is not a vegetarian organization.

9. Upon information and belief, Loma Linda University is not a vegetarian organization.

10. Upon information and belief, none of the Halal organizations proposed in the settlement is a vegetarian organization.

11. This objection is based solely on the fact that the proposed *cy pres* distribution does not comport with the Settlement.

### **Argument**

The terms of distribution are an integral part of the Settlement. The Settlement document expresses the complete understanding and agreement of the Parties:

Entire Agreement. The terms and conditions set forth in this Settlement constitute the complete and exclusive statement of the agreement between the Parties hereto relating to the subject matter of this Settlement, superseding all previous negotiations and understandings, and may not be contradicted by evidence of any prior or contemporaneous agreement. The Parties further intend that this Settlement constitutes the complete and exclusive statement of its terms as among the Parties

hereto, and that no extrinsic evidence whatsoever may be introduced in any agency or judicial proceeding, if any, involving this Settlement. Any modifications of this Settlement must be in writing signed by all the Parties and their counsel.

*Settlement ¶ 17.5.*

The Settlement requires McDonald's to distribute ten million dollars, an extraordinary amount by any standard, but especially significant in the context of the budgets of most vegetarian organizations in the country. However, the negotiated Settlement also included additional, essential agreements concerning how the amount would be distributed. The Parties agreed on (1) the percentages of the fund to go to different types of organizations, *see Settlement ¶ 3.1*, and (2) the guiding principles regarding the distribution of the fund, *see Settlement ¶ 3.1 (a)-(e)*. They agreed that (3) the exact distribution would be decided by mutual agreement. *See Settlement ¶ 3.1 (a)-(e)*. They further agreed that (4) the Settlement represented the complete understanding of the parties. *See Settlement ¶ 17.5*. These agreements are as binding as the agreement that McDonald's will make a ten million dollar contribution. The proposed distribution violates each of these four additional agreements and should not be approved.

**I. There Is No Mutual Agreement**

Under the terms of the Settlement, mutual agreement of the Parties is absolutely required for the distribution of the settlement fund.

The Settlement Amount shall consist of \$10 million, to be placed in a cy pres fund for distribution to charitable and/or other tax-exempt organizations *to be mutually agreed upon by the Parties* on or before the Effective Date.

*Settlement ¶ 3.1* (emphasis added). *See also* Memorandum Order and Opinion, October 30, 2002 (“The two-step selection process agreed to by the parties obligates the parties to work together to recommend suitable recipient organizations that meet the established criteria.”). The “Parties” are

defined in Paragraph 1.7 as “the Representative Plaintiffs, the Plaintiff Settlement Class and all of its members, and McDonald’s.” *Settlement* ¶ 1.7.

The Parties have not reached a mutual agreement. Of the three categories that make up the “Parties,” only McDonald’s has “agreed” to the settlement.

**a. Representative Plaintiffs**

First, and most importantly, consider the Representative Plaintiffs. The Settlement gives them a special status by listing them first among the Parties and awarding them special incentive awards. The Representative Plaintiffs all independently signed and approved the Settlement. As there are only ten such Plaintiffs, it is reasonable for each of them to expect that when he or she signed an agreement to come to “mutual agreement” regarding distribution, each would have to be part of that agreement.

According to the Settlement, the following people are Representative Plaintiffs:<sup>1</sup>

**Brij M. Sharma**  
**Charanjit Singh**  
**Lisa M. Bertini**  
**Vandana Makker**  
**Bala Krishna**  
**Ty C. Gerhardt**  
Jeffrey I. Zimmerman  
Mukesh Mittal  
Sanjay Agarwal

At least those in bold, six out of ten, oppose the proposed distribution. It may be that others oppose the distribution as well. As explained below, “mutual agreement” requires that all relevant parties agree. In this case, with six opposing, there is neither mutual agreement, *nor even majority*

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<sup>1</sup> Penelope Baim Block was dismissed as a Representative Plaintiff on August 19, 2002.

*agreement* among the Representative Plaintiffs. This fact alone should prohibit this Court from approving the proposed submission as a “mutually agreed upon” distribution.

#### **b. Plaintiff Settlement Class**

According to the Settlement, “the Plaintiff Settlement Class and all of its members” must “mutually agree” upon a distribution. *Settlement* ¶ 1.7; ¶ 3.1. The clearest reading of these terms, and one that comports with the overall Settlement, is that “class members” are represented by their counsel.<sup>2</sup> Class members, through counsel, need to come to a “mutual agreement.” All of the attorneys representing the class need to agree.

The term “mutual agreement” is a term of art. “Mutual agreement” requires a “meeting of the minds” of *all* the parties. *See* MERRIAM-WEBSTER’S DICTIONARY OF LAW (1996) (defining agreement as “unity of opinion, understanding, or intent”). It means complete agreement on essential terms.<sup>3</sup> Parties making contracts often use the words “mutually agree” to signal they have all come to a meeting of the minds. *See, e.g., Richmond v. Caban*, 324 Ill. App. 3d 48; 754 N.E.2d 871 (Ill. App. Ct. 2d Dist. 2001).

Meeting of the minds of all the parties on all essential parts of a contract or course of action is required in order to find “agreement” or “mutual agreement.” *See, e.g., Salsitz v. Kreiss*, 198 Ill. 2d 1; 761 N.E.2d 724 (Ill. 2001) (no agreement to arbitrate when failure of all parties specifically agree to arbitration); *Alliance Syndicate v. Parsec*, 318 Ill. App. 3d 590; 741 N.E.2d 1039 (Ill.

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<sup>2</sup> The proponents of the submission might argue that “all of its members” should be taken literally, and that since perfect unanimity among class members would be impossible, the terms of the agreement cannot and should not be followed. However, a contract should not be construed so as to eliminate its own essential terms. This argument would lead to the impractical result that *any* proposed submission would be acceptable so long as some of the class members supported it.

<sup>3</sup> It follows from using this term of art that the Court could approve a distribution where there was a lack of agreement on *immaterial* terms of distribution. In contract law, there is no requirement of perfect agreement on insignificant details *so long as the essentials have been agreed upon by a meeting of the minds*. In this case, the Representative Plaintiffs and Class Members have not even come to an agreement on the appropriate recipients.

App. 2d Div. 2000) (courts examine whether there is “mutual agreement” of all parties to determine existence of contract and “meeting of the minds”); *Klemp v. Hergott Group, Inc.*, 267 Ill. App. 3d 574; 641 N.E.2d 957 (Ill. Ct. App. 1st Dist. Div. 5, 1994) (mutual agreement required for contract reformation); *La Salle Nationa Bank v. 850 DeWitt Condominium Association*, 211 Ill. App. 3d 712; 570 N.E.2d 606 (Ill. Ct. App. 1st Dist. 6th Div. 1991) (using “mutual agreement” and “meeting of the minds” interchangeably); *The Northern Trust Company v. Continental Illinois National Bank and Trust Co. of Chicago*, 43 Ill. App. 3d 169; 356 N.E.2d 1049 (Ill. App. 1st Dist. 4th Div. 1976) (no “meeting of the minds” or “mutual agreement” when two parties made materially different proposals). When the term shows up in the Illinois Code, it also tracks basic contract language of offer and acceptance. *See* ILL REV. STAT. CH. 225, ILSS 515/11 (2002) (acceptance of a contract exists when there is “mutual agreement”). The term “agreement” alone requires all the parties to come to a shared understanding. *See e.g., Magee v. Garreau*, 332 Ill. App. 3d 1070; 774 N.E.2d 441; 2002 Ill. App. LEXIS 656; 266 Ill. Dec. 335 (Ill. App. 2d Dist., 2002) (no binding agreement without meeting of the minds). The term “mutual” merely reinforces this requirement—a mutual agreement must be “directed by each toward the other.” MERRIAM-WEBSTER’S DICTIONARY OF LAW (1996). No cases find mutual agreement without essential agreement by all the relevant parties.<sup>4</sup>

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<sup>4</sup> Attempts to form an alternate understanding of “mutual agreement” in this context quickly run into logistical problems. Assume for a moment that “mutual agreement” were interpreted to mean “majority agreement.” How would one determine what constituted the majority? Counting lawyers? Counting class members?

If it were simply a matter of counting lawyers, it would lead to the absurd result that Texas class members, with three lawyers, counted 50 percent more than both California and Washington class members, with only two lawyers. Furthermore, nothing in the Settlement gives lawyers any powers separate from those of representation.

If it were a matter of counting class members, how would one approach the situation at hand, in which one of the lawyers representing California and Washington class members (Harish Bharti) opposes the distribution, while the other lawyer does not? Would the Washington and California class be presumed to be split down the middle? Furthermore, no estimates on numbers of class members in each of the respective states have been performed.

Finally, how would any method of counting for “majority agreement” purport to handle the knotty problem of class members, such as several of the objectors in this brief, who, by virtue of residing outside of California, Illinois, New Jersey and Texas, are not directly represented by any individual lawyer, but generally represented by all the lawyers?

Harish Bharti, representing Washington and California class members, opposes the proposed distribution. Therefore, under the legal meaning of the term “mutual agreement,” this condition has not been satisfied. Not all of the class members, through counsel, have agreed on the essential elements of the distribution.

The condition requiring mutual agreement of the class members is essential. The class members do not all agree. Therefore, the proposed distribution should not be approved.<sup>5</sup>

### **c. Conclusion**

The Settlement document provides that a distribution will be “subject to Court approval.” *Settlement* ¶ 3.1. However, this authority is not triggered by *any* proposal, but only a submission that comports with the Settlement. *See* Memorandum Order and Opinion, October 30, 2002. The Settlement requires three different groups to come to mutual agreement on the distribution of the *cy pres* fund: the Representative Plaintiffs, Class members, and McDonald’s. McDonald’s has agreed to the proposed distribution. Some class members, but not all, have agreed to the proposal through counsel. Less than half of the Representative Plaintiffs have agreed to the proposal. The requirement of mutual agreement has not been satisfied.

Therefore, this Court should not approve the current proposal.

## **II. The Proposed Distribution Violates the Requirement That 60 Percent Go To Vegetarian Organizations**

In the Settlement, the Parties stipulate that “to the extent practicable,” the fund will be distributed as follows: “60 percent to vegetarian organizations; 20 percent to Hindu and/or Sikh

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At all events, had the Parties concluded that mutual agreement was not possible, the Settlement could easily have required merely “majority” agreement.

<sup>5</sup> Proponents of the distribution might protest that Mr. Bharti has failed his own obligations to negotiate and act in good faith. Mr. Bharti might make the same accusation of the proponents. However, even if this Court were to find that any counsel had, in fact, failed his or her obligations to the class and Representative Plaintiffs in these ways, this would not justify rewriting the Settlement to require less than mutual agreement. Instead, the Court could (1) mandate mediation or (2) declare that mutual agreement according to the terms of the Settlement is impossible and appoint a special master to determine the most appropriate recipients.

organizations; 10 percent to children’s nutrition and/or children’s hunger relief organizations; and 10 percent to organizations promoting the understanding of Jewish law, standards, and practices with respect to Kosher foods and dietary practices, and the observance of such standards by persons of the Jewish religion.” *Settlement* ¶ 3.1. The Representative Plaintiffs and class members, through counsel, signed the Settlement document with the understanding that six million dollars would go to vegetarian organizations unless it was impracticable.

There are dozens of vegetarian organizations in the country. There is no demonstration of impracticability in distributing the fund to one or more of those organizations. The distribution easily could be awarded to a single vegetarian organization or to more than one, depending on the agreement of the Parties. However, less than two-thirds of the six million dollars designated for vegetarian organizations would be distributed to vegetarian organizations if this proposed distribution were approved.

According to the proposal:

- ?? \$250,000 is designated to go to Loma Linda University. Loma Linda University is a “Seventh-day Adventist educational health-sciences institution with 3,000 students located in Southern California.” <http://www.llu.edu/llu/index.html>. It is not a vegetarian organization.
- ?? \$800,000 is designated to go to Tufts University. Tufts University is not a vegetarian organization.
- ?? \$250,000 is designated to go to the Department of Nutrition of the University of North Carolina at Chapel Hill. This is not a vegetarian organization.
- ?? \$50,000 is designated to go to the Muslim Consumer Group. This is not a vegetarian organization.
- ?? \$150,000 is designated to IFANCA. This is not a vegetarian organization.
- ?? \$350,000 is designated to go to the Sound Vision Foundation. This is not a vegetarian organization.
- ?? \$500,000 is designated to go to the Preventive Medicine Research Institute. This is not a vegetarian organization. It is a health organization promoting many variations of vegetarian diets, but actively advocates fish oil consumption.

In sum, NAVS, the Vegetarian Resource Group, Vegetarian Vision, and the American Vegan Society are the only vegetarian organizations in the proposed recipient list. While ADAF,

one of the proposed recipients, does not support vegetarian values, it is arguably a vegetarian organization within a broad understanding of the term.<sup>6</sup> The total amount going to these groups is less than two-thirds of the designated six million dollars.

The proponents might argue that the funding will benefit vegetarians, so it does not matter that the recipients do not share vegetarian values or consider themselves vegetarian organizations. This argument, in effect, rewrites the Settlement document to read, “[T]he funds will be distributed . . . to projects that benefit vegetarians.” There is a fundamental difference between an organization that has vegetarian values and an organization that indirectly benefits vegetarians. For instance, a public library with a nutrition section used by vegetarians benefits vegetarians, but is not a “vegetarian organization.” Unless a document directs otherwise, contract terms are presumed to have their “usual and ordinary meaning.” As the Illinois Supreme Court recently explained, in contract interpretation, “the usual and ordinary meaning of a phrase” is the meaning that “particular language conveys to the popular mind, to most people, to the average, ordinary, normal person, to a reasonable person.” *Traveler’s Insurance Co. v. Eljer Manufacturing, Inc.*, 197 Ill. 2d 278, 301; 757 N.E.2d 481 (Ill. 2001) (internal citations and brackets omitted). The ordinary, normal, reasonable person would think that the phrase “vegetarian organization” means an organization dedicated to vegetarian values made up largely of vegetarians. While there might be some difference at the margins, the ordinary person would not think that a subsection of a larger organization that served some vegetarian needs or interests was a vegetarian organization.

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<sup>6</sup> Undersigned class members believe that under the best understanding of the term, ADAF is also not a vegetarian organization, because it does not support any vegetarian values. Class members urge the Court to take a common-sense meaning of the term; as one would not call a nutrition organization with a subsection providing information to Seventh-day Adventists a “Seventh-day Adventist” organization, one would not call ADAF a “vegetarian organization.” However, for the sake of argument, class members are willing to countenance that, unlike Tufts or UNC, there is a plausible claim that ADAF falls within a broad meaning of the term.

Therefore, setting aside the theoretical question of whether some vegetarians might make a policy decision that funding university research of nutrition is preferable to funding vegetarian groups, neither the nutrition departments of the University of North Carolina at Chapel Hill nor Tufts University are vegetarian organizations under the term's "usual and ordinary meaning." Calling Tufts or UNC a vegetarian organization because each proposes to fund people who study vegetarians is like calling a school that funds anthropologists who study bigamy a bigamist organization. Yet \$1,050,000 is designated to these two facilities.

In sum, even a generous reading of the Settlement document and a generous understanding of the term "vegetarian organization" do not allow for approval of this proposed distribution.

### **III. The Settlement Principles Were Not Followed**

Even if this Court were to conclude that the Tufts nutrition department constituted a "vegetarian organization," neither it nor any of the other similar proposed beneficiaries fit the requirement under *Settlement* ¶ 3.1 (b) that, inasmuch as possible, the recipients should have a "dedication to the values of . . . vegetarianism."

The Parties agreed that the following principles would be used in determining the recipients of the ten million dollars:

- (a) The organizations' nonprofit status;
- (b) The organizations' dedication to the values of Hindu, Sikh, and other beef-less dietary rules; vegetarianism; Kosher dietary rules; and the purposes set forth above (as applicable to the category of the organization);
- (c) The organizations' exclusive or majority concentration of services in the United States;
- (d) The organizations' geographical reach within the United States; and
- (e) The organizations' willingness to use the donation for the stated purpose (e.g., children, education, vegetarianism, and/or nutrition).

*Settlement* ¶ 3.1.

These principles were not followed. Recipients of almost half of the funds ostensibly targeted to vegetarian groups are not dedicated to the values of vegetarianism. The University of North Carolina and Tufts University are not dedicated to any of the values listed in (b). The Preventive Medicine Research Institute is not dedicated to any of the values listed in (b). The Vegetarian Nutrition Practice Group is not dedicated to any of the values listed in (b).

Furthermore, at least 40 percent of the designated vegetarian funds are not targeted to groups with a broad geographical reach. By way of example, given the dozens of national vegetarian groups in the country, one of the designated recipients is Vegetarian Vision, whose reach barely extends beyond the New York metropolitan area. *See* <http://www.vegetarianvision.org>.

Admittedly, these principles were meant to be guiding principles, and, unlike the absolute requirement of “mutual agreement,” the Settlement contemplates that each and every organization chosen might not fit all the categories. If the organizations selected were the only possible choices, even if they fail some of the requirements, they could receive funds. However, several organizations do fit all the criteria, including some of the organizations proposed for some of the funds, such as the Vegetarian Resource Group, as well as other possible recipients. The largest vegetarian organizations in the country, with a national reach and a willingness to use the funds for the stated purposes, would easily fit all the criteria. The failure to target all of the *cy pres* fund to appropriate groups represents a failure to follow the explicit terms of the Settlement, when there are several possible recipients that fit all the qualifications and no reason all of the guiding principles could not be met for every recipient.

#### **IV. Inappropriate Criteria Were Used**

The Settlement document represents the complete agreement of the Parties. *Settlement* ¶ 17.5. Therefore, the use of non-Settlement criteria to determine which groups are selected is inappropriate. However, some of the attorneys rejected groups based on criteria external to the Settlement. According to Cory Fein, counsel involved in creating the proposed distribution explicitly refused to consider groups that were actively suing McDonald's or vigorously protesting McDonald's. *See* Declaration of Cory S. Fein, ¶¶ 17-18.

Nothing in the settlement agreement allows for this restriction.

## **V. Conclusion and Prayer for Relief**

As this Court noted in the October 30 Memorandum Order and Opinion, “The parties, together with the Court, developed a bifurcated procedure that requires Court approval of selected recipient organizations.” The first half of that procedure has not been followed. The “bifurcated selection process . . . incorporated into the Settlement” has yet to be followed. *Id.*

In sum, undersigned class members object to the proposed distribution and request that this Court refuse to approve it. The proposed distribution would violate four of the explicit agreements made in the original Settlement document: (1) the agreement to come to mutual agreement; (2) the agreement to distribute six million dollars to vegetarian organizations; (3) the agreement to follow the governing principles in determining who would receive the money; and (4) the agreement that the Settlement represents the complete agreement of the Parties.

Therefore, this Court should reject the proposed distribution and require the Parties to work together to come up with a distribution according to the terms of the Settlement. In the alternative, the Court should (1) mandate mediation or (2) declare an impasse and appoint a special master to determine an appropriate distribution of funds in accordance with the settlement agreement.

Undersigned counsel and class members would ask that this Honorable Court allow them to speak at any hearing on the distribution of funds as interested parties and *amicus curiae*.

RESPECTFULLY SUBMITTED BY:

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Zephyr Teachout, Esq.

On behalf of *Amicus Curiae* Matthew Ball, Gene Bauston, Lorri Bauston, Jonathan Camp, Lawrence Carter-Long, Sarah Clifton, Sarah Farr, Mary Finelli, Anne Green, Patrick Kwan, Barbara Lomow, Gaverick Matheny, Jack Norris, Lauren Ornelas, Miyun Park, Will Potter, Robert Schwalb, Paul Shapiro, Ryan Shapiro, and Bernard Unti.

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## **CERTIFICATE OF SERVICE**

I hereby certify that a copy of the above and foregoing has been served on the following recipients on this the 2nd day of December, 2002, addressed as follows:

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