

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

GUADALUPE L. GARCIA, JR., <u>et al.</u>)	
)	
Plaintiffs,)	
)	
v.)	Case No. 1:00CV02445
)	
ANN VENEMAN, Secretary of)	Judge: James Robertson
Agriculture,)	
)	
Defendant.)	
_____)	

**DEFENDANT'S OPPOSITION TO
PLAINTIFFS' MOTION FOR CLASS CERTIFICATION**

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INTRODUCTION

Plaintiffs are Hispanic American farmers who allege that since January 1, 1981, the Farm Service Agency ["FSA"] of the Department of Agriculture ["USDA"] discriminatorily denied them access to farm credit and other USDA farm benefit programs in violation of the Equal Credit Opportunity Act ["ECOA"], 15 U.S.C. § 1691, *et seq.*, and the Administrative Procedure Act ["APA"], 5 U.S.C. § 702, *et seq.* They allege that they are victims of "a system that grants to white men unfettered discretion to apply highly subjective standards in determining whether and to what extent Hispanic farmers and ranchers get to participate in USDA loan programs." Pl. Supp. Memo. at 1. According to plaintiffs, this pattern of discrimination was exacerbated by the alleged dismantling of USDA's system for processing administrative civil rights complaints in the 1980s and the resulting failure to redress the complained of discrimination.

Plaintiffs pray for not less than \$20 billion in money damages – \$1 million for each of the 20,000 persons who allegedly comprise the putative class – as well as other related declaratory and injunctive relief (2d Amended Compl. at 58; *see also id.* at ¶ 124). Plaintiffs now move to certify a class consisting of:

All Hispanic farmers and ranchers who farmed or ranched or attempted to do so and who were discriminated against on the basis of national origin or ethnicity in obtaining loans, including the servicing and continuation of loans, or in participating in disaster benefit programs administered by the United States Department of Agriculture, during the period from January 1, 1981 through December 31, 1996, and timely complained about such treatment, or who experienced such discrimination from the period October 13, 1998 through the present.

Pl. Supp. Memo. at 4.

As defendant will explain, plaintiffs' motion for class certification must be denied

because they cannot satisfy the prerequisites of Fed. R. Civ. P. 23(a). There is no common thread that ties plaintiffs' across-the-board discrimination claims together. Although plaintiffs complain that FSA used "highly subjective standards" in evaluating their farm loan and benefit applications, they cannot show that USDA operated its farm programs through "entirely subjective decisionmaking processes" – the only potential basis for finding commonality and typicality in cases such as this. See General Telephone Co. v. Falcon, 457 U.S. 147, 159 n.15 (1982). The extensive statutory and regulatory scheme governing FSA's administration of farm loan and benefit programs – particularly the eligibility and other requirements for participation in USDA's farm programs – necessarily defeats any claim that FSA local officials operated in a system without standards which allowed them to make decisions subjectively. See Williams v. Glickman, No. 95-1149, 1997 WL 198110, at *2 (D.D.C. April 15, 1997) [Williams II].

Nor can plaintiffs establish commonality based on USDA's alleged failure to investigate administrative civil rights complaints. Putting aside the fact that USDA did not "dismantle" its civil rights complaint processing system as plaintiffs claim, a single class-wide determination of liability as to USDA's alleged failure to process plaintiffs' administrative complaints would say nothing about the merits of the administrative complaints of credit discrimination USDA allegedly ignored. Indeed, USDA's administrative civil rights complaint process, instituted in 1966 pursuant to authority conferred by 5 U.S.C. § 301 – a statute authorizing agencies to issue housekeeping regulations – is entirely separate from Congress's enactment of ECOA in 1974. The pursuit of that administrative process is not a prerequisite to filing suit under ECOA; ECOA says nothing about it; and, as this Court has already held, plaintiffs do not have an actionable claim under either ECOA or APA as to the alleged failure of that process.

Plaintiffs also cannot satisfy the requirements of Rule 23(b). Under any standard of predominance, plaintiffs' prayer for "not less than \$20,000,000,000" in monetary damages (2d Amended Compl. at 58) dwarfs their claims for equitable and declaratory relief, thereby making Rule 23(b)(2) certification inappropriate. And, because plaintiffs' 20,000 individualized claims for monetary damages, which span two decades and allegedly occurred in all 50 states, clearly predominate over common questions of law and fact, certification under Rule 23(b)(3) – much less a hybrid certification – also is inappropriate.

Defendant does not dispute that some Hispanic American farmers may have experienced discrimination over the last two decades as they sought to participate in USDA's farm programs. But, whatever the merits of their individual discrimination claims may be, it is not a factor in determining the suitability of class treatment in this case. As the Court noted in Williams II when denying reconsideration of its denial of class certification, "it is not the Court's task at this stage to determine whether discrimination has occurred, or whether it is still occurring. Rather, the Court must ask whether this acknowledged problem is best addressed through a class action lawsuit." Williams II, No. 95-1149, 1997 WL 198110, at *3. The Williams court found that it was not, and this Court should reach the same conclusion.

BACKGROUND

A. Statutory and Regulatory Background

The Farm Service Agency ("FSA") is a component of the USDA. Like its predecessor, the Farmers Home Administration ("FmHA"), the FSA is statutorily authorized to make loans to farmers who cannot obtain sufficient credit elsewhere at reasonable rate and terms. See Consolidated Farm and Rural Development Act, 7 U.S.C. § 1921, et seq. The FSA makes

several types of loans, including "farm ownership" loans, which are intended to assist farmers in buying or improving farm property, 7 C.F.R. § 1943.2; "operating" loans, which provide credit to help farmers run their farms, 7 C.F.R. § 1941.2; and emergency loans, which are made to cover losses after an officially-declared disaster so that a farmer can resume his farming operations. 7 C.F.R. § 1945.152. Since 1994, FSA also has set aside loan funds for socially disadvantaged farmers and ranchers. See 7 U.S.C. § 2003.

To qualify for an FSA loan, an applicant must meet certain eligibility requirements (see 7 C.F.R. §§ 1941.12(a), 1943.12(a)) and submit a Farm and Home Plan demonstrating that his or her overall financial condition indicates an ability to repay the requested loan, see 7 C.F.R. §§ 1941.4, 1943.4, 1943.24. Other considerations in determining whether an applicant may receive a loan include the overall limits on the amount of FSA debt that an applicant may carry, see 7 C.F.R. §§ 1941.29, 1943.29, and the adequacy of the applicant's collateral or security, see 7 C.F.R. §§ 1941.33(b), 1943.33(b); see also 7 C.F.R. §§ 1941.19, 1943.19.

FSA operates its loan programs through its state, district, and more than 2,700 county offices. Until March 1999, an applicant's eligibility for a loan was determined by the county committee, which was comprised of three local, peer-elected farmers. See generally Dahl v. United States, 695 F.2d 1373, 1378 (Fed. Cir. 1982); Hicks v. United States, 23 Cl. Ct. 647, 650 (1991). The county supervisor, however, had the actual authority to approve or disapprove a loan for an eligible applicant, and her determination was based on, among other things, the applicant's projected repayment ability, the adequacy of collateral equity to secure the requested loan, and the feasibility of the proposed operation. See 7 C.F.R. § 1910.4(l) (1998); Dahl, 695 F.2d at 1378.

Borrowers who become delinquent on their FSA loans may apply for "primary loan servicing," which includes such options as debt restructuring, deferral, and write-down. See 7 C.F.R. § 1951.909(e). A borrower may also request "debt settlement," which includes debt forgiveness, compromise, adjustment, cancellation, and charge-off of the borrower's debt to FSA, see 7 C.F.R. § 1956.54. In deciding on such loan servicing and debt settlement, FSA similarly considers the borrower's complete financial situation to assess the propriety and feasibility of the plan. See 7 C.F.R. §§ 1951.902(b), 1951.906, 1951.909.

FSA also administers various farm benefit programs of the former Agricultural Stabilization and Conservation Service ["ASCS"] which do not require participants to repay the moneys received. See generally 7 C.F.R. Part 1477 (1996). These "non-credit," benefit programs were wide-ranging and complex during the approximately two decades covered by plaintiffs' Second Amended Class Action Complaint.

Decisions by FSA to deny credit applications, loan servicing requests, or non-credit benefits under programs administered by FSA or its predecessor agencies, FmHA and ASCS, may be appealed to USDA's National Appeals Division ["NAD"], formerly known as the National Appeals Staff, an entity entirely separate from FSA. See 7 C.F.R. Part 11; see also 7 C.F.R. §§ 1900.51, 1900.54-.55 (1995). The USDA also has internal management guidelines proscribing discrimination based on race, color, religion, sex, age, handicap, or national origin in the administration of any of its programs and activities. See 7 C.F.R. Part 15d. These guidelines have been in place since 1966, see 31 Fed. Reg. 8175 (June 10, 1966), and include a voluntary administrative mechanism under which a person who believes he has suffered discrimination in a covered USDA program may file a complaint with the USDA's Office of Civil Rights ("OCR").

OCR then investigates the complaint and determines what corrective action, if any, is required to resolve it.

B. Equal Credit Opportunity Act

The Equal Credit Opportunity Act ("ECOA"), 15 U.S.C. § 1691, et seq., was enacted in 1974. ECOA prohibits discrimination in the field of consumer credit. The Act makes it "unlawful for a creditor to discriminate against any applicant with respect to any aspect of a credit transaction * * * on the basis of race, color, religion, national origin, sex or marital status, or age." 15 U.S.C. § 1691(a). The Act creates a private right of action against creditors, including the United States, who violate its anti-discrimination provisions, and makes such creditors "liable to the aggrieved applicant for any actual damages sustained by such applicant acting either in an individual capacity or as a member of a class." 15 U.S.C. § 1691e(a).

Although ECOA contains a two-year statute of limitations, 15 U.S.C. § 1691e(f), Congress enacted legislation that retroactively extended the limitations period for certain claims against USDA. Provided an action was commenced within two years of that amendment (October 21, 1998), Congress allowed individuals who filed administrative complaints of discrimination with the USDA between January 1, 1981 and July 1, 1997 to sue for discrimination alleged to have occurred between January 1, 1981 and December 31, 1996. See Agriculture, Rural Development, Food and Drug Administration, and Related Agencies Appropriations Act, 1999, Pub. L. No. 105-277, § 741, 112 Stat. 2681 (codified at 7 U.S.C. § 2297 note).

C. Procedural Background and Other Similar Class Actions

Plaintiffs filed this putative class action on October 13, 2000. This suit is one of a trio of

copy-cat class actions filed in the aftermath of USDA's settlement of Pigford v. Glickman, 185 F.R.D. 82 (D.D.C. 1999), a class action brought by African American farmers against USDA alleging race discrimination in a variety of USDA farm programs. See Keepseagle v. Veneman, Civ. No. 99-3119 (suit by Native American farmers); Love v. Veneman, Civ. No. 00-2502 (suit by female farmers). Like the members of the classes in Keepseagle and Love, the Hispanic American plaintiffs in this case allege that they were victims of discrimination in the same group of USDA programs as were at issue in Pigford.

On March 20, 2002, this Court granted in part and denied in part defendant's motion to dismiss. Specifically, the Court found that some of the plaintiffs are entitled to proceed with their claims for discrimination in lending transactions, and that plaintiff Gloria Morales' claim for discriminatory denial of disaster benefits under the APA – “which does not waive the government's sovereign immunity with regard to money damages, 5 U.S.C. § 702” – falls within Congress's special legislation waiving the applicable statute of limitations. Mem. Order at 4 (March 20, 2002). The Court held, however, that “plaintiffs' allegations of failure to investigate civil rights complaints do not state claims under ECOA or the APA.” Id.

Pursuant to the Court's earlier order on February 21, 2002, plaintiffs were given leave to file a supplemental memorandum regarding class certification and, in the process, refine their proposed class definition. Plaintiffs filed their supplemental memorandum on April 8, 2002.

ARGUMENT

I. Class Certification Standards

Class certification is governed by Fed. R. Civ. P. 23, the provisions of which are designed to promote the efficient and economical conduct of litigation. American Pipe & Constr. Co. v.

Utah, 414 U.S. 538, 553 (1974). The device is “an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only.” General Telephone Co. v. Falcon, 457 U.S. 147, 155 (1982) (quoting Califano v. Yamasaki, 442 U.S. 682, 700-701 (1979)). Class relief is appropriate when the “issues involved are common to the class as a whole” and when they “turn on questions of law applicable in the same manner to each member of the class.” Falcon, 457 U.S. at 155.

Specifically, plaintiffs must demonstrate that their proposed class action satisfies each of the following four prerequisites of Rule 23(a):

(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 protect the interests of the class.

Fed. R. Civ. P. Rule 23(a). Plaintiffs must also demonstrate that they satisfy at least one of the categories set forth in Rule 23(b), namely where the defendant “has acted or refused to act on grounds generally applicable to the class” and injunctive or declaratory relief would therefore predominate, Fed. R. Civ. P. 23(b)(2), or where common issues predominate and a class action is the “superior” means to handle the litigation, Fed. R. Civ. P. 23(b)(3).

“Strict adherence to [these] prerequisites is necessary,” Sperling v. Donovan, 104 F.R.D. 4, 9 (D.D.C. 1984), and the Court must undertake a “rigorous analysis” of plaintiffs’ presentation to ensure that there is “actual, not presumed, conformance with Rule 23(a).” Falcon, 457 U.S. at 158, 160-61; see also Hartman v. Duffey, 19 F.3d 1459, 1469 (D.C. Cir. 1994); Wagner v. Taylor, 836 F.2d 578, 589 (D.C. Cir. 1987). Even if the requirements of Rule 23 have been met, the decision of whether to certify a class is firmly committed to the trial court’s discretion. See

Califano, 442 U.S. at 703.

In this case, an examination of plaintiffs' claims compels the conclusion that plaintiffs' motion for class certification must be denied.

II. Plaintiffs Cannot Meet the Requirements of Rule 23(a)

A. Plaintiffs' Claim of Numerosity Is Unsupported by Any Specific Evidence

Rule 23(a)(1) requires plaintiffs to show that "the class is so numerous that joinder of all members is impracticable." Plaintiffs "may not rely on conclusory allegations that joinder is impracticable or on speculation regarding the size of the class." Allen v. City of Chicago, 828 F.2d Supp. 543, 550 (N.D. Ill. 1993); Marcial v. Coronet Ins. Co., 880 F. 2d 954 (7th Cir. 1989) (mere speculation of class number not enough). "There must be presented some evidence of established, ascertainable numbers constituting the class in order to satisfy even the most liberal interpretation of the numerosity requirement." Rex v. Owens, 585 F.2d 432, 436 (10th Cir. 1978).

In the Second Amended Complaint, plaintiffs estimated a class of not less than 20,000 members, allegedly based on their research, travel to county offices throughout the country, interviews with Hispanic farmers, and review of USDA's reports. 2d Amended Compl. ¶ 112. They do not explain how they came up with this figure. A single reference in the supplemental memorandum to the fact that there were allegedly over 28,000 Hispanic farm operators as of 1997 similarly does not explain how that translates into a class size of 20,000. While a class of less than 20,000 members can certainly satisfy the numerosity requirement, it appears that

plaintiffs' estimation is nothing more than a guess.¹ In these circumstances, plaintiffs have failed to make the necessary showing to satisfy Rule 23(a)(1).

B. Plaintiffs Cannot Establish Commonality or Typicality

Rule 23 requires that plaintiffs establish that "there are questions of law or fact common to the class," Fed. R. Civ. P. 23(a)(2), and that "the claims or defenses of the representative parties are typical of the claims or defenses of the class." Fed. R. Civ. P. 23(a)(3). Courts have demanded that plaintiffs make a "specific presentation" to show that commonality exists, and have, in turn, undertaken "rigorous analys[es]" in making a commonality determination. See Falcon, 457 U.S. at 158, 160-61; Hartman, 19 F.3d at 1469, 1474; Wagner, 836 F.2d at 594.

As for typicality, the putative class representatives must establish that their claims "arise[] from the same event or practice or course of conduct that gives rise to the claims of other class members, and that his or her claims are based on the same legal theory." Williams v. Glickman, No. 95-1149, Mem. Order at 15 (D.D.C. Feb. 14, 1997) [Williams I]. The Supreme Court has noted that "[t]he commonality and typicality requirements tend to merge" because "[b]oth serve as guideposts for determining whether under the particular circumstances maintenance of a class action is economical and whether the named plaintiff's claim and the class claims are so interrelated that the interests of the class members will be fairly and adequately protected in their absence." Falcon, 457 U.S. at 157 n.13. As we now demonstrate, plaintiffs have failed to demonstrate commonality or typicality.

¹ Plaintiffs' allegation of the size of their putative class is suspiciously similar to the size that the Pigford class turned out to be. See Pigford v. Glickman, 185 F.R.D. 82, 94 (D.D.C. 1999) (Pigford class included 15 - 20,000 members as of the date of court approval of Consent Decree) and Pigford v. Glickman, 127 F. Supp. 2d 35, 38 (D.D.C. 2001) (Pigford class had at least 21,000 members).

1. **USDA's Decisionmaking Process Does Not Establish Commonality**

In attempting to establish commonality, plaintiffs argue that the “the policies and practices of USDA, including applying the highly subjective criteria of the USDA loan programs and the subjective decision-making process are generally applicable to the class.” Pl. Supp. Memo. at 35. They contend that commonality is further established by USDA’s alleged failure to investigate claims of discrimination, which, accordingly to plaintiffs, at least exacerbated and prolonged the pattern of discrimination and had a class-wide impact on Hispanic farmers. *Id.* In addition, plaintiffs maintain that the discriminatory impact on Hispanic farmers is confirmed by “statistical evidence” showing that Hispanic farmers received disproportionately fewer USDA loans than white farmers. *Id.* at 34.

a. **Footnote 15 of General Telephone Co. v. Falcon**

In effect, plaintiffs are primarily relying on footnote 15 of the Supreme Court’s decision in General Telephone Co. v. Falcon, in which the Court suggested that “significant proof that an employer operated under a general policy of discrimination conceivably could justify a class” if the discrimination manifested itself “in the general fashion, such as through entirely subjective decisionmaking processes.” 457 U.S. at 159 n.15. Footnote 15 of Falcon, however, does not help plaintiffs in this case. In addition to the fact that its reference to “entirely subject decisionmaking processes” is mere dictum, courts have held that commonality is not established simply because a decisionmaking process contains some subjective factors. As one court has observed, while “the footnote in Falcon * * * alluded to the possibility that ‘entirely subjective decisionmaking processes’ might be a basis for liability, if they resulted in discrimination,” a

decision to permit some consideration of subjective factors is not, in and of itself, a discriminatory practice that provides the unifying thread necessary for 'commonality' to exist." Abram v. United Parcel Service, 200 F.R.D. 424, 429-30 (E.D. Wisc. 2001) (emphasis in original) (quoting Falcon, 457 U.S. at 159 n.15).

Instead, "in applying Falcon's footnote 15, 'courts have required plaintiffs to show that a defendant's decisionmaking process is *entirely* subjective before permitting an across the board attack.'" Bacon v. Honda Mfg., Inc., 205 F.R.D.466, 477 (S.D. Ohio 2001) (emphasis in original) (quoting Appleton v. Deloitte & Touche L.L.P., 168 F.R.D. 221, 228 (M.D. Tenn.1996)). This is because, as the Eleventh Circuit has explained, "[b]y qualifying 'subjective decisionmaking processes' with 'entirely,' the [Falcon] Court implied that an employer's general policy of discrimination manifested, for example, by an objective hiring practice and by a subjective promotion practice would not be discrimination operating in "the same general fashion' sufficient to justify a class of both applicants and employees." Griffin v. Dugger, 823 F.2d 1476, 1490-91 (11th Cir. 1987), cert. denied, 486 U.S. 1005 (1988), *relevant language cited with approval in* Hartman v. Duffey, 19 F.3d 1459, 1471 (D.C. Cir. 1994).

That is, "[w]here * * * there are objective factors, even a generally subjective process will not satisfy the typicality and commonality requirements." Abrams v. Kelsey-Seybold Medical Group, Inc., 178 F.R.D. 116, 132 (S.D. Tex. 1997). See, e.g., Vuyanich v. Republic National Bank of Dallas, 723 F.2d 1195, 1200 (5th Cir.) (holding that "[t]he district court's finding that the Bank relied on two objective inputs -- education and experience -- in its necessarily subjective hiring process * * * precludes reliance on this 'general policy of discrimination' exception."), cert. denied, 469 U.S. 1073 (1984); Bacon, 205 F.R.D. at 477 (plaintiffs failed to

establish commonality because "[a]lthough some factors considered in the promotion process * * * may involve some subjective elements, an associate's eligibility for promotion is also based on certain objective criteria"); Abram, 200 F.R.D. at 429 (holding that "[t]he processes used by the UPS for determining full-time supervisor compensation are by no means 'entirely subjective'" because evaluation forms utilized by company were "quite detailed with respect to UPS's expectations"); Betts v. Sundstrand Corp., No. 97-50188, 1999 WL 436579, at * 6 (N.D. Ill. 1999) (plaintiffs failed to show "entirely subjective employment practices" because "while defendant's hiring practices allow for a certain amount of subjectivity, the managers are not completely unfettered," but must use interview evaluation forms containing "objective inputs"); International Union v. LTV Aerospace & Defense Co., 136 F.R.D. 113, 122 (N.D. Tex. 1991) (finding that, although defendant's decisionmaking process "contains elements of subjectivity and personal discretion by managers," "the existence, throughout the period pertinent to this suit, of a collective bargaining agreement governing many of the decisionmaking processes at issue establishes that the process was not entirely subjective").²

² To be sure, in Buycks-Roberson v. Citibank Federal Savings Bank, 162 F.R.D. 322 (N.D. Ill. 1995), a district court found that the allegation that "Citibank gives its loan originators considerable discretion when making loan decisions" was "sufficient to raise an issue as to whether Citibank used its discretion to apply the otherwise neutral underwriting criteria in a way which resulted in the denial of home loans to African-Americans based on their race or the racial composition of their neighborhood." Id. at 330. The court found that "this allegation of 'subjective decisionmaking' is sufficient to satisfy the commonality requirement of Rule 23(a)(2) and the dictates of [Falcon]." Id. See also Caridad v. Metro-North Commuter R.R., 191 F.3d 283, 292 (2d Cir. 1999) ("the fact that the Class Plaintiffs challenge the subjective components of company-wide employment practices does not bar a finding of commonality under either the disparate treatment or disparate impact model."), cert. denied, 529 U.S. 1107 (2000). The reasoning of Buycks-Roberson and Caridad is not persuasive. Not only does it ignore the qualifier used by the Supreme Court, it renders the commonality requirement meaningless, at least in discrimination cases. As one court has explained, "[i]f the decision to permit some measure of subjectivity could be regarded as itself a discriminatory practice, virtually all Title VII

b. USDA's Loan Making and Loan Servicing Processes Are Governed by Predominately Objective Criteria

Applying the above standard, it is immediately apparent that plaintiffs cannot establish commonality based on USDA's decisionmaking process. Contrary to plaintiffs' claim that USDA "vested white males, operating at the local level in USDA county offices, with virtually unfettered discretion to determine which farmers would participate in [USDA's] loan programs" (Pl. Supp. Memo. at 5), USDA's loan making and loan servicing processes are governed by an extensive statutory and regulatory scheme that imposes neutral, objective standards.

To begin with, the Secretary of Agriculture is authorized to make and insure loans to only those farmers and ranchers of family farms who are unable obtain satisfactory credit elsewhere, taking into consideration prevailing rates in the community in or near which the applicant resides. 7 U.S.C. § 1922(a)(4) (farm ownership loan); 7 U.S.C. § 1941(a)(4) (operating loans); see also 7 C.F.R. §§ 1941.2, 1941.6, 1943.2, 1943.6. Also, the Secretary may make a direct farm ownership loan to only those applicants who have operated a farm or ranch for not less than 3 years, among other conditions relating to whether the applicant had a prior direct loan and the date of that prior loan. See 7 U.S.C. § 1922(b)(1) and (3).

There are also statutory limits on the loan amounts. See 7 U.S.C. §§ 1925(a) (farm ownership loan), 1943(a) (operating loan), 1964(a) (disaster/emergency loan). For example, the Secretary may not make a farm ownership loan that would cause the borrower's unpaid

cases against large employers would be transformed into nationwide class action lawsuits. The class action device was never intended to have such broad application." Abram, 200 F.R.D. at 430. To the contrary, as noted before, class treatment is an exception to the rule.

indebtedness to exceed the smaller of (1) the value of the farm or other security or (2) \$200,000. See 7 U.S.C. § 1925(a). In addition, statutory restrictions exist on the loans that may be provided to a delinquent borrower. See 7 U.S.C. § 2008h; 7 C.F.R. § 1941.12(a)(10).

To qualify for an FSA loan, an applicant must satisfy a long list of eligibility requirements including: citizenship; legal capacity to contract, honesty during the application process; sufficient training or farming experience (i.e., at least one year's complete production and marketing cycle within the last five years); creditworthiness; not delinquent on any federal debt; and not having previously caused FSA a loss by receiving debt forgiveness on all or a portion of any FSA direct or guaranteed loan by debt-write down, write-off, adjustment, reduction, charge-off or discharge in bankruptcy or through any payment of a guaranteed loss claim under the same circumstances. See 7 U.S.C. § 2008h; 7 C.F.R. § 1941.12(a) (operating loans), 1943.12(a) (farm ownership loans); see also 7 C.F.R. § 1910.5.

The applicant must also develop a "feasible" Farm and Home Plan – consisting of the applicant's farming record, financial condition (i.e., amount of farm debt; other farm and non-farm liabilities; living expenses; operating costs; projected farm and non-farm income; farm and non-farm assets), and an explanation of how the loan proceeds will be used – which demonstrates that the applicant's expected cash flow will enable him or her to repay the requested loan. See 7 C.F.R. §§ 1941.4, 1943.4, 1943.24. In evaluating the feasibility of the plan, FSA will rely on the applicant's previous five-year production history, or if such information is unavailable, FSA farm programs' actual yield records and county or state averages. 7 C.F.R. § 1924.56(b)(1). In making projections for agricultural commodities, FSA will use the unit prices published by the State unless the applicant has reliable evidence indicating that he or she will receive a premium

price for the commodity. 7 C.F.R. § 1924.56(b)(2).

Other considerations regarding whether an applicant may receive a loan include, inter alia, the overall limits on the amount of FSA debt that an applicant may carry, see 7 C.F.R. §§ 1941.29, 1943.29, and the adequacy of the applicant's collateral or security. see 7 C.F.R. §§ 1941.33(b), 1943.33(b); see also 7 C.F.R. §§ 1941.19, 1943.19. The availability of funds for a specific county and the timing of a farmer's application may also affect whether the farmer is able to obtain the USDA loan.

As with every aspect of the loan making process, and pursuant to statutory requirements (see 7 U.S.C. § 1983a), FSA has established specific guidelines for the processing of applications, including, inter alia, the time periods required for each step of the application process and the types of notification required. See 7 C.F.R. § 1910.4. Thus, for example, notification of an incomplete application must be sent to the applicant within 10 calendar days of FSA's receipt of the application. 7 C.F.R. § 1910.4(e)(3)(i). If the necessary information has not been received from the applicant, an additional notification must be sent within 20 calendar days of the first notification. 7 C.F.R. § 1910.4(c)(3)(iii). If a complete application is not approved or disapproved within 45 days, the County Supervisor and District Director are required to take certain steps to ensure timely processing. 7 C.F.R. § 1910.4(i)(1). Each complete application for farm credit programs must be approved or disapproved and the applicant notified in writing of the action taken within 60 days. Id. If an applicant receives an adverse decision, FSA must notify the applicant of his or her appeal rights. 7 C.F.R. § 1910.4(i)(5).

USDA's loan servicing procedures also are governed by an extensive statutory and

regulatory scheme. See 7 U.S.C. § 2001; 7 C.F.R. Part 1951, Subpart S. The Secretary is authorized to modify delinquent farmer program loans only when, among other things, the borrower can present a plan that demonstrates that he would be able to meet the necessary family living and farm operating expenses and service all debts, and if the loan, if restructured, would result in a net recovery to the government. 7 U.S.C. § 2001(b). Moreover, the Secretary may not reschedule or reamortize a loan for a borrower unless the borrower first pays a portion of the interest due on the loan. 7 U.S.C. § 2008g.

A delinquent borrower similarly must meet certain eligibility requirements for loan servicing, including, for example, establishing that he or she had less income than expected due to a natural disaster, weather or insect problem, family illness or injury, loss or reduction of off-farm income, diseases in livestock, or low commodity prices and high operating expenses in his or her local area. See 7 C.F.R. § 1951.909(c). In attempting to find the combination of loan servicing programs that will result in a feasible plan, the FSA must use the Debt and Loan Restructuring System ("DALRS") computer program, see 7 C.F.R. § 1951.909, which is an objective, computerized mathematical calculation tied directly to the statutory requirements provided under 7 U.S.C. § 2001 (Debt Restructuring and Loan Servicing).

For example, in assessing cash flow margin, the Secretary must assume that the borrower needs up to 110 percent of the amount indicated for payment of farm operating expenses, debt service obligations, and family living expenses. 7 U.S.C. § 2001(c)(3)(C). Also, the value of the restructured loan must be based on the present value of payments that the borrower would make to the government, with present value being determined by a discount rate of not more than the current rate on 90-day Treasury bill. 7 U.S.C. § 2001(c)(3)(A) and (B).

Finally, FSA's non-credit programs similarly contain specific objective requirements that must be satisfied by the applicant. For example, applicants for disaster payments made during the late 1980's and early 1990's must have had a gross revenue at or below a specific level, and the amount of payment depended on various factors, including crop type, historic levels of planted acreage and yield, market price, and the individual loss experienced by the farmer-applicant.³ See generally 7 C.F.R. Part 1477 (1996).

The existence of these neutral, objective factors by which applications for farm loans and loan servicing are to be evaluated and processed forecloses any suggestion that defendant's loan making process was based mostly on subjective factors, let alone that defendants engaged in "entirely subjective decisionmaking."

c. **Williams v. Glickman Is Directly On Point And Plaintiffs Have Failed to Show Disparate Impact**

The above conclusion is confirmed by Williams, in which the plaintiffs similarly argued that local FSA officials had "unbridled discretion" in reviewing loan applications. Williams I, at 13 n.16. The court rejected the argument, noting that the plaintiffs had not presented "significant proof" that it was so, citing the Supreme Court's language from Falcon. Id. In moving for reconsideration, the plaintiffs argued that "the CRAT Report established commonality by demonstrating that the common practice is for the [USDA] county supervisors, who are not accountable to the Secretary of Agriculture, to subjectively apply the same loan standards discriminatorily." Williams II, No. 95-1149, 1997 WL 198110, at * 2. Judge Flannery rejected that contention, holding that:

³ Congress has since suspended appropriation for disaster benefit programs. See 7 U.S.C. § 7301.

Even if the Court were to accept the truth of the statements in the CRAT Report, this would not constitute significant proof of an entirely subjective decisionmaking processes, as required by Falcon. The plaintiffs appear to be arguing that local officials are ignoring applicable standards, not that such officials operate in a *system* without standards which allows them to make decisions subjectively. The plaintiffs, then are not really describing “common practices” under Falcon. They are describing individual instances of deviation from objective standards.

Id. (emphasis in original, internal footnote omitted). Judge Flannery therefore determined that the plaintiffs’ allegation, “even if supported by the CRAT Report or other evidence in the record, is not sufficient by itself to establish the existence of common factual or legal issues.” Id.

Plaintiffs argue that Williams is distinguishable because, in addition to having a more narrowly defined class and a better pled complaint, they have presented “significant proof” of the existence of unbridled discretion resulting in discrimination against Hispanic farmers. Pl. Supp. Memo. at 32. Relying on an expert report prepared by Professor Jerry Hausman, plaintiffs further contend that commonality is established by “statistical evidence” of disparate impact. Id.

Plaintiffs’ arguments must be rejected because, as already demonstrated above, it is indisputable that FSA’s loan making and loan servicing processes are governed by predominately objective standards set forth in a comprehensive regulatory and statutory scheme. The most plaintiffs can show is that some individual, local FSA officials may have ignored or deviated from applicable objective standards as Hispanic farmers sought to participate in USDA’s farm programs. Indeed, the “significant proof” plaintiffs refer to are no more than declarations from individuals who state their belief that discrimination occurred both within and without USDA. See Pl. Supp. Memo. at 32. Although plaintiffs did cite a farmer advocate’s statement that decisions made by local FSA officials “were somewhat subjective and resulted in unfair

treatment of many applicant” and a 1982 report by the U.S. Commission on Civil Rights referencing the “problem of subjectivity” in FSA’s loan decision process (Pl. Supp. Memo. at 8-9), they are hardly sufficient to establish that FSA officials operated in a system without any standards and which, therefore, allowed them to exercise unfettered discretion.

The expert report from Professor Housman similarly does not help plaintiffs. The report concludes that Hispanic farmers were less likely to receive farm loans from USDA than white farmers. Presumably, plaintiffs are attempting to establish that Hispanic farmers were disparately impacted by USDA’s allegedly excessively subjective decisionmaking process. However, even assuming that disparate impact analysis can be applied to credit discrimination cases such as this, Housman’s report makes no attempt to show causation – a necessary element for proving disparate impact. See Koger v. Reno, 98 F.3d 631, 639 (D.C. Cir. 1996) (In a disparate impact case, “the plaintiff must offer statistical evidence of a kind and degree sufficient to show that the practice in question has caused the exclusion of applicants . . .”) (quotations omitted).

Housman’s simple conclusion that Hispanic farmers were less likely to receive farm loans from USDA than white farmers is inconclusive as to whether there was disparate impact. In addition to the fact that his analysis was greatly limited by his exclusive use of 1997 agriculture census data – which reflected only the financial and economic conditions of farmers in 1997 instead of the nineteen-year period covered by plaintiffs’ claims – his economic model failed to take into account any of the eligibility criteria USDA used in evaluating applications. Variables – such as citizenship, creditworthiness, accessibility of commercial credit in a specific geographic location, prior credit and farming history – that are directly tied to an applicant’s likelihood of obtaining a USDA loan are missing from Housman’s regression model. Thus,

although Housman's finding may be consistent with plaintiffs' allegation of discrimination as he contends, without knowing how the Hispanic applicant pool compared with the white applicant pool, including information regarding who actually applied for such loans, he simply cannot, and in fact does not, rule out the equally possible conclusion that no discrimination had occurred. Indeed, USDA's 1999 Agricultural Economic and Land Ownership Survey showed that the household income of Hispanic farmers exceeded that of white farmers. Fewer Hispanic farmers may have applied for FSA loans or met the eligibility requirements.

In the end, no showing of disparate impact is possible in this case because even if such a theory is viable in a credit discrimination case, plaintiffs cannot show that FSA officials had unfettered discretion in their decisionmaking process, much less that such alleged subjective decisionmaking process directly caused Hispanic American farmers to be excluded from USDA farm programs on a class-wide basis, rather than on an individual, case-by-case basis.

**d. USDA's Decentralized Decisionmaking Process
Precludes A Finding of Commonality and Typicality**

Ironically, plaintiffs' argument that USDA has a policy or practice of vesting the decisionmaking power in FSA officials "at the local level in USDA county offices" and that such local officials control USDA's loans to Hispanic farmers (Pl. Supp. Memo. at 5), actually confirms that there is no possible claim of commonality or typicality among the putative class. Commonality and typicality are generally found lacking where "each plaintiff or putative class member has his or her own set of unique circumstances surrounding the adverse employment action about which they now attempt to collectively complain," Reyes v. The Walt Disney World Co., 176 F.R.D. 654, 658 (M.D. Fla. 1998), and "[t]he decentralization of the challenged decisions is a key factor underlying the necessity for individualized inquiries." Lott v.

Westinghouse Savannah River Co., 200 F.R.D. 539, 555 (D.S.C. 2000).

Courts in this district have routinely held that commonality does not exist where the challenged practices were made in a decentralized fashion by an agency's field offices or divisions. See, e.g., Rowe v. Bailar, No. 77-1943, 1979 WL 24, at * 3 (D.D.C. Aug. 24, 1979); Valentino v. U.S. Postal Service, No. 77-0331, 1978 WL 110, at * 2 (D.D.C. June 14, 1978); Arnett v. American Nat'l Red Cross, 78 F.R.D. 73, 76 (D.D.C. 1978); Rowinski v. Vaughn, 76 F.R.D. 241, 244 (D.D.C. 1977). Similarly, the overwhelming majority of federal courts -- both courts of appeals⁴ and district courts⁵ -- have agreed that "[a] class may not be based on discrimination occurring in different departments, involving different decision makers." Abrams, 178 F.R.D. at 129.

⁴ See, e.g., Bradford v. Sears, Roebuck & Co., 673 F.2d 792, 795 (5th Cir. 1982); Stastny v. Southern Bell Telephone & Telegraph Co., 628 F.2d 267, 279 (4th Cir. 1980); Doninger v. Pacific Northwest Bell, Inc., 564 F.2d 1304, 1311 (9th Cir. 1977). Cf. Haley v. Armour & Co., 743 F.2d 199, 216 (4th Cir. 1984) (reversing certification of a hiring and promotion class "because the district court made no finding that the supervisors who made the challenged promotions decisions were the same persons who made hiring decisions"), *cert. denied*, 470 U.S. 1078 (1985).

⁵ See, e.g., Abram, 200 F.R.D. at 432; Reid v. Lockheed Martin Aeronautics Co., Nos. 00-1182-JOF, 00-CV-1183-JOF, 2001 WL 949960, at *15 (N.D. Ga. Aug. 3, 2001); Lott, 200 F.R.D. at 556; Reap v. Continental Casualty Co., 199 F.R.D. 536, 544-45 (D.N.J. 2001); Zachery v. Texaco Exploration & Production, Inc., 185 F.R.D. 230, 238-240 (W.D. Tex. 1999); Bostron v. Apfel, 182 F.R.D. 188, 195-96 (D. Md. 1998); Abrams, 178 F.R.D. at 130; Appleton v. Deloitte & Touche, 168 F.R.D. 221, 231-32 (M.D. Tenn. 1996); Zapata v. IBP, Inc., 167 F.R.D. 147, 159 (D. Kan. 1996); Allen v. City of Chicago, 828 F. Supp. 543, 552 (N.D. Ill. 1993); Lusardi v. Xerox Corp., 122 F.R.D. 463, 465 (D.N.J. 1988), *mandamus granted on other grounds*, 855 F.2d 1062 (3d Cir. 1988); Rosenberg v. Univ. of Cincinnati, 118 F.R.D. 591, 594-95 (S.D. Ohio 1987); Johnson v. Bond, 94 F.R.D. 125, 129-30 (N.D. Ill. 1982); Seidel v. General Motors Acceptance Corp., 93 F.R.D. 122, 125 (W.D. Wash. 1981); Michigan State Univ. Faculty Ass'n v. Michigan State Univ., 93 F.R.D. 54, 59 (W.D. Mich. 1981); Duncan v. State of Tennessee, 84 F.R.D. 21, 35 (M.D. Tenn. 1979); Wells v. General Electric Co., 78 F.R.D. 433, 438 (E.D. Pa. 1978). But see Bates v. United Parcel Service, 204 F.R.D. 440, 445-47 (N.D. Cal. 2001); Morgan v. United Parcel Service, 169 F.R.D. 349, 355-56 (E.D. Mo. 1996).

What plaintiffs are left with, then, are “across-the-board” claims of discrimination not amenable to class certification. Falcon, 457 U.S. at 157-58, 160. Members of the putative class allegedly dealt with hundreds, if not thousands, of local FSA officials, over a 19-year period, in more than 2,700 county offices across the country. They made their applications for a wide array of programs, with differing eligibility and other requirements, and the class members were exposed to widely divergent outcomes. A single determination that all Native American farmers were discriminated against by USDA as alleged would be extraordinary and impossible, because it would mean that each of the 20,000 members of the putative class was in fact eligible and qualified every time he applied for, and was denied, credit and/or benefits during the 19-year period; that other similarly situated non-Native American farmers in the same locality received better treatment from USDA each time the putative class member was denied credit or benefits; and that USDA had not a single legitimate non-discriminatory reason for denying the credit and/or benefits.

The results of the consent decree proceedings in Pigford v. Glickman, in which the plaintiffs assert exactly the same claims as those asserted in this case, demonstrates that such across-the-board, common determination of liability is impossible. Despite being subjected to a lower standard of proof than would be used at trial, only 60% of the more than 20,000 African American claimants whose claims were adjudicated on a case-by-case basis under the Consent Decree’s Track A process prevailed in their credit discrimination claims. In the Track B Pigford arbitrations, where the Federal Rules of Evidence apply and claimants must establish discrimination by a preponderance of evidence, FSA has prevailed in more than half of the arbitrations that have been decided on the merits. The Pigford plaintiffs’ extraordinary rate of

failure on claims that are virtually identical to those being asserted here amply underscores the individualized nature of plaintiffs' disparate claims of discrimination by 2,700 different local FSA offices over two decades.

For all these reasons, plaintiffs cannot establish commonality or typicality based on USDA's decisionmaking process in granting or denying loans.

2. USDA's Alleged Failure to Investigate Discrimination Complaints Cannot Provide the Basis for Commonality

Plaintiffs also argue that USDA's alleged failure to investigate discrimination complaints establishes commonality under Rule 23(b)(2) because that failure is allegedly "part and parcel of a pattern and practice of discrimination common to all class members that adversely impacted Hispanic farmers and ranchers who sought access to USDA loans and debt servicing." Pl. Supp. Memo. at 28, see also id. at 34. According to plaintiffs, "[i]n the early 1980s, USDA secretly dismantled its apparatus for investigating discrimination complaints arising out of its loan application process, thereby destroying its means of enforcing ECOA." Id. at 1. Perhaps recognizing that commonality may not be based on an issue about which plaintiffs have no cause of action, plaintiffs dispute this Court's finding that their allegations of failure to investigate civil rights complaints do not state claims under ECOA.

Plaintiffs' contention must be rejected. In addition to the fact that USDA did not "dismantle" its civil rights complaint processing system,⁶ this Court's ruling that USDA's failure

⁶ Although USDA's civil rights complaint processing mechanism was admittedly dysfunctional at certain periods and has gone through various organizational changes within the last two decades, it was never "dismantled" at any point. The language can be traced to a June 1996 report by the U.S. Commission on Civil Rights, entitled "Federal Title VI Enforcement to Ensure Nondiscrimination in Federally Assisted Programs." In the chapter on the Department of Agriculture, the report states:

to investigate discrimination complaints did not constitute a credit transaction under ECOA is entirely correct. ECOA makes it unlawful for “any creditor to discriminate against any applicant, with respect to any aspect of a *credit transaction*” 15 U.S.C. § 1691(a) (emphasis supplied), and provides that “[a]ny creditor who fails to comply with any requirement imposed under this subchapter shall be liable to the aggrieved applicant for any actual damages sustained by such applicant . . .” 15 U.S.C. § 1691e(a). The statute says nothing about the requiring a prospective creditor to investigate or process civil rights complaints, nor does it impose any obligations on the creditor or any government entity with respect to such complaints. There is no need to, either. By creating a cause of action and providing an adequate remedy for an aggrieved credit

Around 1980 or 1981, there was an agenda to 'dismantle' the office [of equal opportunity]. Compliance reviews and investigations were stopped, and 'unspent' funds were returned as 'waste.' Because the Director at that time regarded the office as having a primarily minority constituency, the Office of Equal Opportunity was renamed the Office of Minority Affairs. Between 1981 and 1986, the office had a 'revolving door' of civil rights directors, many of whom had no civil rights experience. A reorganization during this period changed the name of the office back to the Office of Equal Opportunity. Until 1986 compliance review reports were systematically suppressed and reports with negative findings were generally not released. Managers and supervisors were downgraded, and the overall morale of the staff was low. Civil rights enforcement at USDA 'diminished,' and the civil rights office became a 'rubber stamp' in enforcement. Whereas prior to 1981, 30 to 35 staff had been assigned to Title VI activities, by 1986, 12 staff were responsible for all of the office's civil rights enforcement. Even today, the office is still suffering from the impact of these actions.

Id. at chapter 7, page 255. The paragraph is primarily based on an interview of one USDA employee within the office of equal opportunity/civil rights in 1994 about what went on in 1980-81. Its reliability and accuracy therefore is far from proven. Even assuming the accuracy of this paragraph, it does not state that the office of equal opportunity/civil rights was “dismantled.” Its reference to the civil rights office’s having a reduced role, with a revolving door of directors, low morale, and reduced number of staff in 1986 appears to be an aspect of the bureaucratic ups and downs of the agency. Indeed, the report states that in the 1990s, the office of equal opportunity continued to undergo reorganizations, with the changes ranging from shifts in staff assignments and civil rights responsibilities to name changes. Id. at 255-56.

applicant, ECOA does not depend on any other civil rights complaint system for its enforcement, nor can the alleged failure of such a system – which itself does not involve a credit transaction or an aspect of one – constitute a violation of ECOA. Plaintiffs’ argument that the alleged failure of USDA’s civil rights complaint process “destroy[ed] its means of enforcing ECOA,” (Pl. Supp. Memo. at 1), therefore, should be rejected out-of-hand.

Indeed, USDA’s administrative mechanism to receive civil rights complaints is designed to redress discrimination claims in all USDA programs, not just FSA’s credit programs. See 7 C.F.R. Part 15d. It is a creature of the agency’s internal guidelines, and was established under 5 U.S.C. § 301,⁷ an authority entirely unrelated to ECOA. Indeed, the administrative complaint mechanism was established in 1966, eight years before ECOA’s enactment. See 31 Fed. Reg. 8175 (June 10, 1966). As stated upon adoption of its most recent version, Part 15d is an internal mechanism for USDA to police itself and correct any prohibited discriminatory conduct. See 64 Fed. Reg. 66,709 (Nov. 30, 1999). Prior versions of Part 15d also described it as an “internal agency management” rule. See, e.g., 54 Fed. Reg. 31,163 (July 27, 1989); 50 Fed. Reg. 25,687 (June 21, 1985).

Moreover, even assuming that USDA’s civil rights complaint processing system was completely dysfunctional (thus impacting all minorities filing such complaints), the idea that an applicant was necessarily left without redress regarding a credit denial unless he sues under ECOA is insupportable. Decisions by FSA denying credit applications, loan servicing requests,

⁷ 5 U.S.C. § 301 is a general statute authorizing executive departments to issue house-keeping regulations. It provides that “[t]he head of an Executive department . . . may prescribe regulations for the government of his department, the conduct of its employees, the distribution and performance of its business, and the custody, use, and preservation of its records, papers, and property.”

or non-credit benefits under programs administered by FSA are appealable to USDA's National Appeals Division ["NAD"], an independent component within USDA that is entirely separate from FSA. See 7 C.F.R. Part 11; see also 7 C.F.R. §§ 1900.51, 1900.54-.55 (1995).

NAD's review power is comprehensive and applies to virtually every agency action plaintiffs challenge in this case, including even denials of equitable relief by FSA, or the failure by FSA to issue a decision or otherwise act on the request or right of the participant within a specified time frame, or within a reasonable time, if a time frame is not specified. See 7 C.F.R. § 11.1. For example, even when an applicant and FSA cannot agree on the Farm and Home Plan – which by itself would not constitute a credit or loan servicing denial – the applicant may appeal to the National Appeals Division. 7 C.F.R. § 1924.56(b)(4).

Although NAD's review is without regard to discrimination, see 7 C.F.R. § 11.1 (10), the appeals process serves the purpose of determining the propriety of FSA's adverse actions. Thus, whatever the "impact" USDA's allegedly dysfunctional complaint processing system may have had on Hispanic farmers, it is greatly mitigated by the existence the NAD appeals procedure.

For these reasons, USDA's alleged failure to timely investigate civil rights administrative complaints of discrimination cannot provide the necessary commonality or typicality that would warrant class certification.

C. Plaintiffs Cannot Fairly and Adequately Represent the Class

Given plaintiffs' failure to meet the commonality and typicality requirements of Rule 23(a), they cannot demonstrate, under Rule 23(a)(4), that they "will fairly and adequately protect the interests of the class." Conflicts of interests necessarily arise when the putative class representatives' claims are atypical. Amchem Products, Inc. v. Windsor, 521 U.S. 591, 626

n.20 (1997); In re American Medical System, 75 F.3d 1069, 1086 (6th Cir. 1996) (“The adequate representation requirement overlaps with the typicality requirement because in the absence of typical claims, the class representative has no incentive to pursue the claims of the other class members.”); Lang v. Kansas City Power & Light Co., 199 F.R.D. 640, 658 (W.D. Mo. 2001) (holding that “lack of typicality precludes a finding that the class representatives can adequately represent the class members’ interests”); Badillo v. American Tobacco Co., 202 F.R.D. 261, 265 (D. Nev. 2001) (“proposed Plaintiff class representatives cannot adequately represent the interests of other Plaintiff members of the class with atypical claims”).

The second criterion of the adequacy of representation is whether counsel is up to the task of representing the class. Plaintiffs’ original counsel clearly are not, as demonstrated by the hundreds of thousands dollars in sanctions that already have been levied against them in Pigford for their repeated failure to adhere to the court’s orders in that case. Nonetheless, given the presence of distinguished new lead counsel for plaintiffs in this case, defendant does not contest the adequacy of counsel’s representation. The quality of plaintiffs’ new counsel, however, is insufficient to establish that plaintiffs will adequately represent the interests of the members of the putative class, as required by Rule 23(a)(4).

III. Plaintiffs Claims Do Not Fall Within Any of the Categories of Rule 23(b).

Plaintiffs’ inability to satisfy the four prerequisites of Rule 23(a) automatically precludes certification in this case. But, even if they could carry their burden as to Rule 23(a), they do not satisfy the requirements of Rule 23(b), which independently precludes certification. Although plaintiffs previously argued that they are entitled to certification under all three categories of Rule 23(b), their supplemental memorandum addresses only Rule 23(b)(2) and (b)(3).

Accordingly, we will address only those two subdivisions.

A. Rule 23(b)(2) Certification is Inappropriate Because Monetary Claims Predominate

Rule 23(b)(2) authorizes a no-notice, no-opt out class in cases in which the defendant “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.” Fed. R. Civ. P. 23(b)(2). This subdivision, however, “does not extend to cases in which the appropriate final relief relates exclusively or predominantly to money damages.” Fed. R. Civ. P. 23(b)(2) Adv. Comm. Notes (1966 amendment). Thus, as the D.C. Circuit has noted, although courts have generally permitted (b)(2) classes to recover monetary relief in addition to declaratory or injunctive relief, “the monetary relief does not predominate” in those cases. Eubanks v. Billington, 110 F.3d 87, 92 (D.C. Cir. 1997).⁸

The D.C. Circuit has not established the outer limits for certification pursuant to (b)(2). The majority of the courts of appeals, however, have said that Rule 23(b)(2) certification is appropriate only if plaintiffs’ claim for monetary relief is “incidental” to their claims for injunctive or declaratory relief. See Kanter v. Warner Lambert Co., 265 F.3d 853, 860 (9th Cir. 2001) (“In Rule 23(b)(2) cases, monetary damage requests are generally allowable only if they are merely incidental to the litigation.”); Murray v. Auslander, 244 F.3d 807, 812 (11th Cir. 2001) (same); Jefferson v. Ingersoll Int’l, Inc., 195 F.3d 894, 898 (7th Cir. 1999) (same); Allison v. Citgo Petroleum Corp., 151 F.3d 402, 415 (5th Cir. 1998) (“[M]onetary relief predominates in

⁸ It nonetheless remains “an open question * * * in the Supreme Court whether Rule 23(b)(2) *ever* may be used to certify a no-notice, no-opt-out class when compensatory or punitive damages are in issue.” Jefferson v. Ingersoll Int’l, Inc., 195 F.3d 894, 899 (7th Cir. 1999) (emphasis in original) (citing Ticor Title Insurance Co. v. Brown, 511 U.S. 117, 121 (1994)).

(b)(2) class actions unless it is incidental to requested injunctive or declaratory relief.”⁹

Even under an “ad hoc balancing” approach recently adopted by the Second Circuit, which focused on the “relative importance of the remedies sought, given all of the facts and circumstances of the case,” Robinson v. Metro-North Commuter R.R., 267 F.3d 147, 163-65 (2d Cir. 2001) (internal quotation omitted), petition for cert. filed, 70 U.S.L.W. 3429 (Dec. 17, 2001), the injunctive or declaratory relief must still predominate over any monetary relief. Under that approach, Rule 23(b)(2) certification is appropriate if “the positive weight or value [to the plaintiffs] of the injunctive or declaratory relief sought is predominant even though compensatory or punitive damages are also claimed.” Id. at 164 (quoting Allison, 151 F.3d at 430). As such, the Second Circuit required a determination that “even in the absence of a possible monetary recovery, reasonable plaintiffs would bring the suit to obtain the injunctive or declaratory relief sought.” Id.

Under any of the above standards, Rule 23(b)(2) certification is inappropriate in this case. Despite plaintiffs’ protestation that their damages claims do not overshadow their request for declaratory and injunctive relief, their claim for not less than \$20 billion in damages – \$1 million for each class member – cannot but dwarf the declaratory and injunctive relief they seek. That

⁹ At least one district court in this Circuit appears to have applied the incidental monetary relief standard. In Kifafi v. Hilton Hotels Retirement Plan, 189 F.R.D. 174 (D.D.C. 1999), a plaintiff brought suit under the Employee Retirement Income Security Act (“ERISA”), 29 U.S.C. §§ 1001, et seq., challenging the method by which the Hilton Hotels calculated the amount of retirement benefits of which Hilton Hotel employees would be entitled. The plaintiff sought injunctive relief which would have required Hilton Hotels to pay the plaintiff and putative class in accordance with ERISA, as well as prejudgment and postjudgment interest. See id. at 177. In determining that certification of the putative class was appropriate under Rule 23(b)(2), Judge Kollar-Kotelly noted that “[t]he fact that Mr. Kifafi’s claim may involve *incidental* monetary relief does not render 23(b)(2) treatment inappropriate” Id. (emphasis supplied).

injunctive and declaratory relief is simply window dressing in this case is also apparent from the generalized nature of plaintiffs' request. Plaintiffs seek only declarations of their right to "equal credit, participation in farm programs, [] full and timely enforcement of racial discrimination complaints," 2d Amended Compl. ¶ 119, and reversal of USDA's actions "as violative of the Equal Credit Opportunity Act." *Id.* at ¶ 122; see also Pl. Supp. Memo. at 38. Were such generic requests for declaratory and injunctive relief sufficient to justify Rule 23(b)(2) certification despite claims for billions of dollars in monetary damages, Rule 23(b)(3) certification would be rendered a nullity and its requirements of predominance and superiority easily circumvented.

Although in Keepseagle, the Court has certified a Rule 23(b)(2) class based on similarly general claims of injunctive and declaratory relief and notwithstanding a request for \$19 billion in monetary damages, the appropriateness of that class certification order has been called into serious question. The D.C. Circuit has exercised its discretion to grant USDA's interlocutory appeal under Rule 23(f), and stayed all proceedings below upon finding that USDA had "satisfied the stringent standards required for a stay pending appeal." In re Veneman, No. 02-5021, at 1. By granting the stay, the Court of Appeals necessarily concluded that USDA was likely to succeed on the merits of its challenge to the class certification order. See Washington Metropolitan Area Transit Commission v. Holiday Tours, Inc., 559 F.2d 841, 843 (D.C. Cir. 1997).

To be sure, plaintiffs argue in the supplemental memorandum that they hope to "fix[] the system," and to "eliminat[e] [] discrimination 'root and branch,'" (Pl. Supp. Memo. at 37), including "enjoining the USDA from further violations of ECOA in its farm loan program," *id.* at 38. Plaintiffs also claim that their requested injunctive and declaratory, if granted, would

significantly impact how USDA processes complaints. *Id.* at 40. Yet, the Second Amended Complaint seeks no prospective relief involving modification of any specific USDA policy or practice, whether relating to USDA's administration of its farm loan programs or the operation of the civil rights complaint system. Nor does the Second Amended Complaint seek equitable relief applicable to the class as a whole.¹⁰ Indeed, the specific prayers for relief plaintiffs identified in the Second Amended Complaint – *viz.*, certification of a class; declaration of plaintiffs' rights; monetary damages of not less than \$20 billion; prejudgment interests; and attorneys' fees and expenses (2d Amended Compl. at 58) – say nothing about altering any aspect of USDA's operation. If anything, they confirm that this suit “relates exclusively or predominantly to money damages,” Fed. R. Civ. P. 23(b)(2) Adv. Comm. Notes (1966 amendment), which renders Rule 23(b)(2) certification inappropriate.

In any event, plaintiffs' claim for monetary damages simply cannot be deemed “incidental” to their requested injunctive or declaratory relief. “Incidental” damages are those that “flow directly from liability to the class as a whole on the claims forming the basis of the injunctive or declaratory relief;” they do not depend “in any significant way on the intangible, subjective differences of each class member's circumstances” or do they “require additional hearings to resolve the disparate merits of each individual's case.” *Allison*, 151 F.3d at 415. Here, as discussed before, no class-wide liability determination is possible, much less any

¹⁰ Although plaintiffs do seek “specific performance of . . . program benefits,” 2d Amended Compl. ¶ 129, the Supreme Court recently confirmed that “specific performance of a past due monetary obligation was not typically available in equity.” *Great Western Life & Annuity Ins. Co. v. Knudson*, 122 S. Ct. 708, 712 (2002). Moreover, not only is that requested relief entirely retrospective, it is individualized and unique to each class member's proof of discrimination and qualification for the various non-credit, benefits each seeks; it is not applicable to all members of the class in precisely the same way.

damages flowing directly from that liability determination. Moreover, allocation of any damages awarded will require individualized inquiries into the individual circumstances of each class member, precluding certification under Rule 23(b)(2). See Eubanks, 110 F.3d at 95 (premise behind Rule (b)(2) class "begins to break down when the class seeks to recover back pay or other forms of monetary relief to be allocated based on individual injuries").

Plaintiffs similarly cannot obtain Rule 23(b)(2) certification under the "ad hoc balancing" approach adopted by the Second Circuit. Most importantly, no court could reasonably conclude that, "in the absence of a possible monetary recovery, reasonable plaintiffs would bring the suit to obtain the injunctive or declaratory relief sought." Robinson, 267 F.3d at 164. Nor can it be said that the positive weight or value of the declaratory and injunctive relief to plaintiffs is "predominant" in this case. Id. Plaintiffs' general request for a declaration of their rights under ECOA and for injunctive relief – seeking proper administrative processing of their discrimination complaints – has no value independent from plaintiffs' individual claims for damages under ECOA, and is only useful to the extent it facilitates adjudication of their claims of credit discrimination. Undoubtedly, plaintiffs seek substantial money damages as the predominate form of relief in this case.

For the same reasons, plaintiffs' reliance on Thomas v. Albright, 139 F.3d 227 (D.C. Cir. 1998), is inapposite. There, although the court approved a consent decree allowing a (b)(2) class to recover \$3.8 million in damages, the injunctive relief awarded in that case was substantial. See 139 F.3d at 229-30 (detailing reinstatements, promotions, and a variety of other prospective remedies). Moreover, the damages in that case flowed directly from the injunctive relief. In contrast, as noted above, the injunctive relief sought by plaintiffs in this case is only significant to

the extent it facilitates plaintiffs' claims for \$20 billion in damages under ECOA.

Finally, plaintiffs' attempt to rely on Pigford v. Glickman, 182 F.R.D. 341, 351 (D.D.C. 1998), cannot be taken seriously. Although Judge Friedman initially certified a class under Rule 23(b)(2) on the "central question" of whether USDA failed to properly process their administrative civil rights complaints (see id. at 345), that certification order was vacated once it became clear that a certification under Rule 23(b)(3) was necessary to permit a settlement mechanism designed primarily to award money damages.¹¹ See Pigford v. Glickman, 185 F.R.D. 82, 93-94 (D.D.C. 1999), aff'd, 206 F.3d 1212 (D.C. Cir. 2000). Moreover, Judge Friedman specifically noted that the consent decree in that case "does not * * * provide any forward-looking injunctive relief." Id. at 110.

The settlement in Pigford makes it plain that this action is primarily focused on damages. Filed by the same counsel as in Pigford, this case, like Pigford, is really about obtaining compensation to redress individual instances of credit discrimination. In such circumstances, a generic prayer for declaratory and injunctive relief cannot provide a basis for certification under Rule 23(b)(2). See Robinson, 237 F.3d at 164 ("Insignificant or sham requests for injunctive relief should not provide cover for (b)(2) certification of claims that are brought essentially for monetary recovery."); Christiana Mortgage Corp. v. Delaware Mortgage Bankers Ass'n, 136 F.R.D. 372, 381 (D. Del. 1991) ("When * * * 'the realities of the litigation' demonstrate that the

¹¹ It bears mention that, in October 1998, when the class was certified in Pigford, there was no mechanism for seeking interlocutory review of class certification orders. Fed. R. Civ. P. 23(f), the provision permitting discretionary interlocutory appeal and pursuant to which the D.C. Circuit granted the appeal in Keepseagle, did not go into effect until December 1, 1998. Prior to that date the Supreme Court had held that class certification orders were not immediately appealable. See Coopers & Lybrand v. Livesay, 437 U.S. 463 (1978).

suit has been brought primarily for money damages, it may not be maintained as a (b)(2) class action” (internal quotation omitted)). Accordingly, this Court should deny plaintiffs’ request for certification of a Rule 23(b)(2) class.

B. Rule 23(b)(3) Certification Also is Inappropriate

Plaintiffs argue that this Court should adopt a “hybrid” approach, certifying a Rule 23 (b)(2) class as to their claims for injunctive and declaratory relief and a (b)(3) class as to their claims for monetary relief. Pl. Supp. Memo. at 29. A “hybrid” certification is unworkable here because absent a settlement, plaintiffs cannot satisfy the requirements of Rule 23(b)(3).

Rule 23(b)(3) requires that questions of law or fact common to the class members “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. Fed. R. Civ. P. 23(b)(3). As the Supreme Court has explained, Rule 23(b)(3) “invites a close look at the case before it is accepted as a class action,” and the proposed class must possess “a high degree of cohesion” to warrant adjudication by representation. Amchem, 521 U.S. at 615 (1997). Moreover, the predominance inquiry focuses on “the legal or factual-questions that qualify each class member’s case as a genuine controversy,” and is “far more demanding” than Rule 23(a)’s commonality requirement. Id. at 623-24. Suits that most commonly meet Rule 23(b)(3)’s requirements are actions alleging consumer or securities fraud or violation of antitrust laws, and may also include mass tort cases arising from a common cause or disaster. Id. at 624-25.

Against this standard, it is clear that plaintiffs’ proposed class cannot be certified under Rule 23(b)(3). According to plaintiffs, “the [allegedly] unfettered discretion of USDA officials

in applying the highly subjective criteria of the USDA farm loan programs is the predominant issue common to the claims of all class members.” Pl. Supp. Memo. at 41. However, as already shown above, plaintiffs cannot establish commonality on that, or any other, basis. Thus, they certainly cannot meet the more demanding standard of Rule 23(b)(3), which requires that common questions of law or fact “predominate,” over any questions affecting only individual members.

Indeed, far from possessing “a high degree of cohesion” to warrant adjudication by representation, Amchem, 521 U.S. at 616, the proposed class contains sharply divergent individual circumstances because plaintiffs allegedly suffered discrimination in a wide variety of different USDA credit and benefit programs, perpetrated by different USDA officials, in different geographic locations, and at different times during the last two decades. The fact that defendant prevailed in so many thousands of the Pigford cases, in which African American farmers asserted exactly the same claims as are asserted by the Hispanic plaintiffs in this case, dispels any notion that the resolution of the claims of a handful of plaintiffs should determine the outcomes of the claims of the other 20,000 class members.

As analyzed in detail in Williams I, in order to determine whether FSA took a given action against a given class member for a discriminatory purpose, the Court must look into the financial qualification and the repayment ability of each class member, among other eligibility requirements. Williams I, No. 95-1149, Mem. Order at 19-20. This would, in turn, require the Court to examine each individual class member’s loan applications to determine if they were “feasible,” and to evaluate the adequacy of each applicant’s collateral for making the loan. Id. at 20. In addition, the Court would have to determine whether FSA provided better treatment to

other similarly situated non-Hispanic American farmers in the same locality, whether it has legitimate, non-discriminatory reasons for denying each class member's application, and what damages, if any, the individual plaintiffs should be awarded.

The same type of analysis would be necessary in determining whether FSA's action on a request for loan servicing or debt settlement was proper and not discriminatory. In fact, given that decisions almost always are made at the county office level for both credit and non-credit benefit programs, these liability issues would also necessarily involve a county-by-county analysis of decisions and other actions over a 19-year period, so that a comparison with the treatment of similarly situated non-Hispanic farmers in each area could be undertaken to determine if discriminatory treatment had occurred.

Without a system for separately adjudicating each putative class member's entirely individualized claims, as was available to the class members in Pigford only by virtue of the settlement, this sort of compartmentalized inquiry certainly cannot meet Rule 23(b)(3)'s "demanding" predominance requirement. See Rutstein v. Avis Rent-A-Car Systems, Inc., 211 F.3d 1228 (11th Cir. 2000) (reversing certification of Rule 23(b)(3) class alleging discrimination by car rental company on predominance grounds), cert. denied, 121 S. Ct. 1354 (2001); Amchem, 521 U.S. 591 (fact that all members had been exposed to asbestos products was insufficient to meet predominance standards, as different members were exposed to different products for different amounts of time in different ways, and differences in state law compounded those disparities).

Because individual issues predominate in this case, it necessarily follows that plaintiffs cannot show that a class action is "superior to other available methods for the fair and efficient

adjudication of the controversy.” Fed. R. Civ. P. 23(b)(3). Courts have recognized that “[t]he greater the number of individual issues, the less likely superiority [of class action] can be established.” Castano v. American Tobacco Co., 84 F.3d 734, 745 n.19 (5th Cir. 1996). Here, the predominance of a host of individual-specific issues relating to plaintiffs’ claims for compensatory and punitive damages necessarily detracts from the superiority of the class action device in resolving these claims. See Allison, 151 F.3d at 419.

If the Court were required to assess the numerous questions related to liability and damages with respect to each class member, as has ultimately become necessary in Pigford for each of the 21,000 class member, one can only imagine the potential management and logistical difficulties likely to be encountered – a significant factor counseling against certification. See Allison, 151 F.3d at 419; cf. Amchem, 521 U.S. at 620 (when “[c]onfronted with a request for settlement-only class certification, a district court need not inquire whether the case, if tried, would present intractable management problems”). These difficulties are compounded, of course, by the purportedly massive size of the putative class.

Moreover, as Judge Flannery explained in Williams I, individual lawsuits would not waste judicial resources “because courts deciding separately-filed lawsuits would not have to decide common legal or factual questions needlessly. Rather, each court would quite properly consider the unique issues raised by each individual farmer’s claims of discrimination.” Williams I, No. 95-1149, Mem. Order at 22 n.21. Accord Frahm v. Equitable Life Assurance Soc’y, 137 F.3d 955, 957 (7th Cir.) (“Individual rather than class litigation is the best way to resolve person-specific contentions when the stakes are large enough to justify individual suits.”), cert. denied, 525 U.S. 1075 (1998).

Finally, superiority of a class action is especially limited where, as here, plaintiffs' individual claims have substantial value. See Allison, 151 F.3d at 420 (finding claims for \$300,000 per plaintiff to undermine claim of superiority). As the Supreme Court has instructed, “[t]he policy at the very core of class action mechanism is to overcome the problem that small recoveries do not provide incentive for any individual to bring a solo action prosecuting his or her rights.” Amchem, 521 U.S. at 617 (quoting Mace v. Van Ru Credit Corp., 109 F.3d 338, 322 (1997)). Given the enormity of each putative class member’s damages claim – \$1 million each – and the availability of attorney’s fees for successful litigants under ECOA, there is also no question as to the feasibility of individual suits.

Accordingly, plaintiffs’ proposed class action cannot satisfy the requirements of Rule 23(b)(3), let alone a hybrid certification.

CONCLUSION

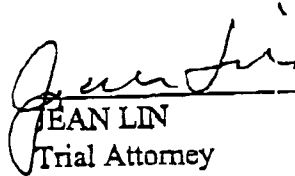
For the foregoing reasons, defendant respectfully requests that the Court deny plaintiffs’ motion for class certification.

Respectfully submitted,

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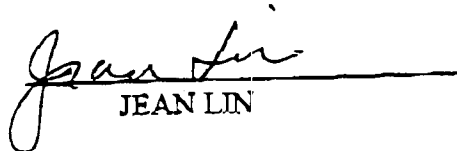
CERTIFICATE OF SERVICE

I certify that today, April 29, 2002, the foregoing Defendant's Opposition to Plaintiffs' Motion for Class Certification was served by first class mail, postage prepaid, upon the following counsel of record:

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