

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

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DISTRICT OF COLUMBIA

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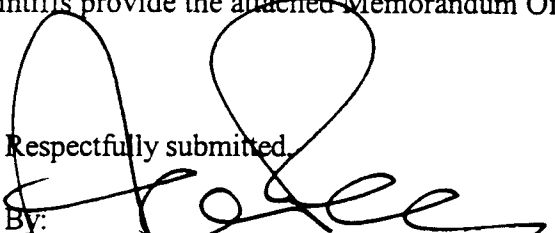
GUADALUPE L. GARCIA, JR., et al.,	:		
Plaintiffs,	:	Case No. 1:00CV02445 (LFO)	NANCY M. MAYER-WHITTINGTON CLERK
v.	:	Judge: Louis F. Oberdorfer	
DAN GLICKMAN, Secretary THE UNITED STATES DEPARTMENT OF AGRICULTURE	:	ORAL ARGUMENT REQUESTED  (Defendant's Response Stayed Until Further Order Of The Court)	
Defendant.	:		

**PLAINTIFFS' MOTION FOR  
CERTIFICATION OF CLASS**

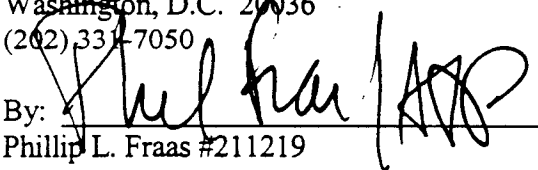
Come Now plaintiffs and move this Court, pursuant to Fed. R. Civ. P. 23, for certification of class. In support thereof, plaintiffs provide the attached Memorandum Of Points And Authorities.

Respectfully submitted,

February 12, 2001

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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 (LFO)  
v. : Judge: Louis F. Oberdorfer  
DAN GLICKMAN, Secretary :  
THE UNITED STATES DEPARTMENT :  
OF AGRICULTURE :  
Defendant. :

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**ORDER**

For the reasons stated in the opinion issued this same day, the Court finds that plaintiffs have established that they meet the prerequisites for class certification under Rule 23(a) of the Federal Rules of Civil Procedure and that plaintiffs have established that the class properly is certified pursuant to Rule 23(b) of the Federal Rules of Civil Procedure. Accordingly, it is hereby

ORDERED that plaintiffs' motion for class certification is GRANTED; it is

FURTHER ORDERED that the class is defined as follows:

All Hispanic American farmers who (1) farmed between January 1, 1981, and \_\_\_\_\_; 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 they were discriminated against on the basis of race, ethnicity, or national origin, and (3) petitioned USDA during that time for relief from acts of discrimination visited upon them as they tried to participate in such farm programs.

FURTHER ORDERED that the above class is divided into four subclasses, defined as follows:

- Subclass I: Hispanic American farmers, who have a file with Defendant, but did not receive a written determination from defendant in response to their discrimination complaint;
- Subclass II: Hispanic American farmers, who have a file with defendant, who received a written determination from Defendant in response to their discrimination complaint but who maintain that the written determination from Defendant was not reached in accordance with law;
- Subclass III: Hispanic American farmers, who do not have a file with Defendant because their discrimination complaints were, destroyed, lost or thrown away by Defendant; and
- Subclass IV: Hispanic American farmers who (a) actively pursued their judicial remedies by filing a defective pleading; (b) were induced or tricked by USDA's misconduct into allowing the filing deadline to pass; or (c) were prevented by other extraordinary circumstances beyond their control from filing a timely complaint.

SO ORDERED.

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

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HONORABLE LOUIS F. OBERDORFER  
UNITED STATES DISTRICT COURT JUDGE

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FOR THE DISTRICT OF COLUMBIA

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THE UNITED STATES DEPARTMENT :  
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Defendant. :

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**MEMORANDUM OF POINTS AND AUTHORITIES  
IN SUPPORT OF PLAINTIFFS' MOTION FOR  
CERTIFICATION OF CLASS**

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Exhibit B      CRAT Report February 1997

Exhibit C      Statute of Limitations Waiver 7 U.S.C. § 2279

Exhibit D      Pigford v. Glickman Consent Decree

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Plaintiffs, : Case No. 1:00CV02445 (LFO)  
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v. : Judge: Louis F. Oberdorfer  
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DAN GLICKMAN, Secretary :  
THE UNITED STATES DEPARTMENT :  
OF AGRICULTURE :  
 :  
Defendant. :

---

**MEMORANDUM OF POINTS AND AUTHORITIES  
IN SUPPORT OF PLAINTIFFS' MOTION FOR  
CERTIFICATION OF CLASS**

**I. INTRODUCTION**

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 and/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 willfully 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, inter alia, 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. USDA's 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 September 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. The Second Amended Class Action Complaint ("Complaint") was filed on February 6, 2001, listing 98 plaintiffs, a proposed class of 20,000, and a claim of damages of \$20,000,000,000.

## **II. THE PARTIES**

Each of the 98 plaintiffs and proposed class representatives is a Hispanic/Latino farmer or rancher who (a) timely applied for loans and/or program payments with defendant during the period January 1, 1981, to present, and was the subject of willful and continuous racial discrimination, and (b) timely filed – or would have filed had they not been induced, tricked, or otherwise prevented from timely filing – (in writing or orally) a complaint with defendant, which complaint was never acted upon pursuant to applicable law, causing the farmer substantial damages.<sup>1</sup>

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<sup>1</sup> While there are presently 98 plaintiffs, based upon counsel's experience in the parallel cases of Pigford v. Glickman (the Black farmers' case) and Keepseagle v. Glickman (the Native American farmers' case), we expect that there will be somewhere between 300-700 named plaintiffs by the time this motion is argued.

### **III. THE OIG/CRAT/GAO INVESTIGATIONS**

After years of abuse and neglect of minority farmers, including Hispanic/Latino farmers, defendant's Office of Inspector General ("OIG") undertook an investigation and review of defendant's program discrimination complaints within the Farm Service Agency ("FSA") as well as 10 other agencies within USDA. The results, released by OIG on February 27, 1997, found that the discrimination complaint process within USDA lacked "integrity" and "accountability", was without a tracking system, was in "disorder", did not resolve discrimination complaints, and had a massive backlog. Indeed, OIG compiled a list of outstanding ("open") program discrimination complaints, as late as 1996, within USDA, totaling 271. (See OIG Report, attached hereto as Exhibit A).

At the same time that OIG released its report, a USDA Civil Rights Action Team ("CRAT") released a report (hereinafter referred to as "CRAT Report"), dated February 1997, condemning defendant's lack of civil rights enforcement and accountability and isolating it as a cause of the drastic decline in the number of minority farmers. (See CRAT Report, attached hereto as Exhibit B).

CRAT found that minorities endured longer loan processing times throughout the United States, systematic mistreatment of minority farmers, insufficient oversight of farm credit to minorities, a lack of diversity in FSA program delivery structure, a lack of minority employees in FSA county offices, lower participation rates and lower approval rates for minorities in FSA programs, widely disparate approval rates for farm loans, and that discrimination complaints at USDA were often ignored. In addition, CRAT found decisions favoring farmers were routinely not enforced by USDA, a lack of USDA regulations for discrimination complaint processing, a lack of response to discrimination complaints by USDA, "non-existent" record-keeping on

discrimination complaints and a significant backlog. CRAT also uncovered neglect of and bias against minorities by USDA, resulting in a loss of farmers' land and income.

More recently, the Government Accounting Office examined the complaint processing system and the other responsibilities of USDA's Office of Civil Rights (OCR). GAO's conclusion, stated in testimony before the Senate Committee on Agriculture, Nutrition, and Forestry on September 12, 2000, that OCR remains dysfunctional and in disarray. Thus, unfortunately even today, complaints that are filed are allowed to languish at OCR, and little if any action is being taken to address the merits of complaints.

In sum, defendant's willful disregard of, and failure to properly investigate, Hispanic/Latino farmers and ranchers' discrimination complaints began with the disbanding of civil rights enforcement functions back in 1983. Even after February 1997, when the administration reorganized and reestablished the enforcement staff of the civil rights office, the situation has not improved, as evidenced by a backlog of unresolved cases and overall disarray in the USDA Office of Civil Rights as reported in a series of OIG Reports.

#### **IV. THE CLASS**

Plaintiffs bring this Class action on behalf of themselves, and all others similarly situated, for the purpose of asserting the claims alleged in the Complaint on a common basis. Plaintiffs' proposed Class is defined as:

All Hispanic American farmers who (1) farmed between January 1, 1981, and present; 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 they were discriminated against on the basis of race, ethnicity, or national origin, and (3) petitioned USDA during that time for relief from acts of discrimination visited upon them as they tried to participate in such farm programs.

Plaintiffs propose that the class is divided into four subclasses, defined as follows:

- Subclass I: Hispanic American farmers, who have a file with Defendant, but did not receive a written determination from defendant in response to their discrimination complaint;
- Subclass II: Hispanic American farmers, who have a file with defendant, who received a written determination from Defendant in response to their discrimination complaint but who maintain that the written determination from Defendant was not reached in accordance with law;
- Subclass III: Hispanic American farmers, who do not have a file with Defendant because their discrimination complaints were, destroyed, lost or thrown away by Defendant; and
- Subclass IV: Hispanic American farmers who (a) actively pursued their judicial remedies by filing a defective pleading; (b) were induced or tricked by USDA's misconduct into allowing the filing deadline to pass; or (c) were prevented by other extraordinary circumstances beyond their control from filing a timely complaint.

While plaintiffs cannot assert proof of the exact number of complaints, the following facts are known:

- (1) There are presently 98 plaintiffs, each of whom has signed a statement that he or she (a) filed a discrimination complaint, or (b) would have filed had they not been induced, tricked, or otherwise prevented from timely filing a complaint;
- (2) Defendant acknowledged, publicly, in a March 2, 1998, USDA press release that since January 1, 1997, USDA settled or closed 224 out of "1,088 program discrimination complaints in the backlog." Civil Rights at the United States Department of Agriculture – One Year of Change" at <<<http://www.usda.gov/da/cr/finals.htm>>>. This left, as of March 2, 1998, 864 cases in the backlog.
- (3) These numbers do not include all of the lost or misplaced complaints, which defendant acknowledges but makes no effort to calculate.

- (4) Neither the OIG Report nor CRAT thoroughly analyzed any counties where substantial numbers of Hispanic/Latinos farm. However, both reports indicate that the discrimination problems at USDA were not limited to a specific group of farmers but victimized minorities in general.

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

This case represents an effort to combat identical USDA institutional racism on behalf of Hispanic American farmers and ranchers as was done for Black farmers in Pigford v. Glickman. 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). 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 USDA's long-standing institutional racism and to obtain relief for those Hispanic Americans harmed by that 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.

This case alleges the same 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>2</sup>. It is important to remember that such relief is specifically made available by the statute of limitations waiver Congress passed and the President signed into law October 21, 1998. (See 7 U.S.C. § 2279, attached hereto as Exhibit C).

## VI. STATEMENT OF FACTS

The following are summaries of facts relevant to the claims of the class representatives:

### A. **With Respect To Plaintiff Guadalupe L. Garcia, Jr., For Himself And On Behalf Of G.A. Garcia And Sons Farm:**

Plaintiff and proposed class representative Guadalupe L. Garcia, Jr., for himself and on behalf of G.A. Garcia and Sons Farm, is a Hispanic American farmer and resident of Dona Ana County, New Mexico. He and his father and brother, also Hispanic American farmers, farmed together as G.A. Garcia and Sons Farm. They produced cotton, peas, alfalfa, and hay on their farm. They owned two farms in Dona Ana County, one with 550 acres of arable land and the other with 78 acres of arable land. They also leased land occasionally for their farm operation.

In 1986, plaintiff Garcia worked with the assistance of FmHA<sup>3</sup> personnel to develop a farm and home plan and an application for direct loans, but FmHA rejected the application. In 1988, plaintiff applied for primary loan servicing but was denied this servicing after a two-year delay. Again, in 1994, FSA (formerly FmHA) refused to work with plaintiff on a farm restructuring with guaranteed loans. Finally in 1998, when plaintiff needed to sell part of the land to service delinquent debt and had found a buyer for some of the farm land, FSA refused to provide financing to allow the sale to take place. In each instance, plaintiff timely filed for the

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<sup>2</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, attached hereto as Exhibit D). 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.

FmHA/FSA financial assistance programs or loans and was qualified for the assistance and loans, but, due to willful and continuous racial/ethnic discrimination by the local and State FmHA/FSA offices, was denied the assistance and loans. As a result, plaintiff suffered severe economic losses, including a farmer's ultimate penalty – their farms were sold at a foreclosure sale in 1999.

Plaintiff filed several complaints to USDA about this treatment. Guadalupe L. Garcia, Jr., registered a complaint regarding the discrimination with the FmHA official that assisted plaintiff prepare the farm and home plan/loan application 1986. Again, in the early 1990s, he filed a complaint with the office of Senator Dominici. In 1998, he filed an additional complaint with USDA's Office of Civil Rights. These complaints were never acted on, causing plaintiffs further damages.

**B. With Respect To Plaintiffs Tony And Patricia Jiminez:**

Plaintiffs and proposed class representatives, Tony and Patricia Jiminez are Hispanic American ranchers and residents of Mariposa County, California. They operate a 299 acre cattle ranch. Tony Jiminez has lived on a cattle ranch since he was 9 years old, and has life-long experience operating dairy and beef cattle ranches.

After having received a \$200,000 farm ownership loan from FmHA to acquire the ranch in 1989, the Jiminezes sought an operating loan at the same time. The operating credit was absolutely essential to enable them to operate the ranch at full and efficient capacity, which in turn was necessary so that they could service the large ownership debt. They were denied the operating loan without explanation. They re-applied for operating credit in 1990 but were turned down again. Once more in 1991, they sought operating funds and servicing benefits, but were

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<sup>3</sup> FmHA was the predecessor agency to FSA to provide farm loans and financial services to farmers. FmHA was disbanded and its responsibilities shifted to FSA in 1994.

denied. In 1992, they applied for an emergency loan, but were turned down. In 1992, they also requested a 60-day extension on their loan because cattle prices were at a 20-year low and they needed to sell cattle to make their loan installment to FmHA. This too was denied. In December 1995, the Jiminezes paid FSA more than \$52,000 to bring the mortgage on the ranch up to date, and at the same time they asked for a loan deferral and an adjustment in the interest rate on the mortgage loan to reflect substantial reduction in interest rates since 1990. FSA did not provide them the application for this servicing for four months. Then, after holding the application for more than two years, it was denied in October of 1998.

This extended pattern of denial of loans and services – treatment different than that received by white farmers – was a series of acts of willful and continuous racial/ethnic discrimination, and as a result of the discrimination, the ranch operation has suffered severe economic losses and the Jiminezes are on the verge of losing their farm to foreclosure. They filed civil rights complaints to USDA and members of Congress in a timely fashion, but these complaints have never been acted on, causing them further damages.

**C. With Respect To Plaintiffs Eduardo And Norma Flores:<sup>4</sup>**

Eduardo and Norma Flores come from a long tradition of farming. They began farming in 1972. For 16 years, Mr. and Mrs. Flores farmed over 300 acres. Their crops included chili peppers, cotton and cabbage.

Between 1985 and 1988, USDA discriminated against Mr. and Mrs. Flores on at least four separate occasions. Their experience is typical of other Hispanic American farmers in their area.

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<sup>4</sup> Eduardo and Norma Flores were listed as Mr. and Mrs. X in the original Class Action Complaint and in the First Amended Class Action Complaint. They disclosed their identity in the Second Amended Class Action Complaint.

In January 1985, Mr. and Mrs. Flores applied for an operating loan of approximately \$100,000 at their local FmHA office. They needed the loan to prepare for planting their crops by March, but funding was delayed until late May, well after planting season.

A similar incident occurred a year later in 1986. They again applied for an operating loan in January, which they did not receive until late May. In addition, FmHA demanded excessive collateral for the loan. Mr. and Mrs. Flores were required to put up their land (valued at \$413,000) and equipment (valued at \$60,000) for a loan in the amount of \$80,000.

In 1987, Mr. and Mrs. Flores sought assistance from FmHA to refinance their farm, because they were facing foreclosure by Federal Land Bank. Mr. and Mrs. Flores needed to take advantage of the lower interest rate offered by FmHA and for which they were eligible, as opposed to the high 14% interest they were paying. When the Flores' inquired with the local agent about refinancing, he replied "You're in a real mess," and refused them an opportunity to apply.

Mr. and Mrs. Flores believe they were discriminated against because they were Hispanic American farmers. White farmers did not receive such treatment. In 1987, Mr. Flores complained to the County Commissioner regarding this discriminatory treatment.

In 1988, Mr. Flores returned to the local FmHA office to attempt again to refinance his farm. Contrary to FmHA regulations, the local FmHA office agent refused to discuss refinancing with Mr. Flores until Mr. Flores' father had cleared a separate unrelated debt with FmHA. 1988 was the last year the Flores family farmed. As a result of FmHA discrimination, the Flores' lost everything, including 8 farm leases – all of which were taken over by white farmers.

**D. With Respect To Plaintiff Gloria Morales:**

Plaintiff and proposed class representative Gloria Palacios Morales is an Hispanic American farmer and resident of Fresno County, California. Her parents were sharecroppers for 25 years, including when she was growing up; and she learned farming from them. Also, she took college courses in agricultural economics, and was selected to be a Kellogg fellow. She owned and operated an 80-acre farm from 1980 to 1998. Up until 1994, she grew various field crops and grapes on the land. In 1998, after repeatedly being denied loans and services from FSA, her land was sold by court order and she lost it.

Morales acquired her farm land in 1980 with a \$200,000 limited resource farm ownership loan she got from FmHA. However, even in this instance, FmHA engaged in discriminatory conduct against her by working hard to prevent her from getting the loan; she got it only through her dogged persistence and hard work. Originally, FmHA would not let her apply for the loan although she clearly had the background and training to qualify for FmHA farm financing. However, after she refused to take no for an answer, she was allowed to apply—but only after she was forced to write a special essay and make special presentations to the Fresno County FmHA staff and county committee. These requirements were never applied to white farmers who sought to apply to FmHA for farm ownership loans. Further, the Chairman of the county committee told her to her face that farming was “not a proper business for a woman, much less a Mexican woman with two kids.” Once she filed her application for the loan, it was improperly rejected two times. One of the rejections was based on the premise that the property she was trying to acquire did not have sufficient water for it to be farmed correctly. However, this same land was being farmed at that time by two white farmers whose farming operations were financed with FmHA operating loans. Another reason her application was initially rejected was

that the FmHA county office asserted that she was proposing to pay too much for the land. However, at the same time, the county office was making farm ownership loans to white farmers to buy similar land in the area her farm was located at even higher prices than she proposed to pay.

In 1981, Gloria Morales applied to the Fresno County FmHA for an equipment loan of \$50,000. She was only approved for \$26,300. As a result, she could only acquire used equipment in poor condition that caused her severe problems in growing her crops and reduced her production. She also received an operating loan of \$31,200 to plant cotton. Her loan funds were put in a supervised bank account. To her information and belief, no similarly situated white farmers in her area were subject to this sort of treatment regarding reduced funding for equipment loans and the supervised account. Further, a Fresno county FmHA staff member told her at that time that she should never apply for another FmHA loan, because they would make sure she never got one. In fact, she never did get another FmHA loan.

She continued throughout the years up to 1998 to seek FmHA and FSA loans, services, and benefits, but was always unfairly discouraged or denied. Her applications included ones for restructuring her debt, so-called "1951-S" servicing, and disaster payments. Her experience with 1951-S servicing is an example of the unfair discouragement she received. FmHA valued her farm low for 1951-S purposes so she couldn't benefit from 1951-S restructuring; but just six months later when she was in bankruptcy, FmHA reversed itself and concluded that the farm had much greater value for purposes of the bankruptcy action.

In late 1993, she applied for disaster payments for losses to her 1993 grape crop caused by a grape disease known as phomopsis. This disease reduced her yield by 69 percent. The 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; they had scheduled the meeting one day in advance.

As a result of FmHA/FSA's unfair discouragement and denials, Gloria Moralez could never obtain the financing or program payments she needed to adequately farm her land, and her farming enterprise foundered. When she became seriously ill and her mother died in January of 1992, Gloria Moralez was forced to file Chapter 12 bankruptcy. During the five years she was in bankruptcy, FmHA/FSA continued to harass her. The agency made several attempts to foreclose on her land even though the bankruptcy court had issued a stay on foreclosure proceedings. The agency ordered its Kansas City financial office to issue a check for \$220,000 so it could buy the land back at foreclosure, even though there was a freeze against foreclosure.

She filed discrimination complaints with USDA in 1984, 1985, 1986, 1987, 1988, 1989, 1990, 1992, 1993, and 1994 regarding the denials and problems she was having with FmHA/FSA, but only on one occasion received a response to her complaint—that regarding the denial of disaster payments in 1993 described above. However, even that action to respond to her complaints was tainted. First of all, she did not get a response to her complaint until 1998. At

that time, she received a letter in response to her complaint purportedly signed by an official working for defendant by the name of Wardell Townsend. The letter stated that USDA found no discrimination. The problem with the letter was that Townsend, who supposedly made this conclusion, had left USDA about one year prior to the date he supposedly signed the letter.

The long and persistent pattern of denial of loans and services by FmHA/FSA during the period from 1981 on—treatment different than that the agency gave to similarly situated white farmers—was willful and continuous racial/ethnic discrimination; and, as a result of the discrimination, Moralez's farm operation suffered severe economic losses and she ultimately lost her 80-acre farm. The refusal by defendant to respond to her repeated (10) complaints of discrimination caused her further damage; the complaints were never investigated and the wrongs committed against her have remained unresolved.

**E. With Respect To Plaintiffs Beatrice And Rodolfo Garza:**

Plaintiff and proposed Class representatives Rodolfo and Beatrice Garza are Hispanic-American residents of Zapala County, Texas, who farmed in the 1980s. Rodolfo Garza had been trained in agriculture at the local junior college, and, in 1983, he and Beatrice Garza acquired 39 acres of farmland in Zapala County from Beatrice's parents for the purpose of starting a vegetable production operation. This land is located in the Wintergarden area of Texas, which is renown for its production of fruits and vegetables; their home town, Crystal City, is known as the Spinach Capital of the World. Unable to get FSA financing to operate their farm, they farmed to the extent they could using their personal funds. They successfully put in several crops of spinach, onions, and grain sorghum.

In 1984 and 1986, the local newspaper ran articles about the availability, at the local FSA office, of loan funds for farming. In 1984, the Garzas sought a loan to irrigate and put in crops on

all 39 acres. They submitted an application to the local FSA office, and waited for a response. FSA never did respond, so Beatrice Garza contacted the office and was told that no money was available for loans. However, when she reminded the office of the article in the local newspaper, they simply told her that she and her husband did not qualify. Again in 1986, having read another article about the availability of funds, the Garzas applied for an operating loan again. They were turned down again. The Garzas knew that a number of white farmers who were friends of theirs and similarly situated farmers were able to obtain operating loans from FSA without any trouble. These included Charles Carr, Lake Smith, and Dorothy Hodges. In fact, these farmers advised the Garzas to apply to FSA for financing.

Concerned about these repeated denials, Beatrice Garza timely complained by letter to the Secretary of Agriculture in 1986, but never received a response. Frustrated by USDA and unable to finance the farm through local cooperative or commercial banks, the Garzas had to abandon their farm operation and sell the land. As a result of USDA's discriminatory acts, the Garzas have suffered substantial economic losses, and as a result of USDA ignoring their complaint about the loan denials, the Garzas suffered further damages.

**F. With Respect To Plaintiffs Larry Chavarria And Robert Chavarria For Themselves And On Behalf Of Chavarria Farming Co.:**

Plaintiff and proposed Class representatives Larry and Robert Chavarria are third-generation Hispanic American farmers in Kings County, California. They have been farming for 17 years. They primarily grow crops on the family farm owned by their mother. It is a 640-acre tract with irrigation ideally suited for cotton and other row crops, as well as fruits and vegetables. Their grandfather cleared the land in 1944, and their family, over the course of years, installed irrigation equipment on the land. They farm together as a general partnership, the Chavarria Farm Co. Neither Larry, Robert, nor the partnership had any dealings with FSA prior to 1997.

In 1995, the partnership suffered severe losses to their cotton crop, as did many other farmers in that area of California. The area was declared a disaster area and the Chavarrias sought to obtain a disaster loan from FSA to cover losses from the 1995 crop. Larry began his inquiries in September of 1996, and filed an application in January of 1997. Although the application was complete and demonstrated that the Chavarrias and the partnership fully qualified for assistance, the Kings County FSA improperly rejected the application on grounds (as later determined by the National Appeal Division) without merit. In doing so, the FSA office gave excess credence to the assertions of a white land owner from whom the Chavarrias were leasing farm land and with whom the Chavarrias had a dispute regarding the white landowner's efforts to revoke the lease.

Larry Chavarria appealed the county office decision to the National Appeals Division, and won the appeal. The hearing officer's decision substantially discounted the credibility of the white land owner and questioned the county office giving weight to that person's assertions and the county office's abortive efforts to set Mr. Chavarria in a "sting" regarding the crops grown on the disputed lease land.

Even though Larry Chavarria won the appeal, the Kings and Tulane county offices continued to subject him and the partnership to unfair treatment. That office has denied them Production Flexibility Contract payments for the 1997 crops; it has been uncooperative and unwilling to work with him on servicing the emergency loan following a second disaster in the area in 1998.

FSA's initial loan denial and inadequate loan servicing was treatment different than that the agency gave to similarly situated white farmers, and amounted to willful and continuous

racial/ethnic discrimination. As a result of the discrimination, the Chavarria farm operation suffered substantial economic losses.

Larry Chavarria filed a complaint with the Office of Civil Rights regarding this discrimination in 1999. Incredibly, the Office responded that FSA's denial of the loan and related unfair acts did not raise an issue of discriminatory conduct by a USDA employee, and refused to investigate the complaint. Further, the response letter was dated April 28, 2000, but postmarked September 12, 2000. The refusal by defendant to respond to the complaint of discrimination caused Larry and Robert Chavarria and the partnership further damage as the complaint was never investigated and the wrongs committed against them remain unresolved.

#### **VII. CERTIFICATION SHOULD BE RESOLVED EXPEDITIOUSLY**

Rule 23(c)(1) of the Federal Rules of Civil Procedure mandates the determination of class certification "as soon as practicable after the commencement" of the action. See, e.g., Weinberger v. Jackson, 102 F.R.D. 839, 843 (N.D. Cal. 1984).

In addition, Rule 23.1(b) of the Federal Local Rules for the United States District Court for the District of Columbia directs plaintiffs to move for class certification under Fed. R. Civ. P. Rule 23 within 90 days after the filing of a complaint. Plaintiffs' original Complaint was filed on October 13, 2000; the First Amended Class Action Complaint was filed on December 12, 2000; the Second Amended Class Action Complaint was filed on February 6, 2001.

On January 9, 2001, plaintiffs filed Plaintiffs' Motion For Extension Of Time To Move For Class Certification, requesting until February 12, 2001, to move for class certification.

On December 22, 2000, defendant filed Defendant's Motion To Dismiss And To Strike Class Action Allegations, arguing, prematurely, that the Court should strike plaintiffs' class action allegations. Plaintiffs filed an Opposition to defendant's motion on February 5, 2001.

On January 23, 2001 this Court ordered “that briefing on plaintiff’s motion for class certification is stayed pending resolution of defendant’s motion to dismiss and to strike class allegations.” (Order, January 23, 2001). Accordingly, defendant need not respond to this motion until the Court issues a briefing schedule. Plaintiffs file their Motion For Certification Of Class now to quiet issues raised in Defendant’s Motion To Dismiss And To Strike Class Action Allegations.

An expeditious determination on class certification will put in place the framework within which this case should proceed.

Because Rule 23(c)(1) gives the Court flexibility to change or alter the determination, at any time, there is no benefit in delaying the determination on whether the class is certifiable.

The issue for the Court on this motion is one of procedure – whether the requirements of Rule 23 have been satisfied – and “does not extend to whether plaintiffs’ class representatives have successfully stated a cause of action or will prevail on the merits.” Longdon v. Sunderman, 123 F.R.D. 547, 551 (N.D. Tex. 1988); Eisen v. Carlisle and Jacquelin, 417 U.S. 156, 178 (1974).

Class certification is the process of recognizing — rather than resolving — common legal and factual issues.

**VIII. BASED ON THE ALLEGATIONS OF THE COMPLAINT AND THE EVIDENTIARY MATERIAL BEFORE THE COURT, PLAINTIFFS’ CLAIMS SHOULD BE CERTIFIED FOR CLASS TREATMENT UNDER RULES 23(a)(1) – (4) AND 23(b)(1)(A) OR 23(b)(2) OR 23(b)(3) OF THE FEDERAL RULES OF CIVIL PROCEDURE AND LOCAL RULE 23.1(b) & (c)**

**A. The Existence Of A Class Has Been Demonstrated**

“The requirement that there be a class will not be deemed satisfied unless the description of it is sufficiently definite so that it is administratively feasible for the court to determine whether a particular individual is a member.” Rappaport v. Katz, 62 F.R.D. 512, 513 (S.D.N.Y. 1974) (quoting 7C. Wright & A. Miller, Federal Practice and Procedure § 1760 at 579-83 (1972)). The class in this action is limited in three ways. First, the class is limited to

Hispanic/Latino farmers and ranchers who were farming at some point during the time period between January 1, 1981, and present. Second, the class is limited to farmers and ranchers who timely applied during that same time period for participation in federal farm programs with the USDA. Finally, the class is further limited to Hispanic/Latino farmers and ranchers who (a) filed written or oral discrimination complaints with USDA as a result of USDA's response to their applications for participation in the farm programs, or (b) would have filed had they not been induced, tricked, or otherwise prevented from timely filing a complaint. This proposed class definition is sufficiently clear to make the class administratively manageable and putative class membership easily ascertainable. See e.g. Pigford, et al. v. Glickman, 182 F.R.D. 341, 346 (D.D.C. 1998) (Class comprised of African-American farmers who farmed during a certain period, applied to participate in USDA programs, and filed written and/or oral discrimination complaints sufficiently limited to merit class certification).

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>5</sup> The Pigford class differs from the Garcia class only in the race of the members, and the relevant timeframe is slightly different to reflect the difference as to when the cases were filed – 1997 versus 2000.

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. Defendant knows, from its experience in Pigford, that most farmers complain of discrimination orally; that they complain to USDA county supervisors, and to their trusted government officials such as U.S. Representatives and Senators. Defendant stipulated, in the Pigford Consent Decree, to define “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 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. Consent Decree at 4-5.

This definition served justice well in Pigford, where a very small percentage of black farmers had copies of 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 oral or written complaint. More than 21,000 families were determined eligible and submitted claims. It is estimated that 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.

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<sup>5</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.

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." 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 parallel 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>6</sup> (See Consent Decree at 11 – 12). In Pigford, a claimant was included as a class member if he "(i)... actively pursued his judicial remedies by filing a defective pleading" in a timely manner; (ii) was "induced or tricked by USDA's misconduct into allowing the filing deadline ... to pass;" or (iii) was "prevented by other extraordinary circumstances beyond his control from filing a [timely] complaint."<sup>7</sup> Id.

**B. The Requirements Of Rules 23(a)(1) – (4) Are Satisfied**

If the existence of a class is established, the Court must then determine whether the four prerequisites set forth in Rule 23(a) are present. These four prerequisites, commonly referred to as numerosity, commonality, typicality and adequacy of representation, are:

- (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

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<sup>6</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.

<sup>7</sup> The percentage of claimants in Pigford who were eligible to toll the statute of limitations was extremely small.

(4) the representative parties will fairly and adequately represent the interests of the class. Fed. R. Civ. P. 23(a).

1. **The Class Is So Numerous That Joinder Of Its Members Is Impracticable.**

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).

This class is so numerous that individual joinder of all of its members is impracticable. Currently, there are 98 named plaintiffs from different states who fall within the class definition. Plaintiffs are joining every week, and we expect 300-700 named plaintiffs by oral argument. The size of this class, and the various locations of plaintiffs in different states is sufficient to establish numerosity. See Kifafi v. Hilton Hotels Retirement Plan, 189 F.R.D. 174, 176 (D.D.C. 1999) (citing Pigford, et al. v. Glickman, 182 F.R.D. 341 (D.D.C. 1998)); Markham v. White, 171 F.R.D. 217, 221 (N.D. Ill. 1997) (class of 35 to 40 plaintiffs sufficient to satisfy numerosity where class members resided in different states).

FSA has approximately 2,750 county offices throughout the United States that process applications for approximately 1,400,000 farmers. Plaintiffs believe, from plaintiffs’ research and interviews with farmers and ranchers, and review of defendant’s reports, that during the period January 1, 1981, to present, at least 20,000 class members complained (orally or in writing) of USDA discrimination, or would have complained had they not been induced, tricked or otherwise prevented from timely filing a complaint. Accordingly, plaintiffs are informed and believe, and on that basis allege, that the Class includes not less than 20,000 members. However, plaintiffs and members of the Class contend that many written and oral complaints of discrimination were never

properly docketed in defendant's "system" and, therefore, were never acknowledged by or responded to by defendant. For example, many complaints of discrimination filed years ago in local and state offices are (because of the publicity generated in Pigford) only now being forwarded to USDA's offices in Washington, D.C. While plaintiffs believe the minimal number of cases is 20,000, without access to defendant's records, plaintiffs have no further specific knowledge as to the exact number of complaints.

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

The requirement of Rule 23(a)(2) that there be "questions of law and fact common to the class" does not present a difficult hurdle for the plaintiffs. Pigford, et al. v. Glickman, 182 F.R.D. 341, 348 (citing Lightbourn v. County of El Paso, 118 F.3d 421 at 426 (5<sup>th</sup> Cir. 1997), *cert. denied*, 118 S.Ct. 700 (1998) ("the test for commonality, is not demanding")); see also Jenkins v. Raymark Industries, Inc., 782 F.2d 468, 472 (5<sup>th</sup> Cir. 1986). Rule 23 (a) (2) merely requires that resolution of one or more common questions affects all or a substantial number of the Class members. See Jenkins, 782 F.2d at 472; Lightbourn, 118 F.3d at 426 ("The commonality test is met where there is at least one issue, the resolution of which will affect all or a significant number of the putative class members"); Watson v. Shell Oil, 979 F.2d 1014 at 1022 (5<sup>th</sup> Cir. 1992) ("The commonality requirement focuses on the common issues relevant to claims by or against the class members; it does not require that all issues be common to all parties").

In Pigford African-American farmers sought class certification for their suit arising from the same course of conduct at issue here. Granting class certification, Judge Friedman held that, "the unifying pattern of discrimination at issue in this case is the USDA's failure properly to process complaints of discrimination." Pigford at 349.

Similar common questions of law and fact exist as to all members of the class in this case. These common legal and factual questions arise from one central issue, which does not vary from class member to class member and which may be determined without reference to the individual circumstances of any particular class member: defendant's institutional and systematic course of conduct in denying due process of law in the handling of civil rights complaints of discrimination filed by Hispanic/Latino farmers and ranchers. The common legal and factual questions include, but are not limited to, the following:

(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);

(f) 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;

(g) How any and all payments the plaintiffs are declared eligible to receive should be equitably allocated among the Class. (2<sup>nd</sup> Am. Compl. at 53-54).

Predictably, defendant will argue that commonality does not exist in this case — that the circumstances surrounding the allegations of the Class members will be so individualized that class treatment is inappropriate. This argument fails as individualized circumstances are merely specific manifestations of a common discriminatory policy. See Shipes v. Trinity Indus., 987 F.2d 311 at 316 (5<sup>th</sup> Cir. 1993) (“Allegations of similar discriminatory practices generally meet the commonality requirement.”); Hall v. Werthan Bag Corp., 251 F.Supp. 184, 186 (M.D. Tenn. 1966) (the “Damoclean threat of a racially discriminatory policy hangs over the racial class [and] is a question of fact common to all the members of the class”); See also Johnson v. Georgia Highway Express, Inc., 417 F.2d 1122, 1124 (5<sup>th</sup> Cir. 1969).

Further, class certification is merited where defendants are alleged to have employed uniform and systematic policies of discrimination: Pigford v. Glickman, 182 F.R.D. 341, 349 (D.D.C. 1999) (commonality inferred for plaintiff class of black farmers against USDA alleging discrimination in the handling of discrimination complaints where “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”); Comer et al. v. Cisneros, 37 F.3d 775 (2<sup>nd</sup> Cir. 1994) (Commonality inferred for plaintiff class of low-income minority residents of city public housing projects whose common questions of law “do not depend on the plaintiff-variable but on the defendants, who are a constant”); Young et al. v. Pierce, 628 F.Supp. 1037 (E.D. Tex. 1985) (commonality inferred in action brought by class of black applicants and residents of public housing against Department of Housing and Urban Development alleging that the government department had “maintained a single, uniform policy of knowingly supporting segregated housing”); Int’l Molders’ and Allied Workers’ Local Union No. 164 et al. v. Nelson, 102 F.R.D. 457 (N.D. Cal. 1983) (plaintiff class of workers of Hispanic

and Latin American ancestry allegedly subject to defendants' systematic and uniform discriminatory practices satisfies commonality requirement for class certification purposes); Ferguson et al. v. Weinberger, 389 F.Supp. 759 (D.Mont. 1975) (common questions of law found for class of persons whose supplemental security income benefits had been withheld from them without a hearing); Buycks-Roberson v. Citibank Fed. Savings Bank, 162 F.R.D. 322 (N.D. Ill. 1995) (Equal Credit Opportunity Act commonality requirement satisfied for proposed class of Black loan applicants, regardless of each specific class member's financial condition and credit history; the relevant conduct at issue was defendant-bank's subjective application of neutral underwriting criteria).

**3. The Claims Of The Representative Plaintiffs Are Typical Of The Claims Of The Class.**

Rule 23(a)(3) requires representative parties to have claims or defenses that are "typical of the claims or defenses of the class." Typicality focuses on the similarity of the legal and remedial theories behind the claims of the plaintiffs and the Class members. Jenkins at 472. The "test for typicality . . . is not demanding." Lightbourn v. County of El Paso, 118 F.3d 421, 426 (5<sup>th</sup> Cir. 1997), *cert. denied*, 118 S.Ct. 700 (1998).

Plaintiffs satisfy the typicality requirement 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 the defendant's liability." Baby Neal for and by Kanter v. Casey, 43 F.3d 48, 58 (3<sup>rd</sup> Cir. 1994); Pigford v. Glickman, 182 F.R.D. 341, 349 (D.D.C. 1998).

The late Professor Herbert Newberg summarized the concept of typicality this way:

Typicality determines whether a sufficient relationship exists between the injury to the named plaintiff and the conduct affecting the class, so that the court may properly attribute a collective nature to the challenged conduct. In other words,

when such a relationship is shown, a plaintiff's injury arises from or is directly related to a wrong to a class, and that wrong includes the wrong to the plaintiff. Thus, a plaintiff's claim is typical if it arises from the same event or practice or course of conduct that gives rise to the claims of other class members, and if his or her claims are based on the same legal theory. When it is alleged that the same unlawful conduct was directed at or affected both the named plaintiff and the class sought to be represented, the typicality requirement is usually met irrespective of varying fact patterns which underlie individual claims.

1 Newberg on Class Actions 3d, Section 3.13 at 3-76 to 3-77.

Differences in the nature and extent of damages among Class members does not impair typicality. These and other factual differences are acceptable provided the claim arises from the same event or course of conduct and is based on the same legal theory. Id.; Jenkins, 782 F.2d at 472; Longden, 123 F.R.D. 547 at 556-57 (N.D. Tex. 1988); In re Texas International Secur. Litigation, 114 F.R.D. 33, 44 (W.D. Okla. 1987); In re Asbestos School Litigation, 104 F.R.D. 422, 429 (E.D. Pa. 1984), aff'd in part, rev'd in part on other grounds, 789 F.2d 996 (3d Cir.), cert. denied, 479 U.S. 852 (1986). Class members are not required to be photostatic copies of each other.

In Pigford, Black farmers sought class certification based on the same injury, same regulatory apparatus and during essentially the same time periods as alleged here. Holding that plaintiffs met the typicality prerequisite and thereby granting class certification, Judge Friedman stated that "the claims of all class members arise from the USDA's alleged dismantling of its civil rights office and its subsequent failure to process discrimination complaints, the same event, practice and course of conduct that give rise to the claims of the four hundred and one representative plaintiffs." Pigford, 182 F.R.D. at 349. The same is true here — the 1983 dismantling of USDA's Civil Rights Office and its subsequent failure to process discrimination complaints give rise to the claims of the representative plaintiffs.

**4. Plaintiffs And Their Counsel Will Fairly And Adequately Represent The Class.**

“In order to satisfy the requirements of Rule 23 (a)(4) that the representative parties fairly and adequately protect the interests of the class, the interests of the class representatives must not be antagonistic to those of the remaining class members, and the representative parties, through their attorneys, must be prepared to prosecute the action vigorously.” Kifafi v. Hilton Hotels Retirement Plan, 189 F.R.D. at 177 (citing Pigford v. Glickman, 182 F.R.D. 341 (D.D.C. 1998)).

Both prerequisites of adequacy of representation are met in this case. Plaintiffs’ interests are co-extensive and not in conflict with the interests of class members. Their claims are typical of the claims of the other members of class. Their interests are identifiable with those of the class. Plaintiffs are adequate representatives of the class because they are members of the class and their interests do not conflict with the interests of the other members of the class they seek to represent.

Plaintiffs have retained competent counsel experienced in the prosecution of complex agricultural disputes involving review of adverse agency action, experienced in civil rights litigation, and experienced in class action litigation, and they intend to prosecute this action vigorously for the benefit of the Class. They intend to prosecute this action vigorously for the benefit of the Class. Mr. Pires, after 7 years at the U.S. Department of Justice, has spent 17 years in private practice representing farmers; he has been Lead Counsel in over 50 lawsuits filed on behalf of farmers in federal courts throughout the country. Mr. Fraas has been in private practice representing farmers for 11 years. Prior to that, he was Chief Counsel of the House Agriculture Committee, responsible for all USDA programs and laws. Mr. Pires and Mr. Fraas are Lead Counsel in Pigford v. Glickman, a parallel class action lawsuit in which over 21,000 Black farmers are participating under a Consent Decree, Keepseagle v. Glickman, a similar class action on behalf of Native American farmers and ranchers, and Love v. Glickman, a similar class action on behalf of

women and other minority farmers. Mr. Pires and Mr. Fraas are Lead Counsel in this case. Joining them as Of Counsel, is J. L. Chestnut of Chestnut, Sanders, Sanders, Pettaway, Campbell & Albright, a nationally known civil rights lawyer, with 38 years of experience in discrimination law and class action litigation. Mr. Chestnut is also Lead Counsel in Pigford v. Glickman, and Of Counsel in Keepseagle v. Glickman, and Love v. Glickman.

The interests of the members of the Class will be fairly and adequately protected by plaintiffs and their Lead Counsel and Of Counsel. Counsel for plaintiffs have signed retainer agreements with plaintiffs stating that in the event of a successful settlement or judgment (1) 100% of all monies received will go to plaintiffs and Class members; and (2) counsel will seek recovery of legal fees, expenses and costs under the Equal Credit Opportunity Act and the Equal Access To Justice Act.

**C. The Requirements Of Rule 23(b) Are Satisfied**

If the four prerequisites of Rules 23(a)(1) – (4) are satisfied, the Court must then decide whether one or more of the three criteria set forth in Rule 23(b) has been met. The three criteria of Rule 23 (b) are:

- (1) the 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 the 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 of controversy already commenced by or against members of the class;
  - (C) the desirability or undesirability of concentrating the litigation of the claims in a particular forum; and
  - (D) the difficulties likely to be encountered in the management of a class action.

Plaintiffs seek to certify a class under 23(b)(1)(A), or 23(b) (2) or 23(b)(3), the last of which allows Class members to “opt-out.”

**1. The Requirements Of Rule 23(b)(1)(A) Are Satisfied.**

Rule 23(b)(1) is satisfied when there is a risk that separate actions will be brought which would expose the party opposing the class to inconsistent adjudications. Fed. R. Civ. P. 23(b)(1)(A). 7A Wright, Miller & Kane Federal Practice and Procedure, Section 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 at 67 (S.D. Ohio 1991). For this reason, plaintiffs’ claims could be properly maintained under Rule 23(b)(1)(A).

**2. The Requirements Of Rule 23(b)(2) Are Satisfied.**

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.

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. 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.

The various claims asserted in this action 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 the individual members of the Class 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 separate actions by individual Class members would create a risk of adjudications that would, as a practical matter, be dispositive of the interests of the other Class members not parties to such adjudications or would substantially impair or impede the ability of such non-party Class members to protect their interests; and

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

### **3. The Requirements Of Rule 23(b)(3) Are Satisfied.**

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”). Both findings call for qualitative and relative analyses. For example, “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. 1996); 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 far outweighs 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 uses in Pigford.

#### **a. 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. at 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)).

**i. Plaintiffs’ Declaratory Judgment Claims Present Predominantly Common Issues**

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* 2<sup>nd</sup> Am. Compl. at 56). Whether defendant so violated plaintiffs’ and class members’ civil and due process rights are common questions of fact and law that are at the core of all plaintiffs’ claims, and will dominate all other issues at trial.

**ii. Plaintiffs' Administrative Procedure Act Claims Present Predominantly Common Issues**

Plaintiffs allege that defendant's course of conduct was arbitrary and capricious and not in accordance with the law, particularly due process 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.<sup>8</sup>

**iii. Plaintiffs' Equal Credit Opportunity Act Claims Present Predominantly Common Issues**

Plaintiffs claim that defendant's acts of denying plaintiffs and Class members credit and other benefits and systematically failing to properly process their discrimination complaints on such denials were racially discriminatory and contrary to the requirements of the Equal Credit Opportunity Act. Proof of this claim will turn on evidence, common to all plaintiffs, 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.

**b. Superiority**

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

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<sup>8</sup> As explained in Plaintiffs' Opposition To Defendant's Motion To Dismiss And To Strike Class Action Allegations, 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 (as of September 13, 2000). This is likely to be

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.

#### **IX. COURTS CONSISTENTLY CERTIFY DISCRIMINATION ACTIONS**

The following is a small sampling of similar discrimination class actions that were certified as national or regional classes: See Pigford v. Glickman, 182 F.R.D. 341 (D.D.C.

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repeated in Garcia. Hispanic/Latino farmers and ranchers deserve the opportunity to pursue their claims of

1999); Lightbourn v. County of El Paso, Texas, 118 F.3d 421 (5<sup>th</sup> Cir. 1997); Forbush v. J.C. Penney Co., 994 F.2d 1101, 1106 (5<sup>th</sup> Cir. 1993); Shipes v. Trinity Indus., 987 F.2d 311, 316 (5<sup>th</sup> Cir. 1993).; Flanagan v. Ahearn (In re Asbestos Litig.), 90 F.3d 963, 976 (5<sup>th</sup> Cir. 1996); McGrew v. Texas Bd. of Pardons & Paroles, 47 F.3d 158, 162 (5<sup>th</sup> Cir. 1995).; Comer, et al. v. Cisneros, 37 F.3d 775 (2<sup>nd</sup> Cir. 1994); Young, et al. v. Pierce, 628 F.Supp. 1037 (E.D. Tex. 1985); International Molders' and Allied Workers' Local Union No. 164, et al. v. Nelson, 102 F.R.D. 457 (N.D. Cal. 1983); Ferguson, et al. v. Weinberger, 389 F.Supp. 759 (D.Mont. 1975).

**X. GARCIA PARALLELS PIGFORD v. GLICKMAN**

Garcia is the third lawsuit arising from the USDA's course of conduct that resulted in the failure of USDA to properly process complaints of discrimination. In Pigford, African American farmers sought and received class certification for their claim. See Pigford, 182 F.R.D. at 342. In Keepseagle, Native American farmers and ranchers seek class certification for the same claim. Keepseagle, et al. v. Glickman, Civil Action No. 1:99CV03119, filed November 24, 1999 (D.D.C.).

A comparison of Pigford and Garcia reveals the following similarities:

- (1) Pigford had 401 class representatives, which Judge Friedman found established numerosity. Pigford, 182 F.R.D. 348. Garcia already has 98 and additional plaintiffs join the lawsuit each week.
- (2) In Pigford, Judge Friedman held that the proposed class was clearly defined because it limited the class to Black farmers who sought to utilize defendant's programs, and had filed with defendant discrimination complaints between January 1, 1983, and February 21, 1997. Id. at 345. In Garcia, the class is limited to Hispanic/Latino farmers who applied to participate in defendant's programs during the period January 1, 1981, to present, and timely filed a complaint with defendant.

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discrimination against USDA as well. (Plaintiffs' Opposition at 17).

(3) Pigford provided for equitable tolling for claimants who actively pursued their judicial remedies by filing a defective pleading during the statutory period, or where the complainant was induced or tricked by USDA into allowing the filing deadline to pass, or was otherwise prevented by extraordinary circumstances from filing a complaint. Garcia proposes a subclass to provide equitable tolling in precisely the same circumstances.

(4) In Pigford Judge Friedman stated that “[p]laintiffs also have established that there are questions of law and fact with respect to the liability that are common to the class” based on the following shared issues:

(1) Did the USDA have a legal obligation to process and investigate complaints of discrimination that it received? (2) If the USDA had such a duty, was there a systemic failure properly to process complaints in the specified time period? (3) If there was such a systemic failure, do plaintiffs have a cause of action against the USDA? (4) Does the government have a legitimate statute of limitations defense to the claims asserted by plaintiffs?

Pigford, 182 F.R.D. at 348. Garcia raises the same common issues of law and fact arising from defendant’s same course of conduct (except with respect to (4) which was taken care of with the Congressional statute of limitations waiver).

(5) In Pigford, Judge Friedman determined that the class representatives’ claims were typical of the class because they arose from the same course of events, and would require the making of the same legal arguments to prove the defendant’s liability. Id. at 349. The claims of the class representatives in Garcia arise from the same course of conduct as the claims of the class.

- (6) With respect to Rule 23(a)(4), Judge Friedman (in Pigford) found that the class representatives and their counsel would “adequately represent the interests of the class,” citing the experience of Class Counsel and the uniformity of representatives’ and class members’ interests. Id. at 350. Garcia entails both the same uniformity of interest among named plaintiffs and class members and the same legal counsel.
- (7) Judge Friedman found that although Pigford sought both money damages and injunctive relief, it was appropriate to certify the class pursuant to Rule 23(b)(2) for determining liability. Id. at 351. He added that, if necessary, the court could certify the class under 23(b)(2) for liability and 23(b)(3) for determining a remedy. Id. Garcia seeks the same combination of injunctive relief and monetary damages requested in Pigford.

## **XI. NOTICE**

Notice to members of the Class will be simple. Most, if not all, members of the Class are on defendant’s computerized federal farm programs system and can be easily identified, categorized by county, and contacted by mail. Accordingly, notice to them will be simple, inexpensive and efficient.

Local Rule 23.1(c) requires plaintiffs to answer the following:

### **A. How, When And By Whom And To Whom Notice Shall Be Given**

Notice shall be given to each member of the class by direct mail to their respective mailing address (usually their farm) as required and recorded by defendant; defendant also requires each farm to have an individual federal farm number, which provides a check and balance against wrong addresses. This notice, subject to approval of the Court, will be sent by counsel for plaintiffs and defendant.

**B. How And By Whom Payment Therefor Is To Be Made**

Payment will be made by plaintiffs, or, if defendant objects, by defendant.

**C. By Whom The Response To The Notice Is To Be Received**

Response to the notice is to be received by whomever the Court deems most appropriate.

(In some cases, response is received by the Clerk's Office; in other cases, it is received by a special master.) Plaintiffs will agree to whichever recipient the Court elects.

**XII. CONCLUSION**

The class fulfills the prerequisites of Rules 23(a) and 23(b). Class treatment of this case provides the best opportunity for all potential class members (many having waited years) to litigate their claims, promotes judicial economy, streamlines complex litigation, and will result in a fair, inclusive and consistent adjudication of liability and damage issues to all Hispanic/Latino farmers and ranchers who have been denied equal access to credit or other program benefits and due process in the enforcement of their discrimination complaints.

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 injunctive and financial relief for eligible farmers. This case seeks the same justice for Hispanic farmers.

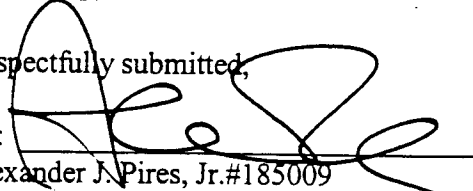
No meaningful progress in erasing racism within USDA can be accomplished unless the class established by Congress is provided redress. An important step in that endeavor was achieved in Pigford; justice dictates that Hispanic farmers and ranchers be permitted to continue that process.

For the foregoing reasons, Plaintiffs' Motion For Certification of Class should be granted.

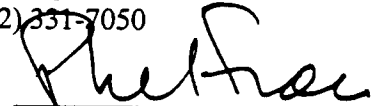
PLAINTIFFS REQUEST ORAL ARGUMENT.

February 12, 2001

Respectfully submitted,

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#### CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Plaintiffs' Motion For Certification Of Class, proposed Order, and Memorandum Of Points And Authorities In Support thereof was sent by U.S. mail this 12th 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.