

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

GUADALUPE L. GARCIA, JR., et al.

Plaintiffs,

v.

ANN VENEMAN, Secretary
United States Department of Agriculture

Defendants.

Civil Action No. 1:00CV02445
Judge Robertson

**PLAINTIFFS' SECOND SUPPLEMENTAL MEMORANDUM
IN SUPPORT OF THEIR MOTION FOR CLASS CERTIFICATION**

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[T]he government's reliance upon footnote 15 of General Telephone Co. of Southwest v. Falcon, . . . [is] overly literal. The [Supreme] Court has not categorically prohibited class actions in discrimination suits involving less than "entirely" subjective decisionmaking processes. Numerous credit and employment discrimination cases have allowed the use of disparate impact analysis to challenge subjective as well as objective criteria and practices that operate systematically to disadvantage minority groups.

5/22/02 Order at 1.

The Court also held that:

I cannot say as a matter of law that plaintiffs who challenge a set of criteria that include subjective elements can never demonstrate a sufficient "nexus" common to the whole group....

That being said, however, the plaintiffs' 1997 statistical analysis and other evidence of record have not established a causal link between the policies that plaintiffs challenge and the asserted fact that Hispanic and Latino farmers have been less likely than white farmers to receive loans from USDA.

Id. at 2.

In that same Memorandum Order, the Court ordered "the parties [to] meet and confer on a schedule for further discovery related to the class certification issue."¹ 5/22/02 Order at 2. The Court also ordered the parties to meet in chambers on June 24, 2002 for a status conference. Id. Pursuant to the Court's Memorandum Order, the parties met on June 4 and again on June 13, 2002 to discuss discovery issues and a possible discovery schedule. In addition, the parties exchanged correspondence and USDA provided plaintiffs with certain documents which purportedly described in detail defendant's farm credit electronic databases.

As a result of those discussions and USDA's representations, plaintiffs soon realized that while USDA was and is prolific in its data gathering, it chose neither to collect nor to retain the very information necessary to permit an audit of its lending practices or to determine the ostensible reason why a loan application was rejected.

¹ While the Order referred to "further discovery," there has in fact been no discovery in the case. Indeed, the Court denied a motion to lift the stay on discovery. See Order dated May 9, 2002.

In a letter from defense counsel dated June 21, 2002, USDA revealed that there are similar gaps in its noncredit benefit program databases. Among the deficiencies attributable to those databases were an inability to determine the race or ethnicity of the program participants in certain instances and the inability to determine the ostensible reason why a program application was rejected. See Ex. F to Affidavit of Stephen S. Hill (“Hill Aff.”). (Ex. 1.)

In light of the obvious deficiencies in USDA’s databases² and hence the lack of any need for prolonged class discovery, plaintiffs proposed a discovery schedule that included provisions for merits discovery and preserved the March 17, 2003 trial date. By contrast, USDA, acting as if there were meaningful information to be discovered in its electronic databases, proposed a schedule that included four months of class discovery and submission of the final class certification brief on April 15, 2003, nearly a month after the proposed trial date. At the June 24th status conference, the parties presented their proposed discovery schedules and discussed the apparent lack of meaningful data in USDA’s electronic databases. Having been advised of the deficiencies in USDA’s databases, the Court suggested that plaintiffs submit a supplemental memorandum describing those deficiencies and making such additional arguments as plaintiffs deemed appropriate in support of their motion for class certification.

FACTUAL BACKGROUND

As set out more fully in the Supplemental Memorandum, plaintiffs bring this case as a class action to remedy years of systematic and admitted discrimination against minority farmers and ranchers of Hispanic origin who sought equal access to USDA farm credit programs and were denied the same by the USDA in violation of the Equal Credit Opportunity Act (“ECOA”), 15 U.S.C. §§ 1691 et seq. They also bring this action to remedy years of admitted discrimination against farmers of Hispanic origin who sought equal access to USDA noncredit farm benefit programs. They were and continue to be the victims of a system that grants to

² These deficiencies are discussed in detail in the Hill Aff. (Ex. 1) and the Declaration of Joseph A. Krock, Ph.D (“Krock Decl.”). (Ex. 2.)

white men unfettered discretion to apply highly subjective eligibility standards to determine whether, and to what extent, Hispanic farmers and ranchers participate in USDA farm credit and noncredit benefit programs. In asserting their claims, plaintiffs proceed under both disparate treatment and disparate impact theories of recovery.

In the early 1980s, while under investigation by the United States Commission on Civil Rights (“Civil Rights Commission”), the USDA secretly dismantled its investigatory apparatus for discrimination complaints arising out of, *inter alia*, its application process for farm credit and noncredit benefit programs, thereby destroying its means of enforcing the ECOA. Indeed, at the very time USDA was dismantling its civil rights enforcement capability, a Task Force, appointed by the then-USDA Secretary to examine “the policies and programs of USDA in light of the concerns raised in the 1982 Civil Rights Commission Report, after acknowledging that problems had existed, “assure[d] the Commission and the public that [the problems in departmental civil rights enforcement procedures] have been addressed, that enforcement procedures have been addressed, that enforcement procedures are in place and are being refined for improving effectiveness internally and in program delivery outright.”³ See Supplemental Memorandum at 14 (Emphasis added.). In fact, nothing could have been farther from the truth.

³ USDA’s handling of the dismantlement of its civil rights investigatory apparatus fits neatly into its modus operandi, as described by Farmers’ Legal Action Group, Inc. (“FLAG”), a well respected farmers advocacy group:

The way USDA deals with the issue of discrimination in its programs tends to follow a rough pattern. First, the USDA programs are designed and implemented in a discriminatory way. The discrimination raises little attention or concern within USDA itself.

Second, there is a public outcry or credible study that brings attention to the unfairness of USDA programs. USDA is thus forced to publicly confront the issue.

Third, USDA reluctantly acknowledges the past failures of its programs, but notes that the situations is different now, and promises to do better in the future.

Fourth, USDA actually does little to prevent discrimination in its programs. USDA continues to discriminate, and after a time this ongoing discrimination leads to another round of public outcry. USDA officials continue the cycle by again acknowledging problems and promising that the future will be different.

FLAG Manual at 10 (Ex. 8 of the Supplemental Memorandum.).

Instead of improving its civil rights enforcement procedures, USDA was dismantling its investigatory apparatus and thereby hobbling its civil rights enforcement efforts.

Despite being under repeated scrutiny by the Civil Rights Commission and Congress for discrimination since at least 1965, the USDA was able to conceal the dismantlement of its civil rights investigatory apparatus from Congress and the farmers it was supposed to serve for nearly two decades. Consequently, during that time, Hispanic and other minority farmers who were discriminated against when they sought to participate in USDA loan programs and who sought redress by filing discrimination complaints with USDA (as its regulations expressly encouraged them to do), received no redress because, unbeknownst to the farmers, their complaints were relegated to a bureaucratic black hole. Worse yet, untold numbers of those complaint files were lost or destroyed by indifferent USDA officials. Upon finally learning what the USDA had done, Congress, in 1998, took the extraordinary step of waiving the two-year statute of limitations applicable to ECOA claims arising between 1981 and 1996 in connection with USDA's farm loan programs, thereby permitting plaintiffs to seek to recover damages for having suffered as a consequence of USDA's discriminatory conduct.

* * * *

To understand fully this case and its current posture, one must realize that the USDA has a long and well-documented history of discrimination against minority farmers. Indeed, the Civil Rights Commission and Congress have, for decades, investigated USDA's discriminatory practices and have heard the testimony of countless victims of that discrimination. In the wake of such repeated scrutiny, USDA has, plaintiffs submit, taken steps to insure that its credit and noncredit benefit program databases are useless as audit tools. As a direct consequence of USDA's failure to preserve evidence and in some instances to destroy evidence, there are limits to the type of statistical analyses that can be performed using the USDA databases.

That being said, it is well settled that plaintiffs should not be faulted for perceived gaps in their statistical analysis that are the direct result of gaps in the defendant's databases. It is equally well settled that statistical analysis can be buttressed by, among other things, anecdotal

evidence, a history of discrimination and evidence of the opportunity to discriminate. In the instant case, Professor Hausman's analysis is supported by substantial anecdotal evidence describing the experiences of hundreds of Hispanic farmers who have been victimized by USDA's discrimination, and by evidence of USDA's long and well-documented history of discrimination against Hispanic and other minority farmers as well as evidence of USDA's opportunity to discriminate through highly subjective eligibility requirements for its farm credit and noncredit benefit programs. Cumulatively, such evidence, plaintiffs submit, more than satisfies the commonality and typicality requirements of Rule 23.

ARGUMENT

I. **USDA HAS A LONG AND WELL-DOCUMENTED HISTORY OF DISCRIMINATION AGAINST MINORITY FARMERS**

There can be no reasonable doubt about USDA's long and well-documented history of discrimination against minority farmers. Plaintiffs chronicled much of that history in their Supplemental Memorandum. See Supplemental Memorandum at 10-18 and Exhibits 5-10 of the Supplemental Memorandum. In addition, since at least 1965, the Civil Rights Commission and Congress have repeatedly cited USDA for discriminating against minority farmers in its farm credit and noncredit benefit programs.

That history was briefly summarized in the following comments of Congresswoman Clayton of North Carolina during Congressional hearings on USDA's treatment of minority and limited resource producers:

There are several reasons why the number of minority and limited resource farmers is declining so rapidly, but the one that has been documented time and time again is the discrimination and discriminatory environment present in the Department of Agriculture, the very agency established by the U.S. Government to accommodate and to assist the special needs of all farmers and ranchers.

A General Accounting Office report, an Inspector General's report, and the recent report of the Civil Rights Action Team are just the latest in a series of Government initiatives examining the problem.

The issue was first raised in 1965, when the U.S. Commission on Civil Rights established that USDA discriminated both in internal employment actions and external program delivery activities. An ensuing USDA Employee Focus Group in 1970 reported that USDA was callous in their institutional attitude and demeanor regarding civil rights and equal opportunity.

In 1982, the U.S. Commission on Civil Rights examined this issue yet another time and published a report entitled “The Decline of Black Farming in America.” The commission concluded that there were widespread prejudicial practices in loan approval, loan servicing, and farm management assistance as administered by the Farmers Home Administration.

However, as no improvement was forthcoming, in 1990 the House Governmental Operations Committee, . . . investigated this matter once again. In their report, entitled “The Minority Farmer: A Disappearing Resource: Has the Farmers Home Administration Been the Primary Catalyst?” the same conclusion was reached in 1990 as had been in 1982, that “ironically, Farmers Home has been a catalyst in the decline of minority farming.”

In January 1997, the General Accounting Office published a report entitled “Farm Programs: Efforts to Achieve Equitable Treatment of Minority Farmers.” While much of the report was inconclusive due to its limited scope, however, GAO did find instances of discrimination in fiscal years 1995 and 1996. GAO also found that the disapproval rate for loans was 6 percent higher for minority farmers than the 10 percent rate for non-minority farmers.

The very next month, two related reports were released. The Office of Inspector General evaluation report for the Secretary on Civil Rights Issues and the Civil Rights Action Team report. The authors of these hard-hitting reports came to the identical conclusion as those who had looked at this issue 32 years previously: There are significant problems with discrimination within the Department of Agriculture.

Hearings of the House Committee on Agriculture, Subcommittee on Department Operations, Nutrition, and Foreign Agriculture, Opening Statement of Honorable Eva M. Clayton, at 2-3 (March 19, 1997). (Emphasis added.) (“March 19, 1997 Hearings”).⁴

The D.C. Circuit also recently acknowledged USDA’s long and well-documented history of discrimination against minority farmers. See Pigford v. Veneman, No. 02-5052

⁴ The quoted excerpts are attached as Ex. 3.

(D.C. Cir. June 21, 2002) (Slip Op.) (“Pigford”). Referring to that well-documented history, Judge Tatel, writing for the court, stated:

Shortly before the [Black] farmers filed suit, the Department released a report commissioned by then-Secretary Dan Glickman “to address [the agency’s] longstanding civil rights problems,” documented since the 1960s by numerous federal government “[s]tudies, reports, and task forces.” Civil Rights Action Team, USDA, Civil Rights at the United States Department of Agriculture 2-3 (1997). . . . Examining the “painful history” of its dealings with African-American farmers, the Department concluded that local credit and loan agencies responsible for administering Department programs often discriminated against the farmers. . . . According to the Glickman report, Department officials had “effectively dismantled” the Office for Civil Rights Enforcement--the very office charged with addressing discrimination complaints. . . . (Internal quotation marks and citation omitted). “[O]ften mak[ing] matters worse,” the “complaints processing system” was a “bureaucratic nightmare” that “processed [complaints] slowly, if at all,” resulting in a huge “backlog,” while at the same time the agency “proceed[ed] with farm foreclosures--even where discrimination may have contributed to the farmers’ plight.” . . . “Minority farmers,” the report concluded, “lost significant amounts of land and potential farm income as a result of discrimination by [USDA] programs.” . . .

Pigford, Slip Op. at 2.

Any doubt concerning USDA’s well-documented history of discrimination against minority farmers in the wake of the foregoing statements should be dispelled by the frank admission of then-Secretary Glickman in testimony before Congress in 1997. As then-Secretary Glickman, the original defendant in this case, put it,

[t]oday I spend as much, if not more, of my time dealing with civil rights matters as I do any specific farm program. And the reason is simple enough. We have a long history of both discrimination and perceptions of unfairness that go literally back to the middle of the 19th century. For those who look back on the progress made in the 1960s of the historic civil rights laws passed in that time and think we got the job done, I can say just from my experiences at USDA, we do not yet fully practice what we preach.

I’ve talked to people who have lost their farm. Good people, who lost their family land not because of a bad crop, not because of a flood, but because of the color of their skin. I’ve talked to employees—dedicated public servants—who have been humiliated, abused and then punished for speaking up. I want to close this chapter of USDA’s history. My goal is to get USDA out from

under the past and have it emerge in the 21st century as the Federal civil rights leader.

This is an extraordinarily complicated problem that has taken decades and decades and decades to build to this situation.

March 19, 1997 Hearings, Statement of Hon. Dan Glickman, Secretary, U.S. Department of Agriculture at 94-95. (Emphasis added.)⁵ (Ex. 3.)

As the foregoing makes clear, USDA has a long and well-documented history of discrimination, and consequently the Civil Rights Commission and Congress have had USDA under scrutiny since at least 1965 for discrimination in its credit and noncredit benefit programs.

II. PLAINTIFFS HAVE SATISFIED THE REQUIREMENTS OF COMMONALITY AND TYPICALITY.

As discussed more fully in Plaintiffs' Supplemental Memorandum, Rule 23 of the Federal Rules of Civil Procedure provides that a court may entertain a class action only if:

(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. 23(a); Hartman v. Duffey, 19 F.3d 1459, 1468 (D.C. Cir. 1994). "In addition to satisfying subsection (a) of Rule 23, a plaintiff must also demonstrate that one of the conditions under subsection (b) is met." Hartman, 19 F.3d at 1468. The requirements of Rule 23(a) have come to be referred to as numerosity, commonality, typicality and adequacy of representation. See, e.g., Wagner v. Taylor, 836 F.2d 578, 590 (D.C. Cir. 1987). The 5/22/02 Order suggests

⁵ While defense counsel deny the existence of a pattern and practice of discrimination at USDA against minority farmers, USDA's long and well-documented history, along with the words of their former client, then-Secretary Glickman, belie those denials. For example, in its Opposition to Plaintiff's Supplemental Memorandum, USDA denied that the Office of Civil Rights was dismantled in 1983. See Opposition at 24-25 n.6. That denial runs counter to not only the legislative history accompanying the passage of the special legislation waiving the statute of limitations, but the express statement of Secretary Glickman. In explaining to Congress the backlog of civil rights cases, then-Secretary Glickman stated: "A good part of the reason for the backlog is the fact that in 1983, USDA Investigation Unit was dismantled." March 19, 1997 Hearings at 97. (Ex. 3.)

that the Court, in focussing exclusively on commonality and typicality, has concluded that plaintiffs have satisfied the requirements of numerosity and adequacy of representation. Accordingly, plaintiffs do not address those requirements in this memorandum and instead rely upon the arguments set forth in plaintiffs' Memorandum in Support of their Motion for Class Certification and the Supplemental Memorandum with respect to those requirements. For the same reason, plaintiffs will not rehearse here the general requirements for commonality and typicality as they are discussed fully in the initial Memorandum and the Supplemental Memorandum. Instead, plaintiffs focus their arguments on the focal point of the Court's 5/22/02 Order, *i.e.*, the need for evidence of a nexus between the demonstrated disparity with respect to Hispanic farmers' ability to receive USDA loans and the complained-of policies of USDA.

In its 5/22/02 Order, the Court focussed exclusively upon disparate impact in analyzing plaintiffs' claims to determine if they satisfied Rule 23's requirements for commonality and typicality. Plaintiffs concede, as the Court correctly noted in its 5/22/02 Order, that disparate impact analysis generally requires a showing of a linkage between the alleged impact and the complained-of policy. However, plaintiffs respectfully submit that such a requirement cannot stand as an absolute bar to plaintiffs where, as here, defendant has controlled and destroyed the data needed to establish definitively the link. Moreover, plaintiffs allege that they are the victims of both disparate treatment and disparate impact. Significantly, where, as here, plaintiffs allege "intentional discrimination . . . plaintiff[s] need not isolate the particular practice and prove that such practice caused the discrimination . . ." Hartman, 19 F.3d at 1472. (Emphasis added and in the original.) Instead, "plaintiffs must make a significant showing to permit the court to infer that members of the class suffered from a common policy of discrimination that pervaded all of [the defendant's] challenged . . . decisions." Id. Furthermore, as the Supreme Court has made clear that although "[t]he mere fact that an aggrieved private plaintiff is a member of an identifiable class of persons of the same race or national origin is insufficient to establish his standing to litigate on their behalf all possible

claims of discrimination against a common” defendant, “[s]ignificant proof that [the defendant] operated under a general policy of discrimination conceivably could justify [such] a class. . . if the discrimination manifested itself . . . in the same general fashion . . . such as through . . . subjective decisionmaking processes.” General Telephone Co. of the Southwest v. Falcon, 457 U.S. 147, 159 n.15 (1982); accord Hartman, 19 F.3d at 1472.

A. Plaintiffs Satisfy The Requirements of Commonality and Typicality Under A Disparate Treatment Theory.

Plaintiffs proceeding under a disparate treatment theory must prove by a preponderance of the evidence a prima facie case of discrimination. Texas Department of Community Affairs v. Burdine, 450 U.S. 248 (1981) (“Burdine”); McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973). To do so, plaintiffs must show “proof of actions taken by [defendant] from which [the court] can infer discriminatory animus because experience has proved that in the absence of any explanation, it is more likely than not that [defendant’s] actions were bottomed on impermissible considerations.” Furnco Construction Co. v. Waters, 438 U.S., 567, 580 (1978) (emphasis added); White v. City of San Diego, 605 F.2d 455, 458 (9th Cir. 1979). While the burden of establishing a prima facie case “is not onerous,” Burdine 450 U.S. at 253, disparate treatment cases require direct or circumstantial proof of discriminatory motive, while no such proof of motive is required in disparate impact cases. International Brotherhood of Teamsters v. United States, 431 U.S. 324, 335 n.15 (1977) (“Teamsters”).

The requisite “[p]roof of discriminatory motive . . . can . . . be inferred from the mere fact of differences in treatment.” Ibid. In that regard, the probative force of the statistics can be reinforced with the testimony of individuals regarding their experiences of discriminatory treatment to bring “the cold numbers convincingly to life.” Id. at 339. “The ultimate test of sufficiency . . . remain[s] . . . did the plaintiffs offer evidence ‘adequate to create an inference that . . . [defendant’s] decision[s] . . . [were] based on a discriminatory criterion illegal under the Act.’” Segar v. Smith, 738 F.2d 1249, 1274 (D.C. Cir. 1984), (quoting Teamsters, 431 U.S. at 358). Accord Burdine, 450 U.S. at 253-54; Furnco, 438 U.S. at 577. As for proving the

disparity, the D.C. Circuit has held, in a case involving gender discrimination, that “proof of disparity” can be “based upon a comparison of the proportion of those women eligible for selection who were actually selected with the corresponding proportion of eligible men who were actually selected. Plaintiffs establish a disparity disfavoring women if the evidence demonstrate[d] that the selection rate for eligible women was less than the selection rate for eligible men.” Palmer v. Schultz, 815 F.2d 84, 90 (D.C. Cir. 1987).

Moreover, as the D.C. Circuit has noted,

[i]t is clear that statistical evidence – despite its perhaps more familiar use to show disparate impact – can in general also be used to prove disparate treatment claims. As part of his or her prima facie case, a plaintiff alleging disparate treatment may introduce statistics tending to demonstrate a “pattern and practice. . . .”

Cook v. Boorstin, 763 F.2d 1462, 1468 (D.C. Cir. 1985).

The D.C. Circuit’s opinion in Cook is instructive. In vacating the district court’s denial of the appellant’s motion to intervene and remanding the case for further proceedings, the court noted that:

By way of guidance, we suggest on remand [that] the district court may wish to reconsider its denial of class certification Particularly given the large number of employees [31] who we hold must otherwise be granted intervention of right, it may well make more sense for this case to proceed as a class action.

Id. at 1471.

After noting that class certification did not appear to be precluded by the Supreme Court’s decisions in East Texas Motor Freight System, Inc. v. Rodriguez, 431 U.S. 395 (1977), and Falcon, the court pointed out that:

To warrant class certification, the [Falcon] Court held, a plaintiff alleging disparate treatment must show that his treatment was in some way typical of that received by other class members. Plaintiffs in this case appear to have met that requirements amply by presenting affidavits and memoranda suggesting that the Library’s subjective standards for advancement have

resulted in systematic discrimination against blacks and other minorities. That such as showing could be sufficient was expressly noted by the Falcon Court itself. . . .

763 F.2d at 1471-72. (Emphasis added.)

In considering that “[t]he district court’s denial of class certification . . . appear[ed] to have reflected an overly restrictive view of the prerequisites for bringing a class action under the Federal Rules of Civil Procedure,” the court, in terms equally applicable to the instant case, held:

Title VII embodies a profound national commitment to end the scourge of racism and sexism in our country’s workplaces. If our nation is to move with speed toward genuine equality of opportunity, employers, including federal agencies, cannot be allowed to escape the requirements of Title VII by a litigation strategy of divide and conquer. “Careful attention” to the Federal Rules of Civil Procedure of course remains “indispensable,” Falcon, 457 U.S. at 157; Rodriguez, 431 U.S. at 405-06, but those rules, it should be remembered, are to be “construed to secure the just, speedy, and inexpensive determination of every action,” Fed. R. Civ. P. 1.

Id. at 1472.

Like the plaintiffs in Cook, plaintiffs have presented substantial anecdotal evidence of disparate treatment of Hispanic farmers and ranchers by the USDA in the administration of its farm credit and noncredit farm benefit programs.⁶ In addition, plaintiffs have cited USDA’s long and well-documented history of discrimination against Hispanic and other minority farmers. This history of discrimination includes specific findings of discrimination by, among others, the Civil Rights Commission and Congress. That long and well-documented history of systemic discrimination against Hispanic and other minority farmers has been acknowledged in express admissions by then-Secretary Glickman and confirmed in the declarations of such high USDA officials as Rosalind Gray, former Director of USDA’s Office of Civil Rights, and Dallas R. Smith, former Deputy Under Secretary Farm and Foreign Agricultural Services, and

⁶ Plaintiffs submitted 39 farmer declarations with their Supplemental Memorandum and submit herewith an additional 71 declarations. These declarations, along with the declarations of Lourdes Gonzales (Ex. 9 to the Supplemental Memorandum) and William Arens (Ex. 10 to the Supplemental Memorandum) reflect the experiences of hundreds of Hispanic farmers and ranchers victimized by USDA. The additional declarations, prefaced by a brief narrative (Ex. 4), are attached as Exs. 5-75.

Richard A. Gomez, a thirty-year veteran of USDA who rose to rank of District Director in Colorado. See respectively Exs. 7, 2, and 1 to the Supplemental Memorandum. In addition, on the basis of publicly available data, including the D.J. Miller Report which was commissioned and funded by the USDA, plaintiffs have presented statistical evidence of disparate treatment.⁷ The combination of the foregoing evidence should be more than enough to permit the Court to infer that insofar as Hispanic farmers are concerned, the discriminatory treatment documented in the instant case is “more than a mere occurrence of isolated or ‘accidental’ or sporadic discriminatory acts,” it is USDA’s “standard operating procedure - - the regular rather than the unusual practice.” Teamsters, 431 U.S. at 336; Segar, 738 F.2d at 1266.

Here the policy of discrimination against Hispanic farmers was carried out by means of the highly subjective decisionmaking process that infects the USDA’s credit and noncredit benefits programs. Indeed, it is that process that allows officials to deny loans outright, to delay them unduly, to reduce loan amounts arbitrarily or to demand excessive collateral to secure loans. And, that same highly subjective decisionmaking process provides the opportunity for discrimination and thus satisfies the commonality and typical requirement of Rule 23. See Falcon, 457 U.S. at 157 n.15; Hartman, 19 F.3d at 1472.

In sum, plaintiffs have more than satisfied that requirements of Rule 23(a) and a prima facie disparate treatment case. Plaintiffs have provided statistically significant evidence of disparate treatment through Professor Hausman’s analysis – an analysis like the one approved by the court in Palmer. See 815 F.2d at 90. Moreover, even if the Court were to discount completely plaintiffs’ statistical evidence of disparate treatment, the anecdotal and documentary evidence, coupled with the express admissions of then-Secretary Glickman and other former high officials of USDA should more than meet the commonality and typicality requirements of Rule 23(a). See Cook, 763 F.2d at 1472; accord Hartman, 19 F.3d at 1473;

⁷ As discussed infra in Part III, any perceived gaps in plaintiffs’ statistical analysis are the result of USDA’s willful and improper conduct.

Griffin v. Carlin, 755 F.2d 1516, 1532 (11th Cir. 1985) (“22 named plaintiffs had alleged sufficiently diverse employment practices that the court might infer that discriminatory treatment was typical of defendant’s promotion practices and that defendant’s promotion practices were motivated by a pervasive policy of racial discrimination”). Indeed, it is difficult to imagine stronger testimonial and documentary evidence establishing systematic discrimination against Hispanic and other minority farmers than that which plaintiffs have provided.

B. Given The Limits Of USDA’s Databases, Plaintiffs Have Also Satisfied the Commonality And Typicality Requirements Under A Disparate Impact Theory.

In its 5/22/02 Order, the Court held that “plaintiffs’ 1997 statistical analysis and other record evidence have not established a causal link between the policies that plaintiffs challenge and the asserted fact that Hispanic and Latino farmers have been less likely than white farmers to receive loans from USDA.” 5/22/02 Order at 2. At the time Professor Hausman performed his analysis, discovery was, and indeed remains, stayed. Plaintiffs consequently were forced to rely totally upon publicly available data. Accordingly, the Court no doubt concluded that, with the benefit of discovery, plaintiffs should be able to produce a more definitive statistical analysis -- a view that frankly Professor Hausman shared. Hausman Decl. ¶ 16. (Ex. 4 to the Supplemental Memorandum.)

Such a conclusion would be consistent with the following facts: USDA is required to make its credit decisions on the basis of criteria set forth in its regulations. Plaintiffs contend and the record shows that some of those criteria are highly subjective and afford officials who are typically white males unfettered discretion in determining a farmer’s eligibility for USDA credit. In addition, as discussed more fully in Part III, USDA is required to give a reason for its decision to reject a loan application and it is required to maintain records memorializing that reason.

Despite the foregoing facts, USDA proposes, for purposes of class discovery, to limit plaintiffs to databases which, USDA concedes, contain no information whatsoever regarding the reason why a loan application is rejected. Simply put, USDA cannot be permitted to use such a transparent ploy to block class certification. Should USDA persist in such a limitation upon class discovery or be sustained in that position by the Court, plaintiffs respectfully submit that, under those circumstances and settled authority, the statistical evidence to date and the other evidence of record more than satisfy the commonality and typicality requirements of Rule 23.

1. **USDA cannot conceal the reasons why it rejects plaintiffs' loan applications and then fault plaintiffs for not definitively linking the observed statistically significant disparity in the ability of Hispanic farmers to receive USDA loans to a specific subjective eligibility requirement.**

As the court in Cook noted, disparate impact is generally proved with statistics. 763 F.2d at 1468. There is, however, no rigid requirement as to the type of statistical analysis that will satisfy the requirements of a prima facie case of disparate impact. Indeed, it has been held, for example, that:

[A] disparate impact prima facie case may . . . be established by statistical proof simply of gross underrepresentation of a protected group in an employment set without identifying any particular policy or practice.

Wright v. National Archives and Record Services, 609 F.2d 702, 711 n.9 (4th Cir. 1979).

Moreover, in a case such as this where “[defendant] cannot or will not supply records necessary to make a determination of disparate impact, a case may be established ‘without elaborate statistical proof.’” Montana Rail Link v. Byard, 860 P.2d 121, 123 (Mont. 1993) (quoting Wright, 609 F.2d at 712). Furthermore, as the Wright court observed,

[the disparate impact doctrine] should not be applied by [the] courts with a rigidity or inflexibility that effectively undercuts its intended function of fairly

implementing Congressional purpose to root out these more subtle forms [of discrimination.]

609 F.2d at 713.

In the instant case, Professor Hausman used 1997 Agriculture Census Data (the most recent such data publicly available) to compare the percentage of Hispanic farmers who received USDA loans to the percentage of white male farmers who received USDA loans and found that there was a statistically significant disparity in the ability of Hispanic farmers to receive USDA loans. See, e.g., Palmer, 815 F.2d at 90; Wright, 609 F.2d at 711 n.9. A similar analysis was performed for the period 1993 to 1994 in the USDA-funded D.J. Miller Report. The Miller Report also showed a significant disparity between the ability of Hispanic and white male farmers to obtain USDA loans. To the extent that census or similar population data exist with respect to Hispanic and white male farmers, plaintiffs could presumably replicate Professor Hausman's analysis for the other years in the period covered by the Complaint. However, given current circumstances and if USDA succeeds in limiting class discovery to its electronic databases, plaintiffs may well be limited in terms of their statistical evidence to the type of study performed by Professor Hausman. As discussed in Part III infra, this is so because USDA, in compiling its databases, has chosen not to collect and to retain the data necessary to audit its lending practices, and in other instances it has destroyed such data.

For example, with respect to USDA's so-called closed-loan database, USDA has data for the period 1981 to the present. Hill Aff. ¶ 5. (Ex. 1.) However, that database contains no information about rejected loans or for that matter loans which were approved but not funded. Similarly, there is no way to determine from that database the time taken by USDA to process the loan application, or the loan amount initially requested as opposed to the loan amount actually received by the borrower. Id. at ¶ 12. (Ex. 1.)

As for the so-called loan-application database, which contains loan-application information only for the period October 1, 1999 to the present, it does not contain the ostensible reason why rejected loans have been rejected. Id. at ¶ 13. (Ex. 1.) Thus, there is no

way to determine from this limited database whether a loan application was rejected on the basis of one or more of the highly subjective eligibility requirements that infect USDA's credit and noncredit benefit programs or for some other reason. The net effect of all of this is that as tools for auditing USDA's loan programs with respect to the lending practices that USDA has historically used to discriminate against Hispanic and other minority farmers, the USDA databases are useless.

In situations such as this where the defendant's control of the data results in an inability to include in the statistical analysis specific qualifications or highly subjective factors, the D.C. Circuit has held that it is reasonable to assume, in the absence of evidence to the contrary, an equal distribution of such qualifications between minority and majority group applicants and, in the case of subjective factors, to ignore them. As the D.C. Circuit has explained,

Both equitable considerations and, in Title VII cases, the policy of the statute, support a rebuttable presumption of an equal distribution of qualifications between minority and majority group applicants when data are unavailable. The presumption should place on the defendant the burden of producing evidence from which it is possible to evaluate the likelihood that the disproportionate impact was caused by unequal qualifications.

De Medina v. Reinhardt, 686 F.2d 997, 1008 n.7 (D.C. Cir. 1982); see also Segar, 738 F.2d at 1276.

In explaining the justification for placing the burden of rebutting such an assumption on the defendant, the court stated,

First, it was the defendant's selection process that produced the observed disproportionate impact, and it is he who is alleging that it is the product of differential qualifications among the applicants. Moreover, the defendant has better access to data on the qualifications of applicants than does the plaintiff. Second, the equal qualifications assumption is often reasonable since many unqualified people are deterred from applying by knowledge of qualifications requirements. Third, in Title VII cases, the logic of the Act's underlying purpose, which places on an employer the burden of justifying an adverse impact produced by a neutral selection rule, suggests that an employer whose discretionary selection process produces a substantial disproportionate impact, whose proof takes into account all relevant qualifications on which data are reasonably available, should shoulder a similar burden of coming forward with

evidence that explains those results or suffer the inference that it was intentionally caused.

686 F.2d at 1009 n.7 (emphasis in original); see also Segar, 738 F.2d at 1276.

In De Medina, the D.C. Circuit approved the use of a statistical analysis that compared defendant's occupational categories to the broader census categories. 686 F.2d at 1006. In particular, "the Census ha[d] fewer occupational categories (approximately 440) than the more detailed Civil Service System (over 1000)"⁸ Id. at 1005. In responding to the dissent's view, which the majority characterized as seeming "to require proof to a mathematical certainty," the court noted:

Although "deficiencies in the data base 'may, of course, detract from the value of such evidence,' . . . [they] ordinarily would not obliterate its evidentiary value." . . . Even so the Teamsters caveat, echoed in Hazelwood, that labor pool statistics should reflect the qualified population should be understood in the context of a case in which general population figures were submitted. Courts have since questioned whether "general population and work force data are appropriate as the basis for statistical comparison" where special qualifications exist, but "Hazelwood did not entirely rule out [their] use [even] in 'special qualification' cases." Here, the base data were not general work force data, but occupation-specific data. The dissent would require job-specific data, but the source of this requirement is unclear. Neither this court nor the Supreme Court has ever required Title VII class action plaintiffs to present nonexistent data on the population qualified for each position, as opposed to particular occupational categories."

Id. at 1009 n.8. (Emphasis added and citations omitted.) In the instant case, Professor Hausman, like the expert in Medina, employed occupation-specific data in analyzing the relative ability of white male and Hispanic farmers to obtain USDA Loans.

It is well settled in this circuit that "[t]he appropriate degree of refinement of the plaintiffs' statistical analysis . . . may depend on the quality and control of the available data." Trout v. Lehman, 702 F.2d 1094, 1101 (D.C. Cir. 1983), vacated on other grounds, 465 U.S.

⁸ Thus, for example, the defendant's expert placed both the defendant's positions entitled "Radio Broadcast Technician" and "Electronic Technician" in the Census category entitled "Electrical and electronic engineering technicians."

1056 (1984); see also Vuyanich v. Republic National Bank, 505 F. Supp. 224, 356 (N.D. Tex. 1980).

As the court explained in Trout,

If the plaintiffs account for the effects of extraneous variables to the extent reasonably permitted by the available data and the evidence presented strongly supports an inference of discriminatory treatment, the District Court properly may conclude that the plaintiffs have made out a prima facie case. [A] court should not “require proof to a mathematical certainty, . . . [because] there is no such requirement [under Title VII]. Deficiencies in the data base ‘may, of course, detract from the value of [statistical] evidence, but ordinarily would not obliterate its evidentiary value.’ This is particularly true where, as here, the defendants controlled the only sources of data on which statistical analyses could be based. As the District Court observed, “plaintiffs cannot legitimately be faulted for gaps in their statistical analysis when the information necessary to close those gaps was possessed only by defendants and was not furnished either to plaintiffs or to the Court.” Trout [v. Hidalgo], 517 F. Supp. at 883 (footnote omitted).

702 F.2d at 1101-02 (emphasis added; citations omitted); Palmer, 815 F.2d at 110; see also Segar, 738 F.2d at 1276.

As the foregoing makes clear, USDA cannot willfully deny plaintiffs access to the data necessary to perform a more definitive statistical analysis and then fault plaintiffs’ analysis. So long as USDA conceals the reasons for its loan rejections, it cannot be heard to complain that plaintiffs’ statistical analysis has not definitively linked the observed disparity in the ability of Hispanic farmers to receive USDA loans to a specific subjective reason or reasons.

2. **Koger is clearly distinguishable from the instant case.**

In holding that “plaintiffs’ 1997 statistical analysis and other evidence of record have not established a causal link between the policies that plaintiffs challenge and the asserted fact that Hispanic and Latino farmers have been less likely than white farmers to receive loans from USDA,” the Court cited Koger v. Reno, 98 F.3d 631, 639 (D.C. Cir. 1996). (“Koger”). Koger was an appeal from a district court decision which granted summary judgment for the federal government on the employees’ disparate impact claim, pursuant to the Age Discrimination

Employment Act (“ADEA”), 29 U.S.C. §§ 623 et seq., and which ruled in favor of the government on the disparate treatment claim following a bench trial.

At issue in Koger was a claim that the promotions system employed by the U.S. Marshals Service discriminated against deputies who were over 40 years of age. In Koger, whatever flaws existed in plaintiffs’ statistical analysis, a class had already been certified and the D.C. Circuit was considering an appeal from a judgment on the merits of the discrimination claims.⁹ In addition, the court in Koger noted that “[t]he district court found the [promotions] system was . . . legitimate and non-discriminatory, ‘designed to measure a range of variables that, in combination reliably indicate whether the applicant is among the best deputies in his or her district and whether the applicant has skills and background necessary to perform a broad range of tasks.’” 98 F.3d at 634.

As for the statistical analysis introduced in that case, the D.C. Circuit faulted the analysis because the expert held age as a constant in the regression analysis. As the court explained,

[b]ecause the expert used a continuous variable for age, her results do not address the issue of whether, holding scores constant, a deputy 40 years old or more is less likely to be promoted than a deputy under 40. All the regression shows is that older deputies (of any age) are less likely to be promoted, relative to younger deputies (of any age). But the entire statistical advantage of the younger deputies could have come from disparate promotion rates as between deputies in the under-40 category. Because these deputies are not protected under the ADEA, regardless of demonstrated discrimination, the inclusion of this data is fatal to the expert’s conclusion.

Id. at 637.

In affirming the district court’s grant of summary judgment in favor of the government, the D.C. Circuit held that “[d]isparate impact analysis requires that plaintiffs show that the

⁹ “The class consist[ed] of deputies who, while they were GS-11 Criminal Investigators, were eligible and applied for positions as GS-12 Senior Criminal Investigators; who were at least 40 years old at the time of the disputed selections; and who were not selected for vacancies for which deputies under 40 were selected.” Koger, 98 F.3d at 632.

practice attacked caused at least some members of the class to be deprived of a promotion or at least the opportunity of being considered for a promotion.” Id. at 639. The court added that: “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 for jobs or promotions.” Ibid., (quoting Watson v. Fort Worth Bank & Trust, 487 U.S. 977, 994 (1988) (O’Connor, J., concurring)).

Koger is distinguishable from the instant case in key respects. First, there was no allegation in that case that defendant sought to limit plaintiffs’ access to relevant data either by failing to maintain or by destroying the data. Second, the flaw in plaintiffs’ statistical analysis was entirely of plaintiffs’ making in terms of the analysis performed. There is no indication that plaintiffs’ experts in Koger did not have sufficient data at her disposal to perform a proper analysis which focused on any alleged adverse impact on deputies over 40.

In addition, Koger, in light of its reliance on Justice O’Connor’s concurring opinion in Watson, is also distinguishable as a result of the 1991 amendments to Title VII. In circumstances such as are present here, the 1991 amendments to Title VII make clear that the requirement to establish a nexus between the specific complained-of practices and evidence of a disparate impact does not preclude plaintiffs from proceeding with the type of analysis performed by Professor Hausman. In Watson, the Court had before it the very narrow issue of whether disparate impact analysis applied to subjective criteria. See, e.g., 487 U.S. at 1011 (Stevens, J. concurring in the judgment). Of the eight justices participating in the decision, the Court unanimously held that disparate impact analysis did apply. However, Justice O’Connor, who wrote the opinion for the Court, also wrote a concurring opinion substantially revising the allocation of the burdens of proof and production in disparate-impact cases. The justices divided evenly on most of those issues.¹⁰

¹⁰ Justice Kennedy did not participate in the decision. Of the eight justices who participated in the decision, only Chief Justice Rehnquist and Justices White and Scalia joined Justice O’Connor’s concurrence discussing the allocation of the burdens of proof and production. 487 U.S. at 982. In a concurring opinion joined by Justices Brennan and Marshall, Justice Blackmun, noting the narrow question presented, stated that he would have limited the

The next term in Wards Cove Packing Co., Inc. v. Atonio, 490 U.S. 642 (1989), a bitterly divided Court, by a vote of 5 to 4, essentially adopted and expanded upon the O'Connor concurring opinion in Watson. The majority, citing Justice O'Connor's concurring opinion in Watson, held that:

Respondents will also have to demonstrate that the disparity they complain of is the result of one or more of the employment practices that they are attacking here, specifically showing that each challenged practice has a significantly disparate impact on employment opportunities for whites and nonwhites.

490 U.S. at 657.

In a strongly worded dissent, Justice Stevens stated:

Also troubling is the Court's apparent redefinition of the employees' burden of proof in a disparate-impact case. No prima facie case will be made, it declares, unless the employees "isolat[e] and identif[y] the specific employment practices that are allegedly responsible for any observed statistical disparities." Ante, at 656 (quoting Watson v. Fort Worth Bank & Trust, 487 U.S. 977, 994 (1988) (plurality opinion)). This additional proof requirement is unwarranted. It is elementary that a plaintiff cannot recover upon proof of injury alone; rather, the plaintiff must connect the injury to an act of the defendant in order to establish prima facie that the defendant is liable. E.g., Restatement § 430. Although the causal link must have substance, the act need not constitute the sole or primary cause of the harm. §§ 431-433; cf. Price Waterhouse v. Hopkins, 490 U.S. 228 (1989). Thus in a disparate-impact case, proof of numerous questionable employment practices ought to fortify an employee's assertion that the practices caused racial disparities. Ordinary principles of fairness require that Title VII actions be tried like "any lawsuit." Cf. U.S. Postal Service Bd. of Governors v. Aikens, 460 U.S. 711, 714 n.3 (1983). The changes the majority makes today, tipping the scales in favor of employers, are not faithful to those principles.

Id. at 672-73 (Stevens, J. dissenting). (Emphasis added.)

holding to the question presented, but felt constrained to address Justice O'Connor's concurrence because he felt it was "flatly contradicted by our cases." Id. at 1000-01 (Blackmun, J. concurring in part). In a separate opinion concurring in the judgment, Justice Stevens questioned the prudence of announcing "a 'fresh' interpretation to our prior cases involving disparate impact analysis to objective employment criteria." and stated that, given the narrow question presented, he "would . . . [have] postpone[d] any further discussion of the evidentiary standards set forth in our prior cases until after the District Court ha[d] made appropriate findings concerning . . . plaintiff's prima facie evidence of disparate impact . . ." Id. at 1011.

Two years later in 1991, Congress, in part to modify the effect of the holding in Wards Cove, amended Title VII. As amended, Title VII provides that a plaintiff in a disparate impact case must “demonstrate[] that a respondent uses a particular employment practice that causes a disparate impact on the basis of race, color, religion, sex or national origin” 42 U.S.C. § 2000e-2(k)(1)(A)(i). Significantly, the revised statute, echoing Justice Stevens’ dissent, further provides that:

[w]ith respect to demonstrating that a particular employment practice causes a disparate impact as described in subparagraph (A)(i), the complaining party shall demonstrate that each particular challenged employment practice causes disparate impact, except that if the complaining party can demonstrate to the court that the elements of a respondent’s decisionmaking process are not capable of separation for analysis, the decisionmaking process may be analyzed as one employment practice.

Id. § 2000e-2(k)(1)(B)(i). (Emphasis added.)

Here, to the extent that USDA seeks to limit class discovery to databases which it concedes do not contain any information concerning the reasons for rejecting loan applications, USDA is, in effect, maintaining a system in which “the elements of [its] decisionmaking process are not capable of separation for analysis” and hence the entire “decisionmaking process may be analyzed as one ... practice.” Ibid. Under such an approach, evidence of “numerous questionable” subjective criteria in USDA’s eligibility requirements “ought to fortify [plaintiffs’] assertion that the practices caused racial disparities.” 490 U.S. at 673. Under such circumstances, an analysis of the sort performed by Professor Hausman or the Miller Report would more than suffice to establish a nexus between the disparity and the USDA decisionmaking process as a whole. See Krock Decl. ¶ 16.

* * * *

In the instant case, plaintiffs have no difficulty identifying the various eligibility requirements that are highly subjective and thereby permit USDA to discriminate against them; the requirements are set forth in the USDA’s regulations. See Supplemental Memorandum

at 5-10. Moreover, if the databases contained, as USDA is required to provide, the specific reasons for any adverse action taken against plaintiffs, plaintiffs submit that they would have no difficulty demonstrating statistically a link between the observed adverse impact on the ability of Hispanic farmers to obtain USDA loans and the highly subjective eligibility requirements. However, unlike the situation in either Koger or Watson, USDA proposes to limit plaintiffs to databases which do not disclose the reasons for rejecting loan applications and then fault plaintiffs for not being able to link the loan rejections with specific reasons. Merely stating the proposition exposes its utter absurdity and injustice. Yet this is precisely the position in which the USDA would place plaintiffs.

III. USDA HAS BOTH FAILED TO MAINTAIN AND HAS DESTROYED EVIDENCE.

A. USDA Does Not Collect Data Necessary To Audit Its Lending Practices

Based upon representations made by USDA, plaintiffs understand that USDA maintains two electronic databases with respect to its farm credit programs. As described by USDA, those databases are the so-called closed-loan database and the loan-application database. Hill Aff. ¶ 4. (Ex. 1.) USDA has taken the position that any class discovery must be limited to those databases. Id. at ¶ 15.

According to USDA, the closed-loan data contains information covering the period 1981 to present with respect to loans in which funds were actually distributed to the borrower. Id. at ¶ 18. (Ex. 1.) Thus, for example, the closed-loan database would not contain information on loans which were approved but never funded. Ibid. Significantly, the closed-loan database contains no information whatsoever with respect to loan applications which were rejected or otherwise did not go to closing in the sense of having the funds actually disbursed to a borrower. Ibid. See also Ex. F to Hill Aff.

In terms of its contents, the closed-loan database contains identifying information with respect to the borrower, the type of loan (e.g., operating loan or farm ownership loan), the

amount of the loan and the closing date. Id. at ¶ 6. (Ex.1.) In total, the database, as currently configured, has fields which allow it to capture and retain for each loan approximately 208 data elements. See Ex. J to Hill Aff. Nevertheless, the closed-loan database does not contain information sufficient to permit one to determine the time taken by USDA to process a loan and thus does not permit one to compare processing times for loan applications from white and Hispanic farmers. Hill Aff. ¶¶ 6, 12. (Ex. 1.) Indeed, the closed-loan database does not permit any analysis of loan applications. Id. at ¶ 18. (Ex. 1.)

The so-called loan-applications database contains information with respect to applications for USDA farm loans. Among the information contained in that database are the following: identifying information with respect to the applicant, the type loan, the date the application was submitted, the date it was deemed to be complete and the date the loan was approved, rejected or withdrawn, the closing date with respect to approved loans, the loan amount requested¹¹ and the amount approved. Hill Aff. ¶ 8. (Ex. 1.) In total, the database, as currently configured, has fields which allow it to capture and retain for each loan approximately 108 data elements. See Ex. I to Hill Aff. (Ex. 1.) Unlike the closed-loan database, the smaller loan-application database does permit one to compare processing times and disparities between the loan amount request and the loan amount approved. The loan-application database, however, contains data covering only the period October 1, 1999 to present. Hill Aff. ¶ 9. (Ex. 1.) Moreover, while it includes information about rejected loan applications, the loan-applications database does not even contain the ostensible reason, much less the real reason,¹² why a loan was rejected. Ibid. (Ex.1.)

Conspicuously absent from all the information contained in USDA's credit databases for the period 1981-1999, a period when its lending practices were the subject of Civil Rights

¹¹ The field for capturing data with respect to the loan amount requested was not added to the loan application database until January 2000. See Hill Aff. ¶ 14. (Ex. 1.)

¹² See discussion infra at 28-29.

Commission and Congressional investigations, is any information which would permit an audit of USDA's loan programs with respect to the lending practices that it historically used to discriminate against Hispanic and other minority farmers.¹³ And while USDA has sought, since 1999, at least with respect to the loan-application database, to capture some information that would permit a limited audit of its lending practices, it has steadfastly declined to capture and retain in its databases any information concerning the reasons why loan applications are rejected.

In view of the aforementioned deficiencies in the USDA databases, plaintiffs asked an expert to review the databases and to provide an opinion as to their usefulness for an analysis of discrimination in USDA lending practices. See Krock Decl. ¶¶ 3-4. (Ex. 2.) Based upon his review of the documents describing the databases and the relevant correspondence, Dr. Krock concluded that:

I would be unable to determine whether USDA lending practices discriminated against Hispanic American farmers solely by using the databases described in the documents provided by USDA. . . . I have also concluded that barring a failure to retain or destruction of documents, the USDA should have access to a majority, if not all, of the information needed to make such an analysis possible.

Id. at ¶ 6; see also ¶¶ 10-18. (Ex. 3.) Simply put, the databases to which USDA seek to confine plaintiffs' class discovery are useless. Moreover, plaintiffs submit that given USDA's long history of discrimination in the face of repeated investigations, it is no coincidence that USDA would maintain and seek to confine plaintiffs to such useless databases.

¹³ In their Second Amended Complaint ("Complaint"), plaintiffs allege, inter alia, that insofar as farm credit is concerned, USDA, beginning in 1981, discriminated against them by, inter alia, (1) denying them loans, (2) taking longer to process loans for Hispanic farmers than for white farmers, (3) approving loans for Hispanic farmers for less than the requested amount and (4) requiring excessive collateral to secure loans made to Hispanic farmers. See Complaint ¶¶ 3-33 and the Supplemental Memorandum at 18-22. Plaintiffs submit that common to all of the variations on the discriminatory theme is a pattern and practice of discrimination which was facilitated by a highly subjective decisionmaking process for determining a farmer's eligibility in USDA farm credit and noncredit benefit programs, as well as the extent of a farmer's participation in such programs. USDA's pattern of credit discrimination against Hispanic is consistent with its historic pattern of discrimination against other minority farmers. See, e.g., Civil Rights Action Team ("CRAT") Report at 15-16.

To the extent that the databases are the sole sources of information within USDA with respect to plaintiffs, USDA has violated Federal Reserve Board Regulation B. 12 C.F.R. §§ 202.1-202.15 (2002). Under ECOA, the Federal Reserve Board is expressly authorized to promulgate regulations for the enforcement of the statute's provisions. See 15 U.S.C. § 1691b(a)(1). Among other things, Regulation B requires USDA, as a creditor, as that term is defined by the statute, to notify an applicant when an adverse action is taken with respect to the applicant's credit application. See 12 C.F.R. §§ 202.9(a)(2)(i) and (a)(3) (2002). A loan rejection is an "adverse action" as that term is defined by Regulation B. See 12 C.F.R. § 202.2(c)(1)(i) (2002). Moreover, Sections 202.12(b)(1)(ii)(A)-(B) provide that any such notices are to be retained by USDA.¹⁴ 12 C.F.R. § 202.12(b)(1)(ii)(A)-(B) (2002).

In pertinent parts, Section 202.12 of Regulation B provides that:

(1) *Applications* For 25 months (12 months for business credit) after the date that a creditor notifies an applicant of action taken on an application or of incompleteness, the creditor shall retain in original form or a copy thereof:

(i) Any application that it receives, any information required to be obtained concerning characteristics of the applicant to monitor compliance with the Act and this regulation or other similar law, and any other written or recorded information used in evaluating the application and not returned to the applicant at the applicant's request;

(ii) A copy of the following documents if furnished to the applicant in written form (or, if furnished orally, any notation or memorandum made by the creditor):

(A) The notification of action taken; and

(B) The statement of specific reasons for adverse action; and

(iii) Any written statement submitted by the applicant alleging a violation of the Act or this regulation.

¹⁴ Furthermore, USDA's own regulations expressly provide, inter alia, that "[e]ach application must be approved or disapproved and the applicant notified in writing of the action taken, not later than 60 days after receipt of a complete application." 7 C.F.R. § 1910(j)(1) (2002).

(2) *Existing accounts.* For 25 months (12 months for business credit) after the date that a creditor notifies an applicant of adverse action regarding an existing account, the creditor shall retain as to that account, in original form or a copy thereof;

(i) Any written or recorded information concerning the adverse action; and

(ii) Any written statement submitted by the applicant alleging a violation of the act or this regulation

12 C.F.R. §§ 202.12(b)(1)-(2) (2002). (Emphasis added.)

As the Regulation expressly provides, USDA is required to provide a “statement of specific reasons for adverse action taken” 12 C.F.R. § 202.9(a)(2)(i) (2002). Section 202.9(b)(2) expressly provides that the “required” statement of reasons for adverse action “must be specific and indicate the principal reason(s) for the adverse action.” 12 C.F.R. § 202.9(b)(2) (2002). In that regard, “[s]tatements that the adverse action was based on the creditor’s internal standards or policies or that the applicant failed to achieve the qualifying score on the creditor’s scoring system are insufficient.”¹⁵ *Ibid.*

The significance of USDA’s failure to maintain evidence is potentially profound. Plaintiffs contend, *inter alia*, that they are the victims of USDA’s facially neutral farm credit and noncredit benefit programs’ highly subjective eligibility requirements set forth in USDA’s regulations and discussed in detail in the Supplemental Memorandum at 5-10. For most of the period covered by the Complaint, county committees, comprised almost entirely of white males, could, with unfettered discretion, determine a farmer’s eligibility to participate in USDA farms credit and noncredit benefit programs. For that same period, 1981 to 1999, USDA contends that for purposes of class discovery, plaintiffs must be limited to a database which

¹⁵ The Official Staff Commentary on Paragraph 9(b)(2) of Regulation B states that

A creditor must disclose the principal reasons for denying an application or taking other adverse action The specific reasons disclosed under § 202.9(a)(2) and (b)(2) must relate to and accurately describe the factors actually considered or scored by a creditor.

FRB Official Staff Commentary, Supplement I to Part 202, § 202.9 Paragraph 9(b)(2).

plaintiffs concede has nothing whatsoever to do with loan applications. Because USDA does not capture as part of its data collection for either of its loan databases the reason why a loan application is rejected, those databases are useless as means of determining which of the highly subjective criteria may have been invoked to reject the loan outright or to require the farmer to revise his or her loan application before it was deemed to be complete.

B. USDA Has Continued to Destroy Documents During the Pendency Of This Litigation In Direct Violation of Federal Reserve Board Regulation B.

In addition to insuring that its databases are useless as audit tools for its lending practices, USDA has continued to destroy credit files as part of its routine document retention policy. During discussions with defense counsel pursuant to the Court's order to meet and confer with respect to class discovery, plaintiffs learned for the first time that, notwithstanding the pendency of the Pigford case, this case and two other class actions and an express regulations prescribing such destruction, USDA is still routinely purging credit and program files and destroying documents allegedly as part of its document retention program. See Hill Aff. ¶ 16. (Ex. 1.) Upon learning this, plaintiffs requested that USDA immediately cease and desist all such documents destruction. See Ex. D to Hill Aff. (Ex. 1.) USDA responded by asking plaintiffs to provide "authority" for such a requests. See Ex. E to Hill Aff. (Ex. 1.) Plaintiffs subsequently responded with a letter citing the relevant provisions of Federal Reserve Board Regulation B. USDA has, to date, offered no further response and, so far as plaintiffs are aware, there has been no abatement in its document destruction. Hill Aff. ¶ 22.

Significantly, Regulation B extends the normal document retention period when, for example, an action such as the instant case is pending. In pertinent parts, Section 202.12 expressly provides that:

(4) Enforcement proceedings and investigations. A creditor shall retain the information specified in this section beyond 25 months (12 months for business credit) if it has actual notice that it is under investigation or is subject to an enforcement proceedings for an alleged violation of the act or this regulation by the Attorney General of the United States or by an enforcement agency charged with

monitoring that creditor's compliance with the act and this regulation, or if it has been served with notice of an action filed pursuant to section 706 of the Act and § 202.14 of this regulation. The creditor shall retain the information until final disposition of the matter, unless an earlier time is allowed by order of the agency or court.

12 C.F.R. §202.12(b)(4) (2002). (Emphasis added.) Despite the express terms of Section 202.12(b)(4), USDA has continued to purge credit files and destroy documents during the pendency of this case.

It is impossible to determine how many relevant documents have been destroyed as a result of USDA's willful disregard of Regulation B during the pendency of this case. Indeed, with the dismantling of the Civil Rights Office in the early 1980s and USDA's subsequent failure to investigate discrimination complaints for nearly two decades, there is no way ever to determine the number of files and relevant documents that were destroyed in violation of Regulation B during that period. In the wake of such clear violations of Regulation B, USDA cannot now be heard to complain about alleged inadequacies in plaintiffs' statistical analysis that would be the direct result of USDA's willful mishandling of the data. See, e.g., Trout, 702 F.2d at 1101. Moreover, as discussed more fully, infra, in circumstances such as these, such document destruction has given rise to either an inference that had the documents been preserved they would contain information adverse to the party destroying them, e.g., Rice v. United States, 917 F.Supp. 17, 19-20 (D.D.C. 1996), or to sanctions pursuant to Rule 37. See, e.g., EEOC v. Jacksonville Shipyards, Inc., 690 F. Supp. 995, 997-93 (M.D. Fla. 1988).

IV. AT A MINIMUM, THE COURT IS ENTITLED TO INFER THAT THE EVIDENCE WHICH USDA FAILED TO PRESERVE AND DESTROYED WAS ADVERSE TO USDA'S INTERESTS.

Plaintiffs cannot, and indeed must not, be faulted for the "gaps in their statistical analysis when the information necessary to close [the] gaps was possessed only by" USDA. Trout, 702 F.2d at 1102 (quoting Trout v. Hildalgo, 517 F. Supp. 873, 883 (D.D.C. 1981)). That USDA should bear fully the burden of its failure to preserve and destruction of evidence is particularly appropriate in light of USDA's long, well-documented and admitted history of

discrimination against Hispanic and the minority farmers. Indeed, under the circumstances of this case, imposing such a burden upon USDA is both appropriate and in keeping with the remedial purposes of the ECOA.

In similar circumstances, the D.C. Circuit has advocated a shifting of the burden of production and required the defendant to identify the specific policy or practice that gives rise to the observed disparity and demonstrate that the policy or practice is lawful. See, e.g., Segar, 738 F.2d at 1270-72. As the court aptly observed,

[t]he employer will possess knowledge far superior to that of the plaintiff as to precisely how its employment practices affect employees. This fact . . . traditionally justifies placing on the defendant the burden of proving the business necessity of an employment practice. So too it justifies the lesser burden of requiring the employer to articulate which of its employment practices adversely affect minorities. A rule placing this justificatory burden on the employer advances the purposes of Title VII far better than would the contrary result. "What is required by Congress is the removal of artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification." . . . This purpose is not well served by a requirement that the plaintiff in every case pinpoint at the outset the employment practices that cause an observed disparity between those who appear to be comparably qualified. Such a requirement in effect permits challenges only to readily perceptible barriers; it allows subtle barriers to continue to work their discriminatory effects, and thereby thwarts the crucial national purpose that Congress sought to effectuate in Title VII. "It is abundantly clear that Title VII tolerates no discrimination, subtle or otherwise." . . . Thus when unnecessary employer-created barriers have been brought into the open through adjudication of a pattern or practice disparate treatment claim, these barriers should be evaluated under the disparate impact theory, as Congress intended them to be.

Id. at 1271-72. (Emphasis added; citations omitted.) Accord Griffin, 755 F.2d at 1528.

Alternatively, if the Court were inclined to conclude that USDA's willful conduct in failing to preserve and destroying evidence did not warrant the burden shifting urged by the court in Segar or were to conclude that such burden shifting was precluded by Justice O'Connor's concurring opinion in Watson, it could nevertheless conclude that plaintiffs are entitled to the benefits of an inference that the information which USDA failed to include in its

databases or destroyed would have been adverse to USDA. See, e.g., Rice, 917 F. Supp. at 19-20. In addition, in light of the Court's inherent authority to manage the conduct of litigation, it could conclude that USDA's failure to include certain required information in its databases and USDA's destruction of documents in contravention of Federal Reserve Board Regulation B give rise to sanctions. See Jackson v. Fedders Corp., No. 93-0344, 1996 U.S. Dist. LEXIS 7306, at *28-*29 (D.D.C. May 21, 1996). "[I]t is well settled that a party's bad faith destruction of a document relevant to proof of an issue at trial gives rise to a strong inference that production of the document would have been unfavorable to the party responsible for its destruction. . . ." Rice, 917 F. Supp. at 19, (quoting Battocchi v. Washington Hospital Center, 581 A.2d 759, 766 (D.C. 1990)). Moreover, "where the proffered evidence demonstrates that documents were concealed or destroyed in bad faith . . . a trial court may well abuse its discretion by refusing to allow factual inferences adverse to the culpable party. . . ." Ibid. (quoting Battocchi, 581 A.2d at 766).

Furthermore, the failure to preserve documents in violation of a regulation requiring their preservation is "'willful' behavior." EEOC v. Jacksonville Shipyard, Inc., 690 F. Supp. at 998. It is well settled that courts have inherent powers to deal with discovery abuses and that "[c]onduct of the kind which ordinarily would be sanctionable under Rule 37, but falls outside the express terms of the rule, can be sanctioned by proper exercise of [the] Court's inherent powers." Id. at 997 (citing cases). In the instant case, defendant's destruction of documents during the pendency of this litigation clearly violated Regulation B. Moreover, to the extent that the databases to which defendant would limit plaintiffs' class discovery constitute all that remains of otherwise destroyed files, the failure to include in the databases the specific reason for rejecting a loan application constitutes a violation of Regulation B.

Finally, even if the Court were to conclude contrary to the weight of evidence that failure to maintain evidence of the reason for rejecting loans or the destruction of documents was inadvertent, such a conclusion would not justify penalizing plaintiffs. See Hartman v.

Duffey, 973 F. Supp. 189, 193 (D.D.C. 1997) (Robertson, J.) Indeed, as this Court noted in Hartman, in terms equally applicable to the instant case,

[Defendant] has not retained applicant files for most of the ten-year period at issue in this suit. While the Court has not subjected defendant to penalty because of this routine destruction of files, it cannot allow the lack of information resulting from defendant's practices to affect the legal requirements governing this suit. If the defendant-discriminator faces difficulties, they are difficulties of his own making, and the law cannot penalize the innocent victims of this discrimination simply in order to ease his tasks.

Ibid. (quoting Hartman v. Wick, No. 77-2019, 1988 WL 39856, at * 2 (D.D.C. Apr. 15, 1988) (Richey, J.)) (Emphasis added.)

Having been the subject of repeated investigations and findings of discrimination over the last 37 years, USDA, rather than end the discrimination, has instead chosen not to collect data that would facilitate such investigations or findings. However, to reward such conduct by rigid adherence to a rule that the USDA, through its willful conduct, has completely undermined would not only “not well serve[]” the purpose of ECOA, but would make a mockery of the statute and the judicial system. Clearly, requiring USDA to bear the burden of its failure to retain and destruction of evidence is “far better than . . . [the] contrary result” of permitting USDA to continue with impunity its well-documented and admitted discrimination against Hispanic and other minority farmers. Segar, 738 F.2d at 1271.

Simply put, USDA cannot be permitted to limit plaintiffs' class discovery to databases that USDA concedes will not permit a linkage between loan rejections and the reasons therefor and then fault plaintiffs for not definitively establishing the linkage. This case cries out for strong and decisive judicial action, including strong injunctive relief that will insure that the practice and pattern of discrimination that pervade USDA's credit programs will be rooted out once and for all. And as the current situation makes abundantly clear, any injunctive relief should include placing some recordkeeping requirements on USDA to insure that there is


transparency in its credit and noncredit benefit programs so that there will be an effective means of monitoring USDA's compliance with any court orders.

CONCLUSION

For the foregoing reasons and for the reasons set forth in plaintiffs' initial Memorandum and the Supplemental Memorandum, plaintiffs submit that they have satisfied all the requirements of Rule 23(a) as well as the requirements of Rule 23(b)(2) and (b)(3) and consequently the Court should certify a class. Moreover, with respect to the particular focus of the Court's 5/22/02 Order, plaintiffs submit that under the circumstances of this case, the combination of evidence of a statistically significant adverse impact on the ability of Hispanic farmers to obtain USDA loans, USDA's long and well-documented history of discrimination against Hispanic and other minority farmers, strong anecdotal evidence of discrimination against Hispanic farmers by USDA and evidence of the opportunity to discriminate created by USDA's highly subjective eligibility requirements more than suffice to establish commonality and typicality under both disparate treatment and disparate impact theories of recovery. USDA has failed to maintain or has destroyed evidence in contravention of applicable regulations. As a direct result of USDA's willful conduct, the databases to which defendant seeks to confine plaintiffs' class discovery are useless as means of establishing a link between the observed statistically significant disparity between Hispanic and white male farmers in their ability to obtain USDA loans and a specific subjective requirement used by USDA to determine

eligibility for participation in its credit and noncredit benefit programs. USDA cannot confine plaintiffs to its databases and then fault them for failing to establish definitively such a precise link.

Respectfully submitted,



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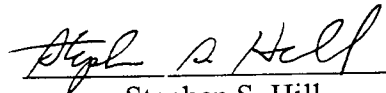
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Dated: July 17, 2002

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Plaintiffs' Second Supplemental Memorandum In Support Of Their Motion For Class Certification was served by hand delivery, this 17th day of July, 2002 upon the following:

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