

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

**DEFENDANT'S OPPOSITION TO CLASS CERTIFICATION AND RESPONSE TO
PLAINTIFFS' DECEMBER 5, 2003 MEMORANDUM REGARDING COMMONALITY**

INTRODUCTION

Stripped of hyperbole and arguments that already have been rejected by the Court, all that remains of plaintiffs' request for class certification is their bare allegation that the discrimination that supposedly pervades USDA satisfies Fed. R. Civ. P. 23(a)(2)'s commonality requirement. Even if that argument had not been foreclosed more than twenty years ago, see General Tel. Co. of the S.W. v. Falcon, 457 U.S. 147, 157 (1982), plaintiffs evidence actually proves nothing. The Report of USDA's Civil Rights Action Team ("CRAT Report") is merely a record of stories told by farmers and USDA employees that found "no consistent picture of disparity" in the treatment of minorities in FSA programs. Plaintiffs' statistical analysis cannot be taken seriously, given that it was performed by a professional litigation consultant-for-hire whose only formal academic training was in philosophy and whose analytical approach already has been rejected by this Court. The closest plaintiffs come to addressing the actual Rule 23 commonality standard is

their assertion that defendant's loan-making process employs subjective criteria. The Court previously rejected this precise argument, and it gains nothing in its retelling (which is based to a significant degree on mischaracterizations of USDA loan-making criteria).

Plaintiffs have been given access to: (1) a tremendous amount of relevant information in defendant's possession regarding the named plaintiffs; (2) all relevant information in defendant's databases; and (3) numerous deponents with relevant knowledge. Plaintiffs have initiated at least three previous rounds of briefing and filed hundreds of pages of exhibits in support of class certification. Plaintiff inability to offer any new arguments or evidence, and their open-ended request for further discovery, indicate that their true motive for seeking class certification is to exert pressure on defendant to settle this litigation for an enormous amount of money. See Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 259 F.3d 154, 167 n.8 (3d Cir. 2001) (observing that enormous size of potential liability resulting from class certification would impose "hydraulic pressure" to settle); see also Coopers & Lybrand Livesay, 437 U.S. 463, 476 (1978) (observing that increased potential damages liability and litigation costs resulting from class certification may cause a defendant to find settlement "economically prudent" and to abandon a meritorious defense). That, of course, is no basis for certifying a class.

Despite being titled a memorandum in response to the Court's July 15, 2003 Order, plaintiffs' submission is in actuality a motion for class certification and should be treated as such. The issue of class certification is, therefore, clearly ripe for a final decision, which should deny class certification in this case once and for all.

ARGUMENT

CLASS CERTIFICATION SHOULD BE DENIED BECAUSE PLAINTIFFS HAVE FAILED TO SATISFY THE RULE 23 STANDARDS

1. Plaintiffs' Alleged Evidence Of Discrimination Does Not Satisfy Rule 23's Commonality Requirement

a. Plaintiffs are not entitled to a reduced burden of proof for purposes of establishing their compliance with Fed. R. Civ. P. 23(a) & (b)

Plaintiffs argue that because USDA's databases do not permit plaintiffs to demonstrate commonality by identifying a distinct policy or practice, as required by Fed. R. Civ. P. 23(a),¹ they should be excused from meeting that requirement. With respect to their disparate impact claim, plaintiffs say they should instead be allowed to show simply that the overall operation of the program in question had a disparate impact on Hispanic farmers. Memorandum in Response to the Court's July 15, 2003 Order With Respect to Commonality ("Pl. Memo.") at 8-9.

Likewise, plaintiffs contend that their individual disparate treatment claims, when bundled

¹ Defendant has fully complied with - and even exceeded - all legal record keeping requirements. See Aug. 28, 2002 Defendant's Response to Plaintiffs' Second Supplemental Memorandum in Support of Their Motion for Class Certification, at 15-17. For example, exceeding its obligation to retain credit application information for one year, 12 C.F.R. § 202.12(b)(4), defendant keeps its records for two years. Declaration of James F. Radintz ¶ 2. Because the statute of limitations under ECOA is two years, defendant therefore retained its records for the full period within which plaintiffs could have brought timely claims. With respect to all records pertaining to this case, see Pl. Memo. at 11, defendant has further exceeded record keeping requirements by preserving the records until the termination of the case. Contrary to plaintiffs suggestion, Pl. Memo. at 11, 9 n.9, 27, defendant is not required to maintain records in anticipation of the needs of future litigants like plaintiffs.

In addition, defendant's instruction to USDA officials to discontinue the use of the term "character" in rejection letters is not evidence of misconduct that would warrant drawing adverse inferences against defendant. See Pl. Memo. at 12 n.12. As this Court put it, the twenty-year-old instruction is hardly "even a popgun let alone a smoking pistol." See July 15, 2003 Transcript at 21:12-17.

together, create an inference that defendant's decisions were discriminatory and that a class should therefore be certified. Pl. Memo. at 22.

The notion that plaintiffs should be entitled class certification under a reduced burden of proof because of alleged deficiencies in defendant's databases already has been rejected by this Court, see Garcia v. Veneman, 211 F.R.D. 15, 21 n.6 (D.D.C. 2002) (finding plaintiffs' arguments both "unsupported by case authority and unpersuasive"), and rightly so. See General Tel. Co. of the S.W. v. Falcon, 457 U.S. at 160 ("[A]ctual, not presumed, conformance with Rule 23(a) remains . . . indispensable"); see also Georgine v. Amchem Products, Inc., 83 F.3d 610, 625 (3d Cir. 1996) ("To allow lower standards for the requisites of the rule . . . would erode the protection afforded by the rule almost entirely").²

Unable to make a legitimate showing of commonality, plaintiffs are in effect seeking to leapfrog to the merits of their claims and to use alleged proof of discrimination as a justification for class certification. However, consideration of the merits of plaintiffs' case is inappropriate at the class certification stage. Garcia v. Veneman, 211 F.R.D. at 19 n.2, citing Eisen v. Carlisle & Jacqueline, 417 U.S. 156, 177 (1974).

Plaintiffs cite Smith v. Chrysler Financial Co., 2003 WL 328719 (D.N.J. 2003), for the proposition that the Title VII standard for disparate impact and the Rule 23 standard for

² Plaintiffs also claim that, because class actions are usually settled once a class is certified, it is unlikely that any evidence can be offered regarding the existence of USDA's alleged policy or practice of discrimination against minority farmers. Pl. Memo. at 23. Plaintiffs' inability to produce evidence to prove their case does not excuse them from the requirement to do so.

commonality can be conflated.³ See Pl. Memo. at 8. In Smith, however, the court decided the merits of a Title VII disparate impact claim without even addressed the commonality requirement of Rule 23. The court did, nonetheless, observe with respect to burden-shifting that in order to assert a proper disparate impact claim, a class representative "must . . . identify a discriminatory policy or practice by Defendant which is 'generally applicable' to the proposed class member." Smith, 2003 WL 328719, *7 (internal quotation marks omitted); see also Watson v. Fort Worth Bank and Trust, 487 U.S. at 994 ("Especially in [disparate impact] cases where an employer combines subjective criteria with the use of more rigid standardized rules or tests, the plaintiff is in our view responsible for isolating and identifying the specific employment practices that are allegedly responsible for any observed statistical disparities"), quoted in Garcia v. Veneman, 211 F.R.D. at 22 n.7. Therefore, under either standard plaintiffs cannot avoid the need to specify a policy or practice that causes the alleged disparities.

³ A disparate impact case addresses the situation where "facially neutral employment practices have significant adverse effects on protected groups." Watson v. Fort Worth Bank and Trust, 487 U.S. 977, 986-87 (1988) (emphasis omitted). To make a prima facie showing, plaintiffs must "isolat[e] and identify[] the specific employment practices that are allegedly responsible for any observed statistical disparities." Id. at 994. Once the employment practice at issue has been identified, causation must be proved, "i.e., that the practice in question "has caused the exclusion of applicants for jobs or promotions because of their membership in a protected group." Id.

A showing of commonality for purposes of certifying a class under Rule 23 involves a different set of considerations. Plaintiffs must identify questions of law or fact that are common to the claims of all purported class members. See General Tel. Co. of the S.W. v. Falcon, 457 U.S. at 158; Stastny v. Southern Bell Tel. and Tel. Co., 628 F.2d 267, 273 (4th Cir. 1980) (plaintiffs must show the existence of an identifiable "pattern, practice or policy that demonstrably affects all members of a class in substantially, if not completely, comparable ways"); Boston v. Apfel, 182 F.R.D. 188, 195 (D. Md. 1998) (same).

b. The CRAT Report is not evidence of discrimination

Plaintiffs mischaracterize the CRAT Report as proving a discriminatory pattern that allegedly shows commonality.⁴ Pl. Memo. at 10, 32, 34-35. Plaintiffs fail to point out that the report indicates, with respect to each passage quoted, that the passage does not consist of USDA findings. Rather, it merely contains USDA summaries of stories told at listening sessions convened in response to USDA customer and employee complaints of discrimination in USDA agricultural and employment operations. See CRAT report at 15 (providing "general outlines of the stories farmers told the CRAT"); id. at 26 (describing what "[m]inority and limited-resource farmers and ranchers reported"). Plaintiffs also ignore the fact that the stories were told not just by minority farmers, but by "limited-resource" farmers as well, a category that encompasses white males.

In addition to mischaracterizing the CRAT Report, plaintiffs omit the only actual findings the Report contains that address the allegations of discrimination in farm loans. According to the Report "[a]pproval rates for the FSA direct and guaranteed loan programs in 1995 and 1996 varied by region and by State and showed no consistent picture of disparity between minority and nonminority rates. . . . Loan processing rates for the FSA direct and guaranteed loan programs also varied widely in 1995 and 1996 and again showed no consistent picture of disparity between

⁴ Plaintiffs rely on various other reports to prove discrimination, none of which has any evidentiary value. See, e.g., Pl. Memo. at 24 (citing 1982 Civil Rights Commission Report); Pl. Memo. at 24-25 (1965 Civil Rights Commission Report); Pl. Memo. at 25 (1987 and 1990 Civil Rights Commission Reports; 1990 Committee on Government Operations Report); Pl. memo at 26 (March 19, 1997 Hearing Statement of Hon. Dan Glickman). On the basis of these hearsay accounts of alleged discrimination, plaintiffs argue that their claims of disparate treatment should automatically meet the commonality requirement, Pl. Memo. at 26, despite the absence of any evidence of a policy or practice that has class-wide disparate effects.

minority and nonminority rates." Id. at 21. Although there were some states in which approval and processing rates varied between minority and nonminority farmers, the Report found that these "disparit[ies] . . . may be partially accounted for by the smaller average size of minority- and female-operated farms, their lower average crop yields, and their greater likelihood not to plant program crops, as well as less sophisticated technology, insufficient collateral, poor cash flow, and poor credit ratings." Id.

In other words, there is no evidence of uniform discriminatory treatment being accorded to minority farmers. And to the extent that there are variations by state, those variations are due not to discrimination, but rather, to a proper regard for the less advantageous circumstances minority farmers present when applying for loans. And because those circumstances consist of objective criteria that must be assessed on a case-by-case basis, they preclude a finding of commonality for purposes of Fed. R. Civ. P. 23(a)(2).

Finally, the CRAT Report's finding of no consistent pattern of discrimination is confirmed by the results of the more than 21,000 Track A claims decided under the Pigford Consent Decree. To prevail on a Track A Claim, a class member needed only establish discrimination by substantial evidence, a standard that would be insufficient to prevail at trial or on summary judgment. In light of Track A's reduced burden of proof and the district court's acceptance at face value of the Pigford plaintiffs' allegations of discrimination, the district court concluded in its decision approving the consent decree in that case that decisions in class members' favor in Track A adjudications would be "virtually automatic[.]" Pigford v. Glickman, 185 F.R.D. 82, 95 (D.D.C. 1995). That has not been the case at all, however. Instead, as of December 8, 2003, USDA had won almost 40% of the Track A cases. It is safe to say that had

the preponderance standard been applied, USDA's rate of success would have been substantially higher. But the true lesson for this case taught by the thousands of Pigford class members whose discrimination claims were found to be meritless is that a handful of Hispanic farmers carefully selected by plaintiffs' counsel cannot fairly stand as surrogates for the remaining 19,000 Hispanic farmers who have lived and farmed in thousands of counties, in 50 states, over the last 20 years, and who would comprise the class plaintiffs seek to have certified.

c. Multiple, individualized instances of alleged discrimination do not show commonality

Plaintiffs' attempt to show commonality through anecdotal accounts of alleged discrimination against individual class members, see Pl. Memo. at 22, ignores the Court's finding that commonality is defeated "by the large numbers and geographic dispersion of the decision-makers." Garcia v. Veneman, 211 F.R.D. at 22. Plaintiffs' multiple accounts of alleged discrimination against various individuals such as Mr. Iriarte, Pl. Memo. at 20, David Flores, id. at 20-21, Mr. Banuelos, id. at 33, the Rodriguez Brothers, id. at 35, Mr. Acoste, id. at 37, Hector Flores, id., and scores of other claimants, see Pl. Exhibits 7-11, demonstrably show that class certification is inappropriate here. "Those farmers' allegations of discrimination cannot be sorted out without individualized inquiries regarding the practices of various county committees." Garcia v. Veneman, 211 F.R.D. at 22. These are "precisely the type of individualized inquir[ies] that class actions were designed to avoid." Id. at 22, quoting Zachery v. Texaco Exploration and Prod., Inc., 185 F.R.D. 230, 239 (W.D. Tex. 1999).⁵ These individualized allegations of

⁵ Plaintiffs claim that "USDA cannot insulate itself from the decisions made by its officials who, no matter how geographically dispersed they may be, act pursuant to its uniform regulations, by simply turning a blind eye to the decisions or their consequences." Pl. Memo. at 24. In effect, plaintiffs are alleging that USDA officials ignore applicable regulatory loan

disparate treatment are not amenable to proof on a class-wide basis and therefore fail to show commonality.

Similarly, the allegation that defendant has engaged in a pattern or practice of "discouraging Hispanic farmers from availing themselves" of farm credit and non-credit programs, Pl. Memo. at 30, is tantamount to an assertion that defendant has an "across-the-board policy" of discrimination, which is not a proper basis for certifying a class. Falcon, 457 U.S. at 157-58; Garcia v. Veneman, 211 F.R.D. at 19. The alleged instances of "discouragement," like generalized instances of "discrimination," are highly individualized and involve defendant's alleged denial of applications, denial of assistance in completing applications, delayed processing of applications, the use of subjective criteria, the requirement that applicants maintain supervised bank accounts, and the delay or denial of loan servicing. Pl. Memo. at 32-39. These purported acts of alleged "discouragement" would have been conducted by "hundreds, if not thousands, of local FSA officials, in more than 2,700 county offices across the country, over a 19-year period." Garcia v. Veneman, 211 F.R.D. at 22. The only common thread binding the claims of "discouragement" is that putative class members suffered some sort of injury because they were Hispanic. Again, however, "as Falcon made clear, there is more to a showing of commonality than a demonstration that class plaintiffs suffered discrimination on the basis of membership in a particular group." Hartman v. Duffey, 19 F.3d 1459, 1472 (D.C. Cir. 1994) (citing Falcon).

standards and subjectively apply them in a discriminatory fashion, not that such officials operate in a system without standards which allows them to make decisions subjectively. Recognizing this distinction, the Court has already observed that such an allegation does "not constitute significant proof of an entirely subjective decision-making process." Garcia v. Veneman, 211 F.R.D. at 21, quoting Williams v. Glickman, Civ. No. 95-1149, 1997 WL 198110, at *2 (D.D.C. Apr. 15, 1997).

Plaintiffs' allegations of a pattern or practice therefore fail to meet the Rule 23 commonality requirement.

d. The statistical analysis performed plaintiffs' new expert should be rejected out-of-hand.

The last time plaintiffs moved for class certification, they relied on statistical analyses performed by Dr. Jerry Hausman, a respected econometrician who has published extensively in the field of statistics. We nonetheless explained, and the Court found, that Dr. Hausman's statistical analyses did not support plaintiffs' commonality assertion. In their recent memorandum, plaintiffs have taken a second shot at proving commonality on the basis of a statistical analysis with a new expert, Dr. Karl R. Pavlovic. While Dr. Pavlovic may qualify as an expert in some fields, statistics is not among them.

According to Dr. Pavlovic, his "formal academic training is in philosophy, philosophy of science, epistemology and logic." Pavlovic Dec. ¶ 2. Neither Pavlovic's declaration, *id.*, nor his vitae, *id.*, Exhibit 1 at 1, indicate that he has received any formal, post-secondary training in statistics, probability, or mathematics. Nor is there any indication that he ever has published in any peer-reviewed scholarly journal an article based on a statistical analysis of anything. *Id.* Although Pavlovic's vitae asserts that his analyses sometimes "are the basis for testimony by Dr. Pavlovic or others in regulatory or court proceedings," *id.*, it does not identify a single instance in which he has been qualified as an expert in statistics or statistical analysis under Fed. R. Evid. 702.

According to Pavlovic's vitae, his employment history is as follows: at present he is President of DOXA, Inc., an enterprise he founded about 1994 and through which "[h]e is

responsible for the design and execution of statistical, economic and financial analyses of discrete commercial operations, individual firms, and industry sections for use by management and counsel in formulating and implementing commercial and litigation strategy." Pavlovic Dec. ¶ 2. Dr. Pavlovic's vitae also discloses that between 1978 (which appears to be about the time he received his doctorate in philosophy) and 1994 (when it appears he founded DOXA, Inc.), he had nothing to do with statistics, but rather was employed as an assistant professor of philosophy, a research associate in civil engineering, the assistant director of something called the Center for Applied Philosophy, and by a firm where he was "[r]esponsible for economic analysis in civil court and regulatory proceedings," in that order.

Rule 702 provides that a witness may be qualified as an expert "by knowledge, skill, experience, training, or education[.]" As the preceding discussion makes clear, Dr. Pavlovic cannot be qualified as an expert in statistics on any of these bases. According to Dr. Pavlovic's vitae, he has no training or education in statistics or statistical methodology, nor did his work prior to 1994 involve those matters. None of the Projects listed on Dr. Pavlovic's vitae appear to involve statistical analysis,⁶ nor do his declaration or vitae identify a single instance when he was qualified as an expert in statistics under Rule 702. There simply is no basis, then, upon which to conclude that Dr. Pavlovic is qualified by "knowledge, skill, [or] experience" to give expert testimony on statistical matters. Fed. R. Evid. 702.

Even if the Court were to find that Dr. Pavlovic qualified as an expert in statistics under Rule 702, it nonetheless should find that his testimony that loan applications from Hispanics are

⁶ Only four of the Projects even involved matters in litigation, and three of those were performed during the period prior when, according to Dr. Pavlovic's vitae, he had nothing to do with statistics.

approved at lower rates than those from white farmers, Pavlovic Dec. ¶ 9; that they are approved in lesser amounts relative to the amount requested, Pavlovic Dec. ¶ 10; and that loan processing times are longer for Hispanic farmers than for white farmers, Pavlovic Dec. ¶ 11, does not fit the circumstances of this case. See Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579, 591 (1993); Kuhmo Tire Co. v. Carmichael, 526 U.S. 137, 147 (1999).

First, Dr. Pavlovic's analysis fails to take geography into account. Freedman Dec. ¶3. The Court has already determined that any statistical analysis used as a basis for a commonality finding must be broken down by relevant geographic units in order to produce valid results. Garcia v. Veneman, 211 F.R.D. at 22. Even plaintiffs' own former expert conceded as much. Second Declaration of Professor Jerry A. Hausman ("Second Hausman Dec.") ¶ 9; Freedman Dec. ¶6. Dr. Pavlovic's statistical conclusions fail to account for the fact that, for example, Hispanics are likely to be more concentrated in some areas than others. Freedman Dec. ¶3. It also fails to take into account that USDA loan processing patterns are likely to differ from one area to another because USDA loan processing is highly decentralized. Freedman Dec. ¶3. Dr. Pavlovic's "statistical analysis does not inform this issue, because it is not broken down by county, or even by state." Garcia v. Veneman, 211 F.R.D. at 22. Hence, it is nothing but "a national average of loan ratios," id., which is useless as statistical evidence of disparities for purposes of showing commonality.

Second, Dr. Pavlovic's analysis suffers from another of the defects that doomed Dr. Hausman's: it fails to show how any statistical disparity in loans to Hispanic farmers is linked to subjective criteria, such as the character of the applicant, that USDA might employ in making its loan decisions. Freedman Dec. ¶ 4. Hence, commonality is defeated by "plaintiffs' inability to

correlate the discrimination they allege with subjective loan qualification criteria.” Garcia v. Veneman, 211 F.R.D. at 22. Moreover, Dr. Pavlovic’s results are not adjusted for any objective differences between Hispanic and non-Hispanic applicants. Freedman Dec. ¶ 5. Here again, Dr. Hausman agrees that such adjustments are necessary. See (First) Declaration of Professor Jerry A. Hausman ¶ 11; Freedman Dec. ¶ 6. In this regard, for example, Hispanics may be less likely to be citizens than non-Hispanics. This fact would affect approval rates given that citizenship is a requirement for approval, 7 C.F.R. § 1941.12(a)(1), and would lengthen processing time for Hispanics, whose citizenship status may be more difficult to ascertain. Freedman Dec. ¶ 5.

Finally, Dr. Pavlovic admits that because defendant’s databases contain no information on either the process or criteria for evaluating loan applications, he was unable to conduct a separate analysis of the various components of USDA’s loan-making process. Pavlovic Dec. ¶ 4. Hence, he concedes that the databases do not permit him to identify any policy or practice to which the purported disparities can be attributed, and which would enable plaintiffs to meet the commonality standard. Consequently, plaintiffs ask the Court to view the loan-making process as a single allegedly discriminatory practice. Pl. Memo. at 40. This is tantamount to asking the Court to determine that defendant had an “across-the-board” policy of discrimination, which is not a suitable basis for certifying a class. Falcon, 457 U.S. at 157.

In sum, plaintiffs have not established that Dr. Pavlovic qualifies as an expert in statistics. In any case, his conclusions do not “fit” the circumstances of the case, see Daubert, 508 U.S. at 591, because they do not take into account geography or USDA’s loanmaking criteria, either the subjective or objective ones. For these reasons, Dr. Pavlovic’s conclusions should be rejected.

2. Plaintiffs Have Failed To Show A Common Policy Or Practice Of Subjective Decision-Making Pursuant To Rule 23(a)

Plaintiffs argue, as they have in the past, that USDA's decision-making process is subjective.⁷ Pl. Memo. at 14-17. However, the Court has already determined that the regulatory criteria for loan and benefit applications are largely objective. Garcia v. Veneman, 211 F.R.D. at 20-21. Its decision is the law of the case. See Arizona v. California, 460 U.S. 605, 618 (1983) (The law of the case "doctrine posits that when a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages in the same case"). Plaintiffs' contention that twenty of the thirty-five named plaintiffs' loan applications were rejected on the basis of subjective criteria is meaningless, given that it is based on plaintiffs' own inaccurate characterization of the criteria as subjective.⁸

⁷ Plaintiffs contend that, inasmuch as USDA is a lender of last resort to farmers who cannot qualify for commercial credit, the process of choosing among such borrowers necessarily involves a great deal of subjectivity. Pl. Memo. at 16 n.14. As indicated in the CRAT report, at 21, some degree of subjectivity is appropriate given the disadvantaged circumstances of minority farmers, and the decision-making process should not be considered suspect merely because it accounts for these circumstances. Cf. ("[C]ourts are generally less competent than employers to restructure business practices, and unless mandated to do so by Congress they should not attempt it." Watson v. Fort Worth Bank and Trust, 487 U.S. 977, 999 (1988) (quoting Furnco Constr. Corp. v. Waters, 438 U.S. 567, 578 (1978))).

⁸ By defendant's calculation, thirty of 189 applications for direct loan assistance in plaintiffs' borrower case files were denied. Only eleven of the thirty denials were based upon the three "subjective" criteria identified by the Court. Garcia v. Veneman, 211 F.R.D. at 20 (finding only three criteria that could properly be characterized as subjective: education and/or farming experience, character, and commitment).

Similarly, two of thirty-two applications for guaranteed loan assistance were denied, and the two denials were based on feasibility (insufficient cash flow), not on any of the subjective criteria identified by the Court.

The other bases for rejection were not subjective. See, e.g., Exhibit 7(D) and (E) (omitted or falsified information in proposed plans of operation); id. Exhibit 7(H) (ineligibility for

Plaintiffs contend that in reaching its conclusion regarding the objectivity of the criteria, the Court mistakenly considered 1997 regulations that were not in effect for the first sixteen years of the putative class period. Pl. Memo. at 13. However, a consideration of the predecessor 1989 regulations would have led the Court to the same conclusion, since the two sets of regulations contain criteria that substantially overlap. Specifically, four of the eligibility criteria are identical in the 1997 and 1989 regulations, and the Court has already ruled that these same four "cannot be properly characterized as subjective."⁹ Garcia v. Veneman, 211 F.R.D. at 20. Thus, at least 57% (four out of seven) of the alleged 1989 criteria are objective. Similarly, the Court has found that 72% (eight out of eleven) of the 1997 criteria are objective. In both the 1997 and 1989 regulations, then, a clear majority of the eligibility criteria are objective and therefore fall outside the purview of the Falcon exception, under which commonality can be found where there exists an "entirely subjective" decision-making process. Garcia v. Veneman, 211 F.R.D. at 21 n.4.

Plaintiffs argue that half of plaintiffs' rejections were based on another allegedly subjective criterion, i.e., the lack of feasible farm and home plans. Pl. Memo. at 19-20. Contrary to plaintiffs' claim, however, the feasibility evaluation is based largely upon objective facts supplied by the applicant. Specifically, a feasible plan is based upon the applicant's records that

Emergency Loan program); id. Exhibit 7(L) (ineligibility for Emergency Loan); id. Exhibit 7(M) (insufficient or outdated information in application); id. Exhibit 7(N) (ability to obtain financing from other sources).

⁹ A total of eight eligibility criteria in the 1997 regulations are objective. Garcia v. Veneman, 211 F.R.D. at 20. The four that match the alleged eligibility criteria in the 1989 regulations are as follows: (1) United States citizenship, (2) the legal capacity to incur loan obligations, (6) inability to obtain credit elsewhere, (7) farm size. Pl. Memo. at 13-14.

show the farming operation's actual production and actual expenses.¹⁰ 7 C.F.R. § 1941.4. These records are used along with realistic anticipated prices and program farm payments to make a straightforward calculation; viz., they are used to determine whether the income from the farming operation will suffice to pay the applicant's operating expenses, taxes, debts, and living expenses. 7 C.F.R. § 1941.4. In this context, it is important to note that "anticipated prices" are based on published estimates or on information provided by the applicant. See 7 C.F.R. § 1924.56. They are not, as plaintiffs allege, Pl. Memo. at 20, based on the loan officer's speculation. Hence, the regulatory constraints on the "feasibility" analysis leave little, if any, room for subjectivity. See Garcia v. Veneman, 211 F.R.D. at 24 (observing that the determination of whether an application was feasible would require scrutiny of "such objective criteria as an applicant's financial qualifications and repayment ability"). Plaintiffs' own examples show this to be the case. See, e.g., Pl. Memo. Exhibit 7(B) (finding no feasible plan to restructure debts where there was only a \$61,028.00 balance available to pay \$212,934.00 debt); id. Exhibit 7(C) (indicating that based upon "factual, historical information," the projected balance available to service non-FSA debts would result in a \$17,313.00 shortfall in meeting applicant's obligations in addition to already existing FSA indebtedness); id. Exhibit 7(L) (rejecting farm plan as not feasible where applicant

¹⁰ 7 C.F.R. § 1941.4 defines a feasible plan as:

a plan based upon the applicants/borrowers records that show the farming operation's actual production and expenses. These records will be used along with realistic anticipated prices, including farm program payments when available, to determine that the income from the farming operation, along with any other reliable off farm income, will provide the income necessary for an applicant/borrower to be at least able to: (a) Pay all operating expenses and taxes which are due during the projected farm budget period; (b) Meet necessary payments on all debts; and (3) Provide living expenses for the family members of an individual borrower

would be unable to debt service obligations as they became due); id. Exhibit 7(I) (finding infeasibility where applicant estimated unrealistic living expenses of \$4500.00 for a family of five, significantly underestimated operating expenses, and would be \$10,473.00 short in repayment ability).

The present case contrasts sharply with Buycks-Roberson v. Citibank Federal Savings Bank, 162 F.R.D. 322 (N.D. Ill. 1995), on which plaintiffs rely to support their claim that USDA's decisionmaking process is subjective. Pl. Memo. at 17-19. The "pivotal" fact in Buycks-Roberson was that the defendant bank gave its loan originators "considerable discretion when making loan decisions," such that they could request additional information from applicants to explain potentially adverse information contained in their credit history, and could even identify certain applicants as "desirable" customers who were then given special treatment. Id. at 330. Based on this "considerable discretion" with respect to each loan applicant, the court found that the subjective application of neutral underwriting criteria was standardized conduct. Id. at 331 and n.11. By contrast, most of USDA's loan criteria are, and always have been, objective, and there is no evidence that loan officers systematically depart from them or have discretion to apply them selectively. See Garcia v. Veneman, 211 F.R.D. at 21 n.4 ("The presence of at least some mandatory objective criteria in the decision-making process take this case out of the purview of the Falcon exception"). Therefore, plaintiffs have failed to show that subjectivity in USDA's loan-making process amounts to "standardized conduct" towards the purported class members.¹¹

¹¹ Plaintiffs suggest that defendant has not produced all of the named plaintiffs' files in its possession since plaintiffs Linares and Iriarte apparently received their own files from the local FSA offices that were not produced in discovery. Pl. Memo. at 19 n.15. USDA's failure to

3. Plaintiffs' \$20 Billion Damages Claim Is Predominant Under Rule 23(b)(2)

The Court has already ruled with respect to plaintiffs' claim for \$20 billion in damages in this case that "the monetary relief plaintiffs seek predominates under any applicable test." Garcia v. Veneman, 211 F.R.D. at 23. Hence it determined that the proposed class could not be properly certified under Rule 23(b)(2).

Plaintiffs have moved to amend their complaint, but the proposed third amended complaint merely repackages the same substantive claims as were raised in the prior complaints. Plaintiffs also have tried to mask the fact that they still are seeking billions of dollars in damages by eliminating from their proposed amended complaint any reference to the actual amount of their damage claim. That plaintiffs' damage claim remains as large as ever is clear from the face of the proposed amended complaint, however. Thus, the proposed amended complaint gives any indication that plaintiffs do not continue to seek the same \$19 billion in damages they explicitly claimed in each previous version of the complaint. And to the extent that the proposed amended complaint addresses damages it makes it clear that plaintiffs are after enormous amounts of money. For instance, plaintiffs acknowledge that they are seeking damages of such magnitude that "computer modeling" may be necessary for proper calculations, see Third Amended

produce these files was the result of a miscommunication with the FSA office as to the nature of the files that were required to be produced.

Regarding plaintiffs' allegation that the Rodriguez Brothers Farm has not yet received the servicing to which it is allegedly entitled, the alleged delay was the result of the Farm's failure to timely provide USDA with all the information it needed to complete processing.

Finally, plaintiffs contend that FSA paid Mr. Iriarte \$550 instead of \$880 per ton for his crop of grapes. Pl. Memo. at 20 n.18. Aside from the fact that the volatility of grape prices results in sudden and dramatic changes in the prevailing market price, FSA provided Mr. Iriarte with the right to appeal its decision, but Mr. Iriarte failed to exercise it.

Complaint at 3, 48, and they note that plaintiffs in Pigford v. Veneman (D.D.C.) have to date recovered \$850 million in damages on claims identical to those asserted here. In these circumstances, there is simply no getting around the fact that plaintiffs' real goal in this case remains the recovery of a vast amount of money damages.¹²

CONCLUSION

For the foregoing reasons, class certification should be denied.

Respectfully submitted,

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/s/ **Lisa A. Olson**
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¹² Plaintiffs' failure to meet their burden to show commonality is highlighted by the proposed third amended complaint. For all their contentions about allegedly discriminatory "policies, practices, patterns, and procedures," see Third Amended Class Action Complaint at 46; see also id. at 3, plaintiffs have failed to identify any policies or practices that caused the alleged disparities. Their request for injunctive and declaratory relief amounts to nothing more than a generalized plea that the Court declare that discrimination has occurred and enjoin it. The failure to specify any particular policies or practices that affect all class members makes it impossible to remedy them through class-wide declaratory or injunctive relief, and class certification is therefore inappropriate.

Plaintiffs reargue that USDA's failure to investigate claims of discrimination in connection with the farm loan application process is a basis for class certification. The Court has already ruled that plaintiffs' allegations of failure to investigate civil rights complaints do not state claims under ECOA or the APA. March 20, 2002 Order at 3-4. That ruling is the law of the case. See Arizona v. California, 460 U.S. at 618.

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Dated: Jan. 16, 2004

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on January 16, 2004, Defendant's Opposition to Class Certification and Response to Plaintiffs' December 5, 2003 Memorandum Regarding Commonality was filed electronically with the Clerk of the Court to be served by operation of the Court's electronic filing system upon plaintiffs' counsel as follows:

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THIRD REPORT OF DAVID A. FREEDMAN

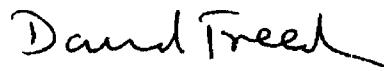
1. I have reviewed Plaintiffs' Memorandum of 5 December 2003 and the report of Dr. Pavlovic. I have also read the court's opinion of December 2, 2002, denying class certification, and the transcript of a status hearing on July 15, 2003.
2. Dr. Pavlovic finds that loan applications from Hispanics are approved at lower rates than those from white farmers, in lesser amounts relative to the amount requested, and processing times are longer. Even if his numbers are right, I cannot see that they are relevant to the questions at issue.
3. Dr. Pavlovic's analyses seem to be national in scope. (He excluded Puerto Rico, as it did not follow the pattern.) The differentials do not take geography into account, but geography matters. Hispanics are likely to be more concentrated in some areas and less so in others. Furthermore, USDA loan processing patterns are also likely to differ from one area to another, because USDA loan processing is highly decentralized.
4. Dr. Pavlovic's differentials are not related to any subjective criteria that USDA might employ in making decisions about loans (for example, character of applicant).
5. The results are not adjusted for any differences between Hispanic and non-Hispanic applicants, in terms of objective characteristics identified in the Court's opinion of December 2, 2002—or any other characteristics. For instance, if Hispanics are less likely to be citizens than non-Hispanics, this would affect approval rates. If documentation is harder to check for Hispanics, this would affect processing time.

6. I find Dr. Hausman's statistical analysis to be unconvincing, for reasons explained in my previous reports. However, Dr. Hausman seems to agree that geography matters: there are states in his model. First Declaration of Professor Jerry A. Hausman. ¶¶8-11. Indeed, by my calculations, different states turn out to have very different concentrations of hispanic farmers, loan ratios, and differentials across ethnic groups. Pooling across states is therefore likely to be misleading.

7. Dr. Hausman must also agree that adjustment is needed for differences between Hispanic and non-Hispanic farmers, because he enters farm size and farm revenue into his model: these variables, and geographic location, are "variables that might be expected to affect the loan ratio." First Declaration of Professor Jerry A. Hausman. ¶11. Comparisons made without adjustment are likely to be misleading.

8. In summary, Dr. Pavlovic's comparisons ignore the state or county where the loan application is filed. The comparisons do not adjust for any differences between Hispanic and non-Hispanic farmers. The comparisons are not related to the criteria used by USDA, whether subjective or objective. Therefore, Dr. Pavlovic's report is even further removed from the issues than Dr. Hausman's reports.

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct. Executed at Oakland, California on January 14, 2004.



David A. Freedman