IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

GUADALUPE L. GARCIA, JR., et al.,

Plaintiffs,

v.

ANNE VENEMAN, Secretary of the
Untied States Department of Agriculture,

Defendant.

Civil Action No. 1:00CVO2445
Judge Robertson

PLAINTIFFS' REPLY TO DEFENDANTS' OPPOSITION TO PLAINTIFFS' MOTION FOR CLASS CERTIFICATION

INTRODUCTION

Pursuant to the procedural schedule approved by the Court, plaintiffs submit this reply to Defendant's Opposition to Plaintiffs' Motion for Class Certification (hereafter "Opposition" or "Opp."). In her Opposition, the Government largely ignores the evidence adduced by plaintiffs showing a well-documented pattern and practice of discrimination by the United States Department of Agriculture ("USDA") against Hispanic farmers and ranchers who attempt to participate in USDA farm credit and benefits programs. Thus, for example, it does not challenge the declarations of former high USDA officials, farmers' advocates, named plaintiffs, and putative class members describing a well-documented pattern and practice of discrimination based upon national origin and ethnicity in the making and servicing of loans by the Farm Home Administration and its successor, the Farm Service Agency (collectively the "FSA"). Exs. 1-2, 7, 9-49 to Plaintiffs' Supplemental Memorandum In Support Of Their Motion for Class Certification ("Plaintiffs' Supplemental Memorandum"). Nor does the Government take issue with the findings of the U.S. Commission on Civil Rights and Congress or the FLAG's detailed

history of discrimination in USDA credit programs. Exs. 5-6, 8 of Plaintiffs' Supplemental Memorandum. Similarly, the Government does not challenge the statistical evidence from the USDA-funded Miller Report showing, inter alia, that Hispanic farmers receive disproportionately fewer USDA loans than white male farmers. Ex. 3 to Plaintiffs' Supplemental Memorandum. The Miller Report's statistical findings are confirmed by the econometric analysis of Professor Hausman of the Massachusetts Institute of Technology ("MIT"). Indeed, the Government "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." Opp. at 3. In the Government's view, the issue is not "whether discrimination occurred, or whether it is still occurring" but "[r]ather . . . whether this acknowledged problem is best addressed through a class action lawsuit." Ibid. (Citation omitted.) Plaintiffs submit that the Government's Opposition fails to explain why a class action is not the best way to address USDA's acknowledged discrimination against Hispanic farmers.

ARGUMENT

I. PLAINTIFFS HAVE SHOWN THAT THEY SATISFY THE REQUIREMENTS OF RULE 23(a).

A. Plaintiffs Have Satisfied the Numerosity Requirement of Rule 23(a)(1).

Incredibly, the Government argues that "[p]laintiffs have failed to make the necessary showing to satisfy Rule 23(a)(1)." Opp. at 10. The argument is baseless.

The Second Amended Complaint contains the names of 98 plaintiffs. In addition, Plaintiffs' Supplemental Memorandum includes the declarations of 44 Hispanic farmers. Farmer advocate Lourdes Gonzalez, in her declaration, states that she has personally worked with hundreds of Hispanic farmers who have been the victims of USDA discrimination with respect to farm credit and benefits programs. Gonzales Decl. ¶¶ 9, 12, 13 and 15 (Ex. 9 to Plaintiffs' Supplemental Memorandum). Furthermore, there are currently 179 Hispanic farmers from 5

states who have signed retainer agreements in connection with this lawsuit. Thus, while plaintiffs stand by their estimate that the total class is approximately 20,000, any of the foregoing numbers cited satisfies the numerosity requirement. Indeed, classes of 35 to 40 plaintiffs have been deemed sufficient to satisfy the numerosity requirement where, as in the instant case, class members reside in different states. Markham v. White, 171 F.R.D. 217, 221 (N.D. Ill. 1997); see also In re Pepco Employment Litig., No. 86-0603, 1992 U.S. Dist. LEXIS 18648 at * 9 (D.D.C. 1992).

B. Plaintiffs Satisfy the Commonality and Typicality Requirements of Rule 23(a)(2) and (a)(3).

1. The Excessive Discretion That Infects the USDA Farm Loan and Benefit Programs Satisfy the Commonality Requirement of Rule 23(a)(2).

As plaintiffs demonstrate in their Supplemental Memorandum, the USDA regulations governing a farmer's eligibility to participate in USDA farm credit and benefits programs are highly subjective and invest local USDA officials with unfettered discretion. Plaintiffs' Supplemental Memorandum at 5-9. In arguing that the demonstrated excessive subjectivity of the USDA's eligibility regulations does not satisfy the commonality requirement, the Government misconstrues the standard set forth in General Telephone Co. v. Falcon, 457 U.S. 147, 159 n.15 (1982). The Government seeks to gloss over the subjectivity and unfettered discretion that unquestionably infect the USDA credit program by, among other things, pointing to supposedly "objective" standards applicable to the farm credit program. It also attempts to disparage some, but not all, of plaintiffs' statistical evidence demonstrating the adverse impact that USDA's lending practices have had on Hispanic farmers. Finally, it argues that USDA's decentralized decisionmaking process precludes a finding of commonality.

a. Defendant Misconstrues Footnote 15 in Falcon.

Starting with footnote 15 in Falcon, 457 U.S. at 159 n.15, the Government argues that in order to satisfy the commonality requirement of Rule 23(a)(2), the USDA farm loan process must be "entirely subjective." Opp. at 11. The Government's argument is wide of the mark.

First, Falcon involved a single plaintiff who had been an employee who alleged that he had been the victim of discrimination in the denial of a promotion. 457 U.S. at 149. In seeking to bring a class action, Mr. Falcon also sought to represent unsuccessful job applicants. Id. at 150-151. Prior to Falcon, the courts permitted class action plaintiffs to bring such across-the-board claims. The Supreme Court in Falcon, however, rejected across-the-board representation. In so doing, the Court discussed ways in which a plaintiff might still be able to bring an across-the-board action. One such way described by the Court was "[s]ignificant proof that an employer operated under a general policy of discrimination conceivably could justify a class of both applicants and employees if the discrimination manifested itself in hiring and promotion practices in the same general fashion such as through entirely subjective decisionmaking processes." 457 U.S. at 159 n.15.

The plain language of footnote 15 makes clear that the "entirely subjective decision-making process" was merely one example that "an employer operated under a general policy of discrimination. . . ." Id. There is simply nothing in Falcon that in any way suggests the Court intended footnote 15 to be an exhaustive list of circumstances in which an across-the-board representation might be allowed. Falcon neither indicates nor requires that "entirely subjective" is the only standard for establishing commonality. Indeed, Falcon in no way suggests that "entirely subjective" is the standard for establishing commonality where a named class plaintiff has experienced each of the challenged discriminatory practices.

b. A farmer's eligibility to participate in USDA's credit programs is determined on the basis of highly subjective criteria by officials with unfettered discretion.

Reflecting a fundamental misreading of Falcon, the Government argues that because the USDA has issued regulations which purport to address certain seemingly objective criteria with

respect to certain USDA loans, the process is not "entirely subjective" and therefore does not satisfy the commonality requirement of Rule 23(a)(2) as construed by the Court in Falcon. See Opp. at 14-18. The Government's argument clearly overreaches. According to the Government, so long as the USDA can point to a single "objective" standard, rule or regulation in its decisionmaking process, no matter how insignificant, then the commonality requirement of Rule 23(a)(2) cannot be satisfied, notwithstanding the fact that the criteria upon which the USDA made its decision were highly subjective and permitted it to discriminate with impunity. Such a standard simply does not, and cannot, state a rational rule of law.

In an effort to bolster the argument that the decisionmaking process associated with the USDA credit programs is based on objective criteria, defendant has seemingly combed the Code of Federal Regulations looking for any regulation that arguably appears to be based upon an objective criteria. See Opp. at 14-18. However, rather than the litany of extraneous regulations cited by defendant, the largely all-white-male-dominated county committees, in determining a farmer's eligibility to participate in USDA credit programs, were supposed to consider only six criteria: creditworthiness, citizenship, experience, character, appropriate farm size and ability to obtain non-USDA credit. See 7 C.F.R. §§ 1941, 1943. Moreover, even when the eligibility-determination authority was transferred to the county credit managers in 1999, the eligibility criteria did not change. As plaintiffs demonstrated in their Supplemental Memorandum, apart from citizenship, the eligibility criteria at the core of the USDA credit programs are highly subjective and fraught with the potential for discrimination against Hispanic farmers and ranchers, as well as other disfavored minorities. See Plaintiffs' Supplemental Memo at 7-9. Significantly, defendant does not challenge that conclusion. Obviously, if the county committee and later the county credit manager could, with absolute discretion, use any of five highly subjective criteria to declare a minority farmer ineligible to participate in USDA credit programs, it is wholly irrelevant that other arguably "objective" criteria might also have some bearing upon the credit program. Indeed, such a system is, for all practical purposes, "entirely subjective."

The law in this circuit is clear: "The existence of some common practices, such as subjective decisionmaking, can" satisfy the commonality requirement of Rule 23(a)(2). Wagner, 836 F.2d at 589, 594; Hartman v. Duffey, 19 F.3d 1459, 1472 (D.C. Cir. 1994); Cook v. Billington, 1992 U.S. Dist. LEXIS 12519 at *11 (D.D.C. Aug. 14, 1991); cf. Caridad v. Metro-North Commuter R.R., 191 F.3d 283, 292 (2d Cir. 1999), cert. denied, 529 U.S. 1107 (2000); Buycks-Roberson v. Citibank Fed. Sav. Bank, 162 F.R.D. 322, 330-331 (N.D. Ill. 1995); Shores v. Publix Super Mkts. Inc., No. 95-1162-CIV-T-25(E), 1996 WL 407850 at * 5 (M.D. Fla. March 12, 1996). There is no requirement in this circuit that the decisionmaking process must be "entirely subjective" in order to form the basis for commonality.

With respect to the unfettered discretion that undeniably infected the USDA farm loan program, Buycks-Roberson is particularly instructive because it closely parallels the facts of this case. That case, like the instant case, involved a claim brought under ECOA, 15 U.S.C., § 1691, et seq. In that case, like the instant case, the defendant lender had a number of facially neutral underwriting standards with respect to making loans. Plaintiffs in that case, as in the instant case, alleged, inter alia, that defendant's underwriting standards afford defendant's loan officers substantial discretion when making loan decisions and that that subjectivity allowed the bank to systematically discriminate on the basis of race or the racial composition of the applicant's neighborhood. . . ." 162 F.R.D. at 330. In terms equally applicable to the instant case, the court held that:

> The unifying force between the named representatives' claims and those of the proposed class is the allegation that Citibank subjectively applied its neutral underwriting criteria in a way which resulted in the denial of home loans to African-American applicants on the basis of race or the racial composition of the neighborhoods in which the applicants lived. Plaintiffs' failure to "challenge any particular underwriting criteria that applies generally to the class" is not relevant, since the alleged "policy or practice" at issue is Citibank's subjective application of these criteria, not the particular types of underwriting criteria, alone. This "subjective decisionmaking" . . . is the practice which is "generally applicable" to the class.

Id. at 331.

c. **Williams v. Glickman is clearly distinguishable from the instant case.**

In further support of its position, the Government argues that Williams v. Glickman, No. 95-1149, 1997 WL 198110 (D.D.C. April 15, 1997) (Williams II) is directly on point. See Opp. at 18-19. In Williams II, Judge Flannery rejected plaintiffs' claim that the USDA loan decision process was "entirely subjective" because, as he understood plaintiffs' claims, "plaintiffs appear[ed] 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." 1997 WL 198110, at *2. (Emphasis in original.) Given Judge Flannery's understanding of plaintiffs' claims, his conclusion in Williams II offers no comfort for defendant in this case because the claim in the instant case is precisely the reverse of what has been described as the plaintiffs' claim in Williams II. In the instant case, plaintiffs do not contend that local USDA officials have ignored USDA eligibility standards to discriminate against Hispanic farmers. To the contrary, plaintiffs contend, and the record conclusively demonstrates, that local USDA officials have used highly subjective eligibility criteria promulgated by USDA to discriminate against Hispanic and other minority farmers. Furthermore, the record also conclusively demonstrates that despite warnings about the adverse effects of such subjective standards on minority farmers dating to at least the 1982 Report of the U.S. Civil Rights Commission, USDA has done nothing to eliminate the subjectivity in its eligibility standards. See, e.g., Plaintiffs' Supplemental Memorandum at 9 and Ex. 6. See also Gray Decl. at ¶¶ 17 and 28 (Ex. 7 to Plaintiffs' Supplemental Memorandum).

In an attempt to denigrate the significant proof which plaintiffs have amassed concerning the subjective decisionmaking that infects the USDA credit program, the Government asserts that

> [t]he 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 the USDA.

Opp. at 19. Among the individuals whose declarations the Government dismisses in this fashion are Rosalind Gray, former Director of the USDA Office of Civil Rights, Dallas Smith, former Deputy Under Secretary, Farm and Foreign Agricultural Service, and Richard Gomez, former District Director of FmHA in Colorado and a veteran of over thirty years in the USDA. See Exs. 1, 2 and 7 to Plaintiffs' Supplemental Memorandum.

Moreover, while the Government acknowledges the declaration of "a farmer's advocate" and the 1982 Report of the U.S. Commission on Civil Rights, which the Government concedes refer to "the problem of subjectivity in FSA's loan decision process," the Government nonetheless dismisses that evidence as "hardly sufficient to establish that FSA officials operated in a system without any standards and which, therefore, allowed them to exercise unfettered discretion." Opp. at 20. (Emphasis added.) The Government's assertions to the contrary notwithstanding, as we have already shown, the test is not whether FSA officials operated in a system without any standards, but whether the standards were sufficiently subjective to permit them to exercise unfettered discretion. Both the U.S. Commission on Civil Rights and Congress concluded that the standards were sufficiently subjective to invest the local FSA officials with too much discretion. It is that discretion which satisfies the commonality requirement of Rule 23(a)(2). See Wagner, 836 F.2d at 589, 594; Buyck-Roberson, 162 F.R.D. at 330-331.

d. Plaintiffs Have Demonstrated The Adverse Impact of USDA's Granting Unfettered Discretion to Local Officials.

In addition to the undisputed reports of the U.S. Commission on Civil Rights, the United States Congress, and the undisputed declarations of USDA officials Rosalind Gray, Dallas Smith, and Richard Gomez, farmers' advocates Lourdes Gonzalez and William Arens, and the undisputed declarations of 44 Hispanic farmers, plaintiffs have presented statistical evidence demonstrating the disparate impact of the USDA's unfettered discretion on Hispanic farmers. That evidence consists of excerpts from the USDA-funded Miller Report and the declaration of

Professor Jerry Hausman of MIT. See Exs. 3 and 4 to Plaintiffs' Supplemental Memorandum. Both show that Hispanic farmers have a statistically significant lower likelihood of receiving a USDA loan than white farmers.

As a review of his resume makes clear, Professor Hausman is a world renowned econometrician.[1] In order to determine whether "the Hispanic loan ratio was lower than the white loan ratio, an outcome that would be consistent with discrimination against Hispanic farmers by the USDA in the provision of loans," Professor Hausman "used the same econometric methods [he] ha[s] used numerous times in [his] own academic research, and in government proceedings, e.g., before the Department of Energy, the USDA, the Department of Justice, and the Federal Trade Commission." Hausman Decl. ¶ 10 (Ex. 4 to Plaintiff's Supplemental Memorandum). In his regression model, Professor Hausman accounted for, inter alia, economic conditions in a given state that would affect both white and Hispanic loan ratios, average farm size and revenue. Id. at ¶ 11. In the course of that analysis, Professor Hausman found the difference in loan ratios between white and Hispanic farmers was not only statistically significant but "economically significant in the sense that it implies a substantial differential in the likelihood of obtaining a loan for Hispanic farmers." Id. at ¶ 13. Accordingly, Professor Hausman concluded "the econometric analysis demonstrates that, controlling for other available variables, the loan ratio for Hispanic farmers is lower than the loan ratio for white farmers, which indicates that Hispanic farmers are less likely to receive loans than white farmers. This result is consistent with plaintiffs' allegations that Hispanic farmers have been discriminated against by the USDA in the provision of farm loans." Id. at ¶ 15. That unrefuted testimony is also consistent with the declarations of Hispanic farmers who have described the discrimination perpetrated against them by the USDA. Exs. 11-49 to Plaintiff's Supplemental Memorandum.

While the Government attacks Professor Hausman's "simple conclusion" (Opp. at 20), it never mentions the USDA-funded Miller Report, which presents a similar conclusion. See Ex. 3

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[1] See Ex. 4 to Plaintiffs' Supplemental Memorandum.

to Plaintiffs' Supplemental Memo. The USDA-funded Miller Report shows that for the period of 1993-1994 Hispanic farmers received disproportionately fewer loans than did white male farmers. In fact, as the Miller Report makes clear, all minority groups and white females received proportionately fewer loans than did white males. Id.

Defendant's attacks on the Hausman study are simply wide of the mark. It is well settled that a motion for class certification is not an occasion for an examination of the merits of the case. Caridad v. Metro-North Commuter R.R., 191 F.3d at 291. See also Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 177 (1974) ("[N]othing in either the language or history of Rule 23 . . . gives a court any authority to conduct a preliminary inquiry into the merits of a suit in order to determine whether it may be maintained as a class action"); Sirota v. Solitron Devices, Inc., 673 F.2d 566, 570-72 (2d Cir. 1982); Kuck v. Berkley Photo, Inc., 81 F.R.D. 736, 739 (S.D.N.Y. 1979) ("[o]nce plaintiffs have demonstrated . . . a reasonable basis for crediting the assertion that aggrieved individuals do exist in the broader class they propose, then it is inappropriate for th[e] Court to attempt to resolve material factual disputes on a motion for class certification") (footnotes omitted). Indeed, in Caridad, the court found that an analysis similar to the type performed by Professor Hausman was sufficient to support plaintiff's claims of discrimination and class certification notwithstanding extensive criticism of the analysis by defendant's expert. 191 F.3d at 288-289. In so concluding, the court noted "[t]hough Metro-North's critique of Class Plaintiffs' evidence may prove fatal at the merits stage, Class Plaintiffs need not demonstrate at this stage that they will prevail on the merits." Id. at 292; see also Jarvaise v. Rand Corporation, 2002 U.S. Dist. LEXIS 6096 at *5 & n.1 (Feb. 19, 2002) ("The battle of statistical experts, while central to the ultimate issue of liability, is not relevant to the issue of class certification").

2. USDA's Decisionmaking Process Supports A Finding of Commonality and Typicality.

The Government next argues that USDA's allegedly decentralized decisionmaking process with respect to farm loan precludes a finding of commonality and typicality. Opp. at 21-24. However, it is well settled in this circuit that decentralized decisionmaking does not per se

preclude a finding of commonality and typicality. See, e.g., Thomas v. Christoper, 169 F.R.D. 224 (D.D.C. 1996), aff'd in part rev'd in part, 139 F.3d 227 (D.C. Cir.), cert. denied, 525 U.S. 1016, 525 U.S. 1033 (1998); Arnett v. American Nat'l Red Cross, 78 F.R.D. 73, 76 (D.D.C., 1978), Hyman v. First Union Corp., 982 F. Supp. 1, 5-7 (D.D.C. 1997).

While the Government cites numerous cases for the proposition that decentralized decisionmaking precludes a finding of commonality and typicality (Opp. at 21-22), those cases are all distinguishable from the instant case. Unlike those cases, the instant case involves highly subjective, uniform national regulations which have the force and effect of law and provide the means by which local USDA officials are able to discriminate against Hispanic farmers. This case, unlike those cited by defendant, also has a centralized complaint process established for the purpose of addressing discrimination complaints which had its investigatory apparatus surreptitiously dismantled and rendered dysfunctional for nearly twenty years. As the Court in Keepseagle found, "the ... absence of a functioning, effective mechanism for investigating ... complaints of discrimination ... exacerbate[d] and prolong[ed] any discrimination in the administration of USDA programs." Keepseagle v. Veneman, Mem. Op. at 22. Thus, where as here, USDA's acts or omissions contribute to the alleged discrimination, the commonality requirement is satisfied. See, e.g., Bates v. UPS, 204 F.R.D. 440, 446 (N.D. Cal. 2001); Morgan v. UPS of Am. Inc., 169 F.R.D. 349, 355-56 (E.D. Mo. 1996); Shores, 1996 WL 407850 at *5. See also Keepseagle, Mem. Op. at 22.

In the instant case, the national office of USDA has been repeatedly put on notice by reports of the U.S. Commission on Civil Rights, the Congress, the Office of Inspector General and the Civil Rights Action Team of a long history of discriminatory practices facilitated by its highly subjective regulations and has done nothing to correct either the regulations or the practices. See Gray Decl. at ¶ 17 ("Despite ample warnings that minority farmers were being subjected to systematic discrimination at the local level in the delivery of credit and debt servicing, USDA has failed to exercise sufficient control over its field operations to address these lingering problems") (Ex. 7 to Plaintiffs' Supplemental Memorandum). Indeed, as the

declaration of Rosalind Gray makes clear, despite repeated warnings and hundreds of millions of dollars having been paid to victims of its discrimination, there is no indication that the USDA has changed its standard operating procedure and "systematic exclusion of minority farmers remains the standard operating procedure for FSA." Gray Decl. at ¶ 28.

Finally, the Government argues that commonality is impossible because "[m]embers 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." Opp. at 23. The argument is unavailing. In each instance, plaintiffs were subject to the same nationally prescribed, highly subjective eligibility criteria and it is the subjective decisionmaking that those criteria permit and encourage that satisfies the commonality requirement of Rule 23(a)(2). See Buycks-Roberson, 162 F.R.D. at 330-331. Moreover, commonality does not require that there can be no differences in the circumstances and experiences of the putative class members, so long as there is a common thread. See, e.g., Hartman v. Duffey, 19 F.3d 1459, 1472 (D.C. Cir. 1994); Marisol v. Giuliani, 126 F.3d 372, 377 (2d Cir. 1997); DeBoer v. Mellon Mortgage Co., 64 F.3d 1171, 1174 (8th Cir. 1995); Robidoux v. Celani, 987 F.2d 931, 936-937 (2d Cir. 1993); Daniels v. City of NY, 198 F.R.D. 409, 417 (S.D.N.Y. 2001); Tonya K v. Chicago Bd. of Educ., 551 F. Supp. 1107, 1110 (N.D. Ill. 1982); Jarvaise, 2002 U.S. Dist. LEXIS at * 5 ("Plaintiffs are not required to show that there is commonality on every factual or legal issue").

3. USDA's Failure To Investigate Discrimination Complaints Provides A Basis for Commonality.

Defendant next argues that the USDA's alleged failure to investigate discrimination complaints cannot provide a basis for commonality. Opp. at 24-27. While arguing that the "court's ruling that USDA's failure to investigate discrimination complaints did not constitute a credit transaction under ECOA is entirely correct," defendant totally ignores the regulations and interpretative Official Staff Commentary that define "credit transaction." Id. at 25. Instead, defendant argues that "[t]he statute says nothing about 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." Ibid. Defendant's argument, however, misses the point.

Defendant concedes, as indeed it must, that "USDA's administrative mechanism to receive civil rights complaints" applies to the "FSA's credit programs." Id. at 26. Thus, the fact that the discrimination complaint procedure predates ECOA is absolutely of no moment. As plaintiffs make clear in their Supplemental Memorandum, "[w]hile the USDA may have established its review procedures without explicit regard for the provisions of ECOA, the regulations . . . expressly apply to USDA loan programs." Plaintiffs' Supplemental Memorandum at 25-26. Once USDA permitted farmers to file discrimination complaints in connection with the loan application process, thereafter it could not ignore with impunity its own regulations and refuse to review claims of discrimination in the application process.[2] Moreover, as the regulations which defendant conveniently ignores make clear, the term "credit transaction" as used in ECOA has a very broad meaning and includes "[e]very aspect of an applicant's dealings with a creditor regarding an application for credit or an existing extension of credit. . . ." Regulation B, 12 C.F.R. § 202.2(m) (2002) (emphasis added). See also Official Staff Commentary, 12 C.F.R. § 202.4(1) (2002) (defining "credit transaction" as "all dealings, without exception, between an applicant and a creditor, whether or not addressed by other provisions of the regulation"). See Plaintiffs' Supplemental Memorandum at 24-28.

In addition, defendant argues that "even assuming that USDA's civil rights complaint processing system was completely dysfunctional, . . . [d]ecisions by FSA denying credit applications loan servicing requests, 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." Opp. at 26-27. According to defendant, "whatever the impact USA's allegedly dysfunctional complaint processing system may have had

2 The USDA not only permitted farmers to file discrimination complaints. it encouraged farmers to file such complaints. See Plaintiffs' Supplemental Memorandum at 25 and n.17.

on Hispanic farmers, it is greatly mitigated by the existence of the NAD appeals procedure." Opp. at 27.

Defendant's argument is at best disingenuous. The NAD did not come into existence until July 12, 1988, pursuant to the Agricultural Credit Act of 1987, Pub. L. No. 100-233. Furthermore, as defendant concedes, NAD review did not even cover discrimination claims. Opp. at 27. Thus, farmers who filed discrimination complaints were, in Senator Robb's words, "led to believe that their complaints were still being investigated when they were not." 144 Cong. Rec. S11433, quoted at Plaintiffs' Supplemental Memorandum at 10. Moreover, the NAD, which expressly declined to review discrimination claims, could hardly "mitigate" the "impact" of the dysfunctional civil rights complaint processing for the farmers who, with the express encouragement of USDA, filed civil rights complaints from 1981 to 1996, only to have those complaints relegated to a bureaucratic black hole. Indeed, it was precisely because these farmers had no other recourse that Congress took the extraordinary step of waiving the ECOA's two-year statute of limitations with respect to claims arising between January 1, 1981 and December 31, 1996. Id. at 10-12.

C. Plaintiffs Can Fairly and Adequately Represent The Class.

Defendant next argues that plaintiffs cannot fairly and adequately represent the class. Opp. at 27-28. The gravamen of the argument seems to be that plaintiffs cannot meet the commonality and typicality requirements of Rule 23(a), because "they cannot demonstrate, under Rule 23(a)(4), that they 'will fairly and adequately protect the interests of the class.'" Opp. at 27. Defendant's conclusion that plaintiffs cannot satisfy the commonality and typicality requirements rests upon defendant's previously discussed arguments that (1) USDA's decisionmaking process cannot satisfy the commonality requirement unless the process is "entirely subjective" and (2) because USDA's decisionmaking process is decentralized, it cannot satisfy the requirements of commonality and typicality. As plaintiffs have already demonstrated, those arguments are unavailing. See supra at 4-8, 10-12.

In equally conclusory terms, defendant argues that "[c]onflicts of interest necessarily arise when putative class representatives' claims are atypical." Opp. at 27. Significantly, defendant never describes what it contends are atypical about the named plaintiffs' claims and those of the other members of the putative class. Nor has defendant offered any explanation of what it contends would constitute the potential conflict of interest between the named plaintiffs and the other members of the putative class. In any event, plaintiffs' claims are not atypical of those of the putative class and there is no conflict of interest, and defendant has not identified any such conflict, between the named plaintiffs and the putative class. See Littlewolf v. Hodel, 681 F. Supp. 929, 937 (D.D.C. 1988), aff'd sub nom., Littlewolf v. Lujan, 877 F.2d 1058 (D.C. Cir. 1989), cert. denied, 493 U.S. 1043 (1990) (mere "incantations of the potential for antagonism [between class members] are insufficient" to establish inadequacy of representation).

II. PLAINTIFFS' CLAIMS SATISFY THE REQUIREMENTS OF RULE 23(b)(2) AND (b)(3).

Defendant argues that plaintiffs' claims do not satisfy any of the requirements of Rule 25(b). In so arguing defendant places substantial reliance upon (1) an assertion set forth in the Second Amended Complaint estimating the damages in the case at $20 billion and (2) the settlement in Pigford v. Glickman. In both instances, defendant's reliance is misplaced.

As the Court is well aware, there has been no discovery in this case. The amount of damages will be determined with the assistance of experts. Given the potential size of the putative class and the number of years during which plaintiffs have been and continue to be subject to discrimination and the absence of any discovery, it is expected that damages will be substantiatal. To date in Pigford, as defendant well knows, the Government has paid approximately $1.1 billion in damages and debt relief and claims are still being processed. But the amount of damages for an individual Hispanic farmer are, for many, insufficient reasonably to prosecute individual claims against the unlimited resources of the United States Government to defend.

Perhaps it will take the threat of substantial damages finally to get the USDA to end its long and sordid history of discrimination. One might have thought that having to pay $1.1 billion in damages and debt relief in Pigford -- not an insubstantial sum in most circles -- would have prompted the USDA to address the well-documented discrimination that has infected its credit programs for decades. However, as Rosalind Gray's declaration makes clear, "systematic exclusion of minority farmers remains the standard operating procedure for FSA." Gray Decl. at ¶¶ 28; see also id. at 17. Indeed, it is that very fact that motivates plaintiffs to undertake a serious effort to fix once and for all the USDA farm credit and benefits programs. To that end, plaintiffs have already sought the aid of experts to make recommendations for improving the credit and benefits systems and to insure that all farmers have equal and fair access to the USDA farm credit and benefits programs. Thus, whether this case proceeds to trial or is ultimately settled, plaintiffs will vigorously press for substantial injunctive relief to insure, to the extent possible, that this exercise will not have to be repeated in a few years.

Defendant argues that 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." Opp. at 32. Plaintiffs are aware of no rule, and defendant cites none, that required them to spell out in great detail the injunctive relief they are seeking in this action. The current complaint, consistent with the requirements of notice pleading, is sufficient to put the defendant on notice that plaintiffs intend to seek injunctive relief. And if defendant requires any further notice that plaintiffs, in fact, intend to seek substantial injunctive relief to correct, once and for all, the USDA farm credit and benefits programs as well as the civil rights enforcement system associated with such programs, then this reply and Plaintiffs' Supplemental Memorandum should serve that purpose.

Defendant also argues that:

> 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.

Opp. at 34. While both the instant case and Pigford were filed by the same counsel, as defendant noted earlier, plaintiffs are now represented by new lead counsel. Id. at 28. Simply put, the Pigford settlement is largely irrelevant to this case in terms of how plaintiffs propose to proceed and the types of relief plaintiffs will seek. Indeed, to the extent that the Pigford settlement has any relevance, it is that inasmuch as Pigford did not end the USDA's well-documented and on-going discrimination against Hispanic and other minority farmers, plaintiffs believe that it is all the more imperative that this lawsuit, in addition to compensating farmers for past injuries, insure that, in the future, all farmers will have equal and fair access to USDA farm credit and benefit programs.

Finally, as plaintiffs demonstrate in their Supplemental Memorandum at 37-43, plaintiffs satisfy all of the requirements of Rule 23(b)(2) and Rule 23(b)(3). Similarly, the Court could elect to treat this case as a hybrid and certify it for purposes of liability pursuant to Rule 23(b)(2) and for purposes of damages pursuant to Rule 23(b)(3). See Eubanks v. Billington, 110 F.3d 87, 96 (D.C. Cir. 1997); Taylor v. District of Columbia Water & Sewer Auth., 205 F.R.D. 43, 50 (D. D.C. 2002).

While defendant lists a litany of supposed problems that would confront the Court were it to certify the case pursuant to Rule 23(b)(3) (Opp. at 35-39), those problems are either exaggerated[3] or simply a function of the fact that the USDA has discriminated against a lot of farmers for a very long time.[4] To the extent that the problems are merely a function of the

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3 For example, defendant argues that "given that decisions almost always are made at the county office level for . . . programs, these liability issues would also necessarily involve a county-by-county analysis of decisions and other actions over a 19-year period . . . ." Opp. at 37. However, inasmuch as the regulations apply nationally, it is unclear why a county-by-county analysis would be necessary to establish liability.

Similarly, defendant, in discussing liability, seems to take comfort in the fact that defendant has prevailed in 40% of the 21,000 Track A Pigford claims. That means of course that 13,000 claimants received awards -- more than enough claimants to satisfy the numerosity requirements of Rule 23(a)(1).

4 USDA's well-documented discrimination against black farmers pushed black farmers to brink of extinction.

USDA's long history of discrimination and Congress' waiver of the statute of limitations, it is difficult to imagine how a class action would not be superior to hundreds and perhaps thousands of individual trials. Moreover, if the class is certified, even if only for purposes of establishing liability, there is at least a chance that it may well facilitate a prompt and just resolution to the USDA's well documented, decades-old discrimination. If, however, the Court declines to certify the class, then it faces the prospect of hundreds, and perhaps thousands, of individual trials for those Hispanic farmers who are able to pursue their individual claims. And the smallest farmers who have been discriminated against would be left without any remedy at all. The only savings the Court will likely realize will be at the expense of those Hispanic farmers who will be unable financially to pursue their individual claims. Plaintiffs respectfully submit that any such savings would come at much too high a price. This is particularly so given that the ECOA statute expressly contemplates class actions as a mechanism for relief. 15 U.S.C. § 1691e(a).

Owing to years of discrimination, many of the Hispanic farmers are barely operating at a subsistence level,[5] others have already been forced off their farms.[6] It is simply cynical and disingenuous for the defendant to suggest that these plaintiffs would be able individually to take on the huge and powerful USDA to bring an end to a decades-old discriminatory system that has thus far resisted the various reform efforts of the Executive and Legislative Branches of the Federal Government. See Plaintiffs' Supplemental Memorandum at 5-22. Clearly, the independent Judicial Branch and the class action vehicle represent the best and perhaps the only chance of solving the problem once and for all and insuring that justice is finally done. In the words of former Deputy Under Secretary Smith:

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[5] See, e.g., Jimenez Decl. at ¶ 8 (Ex. 19), Chavez Decl. at ¶ 6 (Ex. 22), Settle Decl. at ¶ 17 (Ex. 38), Banuelos ¶¶ 5-6 (Ex. 39, Vasquez Decl. at ¶ 5 (Ex. 44). (Exhibit references are to Plaintiffs' Supplemental Memorandum.)

[6] See, e.g., Gonzales Decl. at ¶ 3 (Ex. 9), Garcia & Sons Decl. at ¶ 3 (Ex. 11), L. Garcia Decl. at ¶ 2 (Ex. 12), G. Garcia Decl. at ¶ 3 (Ex. 13), Lopez Decl. at ¶¶ 2, 7 (Ex. 14), A. Garza Decl. at ¶ 14 (Ex. 15), Provencio Decl. at ¶ 5 (Ex. 16), Contreras Decl. at ¶ 7 (Ex. 18), Flores Decl. at ¶ 7 (Ex. 24), A. Garcia Decl. at ¶ 7 (Ex. 25), Oaxaca Decl. at ¶ 6 (Ex. 26), Reyes Decl. at ¶ 5 (Ex. 27), S. Garza Decl. at ¶ 13 (Ex. 28), Tixier Decl. at ¶ 7 (Ex. 29), Garza Decl. at ¶ 8 (Ex. 30), V. Garza Decl. at ¶ 12 (Ex. 31), Rejino Decl. at ¶ 7 (Ex. 34), Perez Decl. at ¶ 7 (Ex. 40), Ayon Decl. at ¶ 6 (Ex. 45), Alvarez Decl. at ¶ 7 (Ex. 46), Ortega Decl. at ¶ 7 (Ex. 49). (Exhibit references are to Plaintiffs' Supplemental Memorandum.)

> It appears that neither Congressional nor USDA initiated relief is likely, which means that only through judicial intervention can a fair, nondiscriminatory allocation of taxpayer funds intended to provide encouragement and security for all family farm families in America. The conduct of some USDA managers and employees in perpetuating this egregious situation simply can no longer be tolerated.

Smith Decl. at ¶ 14 (Ex. 2 to Plaintiffs' Supplemental Memorandum) (Emphasis in original).

As for defendant's claims that the case will pose problems of manageability (Opp. at 38), Rules 23(c) and (d) provide the Court with tools to deal with such problems. Moreover, the Manual for Complex Litigation states that "[d]ismissal for management reasons, in view of the public interest involved in class actions, should be the exception rather than the rule." Manual, Part I § 1.43 n.72 (1977). The Manual also makes clear that problems of administration alone ordinarily should not justify denial of class certification unless the resources required to be devoted to such administrative matters would frustrate the securing of the relief to which the class members may be entitled. See id. at 41-42.

Clearly, the Court has a number of options available to it in managing the case. Rule 23(d), for example, enables the Court to "determin[e] the course of proceedings or prescrib[e] measures to prevent undue repetition or complication in the presentation of evidence or argument." Fed. R. Civ. P. 23(d)(1). In addition, the Court "may make appropriate orders . . . dealing with similar procedural matters." Fed. R. Civ. P. 23(d)(5). The Court also has the option of bifurcating the liability and damage issues or appointing special masters or magistrates to preside over individual damage proceedings. In the final analysis, Rule 23(b)(3) requires the Court to determine whether it is better in terms of judicial economy and efficiency to proceed as a class action or as separate lawsuits. Where, as here, the defendant has discriminated against thousands of farmers over decades through a common practice or pattern, it is difficult to imagine how thousands of such trials addressing the same pattern or practice and the same highly subjective regulations would be preferable to a single class action lawsuit.

CONCLUSION

For the foregoing reasons, and for the reasons set forth in Plaintiffs' Supplemental Memorandum, as well as Plaintiffs' Memorandum of Points and Authorities In Support of Their Class Certification Motion, plaintiffs submit that the class should be certified because it meets all the requirements of Rule 23(a) as well as the requirements of Rule 23(b)(2) and (b)(3). With respect to Rule 23(b), plaintiffs have shown that the Court has discretion to certify this case under either Rule 23(b)(2) or (b)(3) or both. Plaintiffs respectfully request that the Court, in weighing its discretion in this regard, take into account the need for strong injunctive relief to stamp out once and for all the systemic discrimination that infects the USDA farm loan programs and the need to compensate plaintiffs for the past discrimination they have suffered as a result of the subjective decisionmaking of USDA officials in administering the farm loan and benefits programs.

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Date: May 6, 2002

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Plaintiffs' Reply to Defendants' Opposition to Plaintiffs' Motion for Class Certification was served by hand delivery, this 6th day of May, 2002 upon the following:

Jean Lin, Esquire
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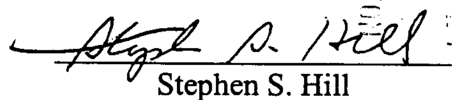

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