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FOR THE DISTRICT OF COLUMBIA FEB 20 PM '01

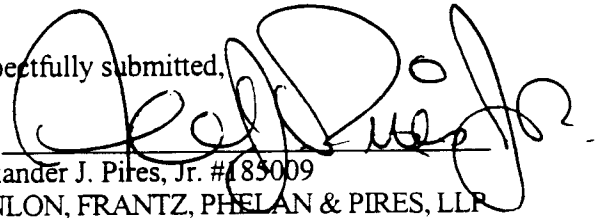
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<u>GUADALUPE L. GARCIA, JR., et al.,</u>	:	U.S. DIS.
Plaintiffs,	:	Case No. 1:00CV02445
v.	:	Judge: Louis F. Oberdorfer
DAN GLICKMAN, Secretary THE UNITED STATES DEPARTMENT OF AGRICULTURE	:	ORAL ARGUMENT REQUESTED
Defendant.	:	


**PLAINTIFFS' OPPOSITION TO DEFENDANT'S MOTION TO DISMISS AND TO STRIKE CLASS ACTION ALLEGATIONS**

Come now plaintiffs, through their Lead Counsel and Of Counsel, and oppose Defendant's Motion To Dismiss And To Strike Class Action Allegations. In Support thereof, plaintiffs' provide the attached Memorandum Of Points And Authorities In Support Of Plaintiffs' Opposition To Defendant's Motion To Dismiss And To Strike Class Action Allegations.

February 5, 2001

Respectfully submitted,  
By:   
Alexander J. Pires, Jr. #185009  
CONLON, FRANTZ, PHELAN & PIRES, LLP  
1818 N Street, N.W., Suite 700  
Washington, D.C. 20036  
(202) 331-7050

Of Counsel:  
J. L. Chestnut, Jr.  
CHESTNUT, SANDERS, SANDERS,  
PETTAWAY, CAMPBELL &  
ALBRIGHT, P.C.  
1 Union Street  
Selma, Alabama 36701  
(334) 875-9264

By:   
Phillip L. Fraas #211219  
TUTTLE, TAYLOR & HERON  
1025 Thomas Jefferson Street, N.W.  
Washington, D.C. 20007  
(202) 342-1300

Lead Counsel for Plaintiffs

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DAN GLICKMAN, Secretary :  
THE UNITED STATES DEPARTMENT :  
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Alexander J. Pires, Jr.  
CONLON, FRANTZ, PHELAN & PIRES, LLP  
1818 N Street, N.W., Suite 700  
Washington, D.C. 20036  
(202) 331-7050

Phillip L. Fraas  
TUTTLE, TAYLOR & HERON  
1025 Thomas Jefferson Street, N.W.  
Washington, D.C. 20007  
(202) 342-1300

*Lead Counsel for Plaintiffs*

J. L. Chestnut, Jr.  
CHESTNUT, SANDERS, SANDERS,  
PETTAWAY, CAMPBELL & ALBRIGHT, P.C.  
1 Union Street  
Selma, Alabama 36701  
(334) 875-9264

*Of Counsel for Plaintiffs*

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- Exhibit 3      Internal Department of Justice memorandum, dated January 29, 1988, which addressed the exhaustion of administrative remedies as a prerequisite for filing suit against the USDA for violations of the Equal Credit Opportunity Act
- Exhibit 4      Pigford v. Glickman Memorandum of Law in Support of Defendant's Motion for Judgment, in part, On the Pleadings and for Partial Summary Judgment
- Exhibit 5      Pigford v. Glickman Consent Decree
- Exhibit 6      Letter of July 20, 1998, from USDA, Office of Civil Rights, which defined a "good cause" exception for failure to file discrimination complaints

## INTRODUCTION

Plaintiffs submit this memorandum in opposition to Defendant's Motion To Dismiss And To Strike Class Action Allegations. The First Amended Class Action Complaint (Complaint) alleges (1) defendant engaged in a systemic practice of discriminating against Hispanic/Latino farmers and ranchers (farmers) in the administration of federal farm loans and benefit programs, and (2) defendant failed to properly and timely investigate plaintiffs' discrimination complaints. Plaintiffs contend these practices and failures, together, violated the Equal Credit Opportunity Act (ECOA) and the Administrative Procedure Act (APA). Garcia closely parallels Pigford v. Glickman, where African American farmers sought and received class certification for their claims arising from the same pattern of discrimination and failure to properly process complaints of discrimination.<sup>1</sup> See Pigford v. Glickman, 182 F.R.D. 341 (D.D.C. 1998), see also Pigford v. Glickman, 185 F.R.D. 82 (D.D.C. 1999).

Plaintiffs respectfully submit that defendant's motion should be denied:

- Plaintiffs seek declaratory judgment (1<sup>st</sup> Am. Compl., Count I) to preclude defendant from continuing its systemic acts of discrimination against Hispanic/Latino farmers and ranchers.
- The allegations in plaintiffs' Complaint state claims under ECOA (1<sup>st</sup> Am. Compl., Count II) and APA (1<sup>st</sup> Am. Compl., Count III).
- Plaintiffs' Complaint contains averments regarding class certification which meet the requirement of Federal Rule of Civil Procedure 23.<sup>2</sup>

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<sup>1</sup> Pigford was settled. Under the Consent Decree the plaintiffs will recover approximately \$1 billion in damages and receive substantial injunctive relief.

<sup>2</sup> Plaintiffs' Motion For Class Certification will be filed on February 12, 2001.

- Defendant's Motion to Dismiss recycles arguments that were raised and rejected by Judge Friedman in Pigford.
- Defendant mischaracterizes plaintiffs' claims, resulting in a warped, unrealistic version of the issues at stake.
- Defendant invents a jurisdictional prerequisite for this lawsuit that has no basis. Defendant dramatically changes course from the position defendant took in Pigford, and, here, makes up a requirement that plaintiffs must demonstrate that they exhausted administrative remedies before seeking relief in federal court.

#### **I. OVERVIEW OF PLAINTIFFS' CLAIMS**

Plaintiffs and proposed class representatives are 10 Hispanic/Latino farmers and ranchers from California, New Mexico, and Texas. This case involves defendant's administration, during the period January 1, 1981, to present, of applications by Hispanic/Latino farmers and ranchers for farm loans and credit and participation in other federal farm programs (referred to hereinafter as, generally, "farm programs"). Plaintiffs contend that defendant, when processing applications of Hispanic/Latino farmers and ranchers for farm programs (1) willfully discriminated against them, and (2) when, in response, plaintiffs filed (in writing or orally) discrimination complaints with defendant, failed to investigate the complaints. For example, when Hispanic/Latino farmers and ranchers filed complaints of discrimination with defendant, defendant either (1) avoided processing or resolving the complaints, (2) stretched the review process out over many years, (3) conducted a meaningless, or "ghost" investigation, or (4) discarded or destroyed complaints.

These two acts: (1) the discrimination in denial of the application to participate in the farm program, and (2) the failure to properly and timely investigate the discrimination complaints, deprived Hispanic/Latino farmers and ranchers of equal and fair access to farm programs, and due process, resulting in substantial damages to them.

In May 1997, defendant's officials admitted that, in early 1983, the Reagan administration had quietly disbanded and dismantled the civil rights enforcement arm at the United States Department of Agriculture ("USDA") and that discrimination complaints had not been properly investigated since 1983. Two federal reports, issued in February 1997, verified these facts. The Office of Inspector General has released six additional reports documenting USDA's continuing failure to remedy its egregious flaws in processing civil rights complaints. The Government Accounting Office testified before Congress in October 2000 that USDA's civil rights investigation/enforcement agency remains dysfunctional.

This complaint was filed on October 13, 2000. The First Amended Class Action Complaint was filed on December 12, 2000, listing 34 plaintiffs, a proposed class of 20,000, and a claim of damages of \$20,000,000,000.

**II. USDA'S PROGRAMS ARE INTENDED TO ASSIST FARMERS WHO MAY NOT HAVE ACCESS TO RESOURCES THEY NEED TO SUCCEED**

Defendant's description of USDA programs is generally accurate, however, it omits an essential fact -- USDA's farm loan programs are specifically directed to assist farmers who might not otherwise have the resources to succeed. Thus, USDA is known as the "lender of last resort."

The federal government has a long tradition of providing loan programs for "the family farmer who cannot obtain credit from a different source." Curry, et al. v. Block,

541 F.Supp. 506, 511 (S.D.Ga. 1982), aff'd 738 F.2d 1556 (11<sup>th</sup> Cir. 1984). The stated objective of the legislation establishing the USDA loan programs was to aid the “underprivileged” farmer, and is therefore a form of “social welfare legislation.” Id.; see also U.S. v. Kimbell Foods, Inc., 440 U.S. 715, 735 (1979) (“The overriding purpose of the tax law statute obviously is to ensure prompt revenue collection. The same cannot be said of the SBA and FHA<sup>3</sup> lending programs. They are a form of social welfare legislation, primarily designed to assist farmers and businesses that cannot obtain funds from private lenders on reasonable terms.”) The gravamen of plaintiffs’ Complaint is that USDA responds positively in meeting the credit needs of hard-pressed white farmers, as Congress intended, but treats Hispanic farmers in need with callous indifference or, worse, active hostility.

On top of USDA’s charter to assist all family farmers who can’t get credit elsewhere, the agency has been given the additional challenge of using its programs to specifically help minorities. To further this end, USDA administers the Socially Disadvantaged Farmers’ Program (SDA). The SDA program<sup>4</sup> is a racial preference program. Pursuant to a 1988 Congressional mandate, the SDA program should provide a comprehensive set of policies and rules to assist Socially Disadvantaged Groups, including Hispanic/Latino farmers and ranchers.

The SDA program’s policy goals were and are to:

1. Make direct Farm Ownership (FO) loan funds and acquisition of inventory farmland more available to members of socially disadvantaged groups;

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<sup>3</sup> FHA stands for Farmers Home Administration, FSA’s predecessor organization.

<sup>4</sup> Also known as the FmHA FO Loan and Acquired Property Outreach Program.

2. Surface and correct problems and obstacles that prevent the participation of members of socially disadvantaged groups in the FO loan and credit sale programs;
3. Increase the numbers of direct FO loans and credit sales made to members of socially disadvantaged groups in targeted and non-targeted areas;
4. Target direct FO loan funds and acquired properties to ensure participation of members of socially disadvantaged groups in these programs;
5. Provide pamphlets, publications and general information on the direct FO loan and credit sale programs to members of socially disadvantaged groups; and
6. Provide assistance to members of socially disadvantaged groups to assure that the application process is expedient and complete.

See 7 C.F.R. § 1943.13 (1989).

The regulations enacted in accordance with these policies were woven throughout the FmHA farm loan program regulations.<sup>5</sup> Importantly, recognizing the difference that appropriate customer service can make for a FmHA loan applicant, SDA regulations are replete with references to technical assistance:

[A policy goal of the SDA program is to] [p]rovide assistance to members of socially disadvantaged groups to assure that the application process is expedient and complete. 7 C.F.R. §1943.13(a)(5).

Socially disadvantaged individuals will be provided the technical assistance necessary when applying for FO assistance to acquire inventory farmland. 7 C.F.R. § 1943.11.

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<sup>5</sup> Two examples include the local FmHA office's obligation (1) to notify "socially disadvantaged applicants/borrowers about the availability of Direct Farm Ownership (FO) loans and the acquisition/leasing of FmHA acquired farmland. Immediately after an application for FO assistance is received, the County Supervisor will send [a letter to this effect to the SDA applicant.]" 7 C.F.R. § 1910.4 (1989), and (2) to provide a similar letter "to all socially disadvantaged individuals at the time they make their initial contact with FmHA regarding FmHA services." Id.

[County Supervisors should] make a special effort to insure that prospective purchasers who traditionally would not be expected to apply for farm ownership loan assistance because of existing racial or ethnic prejudice. Emphasis will be placed on providing assistance to such socially disadvantaged individuals. . . . 7 C.F.R. § 1955.106(b).

EOCA prohibits USDA from discriminating against minority farmers; SDA programs create an affirmative obligation for USDA to increase minority participation in federal farm programs.

Plaintiffs' complaint alleges that defendant failed to provide services to Hispanic/Latino farmers and ranchers, and, in fact, discriminated against them in favor of white farmers.

#### **PLAINTIFFS' OPPOSITION TO DEFENDANT'S MOTION TO DISMISS**

A motion to dismiss should be granted only when it appears beyond doubt that, under any reasonable reading of the complaint, the plaintiff will be unable to prove any set of facts that would justify relief. Haynesworth v. Miller, 820 F.2d 1245, 261 U.S. App.D.C. 66 (D.C.Cir. 1987)(citations omitted).

The allegations set forth in the First Amended Class Action Complaint, if proved, provide a basis for recovery.

Accordingly, this case must go to trial.

#### **I. PROPOSED CLASS REPRESENTATIVES PROVIDE SPECIFIC FACTUAL ALLEGATIONS ON BEHALF OF THEMSELVES AND ALL OTHERS SIMILARLY SITUATED**

The First Amended Class Action Complaint names 10 plaintiffs as proposed class representatives. Specific factual allegations are provided for each. These plaintiffs sue on behalf of themselves and all others similarly situated, including but not limited to the 29 individual named plaintiffs listed (See 1<sup>st</sup> Am. Compl. at 2-5).

Defendant protests that, as to the 29 named plaintiffs, “the complaint offers only the most conclusory allegations of discrimination.” (Def.’s Mot. To Dismiss at 14). Defendant concludes that “Because 29 of the 39 named plaintiffs provide no specific factual allegations to support their discrimination claims, they must be dismissed as plaintiffs.” (*Id.* at 15). Whether or not the 29 named plaintiffs are eligible class members is an issue to be determined after class certification is resolved.

## **II. MR. AND MRS. X HAVE DISCLOSED THEIR IDENTITY**

Defendant contends that Mr. and Mrs. X “must be dismissed at the outset because they cannot use pseudonyms in this case.” (*Id.* at 14). Defendant’s contention is moot. Mr. and Mrs. X chose to disclose their identity in the Second Amended Class Action Complaint.<sup>6</sup>

## **III. PLAINTIFFS PROPERLY PLEAD CLAIMS UNDER THE EQUAL CREDIT OPPORTUNITY ACT**

### **A. Defendant’s Discriminatory Practices Have Been Established In The Pigford Class Action**

The discriminatory practices of defendant have already been the subject of litigation. More than 21,000 African-American farm families have participated in the settlement arising from Pigford v. Glickman. See Pigford, 185 F.R.D. 82. The settlement is a confirmation of the USDA Civil Rights Action Team (CRAT) and Office of Inspector General (OIG) Reports’ analyses of USDA as an agency beset by endemic racism and lack of accountability. (See 1<sup>st</sup> Am. Compl., Exhibits A – E). Although defendant admits that the CRAT Report “is a recognition by the USDA Civil Rights Action Team that farmers have complained of alleged civil rights problems at USDA,” defendant dismisses

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<sup>6</sup> The Second Amended Complaint will be filed tomorrow, February 6, 2001.

CRAT as merely reporting the “perception of USDA by the farming community.”  
(Def.’s Mot. To Dismiss at 12).

In Pigford, Judge Friedman summed up the depth and severity of USDA discriminatory treatment of minority farmers in the administration of federal programs and USDA’s failure to respond to discrimination complaints, as revealed in the CRAT and OIG reports:

In December of 1996, Secretary of Agriculture Dan Glickman appointed a Civil Rights Action Team (“CRAT”) to “take a hard look at the issues and make strong recommendations for change.” In February of 1997, CRAT concluded that “[m]inority farmers have lost significant amounts of land and potential farm income as a result of discrimination by FSA [Farm Services Agency] programs and the programs of its predecessor agencies, ASCS [Agricultural Stabilization and Conservation Service] and FmHA [Farmers Home Administration] .... The process for resolving complaints has failed. Minority and limited-resource customers believe USDA has not acted in good faith on the complaints ....” Pigford, 185 F.R.D. at 88 (citations omitted).

Judge Friedman explained that not only were minority farmers discriminated against, resulting in significant losses of land and farm income, but that their discrimination complaints were ignored, and backlogged in a process which “lacks integrity” and is characterized by a “climate of disorder”:

Also in February of 1997, the Office of the Inspector General of the USDA issued a report to Secretary Glickman stating that the USDA had a backlog of complaints of discrimination that had never been processed, investigated or resolved. The Report found that immediate action was needed to clear the backlog of complaints, that the “program discrimination complaint process at [the Farm Services Agency] lacks integrity, direction, and accountability,” and that “[s]taffing problems, obsolete procedures, and little direction from management have

resulted in a climate of disorder within the civil rights staff at FSA. Id. (citations omitted).

In Pigford more than 21,000 African-American farmers were declared eligible to and did submit claims alleging discrimination by USDA. To date, 20,000 have received decisions from independent adjudicators who are retired judges. In better than 60% of the rulings adjudicators have found discrimination and paid the farmers liquidated damages of \$50,000 tax-free, and provided debt forgiveness and injunctive relief. In sum, independent adjudicators – in a system established with consent of defendant – have found that USDA committed acts of discrimination against some 12,000 African-American farmers. Is there better proof that USDA has had an institutional civil rights problem? This also confirms the findings of the CRAT and OIG Reports – that USDA discriminated against minority farmers, including African-Americans and Hispanic/Latinos.

**B. Defendant's Failure To Investigate Civil Rights Complaints Is Only One Symptom Of Its Endemic Racism**

Defendant proposes plaintiffs' allegation that defendant mis-processed discrimination complaints must be dismissed because it is not cognizable under ECOA.

To the contrary, USDA's failure to investigate complaints of discrimination left discrimination unchecked within the agency and is indicative of the systemic nature of defendant's ECOA violations. That USDA failed to investigate or process civil rights complaints for more than 15 years<sup>7</sup> is but one symptom of the racism that infects the agency and its loan programs subject to ECOA. Defendant failed to appropriately

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<sup>7</sup> The CRAT and OIG Reports document the dismantling of the civil rights office at USDA in 1983, and USDA's failure to process or investigate civil rights complaints for more than a decade. (See 1st Am. Compl. at 20).

respond to, catalogue, or investigate any complaints of racial discrimination.<sup>8</sup> This failure to investigate civil rights complaints permitted and fostered discrimination against minority farmers who applied for USDA farm loans.

Defendant characterizes plaintiffs' Complaint as if it were no more than a dry challenge to the computation of an agency formula for loan amortization or crop insurance. In reality, it concerns defendant's failure to provide any recourse for minority farmers seeking loans whose civil rights were trampled. Defendant's complaint processing system was a sham. Plaintiffs' allegations address USDA's rampant racism that harmed Hispanic/Latino farmers and ranchers.

### **C. There Are No Jurisdictional Prerequisites To This Suit**

In its Motion to Dismiss, defendant proposes that plaintiffs' ECOA claims must be dismissed because plaintiffs failed to exhaust administrative remedies by appealing their loan denials to the National Appeals Division (NAD) before asking this Court for relief. Defendant concludes "nothing can excuse plaintiffs' failure to exhaust their administrative remedies." (Def.'s Mot. to Dismiss at 25). Defendant's argument is at best, mistaken, at worst, misleading. Defendant argues that the agency's "organic statute"<sup>9</sup> mandates exhaustion of administrative remedies. (Def.'s Mot. to Dismiss at 22). Therefore, defendant states, "all but one single claim of credit discrimination under

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<sup>8</sup> Defendant narrowly reads the statute of limitations waiver as only covering minority farmers who filed written complaints directly with USDA. The waiver includes no such limitation. Plaintiffs read the waiver to include minority farmers who complained, in writing or orally, to a wider range of government officials, including Congressmen, who traditionally look out for minorities. Plaintiffs' position is identical to that followed by plaintiffs and defendant, and upheld by the Court, in Pigford.

<sup>9</sup> The terminology used by defendant to describe the exhaustion of remedies statute appears to be an effort to give the statute a transcendent importance in this case that simply is not merited – as we demonstrate below. Certainly, the U.S. Code does not refer to this statute as USDA's "organic" statute.

EOCA ... must be dismissed for failure to exhaust administrative remedies.” (Def.’s Mot. to Dismiss at 8).

The “organic statute” mandating administrative exhaustion on which defendant relies is 7 U.S.C. § 6912(e). Congress did not adopt this “exhaustion” statute until 1994 – a fact defendant conveniently leaves out of its discussion. NAD was created by the same statute. Moreover, NAD’s expertise concerns technical application of program criteria, not discrimination caused by racial animus. Regulations governing the National Appeals Division specifically exclude from its authority “Discrimination complaints prosecutable under the nondiscrimination regulations at 7 CFR §§ 15, 15a, 15b, and 15c.” 7 CFR § 11.1. (Emphasis added). This directly refutes defendant’s position that victims of discrimination must appeal credit denials to NAD.

In addition, NAD’s own Handbook laying out its internal rules for farmer’s appeals specifically charges NAD’s Hearing Officers not to adjudicate civil rights discrimination complaints, which are matters not within their area of expertise:<sup>10</sup>

#### 77. Submitting Discrimination Complaints

##### A. Which Officials May Receive Complaints

Discrimination complaints may be submitted to any of the following:

- Director, EEO/CRS
- Administrator, ASCS
- Secretary

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<sup>10</sup> NAD’s area of expertise is the lengthy and sometimes arcane rules governing a wide range of farmer benefits programs. The defendant has delegated to a different official – the Director of USDA’s Office of Civil Rights – the responsibility to investigate and resolve civil rights complaints. See 7 C.F.R. § 2.89 (1995); 7 C.F.R. § 15.52(b) (1989); 7 C.F.R. Subpart B, Appendix (1989). Further, it is worth noting that defendant delegated to the Office of Civil Rights, not NAD, the responsibility to implement the administrative review process for discrimination complaints eligible for resolution under the statute of limitations discussed in the next section.

## B. Routing Complaints Received in an Appeal

If an appeal includes an allegation of discrimination, it shall be considered a discrimination complaint and be submitted by the receiving office to the Director, EEO/CRS or the Administrator, ASCS.

(NAD Handbook, pages 11b to 11f, attached hereto as Exhibit 1).

## E. Allegations of Discrimination

Hearing Officers do not have the Authority to address allegations of discrimination. If at any time during the appeal process an Appellant asserts an allegation of discrimination, hearing Officers must explain that the issue of discrimination is outside the scope of Hearing Officers' authorities.

(NAD Hearing Officers' Manual, page 11g, attached hereto as Exhibit 2)

(emphasis added).<sup>11</sup>

Although plaintiffs have no evidence that defendant intentionally means to mislead the court on this point, defendant's own well established procedures are 180 degrees from defendant's position on this point.

ECOA does not require exhaustion of administrative remedies. See 15 U.S.C. § 1691(a). ECOA creates a private right of action against creditors, including a government agency. See 15 U.S.C. § 1691a(e). Further, USDA's compliance with ECOA is monitored by the Federal Trade Commission (FTC). USDA does not have the authority to ignore, interpret, or limit rights of action under ECOA. Moreover, USDA's credit denial letters instruct applicants to complain of ECOA violations to the FTC or the Secretary of Agriculture. They do not refer them to NAD.

Defendant demonstrates with citations to a string of cases that, when a plaintiff's complaint involves technical aspects of federal farm programs, there is a requirement to

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<sup>11</sup> Exhibit 2 is a copy from the 1995 draft NAD Hearing Officer's Manual. When we obtain a copy of the final manual, we will forward it to the Court.

exhaust administrative remedies before filing suit in federal court. However, only one of defendant's citations refers to a case concerning discrimination. Lewis v. Glickman, 104 F.Supp.2d 1311 (D. Kan. 2000). In Lewis, exhaustion of administrative remedies was not at issue<sup>12</sup>. The rest involved complaints about the rules governing the federal farm programs and how USDA's implementation and interpretation of those rules adversely affected the farmer.

That there is no administrative exhaustion requirement for plaintiffs' ECOA claims is not news to defendant. An internal Department of Justice Memorandum opinion ("Memorandum"), dated January 29, 1988, addresses exhaustion of administrative remedies as a prerequisite for filing suit against the United States Department of Agriculture for violations of the Equal Credit Opportunity Act (ECOA). (Attached as hereto as Exhibit 3). This Memorandum conflicts with and rejects the argument for administrative exhaustion presented by defendant to this Court in Defendant's pending Motion. The memo states, inter alia:

USDA has suggested that 7 U.S.C. §6912(e) (1994) may require an ECOA claimant to exhaust administrative procedures before filing suit against the Secretary or the Department of Agriculture . . . While we have found nothing in the legislative history of §6912(e) that elaborates on its intended purpose, it seems unlikely that Congress intended such a result. The better interpretation, we believe, is that §6912(e) applies to administrative procedures related to statutes or programs administered by USDA. Memorandum at 11-12. (Emphasis added.)

Further, at the time the Department of Justice drafted this memorandum, USDA was arguing that §6912(e) required administrative exhaustion through the civil rights complaint process, not NAD:

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<sup>12</sup> The plaintiff in Lewis alleged USDA had discriminated against him based on age. He had exhausted his administrative remedies. There was no finding that exhaustion was a prerequisite to his filing suit in federal court. "Exhaustion" was not a contested issue.

. . . USDA has suggested that §6912(e) requires that an ECOA claimant exhaust the administrative procedure in §15.52 before bringing a civil action.

We do not think the process for pursuing an ECOA claim under §15.52 is an “administrative appeal procedure” within the meaning of §6912(e). An ECOA claim under §15.52 is not an “appeal” of a USDA program action. It is a separate determination of a complaint regarding discrimination in USDA’s administration of its programs. Memorandum at 12.

Defendant adopted this analysis in its Motion for Judgment, in Part, on the Pleadings and for Partial Summary Judgment in Pigford. (See Pigford Motion, attached hereto as Exhibit 4). The brief supporting that motion states, inter alia, that “the filing of an administrative complaint under section 15.52 is not a prerequisite to filing suit against USDA under ECOA or any other statute.” Id. at 4. Moreover, defendant admits that under ECOA “there is no administrative exhaustion requirement that must be satisfied before a plaintiff may sue in federal court.” Id. at 5.

In contrast, defendant now contends that the civil rights complaint process botched by the USDA Office of Civil Rights was not intended to review ECOA-based discrimination complaints. (See Def.’s Mot. to Dismiss at 23). In Pigford, Judge Friedman found the opposite:

Any farmer who believed that his application to those [farm] programs was denied on the basis of his race or for other discriminatory reasons theoretically had open to him a process for filing a civil rights complaint either with the Secretary of Agriculture or with the Office of Civil Rights Enforcement and Adjudication (“OCREA”) at USDA. USDA set forth a detailed process by which these complaints were supposed to be investigated and conciliated, and ultimately a farmer who was unhappy with the outcome was entitled to sue in federal court under ECOA. All the evidence developed by the USDA and presented to the Court indicates, however, that this system was functionally nonexistent for well over a decade. In

1983 OCREA essentially was dismantled and complaints that were filed were never processed, investigated or forwarded to the appropriate agencies for conciliation. Pigford, 185 F.R.D. at 88. (citations omitted) (emphasis added).

Defendant's argument that plaintiffs can only bring an action under ECOA if they exhausted administrative remedies by appealing their loan denials to NAD lacks credibility. It is inconsistent with (1) NAD's purpose and regulations; (2) USDA's 1998 tentative position, rejected by the Department of Justice, that administrative exhaustion was required through OCR, and (3) defendant's position, and Judge Friedman's finding, in Pigford where defendant never raised the issue of administrative exhaustion for thousands of African-American farmers who sued USDA under ECOA.

Moreover, there is no reference to exhaustion of administrative remedies in the statute of limitations waiver Congress enacted specifically to enable minority farmers to bring suit against USDA under ECOA. To the contrary, the administrative remedy provided for in the waiver is clearly optional for the farmer. See P.L. 105-277, Div. A, § 101(a) [§ 741], 112 Stat. 2681 (codified at 7 U.S.C. § 2279) and 7 CFR § 15 f \_\_\_\_.

**D. Plaintiffs' Claims Are Not Time-Barred -- Congress Waived The Statute Of Limitations For Plaintiffs.**

On October 21, 1998, the President signed into law a waiver of the statute of limitations for precisely the type of civil action plaintiffs now bring. See the Omnibus Consolidated Appropriations Act for Fiscal Year 1999, P.L. 105-277, Div. A, § 101(a) [§ 741], 112 Stat. 2681 (codified at 7 U.S.C. § 2279).

**Sec. 741. Waiver of Statute of Limitations.**

(a) To the extent permitted by the Constitution, any civil action to obtain relief with respect to the discrimination alleged in an eligible complaint, if commenced not later than 2 years after the date

of the enactment of this Act, shall not be barred by any statute of limitations.

\* \* \* \* \*

(d) The United States Court of Federal Claims and the United States District Court shall have exclusive original jurisdiction over—

(1) any cause of action arising out of a complaint with respect to which this section waives the statute of limitations; and

(2) any civil action for judicial review of a determination in an administrative proceeding in the Department of Agriculture under this section.

(e) As used in this section, the term “eligible complaint” means a nonemployment related complaint that was filed with the Department of Agriculture before July 1, 1997 and alleges discrimination at any time during the period beginning on January 1, 1981 and ending December 31, 1996—

(1) in violation of the Equal Credit Opportunity Act (15 U.S.C. § 1691, et seq.) in administering—

(A) a farm ownership, farm operating, or emergency loan funded from the Agricultural Credit Insurance Program Account; or

(B) a housing program established under title V of the Housing Act of 1949; or

(2) in the administration of a commodity program or a disaster assistance program.

(f) This section shall apply in fiscal year 1999 and thereafter.

Defendant does not dispute that the Section 741 waiver of the statute of limitations applies here. Rather, defendant protests that the style of plaintiffs’ discrimination complaints does not fall within the waiver.

Some of the Garcia plaintiffs have filed written complaints; some filed oral complaints. Whether or not the complaints of particular plaintiffs qualify as complaints within the definition of “eligible complaint” covered by the waiver is a fact issue best left for trial.

#### **IV. PLAINTIFFS’ NON-CREDIT CLAIMS UNDER THE ADMINISTRATIVE PROCEDURE ACT**

Non-credit claims represent a very small percentage of plaintiffs’ claims. (How small? Probably around 1%). Plaintiffs’ complaint included non-credit program discrimination because interviews with farmers and ranchers made clear this was a minor (but important) problem. Moreover, the experience in Pigford established that USDA’s institutional racism extended to non-credit benefit programs. In Pigford, a little less than 1%, 185 African-American plaintiffs out of 21,000 have prevailed in non-credit benefit claims<sup>13</sup> (as of September 13, 2000). This is likely to be repeated in Garcia. Hispanic/Latino farmers and ranchers deserve the opportunity to pursue their claims of discrimination against USDA as well.

In the Pigford settlement, non-credit APA claims were included, subject to availability of funds. The ECOA claims (which constitute 99% of Pigford claims) are paid out of the Judgment Fund; non-credit APA claims (1% of claims filed in Pigford) are paid from funds appropriated for the non-credit programs or from the Commodity Credit Corporation fund.

In sum, it is important for the Court and the defendant to understand that 99% of this case is for ECOA claims. Plaintiffs see no reason to abandon the 1% of claims for

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<sup>13</sup> This number does not include those African-American farmers who received both a recovery of \$50,000 and a monetary award for non-credit benefits programs.

discrimination in non-credit programs which arise from exactly the same discrimination on which ECOA claims are based.

**A. Plaintiffs' Claims Are Not Conclusory**

Defendant contends that plaintiffs' claims of discrimination in non-credit benefits programs<sup>14</sup> must be dismissed as a matter of law because they are conclusory. (See Def.'s Mot. to Dismiss at 31-32). Defendant alleges that plaintiffs failed to state a specific allegation to support a claim of discrimination in non-credit benefit programs; what benefits programs might be at issue; whether plaintiffs qualified for these benefits at issue; when and to whom plaintiffs applied for non-credit benefits; the circumstances surrounding the denial of these benefits; the sort of discrimination that occurred; and, how plaintiffs were injured as a result of the denial of non-credit benefits. Id.

Defendant's allegations exemplify defendant's refusal to confront its legacy of discrimination. Moreover, they fly in the face of the First Amended Class Action Complaint which includes a class representative who has suffered discrimination in a non-credit benefits program.

The discriminatory treatment in non-credit benefits programs was imposed upon Hispanic/Latino American farmers and ranchers in a manner as egregious as the treatment visited upon African-American farmers.

For example, "plaintiff and proposed class representative Gloria Morales applied for disaster payments in Fresno, CA, for losses to her grape crop in 1993 caused by a grape disease known as phomopsis. This disease reduced her yield by 69 percent. The

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<sup>14</sup> Contrary to Defendant's interpretation, plaintiffs do not bring the non-credit benefits programs claims under ECOA; plaintiffs bring these claims under the Administrative Procedure Act ("APA"). (See 1<sup>st</sup> Am. Compl. at 40).

Fresno county office told her that such a disease did not exist. However, this disease in fact has become epidemic in California in recent years and a threat to the grape industry statewide, with the state and Federal governments spending millions on its eradication. Also, the county office accused her of fraudulently submitting two claims for payments on the loss. In fact, what happened was that she had submitted her disaster application in September of 1993, then in December of that year checked with the Fresno county office to see where it stood. At that time, she was told that they could not locate the September application, and that she must fill out a second application, which she did. Further, when she appealed the denial of disaster benefits to the county committee, she attempted to have a court reporter transcribe the meeting. However, the county committee refused to allow the reporter to attend the meeting, stating that she had to give notice 7 days in advance. The problem was that they had scheduled the meeting one day in advance.” (1<sup>st</sup> Am. Compl. at 13).

**B. Plaintiffs’ Administrative Procedure Act Claims For Discrimination In Non-Credit Benefits Programs Are Not Barred By The Statute Of Limitations**

Defendant argues that plaintiffs’ claims of discrimination regarding non-credit benefits programs are barred by the statute of limitations. Defendant is wrong. Defendant ignores the plain language of the statute of limitations waiver, which explicitly covers non-credit benefit programs in its definition of “eligible complaint”:

(e) . . . an “eligible complaint” means a complaint that was filed with the Department of Agriculture before July 1, 1997 and alleges discrimination at any time during the period beginning on January 1, 1981, and ending December 31, 1996—

. . . (2) in the administration of a commodity program or a disaster assistance program. 7 U.S.C. §2279.

A disaster assistance program is a non-credit benefit program.

Since the waiver of the statute of limitations applies to APA-based claims, they are on the same footing as plaintiffs' ECOA claims. Therefore, defendant's contentions that plaintiffs' APA-based claims are time-barred or invalid for failure to exhaust administrative remedies are similarly without merit.<sup>15</sup>

V. **DEFENDANT HAS A DUTY TO COMPLY WITH THE CIVIL RIGHTS ACT OF 1964**

Echoing arguments made years ago by those who relentlessly sought to derail civil rights enforcement actions, defendant argues that USDA had no obligation to process complaints because its regulations establish "no standards regarding the manner in which defendant is to process such complaints." (Def.'s Mot. to Dismiss at 41). Defendant, with its narrow, legalistic focus, sees the regulations as a mechanism for USDA to "police itself with respect to civil rights enforcement in all of its programs" – that USDA's implementation of a discrimination complaint process was "voluntary." (Def.'s Mot. to Dismiss at 40).

The objective of the landmark Civil Rights Act of 1964 is to combat the use of narrow legalisms to frustrate those seeking to vindicate their civil rights. It is most certainly not intended to be "voluntary." 42 U.S.C. § 2000d states, inter alia,

No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

USDA, which extends loans, must implement regulations to ensure compliance with 42 U.S.C. § 2000d:

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<sup>15</sup> Defendant also insists that civil rights discrimination claims for APA-based cases are subject to an exhaustion of administrative remedies requirement. For the same reason stated above with regard to ECOA cases, defendant's position here is totally without merit.

Each Federal department and agency which is empowered to extend Federal financial assistance to any program or activity, by way of grant, loan or contract other than a contract of insurance or guaranty, is authorized and directed to effectuate the provisions of section 2000d of this title with respect to such program or activity by issuing rules, regulations, or orders of general applicability which shall be consistent with achievement of the objectives of the statute authorizing the financial assistance in connection with which the action is taken. 42 U.S.C. §2000d-1 (emphasis added).

Acceptance of defendant's narrow, excessively legalistic theory would reduce laws against discrimination to unenforceable expressions of good intent with no force or effect. Accordingly, it is obvious that a policy prohibiting discrimination within the agency without providing for oversight or enforcement obviously makes the prohibition meaningless. USDA must abide by 42 U.S.C. § 2000d.

In short, USDA directed Hispanic/Latinos who felt they had suffered discrimination to complain to the Secretary of Agriculture. Now USDA apparently maintains that it had no obligation to do anything with those complaints -- that mishandling and intentionally destroying complaints of discrimination was somehow not improper. And, defendant would have us believe that the farmer has to file a second complaint to another agency, NAD, after he complains to the Secretary if he really wants to get action on his problem. Even the worst critic of the federal bureaucracy couldn't conceive that such a Kafkaesque system existed at USDA.

#### **VI. PLAINTIFFS' CLAIMS UNDER THE DECLARATORY JUDGMENT ACT**

Defendant's objection to plaintiffs' claims under the Declaratory Judgment Act (DJA) is founded in defendant's erroneous belief that plaintiffs have no cause of action under ECOA or APA. Since plaintiffs do have causes of action under both ECOA and APA, they rightfully assert their rights under DJA.

Plaintiffs ask for declaratory judgment to address their need for non-monetary relief to preclude defendant from continuing its systemic practice of discrimination.

**PLAINTIFFS' OPPOSITION TO DEFENDANT'S  
MOTION TO STRIKE CLASS ACTION ALLEGATIONS**

**I. PLAINTIFFS' PROPOSED CLASS DEFINITION WAS ESTABLISHED IN PIGFORD**

This case represents an effort to combat identical USDA institutional racism on the behalf of Hispanic American farmers and ranchers as was done for Black farmers in Pigford. Apart from the fact that Hispanic Americans have been substituted for Black farmers, in all other respects this case is virtually an exact replica of the Pigford case. The objective of this case, as it was in Pigford, is to definitively root out all remnants of this long-standing institutional racism and to obtain relief for those Hispanic Americans harmed by USDA's racism. Hispanic Americans, in short, want to make common cause with African Americans in reforming USDA to their mutual benefit and in obtaining relief from the harms generated by this institutional racism.

In defendant's Motion, defendant seeks to deny Hispanic farmers the same redress for the harms they suffered from the institutional racism at the hands of the USDA that Black farmers obtained in Pigford. In their effort to derail plaintiffs' claims, defendant does not challenge the existence of this pervasive racism. Rather, defendant concentrates on alleged hyper-technical defects in plaintiff's Complaint. In doing so, defendant ignores the fact that plaintiffs' pleadings closely follow those in Pigford, which successfully prosecuted the identical racially motivated conduct. In Pigford, Judge Friedman certified a class containing more than 21,000 Black farmers. Why these same

legal predicates used successfully in Pigford would become “fundamental defects” when used by Hispanic Americans is incomprehensible.

In its Motion, defendant alleges:

1. Plaintiffs class definition is inconsistent with the true nature of their case. (See Def.’s Mot. to Dismiss at 46).
2. No ascertainable class exists because the Court must resolve factual and legal questions for each potential class member. Id. at 43.
3. Plaintiffs cannot satisfy Fed. R. Civ. P. 23(a). Id. at 43.
4. Plaintiffs cannot satisfy Fed. R. Civ. P. 23(b). Id. at 43 – 44.

## **II. DEFENDANT’S CHALLENGE TO CLASS CERTIFICATION IS PREMATURE**

Local Rule LCvR 23.1(b) requires:

Within 90 days after the filing of a complaint in a case sought to be maintained as class action, unless the court in the exercise of its discretion has extended this period, the plaintiff shall move for a certification under Rule 23(c)(1), Federal Rules of Civil Procedure, that the case may be so maintained. In ruling upon the motion, the court may allow the action to be so maintained, may deny the motion, or may order that a ruling be postponed pending discovery or other appropriate preliminary proceedings. A defendant may move at any time to strike the class action allegations or to dismiss the complaint.

On January 9, 2001, plaintiffs filed Plaintiffs’ Motion For Extension Of Time To Move For Class Certification, requesting a 30-day extension of time from January 11, 2001 to, and including February 12, 2001, to move for class certification. Plaintiffs are prepared to file Plaintiffs’ Motion For Class Certification by February 12, 2001 – within 7 days.

Defendant, although aware that plaintiffs requested only until February 12, 2001 to move for class certification, asks the Court to strike plaintiffs' class action allegations without considering the Memorandum Of Points And Authorities plaintiffs will submit in support of Plaintiffs' Motion For Class Certification. Defendant's challenge to class certification is premature and should be stayed until Plaintiffs' Motion For Class Certification is before the Court.

### **III. CLASS CERTIFICATION STANDARDS**

Plaintiffs' Complaint thoroughly avers class action allegations pursuant to Fed. R. Civ. P. 23, and survives defendant's premature motion to strike class action allegations.

Determining whether an action is maintainable as a class action under Rule 23 is a two-step process. First, the Court must determine whether the proposed class satisfies Fed. R. Civ. P. 23(a) which requires:

(1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately represent the interests of the class.

Fed. R. Civ. P. 23 (a). These four prerequisites limit class claims to those which are fairly encompassed by the claims of the named plaintiffs. General Telephone Co. of Southwest v. Falcon, 457 U.S. 147, 156 (1982).

If Rule 23(a) is satisfied, the Court must then decide whether one or more of the three criteria in Fed. R. Civ. P. Rule 23(b) has been met. The three criteria of Rule 23(b) are:

(1) prosecution of separate actions by or against the class would create a risk of

(A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or

(B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or

(2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or

(3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of the members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties are likely to be encountered in the management of a class action.

Fed. R. Civ. P. 23(b).

#### **IV. PLAINTIFFS' CLASS DEFINITION IS CONSISTENT WITH PLAINTIFFS' CLAIMS**

Defendant deliberately ignores the inconvenient reality that the class is the direct consequence of systemic racism within USDA. Over the past twenty years USDA has experienced a complete breakdown of the checks and balances necessary to detect and eradicate discrimination, out of which grew an environment conducive to racial discrimination both in the administration of USDA farm loan and benefit programs and the implementation of procedures ostensibly created to combat racial discrimination.

Defendant argues that Plaintiffs' class definition is inconsistent with the true nature of their case because the plaintiffs have not prayed for any specific injunctive relief with respect to USDA's failure to process and investigate their administrative civil rights complaint. Defendant is wrong. In plaintiffs' First Amended Class Action Complaint, plaintiffs pray for injunctive relief. For example:

Plaintiffs and the Class pray that this Court declare and determine, pursuant to 28 U.S.C. § 2201, the rights of plaintiffs and Class members under defendant's farm programs including their right to equal credit, and equal participation in farm programs, and their right to full and timely enforcement of racial discrimination complaints.”

(1<sup>st</sup> Am. Compl. at 47).

Plaintiffs and the Class pray defendant's actions be reversed as arbitrary, capricious, an abuse of discretion, and not in accordance with the law, pursuant to 5 U.S.C. § 706(2)(A); contrary to constitutional rights, pursuant to 5 U.S.C. § 706 (2)(B); and in excess of defendant's statutory jurisdiction, pursuant to 5 U.S.C. § 706(2)(C).

(1<sup>st</sup> Am. Compl. at 48).

This case is a mirror image of the pattern of governmental malfeasance at the core of Pigford--same defendant, same discriminatory conduct, and same violation of the law. In Pigford, Black farmers sought and obtained redress for discriminatory harms they suffered at the hands of USDA; here, Hispanic American farmers and ranchers seek to do the same. Moreover, the dual--and equally important--objectives of this case are 1) to obtain through injunctive relief meaningful reforms within USDA to ensure that discriminatory attitudes and practices are eliminated, and 2) to obtain relief for those who have already suffered harm from the discriminatory administration of USDA programs vital to the economic well-being of Hispanic American farmers and ranchers<sup>16</sup>. It is important to remember that such relief is specifically made available by the statute of

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<sup>16</sup> Pigford provided injunctive relief for African-American farmers, including priority status for lending, an affirmative bar against further discrimination, and the creation of the Office of the Monitor to oversee that the Consent Decree is properly executed. See Consent Decree at 19-20. Because USDA's failure to process discrimination complaints was one manifestation of the agency's endemic racism, the injunction against further discrimination directly affects the complaint processing system.

limitations waiver Congress passed and the President signed into law October 21, 1998.

See 7 U.S.C. § 2279.

Accordingly, plaintiffs' proposed class is defined as:

[A]ll Hispanic American participants in FSA's farm programs who petitioned – or would have petitioned had they not been induced, tricked, or otherwise prevented from timely filing a complaint – USDA at any time between January 1, 1981, and present, for relief from acts of racial discrimination visited on them as they tried to participate in such farm programs, and who, because of the failings in the USDA civil rights complaint processing system . . . were denied equal protection under the laws of the United States and deprived of due process in the handling of their discrimination complaints. (1<sup>st</sup> Am. Compl. at 42).

**V. A DEFINITE AND ASCERTAINABLE CLASS EXISTS**

While Rule 23 does not formally require plaintiffs to establish that a class exists, “this is a common-sense requirement and courts routinely require it.” Pigford v. Glickman, 182 F.R.D. 341, 346 (D.D.C. 1998). Showing the existence of the class is “not designed to be a particularly stringent test;” plaintiffs must establish that “the general outlines of the membership of the class are determinable at the outset of litigation.” Id.

Defendant argues plaintiffs' class definition is “unmanageably broad,” citing Williams v. Glickman, Civil Action No. 95-1149 (TAF) (D.D.C. Feb. 14, 1997). (Def.'s Mot. to Dismiss at 52). Defendant's reliance on Williams is misplaced. The proposed class in Garcia does not parallel the Williams class; rather, it parallels the class certified in Pigford.

In Pigford, the Court found “counsel and putative class members can easily ascertain whether they are members of the class,” Pigford, 182 F.R.D. at 347, certified and defined as:

All African-American farmers who (1) farmed between January 1, 1983 and February 21, 1997; and (2) applied, during that time period, for participation in a federal farm program with USDA, and as a direct result of a determination by USDA in response to said application, believed that they were discriminated against on the basis of race, and subsequently filed a written discrimination complaint with USDA. Id. at 345.

The Pigford Consent Decree which the Department of Justice signed contains an almost identical definition of the class:

All African American farmers who (1) farmed, or attempted to farm, between January 1, 1981, and December 31, 1996; (2) applied to the United States Department of Agriculture (USDA) during that time period for participation in a federal farm credit or benefit program and who believed that they were discriminated against on the basis of race in USDA’s response to that application; (3) filed a discrimination complaint on or before July 1, 1997, regarding USDA’s treatment of such farm credit or benefit application. Consent Decree at 5.

The Garcia class definition mirrors the class certified in Pigford.<sup>17</sup> The Pigford class differs from the Garcia class only in the race of the members. The relevant timeframe is slightly different to reflect the difference as to when the cases were filed – 1997 versus 2000.

Defendant maintains that “the scope of ‘petitioned’ is so broad as to prevent any ready determination of a given individual’s membership in the class.” (Def.’s Mot. to Dismiss at 50). The Pigford Consent Decree defined “discrimination complaint” as:

a communication from a class member directly to USDA, or to a member of Congress, the White House, or a state, local or federal official who

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<sup>17</sup> The Garcia class definition, like the class definition approved in the Pigford Consent Decree, does not require complaints to be written. Approving the Consent Decree, Judge Friedman found the change in the definition in no way “affects the Court’s analysis or conclusion that the case properly is certified as a class action.” Pigford, 185 F.R.D. at 93.

forwarded the class member's communication to USDA, asserting that USDA had discriminated against the class member on the basis of race in connection with a federal farm credit transaction or benefit application. Id. at 4-5.

Defendant knows from Pigford that most farmers complain of discrimination orally. They complain to USDA county supervisors, and to their trusted government officials such as U.S. Representatives and Senators. Pigford also uncovered a substantial body of written discrimination complaints filed at the county level that had never been forwarded to Washington, D.C. The same scenario is likely in Garcia.

Plaintiffs contend that the class should include any Hispanic American whose complaint, regardless of its form, put USDA on notice--a standard applied in Pigford. This includes oral and written complaints to USDA employees, members of Congress, and the White House. Considering the findings of the CRAT and OIG Reports, it is disingenuous for defendant to argue that complaints in forms other than in writing would not be sufficient "enough to trigger USDA's complaint process." (Def.'s Mot. to Dismiss at 50).

This class definition served justice well in Pigford, where a very small percentage of black farmers had copies of their written complaints. Instead, most black farmers provided written affidavits signed, pursuant to 17 U.S.C. § 1946, by a non-family member with first-hand knowledge of the complaint. More than 21,000 families were determined eligible to and did submit claims. About 80% of the 21,000 had made oral complaints. Given that the class definition in Pigford proved to be a fair reflection of reality, there is every reason to believe it will be equally appropriate in this case.

Plaintiffs proposed class includes "Hispanic American participants in FSA's farm programs who ... would have petitioned had they not been induced, tricked or otherwise

prevented from timely filing a complaint.” (1<sup>st</sup> Amend. Compl. at 42). Defendant states that “[s]uch a definition is only limited by plaintiffs’ imagination.” (Def.’s Mot. to Dismiss at 50). This element of the proposed class definition does not broaden the class definition that defendant agreed to in the Pigford settlement. Plaintiffs propose a subclass like the subclass in Pigford, which precisely mirrors the group of claimants in Pigford that tolled ECOA’s statute of limitations, consistent with Irwin v. U.S. 498 U.S. 89 (1990).<sup>18</sup> (See Consent Decree at 11 – 12, attached hereto as Exhibit 5). In Pigford, claimants were included as class members if they “(i)... actively pursued his judicial remedies by filing a defective pleading” in a timely manner; (ii) were “induced or tricked by USDA’s misconduct into allowing the filing deadline ... to pass;” or (iii) “prevented by other extraordinary circumstances beyond his control from filing a [timely] complaint.” Consent Decree at 11 –12. The percentage of claimants in Pigford who were eligible to toll the statute of limitations was extremely small.

In a 1998 letter, defendant’s own Office of Civil Rights informed complainants that the time frame for filing a complaint would be tolled upon a showing that “the failure to file was based on good cause.” (See letter from USDA, Office of Civil Rights, dated July 20, 1998, attached hereto as Exhibit 6). According to the letter, “good cause” includes those who were “actively misled [ ] into believing that there was no remedy”; “failed to tell [ ] how to file a formal complaint”; and “other unique circumstances generated by agency action [that] have adversely affected the complainant.” USDA

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<sup>18</sup> In Irwin, the Court allowed equitable tolling where “the claimant has actively pursued his judicial remedies by filing a defective pleading during the statutory period or where the complainant has been induced or tricked by his adversary’s misconduct into allowing the filing deadline to pass.” Irwin, 498 U.S. at 96.

determined that if a complainant could demonstrate “good cause” for not timely filing, his complaint would be treated as if it were timely filed.

Defendant agreed to this same type of tolling provision in the Pigford settlement. Plaintiffs propose a subclass to include Hispanic American class members who, like claimants in Pigford, demonstrate good cause for not timely filing discrimination complaints.

Defendant mistakenly proposes that the Court would have to “engage in an individualized inquiry into the handling of each claimant’s complaint and its underlying merits, simply to determine class membership.” (Def.’s Mot. To Dismiss at 51). Defendant engaged in a nationwide policy of discrimination that violated the due process and equal protection rights of all class members by discriminating in the administration of its farm programs, and by dismantling its civil rights enforcement division in 1983 – thereby depriving plaintiffs of meaningful opportunity to secure relief from discrimination for at least the past 18 years. (See 1<sup>st</sup> Am. Compl. at 6-7). Therefore, the Court could make a single determination of liability for the entire class as to the handling of claimants’ complaints – just as the court did in Pigford.

## **VI. PLAINTIFFS MEET THE REQUIREMENTS OF RULE 23(a)**

### **A. Plaintiffs Have Established Numerosity**

Rule 23(a)(1) requires that the Class be “so numerous that joinder of all [class] members is impracticable.” Fed. R. Civ. P. 23 (a)(1). The precise number and identity of class members need not be shown for certification of the class; good faith and common sense estimates suffice. Ashe v. Board of Elections in the City of New York, 124 F.R.D. 45, 47 (E.D.N.Y. 1989).

Defendant disputes the numerosity of plaintiffs' class with a sweeping dismissal of decades of discrimination suffered by minority farmers at the hands of USDA by concluding "it is immediately apparent that plaintiffs' assessment amounts to nothing more than a random, yet inflated guess." (Def.'s Mot. to Dismiss at 54). Defendant cites the OIG Phase II Report issued in September 1997 that indicate a total of "only 474 pending discrimination complaints for all races against FSA." The period covered by the lawsuit spans almost 20 years. A snap-shot of one year (1997), near the end of that time, provides little insight into the true number of potential class members that suffered discrimination when they participated or attempted to participate in USDA farm programs during the whole period. Whatever the actual number turns out to be, it is indisputable that it will be in the thousands.

The government acknowledges that "[m]inority farmers have lost significant amounts of land . . . as a result of discrimination by FSA programs and of its predecessor agencies, ASCS and FmHA" (CRAT Report at 30) but refuses to acknowledge that USDA failed for more than 14 years to process civil rights complaints. The CRAT Report described USDA record keeping on discrimination complaints as "virtually nonexistent." CRAT Report at 24. Defendant does not dispute this finding.

The OIG Report (Phase 1) found that USDA had no reliable method of processing complaints, had a large backlog of unresolved cases, and could not locate files on others. See OIG Report at 7-8. Defendant does not dispute this finding.

OIG determined that the CR&SBUS report of complaints contained "errors and inaccurate information," and found the case files "generally disorganized." Id. at 7. Defendant does not dispute this finding.

For more than a decade, FSA's complaint process lacked "integrity, direction and accountability." Id. at 6. Defendant does not dispute this finding.

OIG found the Office of Operations, Civil Rights Enforcement and Adjudication lacked "controls . . . to monitor and track discrimination complaints." Id. at 9. Defendant does not dispute this finding.

To date, OIG has produced seven reports documenting USDA's continuing failure to remedy its egregious flaws in processing civil rights complaints. USDA has failed to implement the recommendations of OIG and its Congressional Oversight Committees.

For example, in a report released September 30, 1998, OIG found the Office of Civil Rights [CR] "still in disarray." OIG Report V at i. (emphasis added). The report noted "with considerable concern that after 20 months, CR [had] made virtually no progress in implementing the corrective actions [they] thought essential to the viability of its operations. Id. In OIG Report VII, OIG again found ". . . no significant changes in how complaints [were] processed." OIG Report VII at i. Defendant does not dispute this finding.

**B. There Are Questions Of Law And Fact Common To The Class**

The proposed class identifies a finite and common group: (1) Hispanic Americans; (2) farmers or ranchers; (3) who suffered discrimination in attempts to participate in federal farm programs; (4) who complained about discrimination or would have complained about discrimination had they not been induced, tricked or otherwise prevented from timely filing a complaint; and (5) whose complaints USDA failed to properly process and investigate.

The purpose of a class action is to conserve the resources of both the courts and parties by permitting an issue potentially affecting every class member to be litigated in an economical fashion. Jenkins v. Raymark Industries, Inc., 782 F.2d 468, 471 (5<sup>th</sup> Cir. 1986) (quoting General Telephone Co. of Southwest v. Falcon, 457 U.S. 147, 155 (1982)).

Commonality requires only that resolution of the common questions affect all or a substantial number of the class members. See Stewart v. Winter, 669 F.2d 328, 335 (5<sup>th</sup> Cir. 1982). Plaintiffs meet the commonality test “where there is at least one issue, the resolution of which will affect all or a significant number of the putative class members.” Pigford, 182 F.R.D. at 348 (quoting Lightbourn v. County of El Paso, 118 F.3d 421, 426 (5<sup>th</sup> Cir. 1997), *cert. denied*, 118 S.Ct. 700 (1998)).

Defendant’s dismissal of the central issue of USDA’s “institutional and systematic course of conduct in denying civil rights complainants due process of law in the handling of their [civil rights] complaints” as a “phony issue” is disgraceful and ignores the plain language of plaintiffs’ Complaint. (Def.’s Mot. to Dismiss at 54-55). That issue is the heart of this case, and it provides a question of law and fact equally applicable to every member of that finite and common group that is the class described in the Complaint.

Common issues of law and fact exist as to all members of the class. Defendant overlooks that plaintiffs list seven listed common legal and factual questions in the Complaint. They are:

- (a) Whether and when defendant’s officials discriminated against plaintiffs and Class members in failing to process discrimination complaints;

(b) Whether and when defendant's officials discriminated against plaintiffs and Class members in granting credit or other program benefits;

(c) Whether defendant's officials failed to provide plaintiffs and Class members equal opportunity for and access to credit and other program benefits;

(d) Whether defendant's institutional and systematic failure to provide plaintiffs and Class members equal opportunity for and access to credit or other program benefits was arbitrary, capricious, an abuse of discrimination, and in excess of statutory jurisdiction;

(e) Whether defendant's actions violated plaintiffs' and Class members' rights under the Equal Credit Opportunity Act, 15 U.S.C. § 1691(a);

(g) Whether plaintiffs and Class members are entitled to (1) a declaration of their eligibility to receive damages or other monetary relief, (2) costs, (3) attorneys' fees and (4) interest from the date they should have been paid to the actual date of payment;

(h) How any and all payments the plaintiffs are declared eligible to receive should be equitably allocated among the Class. (1<sup>st</sup> Am. Compl. at 44-45).

Defendant also argues that no commonality can exist among plaintiffs because "some complaints will have not been acted upon in any fashion, some will have been investigated but not yet decided, some will have been decided in the putative class members favor, and some will have been decided against the complainants." (Def.'s Mot. to Dismiss at 55). The identical issue arose in Pigford.

In Pigford, Judge Friedman noted that the complainants fell into three categories; those whose complaints were resolved; those whose complaints were still pending; and,

those whose complaints were lost. The Court resolved this issue through the use of subclasses. See Pigford, 182 F.R.D. at 349. Judge Friedman stated:

The claims of these three different groups do present slightly different issues, but the class action rule does not require commonality on every fact or every issue, Franklin v. Barry, 909 F.Supp. at 30, and the Court finds that there is sufficient similarity in the claims presented by class members that the differences that do exist are best addressed through the subclass mechanism rather than by abandoning the class mechanism altogether. Id. at 348

This cogent analysis applies with equal force here. Similar subclasses could be created in Garcia.

Defendant further asserts that “‘across-the-board’ claims of discrimination may not be certified, absent ‘specific presentation’ of a discriminatory policy of practice applicable to the entire class.” (Def.’s Mot. to Dismiss at 58). The Pigford Court emphasized,

The government overlooks the central fact that the unifying pattern of discrimination at issue in this case is the USDA’s failure properly to process complaints of discrimination, without regard to the program that triggered the discrimination complaint. Id. (Emphasis added.)

The government contends that an allegation that class-wide racial discrimination has occurred is insufficient by itself to establish the right to proceed as a class action. . . . Plaintiffs have alleged not just class-wide racial discrimination, but that the USDA for a period of fourteen years systematically failed to properly process written complaints of discrimination filed by African-American farmers. It is the allegation of that discriminatory practice that defines this class and that entitles plaintiffs to class certification. Pigford, 182 F.R.D. at 349, fn.5.

Defendant argues that the “[e]ven more individualized” claims stem from those “administrative complaints” that were never filed but would have been had “the complainants not been ‘tricked’ or ‘induced.’” (Def.’s Mot. to Dismiss at

56). Plaintiffs propose a subclass in Garcia that mirrors similarly situated

claimants in Pigford:

“...[those] who did not file a discrimination complaint until after July 1, 1997 [became] entitled to relief under [the] Consent Decree by demonstrating, consistent with Irwin v. U.S., 498 U.S. 89 (1990) that: “(i)... actively pursued his judicial remedies by filing a defective pleading” in a timely manner; (ii) were “induced or tricked by USDA’s misconduct into allowing the filing deadline ... to pass;” or (iii) “prevented by other extraordinary circumstances beyond his control from filing a [timely] complaint.” Consent Decree at 11.

### **C. Plaintiffs Claims Are Typical Of The Class**

Typicality “is satisfied if each class member’s claim arises from the same course of events that led to the claims of the representative parties and each class member makes similar legal arguments to prove defendant’s liability.” Pigford, 182 F.R.D. at 349, (citing Baby Neal for and by Kanter v. Casey, 45 F.3d 48, 58 (3d Cir. 1994)). Defendant argues that plaintiffs’ claims are not typical of the proposed class because whether or not discrimination occurred “depends upon localized and individualized circumstances.” (See Def.’s Mot. To Dismiss at 60). Defendant argues that “no ascertainable class exists, nor is there a challenge to an identifiable common policy or practice that affects all class members.” Id.

Here, as in Pigford, plaintiffs’ claims arise from the same overriding, undeniable reality: USDA discrimination in the administration of federal farm programs, and failure to process civil rights complaints. See Pigford, 182 F.R.D. at 349.

### **D. The Class Has Fair And Adequate Representation**

Determining adequacy of class representation is “primarily a factual issue that is best left for determination by the district court.” Kirkpatrick v. J.C. Bradford & Co., 827 F.2d 718, 728 (11<sup>th</sup> Cir.1987), cert. denied, 485 U.S. 959, 108 S.Ct. 1220, 1221, 99

L.Ed.2d 421 (1988); see also 7A Charles A. Wright, Arthur R. Miller & Mary Kay Kane, Fed. Practice & Procedure §1765 at 271. “To satisfy the adequacy test, the named representative of a class need only be adequate and need not be the best of all possible plaintiffs.” Ashe v. Board of Elections in City of New York, 124 F.R.D. 45, 50 (E.D.N.Y. 1989).

Defendant argues that plaintiffs do not fairly and adequately represent the class as required by Fed. R. Civ. P. 23(a)(4). Defendant argues that the putative class representatives cannot adequately represent the class because they will be at odds with class members depending on whether they ever filed complaints and how those complaints were resolved.

The named representatives do not have antagonistic or conflicting interests with the unnamed members of the class and they will vigorously prosecute the interests of the class through qualified counsel. See Twelve John Does v. District of Columbia, 117 F.3d 571 (D.C. Cir. 1997); see also Pigford, 182 F.R.D. at 351. Each of the Garcia class representatives was a victim of USDA’s institutional racism; each applied to participate in federal farm programs and was discriminated against; USDA failed to address discrimination complaints registered by each. No conflict of interest exists between class representatives and the class as a whole.

Lead Counsel Alexander J. Pires, Jr. and Phillip L. Fraas, and Of Counsel J.L. Chestnut, are Lead Counsel in Pigford, a landmark civil rights class action that has provided restitution for thousands of minority farmers and their families.<sup>19</sup>

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<sup>19</sup> In his Memorandum Opinion And Order of January 4, 2001, Judge Friedman characterizes the Consent Decree achieved in Pigford: “As Class Counsel, government counsel and movant’s counsel all note in their briefs, the Consent Decree approved by the Court on April 14, 1999, is a

Plaintiffs and their Counsel will fairly and adequately protect the interests of the members of the Class.

**VII. PLAINTIFFS' PROPOSED CLASS ACTION SATISFIES THE REQUIREMENTS OF RULE 23(b)**

**A. The Proposed Class Action Satisfies The Requirements Of Rule 23(b)(1)**

Rule 23(b)(1) is satisfied when there is a risk that separate actions will be brought, and that allowing separate actions to proceed would expose the party opposing the class to inconsistent adjudications. Fed. R. Civ. P. 23(b)(1)(A). 7A Charles A. Wright, et al. Federal Practice and Procedure, § 1773. There is little doubt that multiple separate actions will be initiated if a class is not certified here – resulting in a high probability of inconsistent adjudications — ordering defendant to take actions that could not be performed consistently with each other, thus forcing defendant to choose which orders to obey and to disregard, under threat of contempt. See Boggs v. Divested Atomic Corp. 141 F.R.D. 58, 67 (S.D. Ohio 1991).

**B. The Proposed Class Action Satisfies The Requirements Of Rule 23(b)(2)**

Rule 23(b)(2) allows an action to be maintained as a class action if the party opposing the class has acted in a manner generally applicable to the class, thus making entry of declaratory relief appropriate. As described above, defendant has acted on grounds generally applicable to the Class necessitating final declaratory relief with respect to the Class as a whole. Defendant's failure to enforce the civil rights law (beginning in 1983) applies to each member of the Class, without exception.

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grand, historical first step toward righting the wrongs visited upon thousands of African American farmers for decades by the United States Department of Agriculture.” Opinion at 8.

Plaintiffs seek injunctive and declaratory remedies. Plaintiffs seek a declaratory judgment defining “the rights of plaintiffs and class members under defendant’s farm programs including their right to equal credit, participation in farm programs, and their right to full and timely enforcement of racial discrimination complaints,” and an injunction reversing as “arbitrary, capricious, and abuse of discretion” and contrary to law defendant’s acts denying class members credit and other benefits. (See 1<sup>st</sup> Am. Compl. at 47-48). If granted, the requested injunctive and declaratory relief will have a significant impact on how USDA processes its complaints and how it handles discrimination complaints currently proceeding through the administrative mechanism.

Plaintiffs claims are additionally or alternatively certifiable under the provisions of Fed. R. Civ. P. 23(b)(1) and 23(b)(2) because:

(a) The prosecution of separate actions by thousand of Hispanic farmers and ranchers would create a risk of inconsistent or varying adjudications with respect to individual Class members, thus establishing incompatible standards of conduct for defendant;

(b) The prosecution of thousands of separate actions would also create a risk of adjudications that would be dispositive of the interests of the other Class members or would impair the ability of such non-party Class members to protect their interests; and

(c) USDA has acted on grounds generally applicable to the Class, thereby making appropriate (as in Pigford) final declaratory relief with respect to the Class as a whole.

**C. The Proposed Class Action Satisfies The Requirements Of Rule 23(b)(3)**

For an action to be maintained as a class action, Rule 23(b)(3) requires that two findings be made: (1) that common questions of law and fact predominate

(“predominance”); and (2) that a class action is superior to other forms available for fair and efficient adjudication (“superiority”). “Predominance” means that resolution of common liability issues should affect “all or a substantial number of class members”; it does not require that all issues be common to all parties. Jenkins v. Raymark Industries, Inc., 782 F.2d 465, 472 (5<sup>th</sup> Cir. 196); Watson v. Shell Oil Co., 979 F.2d 1014, 1022 (5<sup>th</sup> Cir. 1992).

The ability of the class action to bring all claimants together for adjudication of their common issues in a single proceeding outweigh the logistical demands of class treatment, particularly since the class mechanism “reduces the systemic burden” on the court system and litigants by reducing the time and costs which must otherwise be spent in replicating the same case thousands of times over. Watson, 979 F.2d at 1023. Moreover, this Court has seen its successful use in Pigford.

#### **1. Common Issues Of Fact And Law Predominate**

In order to “predominate,” common issues must constitute a significant part of the individual cases. Jenkins, 782 F.2d at 472. See also Watson, 979 F.2d at 1022; In re Asbestos School Litigation, 104 F.R.D. 422, 431-32. Examination of the central elements of plaintiffs’ claims illustrates that the common issues of fact and law constitute a significant part of all Class members’ claims and, therefore, predominate over any question that might affect only individual class members.

While individual damage issues are invariably present in all class actions, most courts recognize that they cannot be exploited to preclude class treatment. Id. at 432. The courts have repeatedly held that where, as here, proof of liability and general causation can be made on a class-wide basis, common issues are held to predominate

over such individual issues as the varying degrees of damages suffered by claimants. See e.g., Jenkins, 782 F.2d at 473.

Moreover, when a class action seeks both injunctive and monetary relief it is appropriate for the court to grant class certification under Rule 23(b)(2) for purposes of determining liability, and pursuant to 23(b)(3) for determining remedy. See e.g., Williams v. Empire Funding Corp., 183 F.R.D. 428 (E.D.Penn. 1998) (“conditionally certifying the general class seeking a declaration of right . . . before turning to certification of a class or classes pursuant to Rule 23(b)(3) for the damage claims . . . is appropriate for case management.”); Pigford, 182 F.R.D. at 351 (citing Eubanks v. Billington, 110 F.3d 87, 96 (D.C. Cir. 1997) (in class action seeking both injunctive and monetary relief, court may adopt a “hybrid” approach and certify (b)(2) class as to claims for injunctive or declaratory relief and certify (b)(3) class at monetary relief stage)).

**a. Common Issues In Plaintiffs’ Declaratory Judgment Claims**

Under the Declaratory Judgment Act, plaintiffs and the class “pray that this Court declare and determine, pursuant to 28 U.S.C. § 2201, the rights of plaintiffs and Class members under defendant’s farm programs including their right to equal credit, and equal participation in farm programs, and their right to full and timely enforcement of racial discrimination complaints”. (See 1<sup>st</sup> Am. Compl. at 47). Whether defendant so violated plaintiffs’ and class members’ civil and due process rights common questions of fact and law that are at the core of all plaintiffs’ claims, and will dominate all other issues at trial.

**b. Common Issues In Plaintiffs’ APA Claims**

Plaintiffs allege that defendant’s course of conduct was arbitrary and capricious and not in accordance with the law, particularly the due process clause of the Constitution

and the Civil Rights Act of 1964. This course of conduct is a common issue that predominates over any secondary issues in the APA aspects of the case.

**c. Common Issues In Plaintiffs' ECOA Claims**

Plaintiffs claim that defendant's acts of denying plaintiffs and Class members credit and credit services and systematically failing to properly process their discrimination complaints was racially discriminatory and contrary to the requirements of the Civil Rights Act of 1964, the Equal Credit Opportunity Act and, as to non-credit claims, the Administrative Procedures Act. Plaintiffs will provide documentary and testimonial evidence that the failures of defendant prevented members of the Class from proceeding with their constitutional due process right to have their discrimination complaints properly reviewed and enforced.

**2. Class Action Is The Superior Method To Adjudicate Plaintiffs' Claims**

Rule 23(b)(3) directs the Court to determine that a "class action is superior to other available methods for fair and efficient adjudication of the litigation." Fed. R. Civ. P. 23(b)(3). Class actions are the superior method for the fair and efficient adjudication of numerous claims arising from a wrong of defendant that affects thousands of individuals.

The "procedural device of a . . . class action was designed not solely as a means for assuring legal assistance and the vindication of small claims but, rather, to achieve the economics of time, effort, and expense." Sterling v. Velskol C. Corp., 855 F.2d 1188, 1196 (6<sup>th</sup> Cir. 1988). Accordingly:

numerous . . . courts have recognized the increasingly insistent need for a more efficient method of disposing of a large number of lawsuits arising out of a single disaster or single course of conduct. In mass tort accidents, the factual and legal issues of the defendant's liability do not differ

dramatically from one plaintiff to the next. No matter how individualized the issue of damages may be, these issues may be reserved for individual treatment with the question of liability as a class action . . . . Where the defendant's liability can be determined on a class-wide basis because the cause of the disaster is a single course of conduct which is identical for each of the plaintiffs, class action may be the best suited vehicle to resolve such a controversy.

Id. at 1197. Under such circumstances, there is no justification for allowing defendant to put similarly situated plaintiffs (some 20,000 in number) to the repetitive and wasteful burden of separate proofs. Nor should the Court system itself stand for such a wholly unjustified waste of scarce judicial resources. Boggs, 141 F.R.D. at 58 ("it would be neither efficient nor fair to anyone, including defendants, to force multiple trials to hear the same evidence and decide the same issues").

Plaintiffs' claims concern USDA's systematic discrimination against Hispanics attempting to participate in farm programs, and USDA's failure to investigate civil rights complaints arising from this discrimination. These issues are intertwined and inseparable. The nature of the claims allows the Court to make a single judgment on USDA's liability for its course of conduct. Thus, this dispute can be resolved in efficient broad strokes through a class action instead of through duplicative individual lawsuits.

Moreover, the superiority of plaintiffs' proposed class action over individual lawsuits is reflected in Congress's approach to the problem. A unanimous Congress passed, and the President signed, legislation waiving the statute of limitations to provide due process for a specific class – minority farmers who faced discrimination from USDA from 1981 to 1997. One hundred Senators and 435 members of the House of Representatives, the President of the United States, and all decent people recognize that minority farmers as a class have been discriminated against, mistreated and denied due process of law by USDA. This class includes the black farmers in Pigford and the

Hispanic farmers in this case, who are on the same footing and who now seek class certification as occurred in Pigford, and a trial.

In Pigford, over 21,000 farmers in the class have participated in the Consent Decree – obtaining a review of their discrimination complaints, as well as, for most, injunctive and financial relief. This case seeks the same justice for Hispanic farmers.

No meaningful progress in erasing racism within USDA can be accomplished unless the class established by Congress is provided redress. An important step in that endeavor was achieved in Pigford; justice dictates that Hispanic farmers and ranchers be permitted to continue that process.

### CONCLUSION

For the foregoing reasons, Defendant's Motion To Dismiss And To Strike Class Action Allegations should be denied.

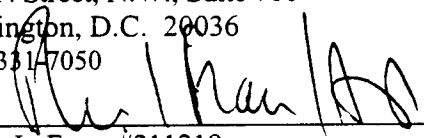
### PLAINTIFFS REQUEST ORAL ARGUMENT.

Respectfully submitted,

February 5, 2001

By:   
\_\_\_\_\_

Alexander J. Pires, Jr. #185009  
CONLON, FRANTZ, PHELAN & PIRES, LLP  
1818 N Street, N.W., Suite 700  
Washington, D.C. 20036  
(202) 331-7050

By:   
\_\_\_\_\_

Phillip L. Fraas #211219  
TUTTLE, TAYLOR & HERON  
1025 Thomas Jefferson Street, N.W.  
Washington, D.C. 20007  
(202) 342-1300

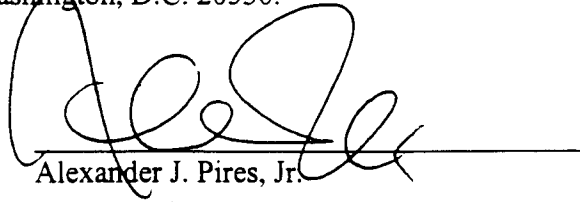
Lead Counsel for Plaintiffs

### Of Counsel:

J. L. Chestnut, Jr.  
CHESTNUT, SANDERS, SANDERS, PETTAWAY, CAMPBELL & ALBRIGHT, P.C.  
1 Union Street  
Selma, Alabama 36701  
(334) 875-9264

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Plaintiffs' Opposition To Defendant's Motion To Dismiss And To Strike Class Action Allegations was hand delivered, this 5<sup>th</sup> day of February, 2001 to Jean Lin, United States Department of Justice, Civil Division, 901 E Street, N.W., Room 866, Washington, D.C. 20530.



Alexander J. Pires, Jr.

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

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GUADALUPE L. GARCIA, JR., et al., :  
 :  
Plaintiffs, : Case No. 1:00CV02445  
 :  
v. : Judge: Louis F. Oberdorfer  
 :  
DAN GLICKMAN, Secretary :  
THE UNITED STATES DEPARTMENT :  
OF AGRICULTURE :  
 :  
Defendant. :

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**ORDER**

The Court, having considered Defendant's Motion To Dismiss And To Strike Class Action Allegations, and the Memorandum In Support thereof, and Plaintiffs Opposition thereto,

NOW THEREFORE, it is by the Court ORDERED that Defendant's Motion To Dismiss And To Strike Class Action Allegations, and the Memorandum In Support be and is hereby DENIED.

Dated: \_\_\_\_\_, 2001

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HONORABLE LOUIS F. OBERDORFER  
UNITED STATES DISTRICT COURT JUDGE

Copies to:

Alexander J. Pires, Jr.  
Conlon, Frantz, Phelan & Pires, LLP  
1818 N Street, N.W., Suite 700  
Washington, DC 20036

Jean Lin  
Civil Division – Room 866  
Department of Justice  
P.O. Box 883  
Washington, DC 20044

Phillip L. Fraas  
Tuttle, Taylor & Heron  
1025 Thos. Jeff. St., NW, Suite 407W  
Washington, DC 20007

*For Defendant*

*For Plaintiffs*