

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

GUADALUPE L. GARCIA, JR., et al.,)	
)	
Plaintiffs,)	
)	
v.)	Civil Action No. 1:00CVO2445
)	Judge Robertson
ANN VENEMAN, Secretary of the)	
United States Department of Agriculture)	
)	
Defendant.)	

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

INTRODUCTION

Pursuant to the briefing schedule approved by the Court, plaintiffs submit this reply to Defendant's Opposition to Class Certification and Response to Plaintiffs' December 5, 2003 Memorandum Regarding Commonality ("Defendant's Response").¹

Defendant's Response necessitates a brief review of the Court's July 15, 2003 Order with respect to commonality and the circumstances that gave rise to it. The Court will recall that in lieu of responding fully to discovery requests that were tailored to address concerns raised by the Court's December 2, 2002 Memorandum Order ("12/02/02 Order"), defendant offered to provide to plaintiffs the loan files of 35 of the 110 plaintiffs named in the Second Amended Complaint. According to defendant, those 35 files were the only loan files in the possession of the United States Department of Agriculture ("USDA") relating to the 110 named plaintiffs. The Court ordered defendant to produce the proffered files. April 29, 2003 Status Hearing Tr. at 40. Subsequently, during the July 15, 2003 Status Hearing, the Court ordered plaintiffs to review the

¹ In this reply, the Memorandum In Response To The Court's July 15, 2003 Order With Respect To Commonality filed on December 5, 2003, is referred to as "Plaintiffs' 12/05/03 Memorandum."

produced loan files to determine whether there is commonality among those named plaintiffs. July 15, 2003 Status Hearing Tr. at 22-23. The Court expressly conditioned any further discovery upon plaintiffs' ability to demonstrate that there are issues of law and fact common to the named plaintiffs. On the basis of that review, plaintiffs identified a number of such common issues in Plaintiffs' 12/05/03 Memorandum.

Defendant now seeks to short-circuit the process by arguing that Plaintiffs' 12/05/03 Memorandum should be considered a renewed motion for class certification. Defendant's Response at 2. Inasmuch as plaintiffs have clearly identified a number of issues of law and fact common to the named plaintiffs in question, if the process is to be short-circuited, as defendant demands be done, then it follows that the Court necessarily must find that plaintiffs have satisfied the requirements of Fed. R. Civ. P. 23 and in particular Fed. R. Civ. P. 23(b)(2). Any other conclusion would be contrary to fundamental notions of fairness.

In addition to trying to short-circuit the process, defendant, to the extent that she attempts to address plaintiffs' arguments, distorts them until they are hardly recognizable. Thus, for example, defendant overstates plaintiffs' reliance upon the so-called CRAT Report. She indulges in factually baseless speculation to impugn the qualifications of Dr. Pavlovic, she dismisses the evidence gleaned from the limited discovery to date and the sworn declarations of named plaintiffs as bare allegations, and she dismisses the multiple findings of discrimination made by, among others, the Congress and the United States Commission On Civil Rights ("Civil Rights Commission"). Discovery requests, which, as previously noted, are narrowly tailored to address concerns raised by the Court, and which remain largely unanswered, are mischaracterized as an "open-ended request for further discovery, indicating that [plaintiffs'] true motive for seeking class certification is to exert pressure on defendant to settle this litigation for an enormous amount of money." Defendant's Response at 2. One might well wonder precisely what defendant seeks to conceal if the prospect of responding to the pending narrowly tailored

discovery requests would “exert pressure on defendant to settle this litigation for an enormous amount of money.”²

It is also worth noting the issues that defendant ignores. Defendant never addresses plaintiffs’ argument regarding Congress’ 1991 Amendment to Title VII which expressly modified the holding in Wards Cove Packing Co. v. Antonio, 490 U.S. 642 (1989), requiring the identification of a “distinct policy or practice” causing the disparate impact where a defendant’s policy or practice cannot be separated into its component parts. In claiming that USDA’s lending criteria is objective, defendant completely ignores the contrary admission by the Farm Home Administration (“FmHA”), the USDA agency responsible for promulgating and administering those criteria. Furthermore, defendant fails to even address plaintiffs’ argument that USDA ratified and acquiesced in the “pattern and practice” of discrimination infecting its farm loan programs when it took no meaningful steps to eliminate the discrimination plaguing its credit and non-credit benefit programs. Thus, defendant must be deemed to concede those arguments and their implications for this case.

ARGUMENT

I. BASED ON THE LIMITED DISCOVERY TO DATE, PLAINTIFFS HAVE IDENTIFIED COMMON ISSUES OF LAW AND FACT WITH RESPECT TO PLAINTIFFS’ DISPARATE IMPACT AND DISPARATE TREATMENT CLAIMS

A. Discovery To Date Reveals Common Issues Of Law And Fact With Respect To Plaintiffs’ Disparate Impact Claims.

The current discovery clearly demonstrates that USDA operates its farm credit and non-credit benefit programs in a manner that adversely impacts Hispanic farmers’ ability to access credit on equal terms. The limited discovery to date also demonstrates that USDA’s farm credit eligibility criteria are, notwithstanding defendant’s self-serving assertions to contrary, admittedly subjective. USDA’s admission in that regard is confirmed by the detailed findings of Congress

² See Ex. 1.

and the Civil Rights Commission, both of whom extensively studied USDA's lending practices. Moreover, of particular importance for the instant exercise, that discovery demonstrates the existence of the following common question of law and fact:

Did USDA attempt to discourage Hispanics from availing themselves of farm credit and loan servicing in violation of the Equal Credit Opportunity Act ("ECOA"), 15 U.S.C. § 1691 *et seq.*, Regulation B promulgated pursuant thereto, and USDA's own regulations with respect to farm credit?³

That question of law and fact gives rise to the following questions:

Did defendant attempt to discourage Hispanic farmers from availing themselves of farm credit by denying them applications and assistance in completing applications?

Did defendant attempt to discourage Hispanic farmers from availing themselves of farm credit by delaying the processing of their loan applications?

Did defendant attempt to discourage Hispanic farmers from availing themselves of farm credit by using highly subjective criteria to reject their loan applications?

Did defendant attempt to discourage Hispanic farmers from availing themselves of farm credit by subjecting them to supervised bank accounts?

Did defendant attempt to discourage Hispanic farmers from availing themselves of farm credit by delaying or denying loan servicing?

The latter five questions can, in turn, be converted to questions of law; *e.g.*:

Did defendant's attempts to discourage Hispanic farmers from availing themselves of farm credit by denying them loan applications constitute a violation of the ECOA, Regulation B promulgated pursuant thereto and USDA's own regulations?

There is no dispute that attempting to discourage Hispanic farmers from availing themselves of farm credit and using the tactics and practices alleged in the proposed Third Amended Complaint

³ While plaintiffs have chosen to state it as a mixed question of law and fact, it can readily be converted into a question of fact and a separate question of law, *e.g.*: Did USDA attempt to discourage Hispanic farmers from availing themselves of farm credit and loan servicing?

constitute violations of ECOA, Regulation B promulgated pursuant thereto, and USDA's own rules and regulations. Nor is there any serious dispute that ECOA expressly grants the Court authority to grant injunctive and declaratory relief sufficient to proscribe all of the tactics and practices alleged. See 15 U.S.C. § 1691e(c). The existence of such common questions of law and fact and the express statutory authority to address the conduct giving rise to the questions are sufficient to establish commonality for purposes of a Fed. R. Civ. P. 23(b)(2) certification. Unable to overcome this hard reality, defendant retreats from these facts to a more accommodating "reality" of her own creation.

B. Defendant's Claim That Plaintiffs Seek A Reduced Burden Of Proof Fails To Account For The 1991 Amendment To Title VII.

Defendant argues that plaintiffs are not entitled to a reduced burden of proof for purpose of establishing their compliance with Fed. R. Civ. P. 23(a) & (b). Defendant's Response at 3-5. To be clear on this point, plaintiffs maintain that if the Court sustains defendant's repeated objections to discovery so that the only available sources for statistical data are the databases centrally maintained by USDA and already produced, plaintiffs cannot, as a matter of law, be required to identify a specific practice and show statistically the impact thereof upon plaintiffs as the Court held in Wards Cove. Significantly, defendant never once mentions or in any way addresses the 1991 Amendment to Title VII, see Plaintiffs' 12/05/03 Memorandum at 7-10, but ignoring this telling argument does not make it go away. Nor does defendant dispute the fact that the USDA loan databases do not contain any information needed to determine the ostensible reason(s) why a loan application was rejected. Indeed, defendant concedes that the databases do not contain that information.

Defendant's assertion that she "has fully complied with ... all legal record keeping requirements" (Defendant's Response at 3 n. 1) is both disingenuous and misleading because the fact that USDA may have kept its records for the requisite period of time, falls far short of addressing the critical issue regarding whether defendant collected and maintained data that

would permit an audit of its lending practices. Indeed, defendant does not dispute or in any way rebut the repeated findings of Congress and the Civil Rights Commission that USDA did “not collect, maintain, and analyze data to determine the impact its programs have on minority farmers.”⁴ Plaintiffs 12/05/03 Memorandum at 9 n. 9 and Ex. 1. Similarly, defendant does not deny that USDA repeatedly failed to heed warnings about the inadequacy of both its data gathering capabilities and of the analytical work it performed using outmoded computers and software in an unsuccessful effort to assist management and others in assessing the impact of USDA’s policies on minority farmers.⁵ See id. Significantly, in arguing that plaintiffs are inappropriately seeking a reduced burden of proof, defendant, at no point, explains why it is appropriate to continue to use, for Fed. R. Civ. P. 23 purposes, a standard that Congress expressly modified in circumstances that are identical to the circumstances Congress sought to address in modifying the standards.⁶ One must assume necessarily that when Congress expressly

⁴ Defendant cavalierly asserts that USDA is under no obligation to “maintain records in anticipation of the needs of future litigants like plaintiffs.” Defendant’s Response at 3 n.1. To the contrary, USDA necessarily was under an obligation, one which it completely ignored, to maintain its records in such a way as to permit Congress to exercise its oversight function and, among other things, determine the impact of USDA’s programs on minority farmers. Indeed, had USDA simply complied with that obligation instead of continuing to ignore Congressional concern about recordkeeping and secretly dismantling its Office of Civil Rights, Congress and others would have been in a better position to end the discrimination that persists to this day.

⁵ That such issues continue to be concerns is evidenced by the fact that USDA’s recently appointed Assistant Secretary for Civil Rights identified as among the “major challenges facing USDA” to improve civil rights enforcement were “systems challenges” which the Assistant Secretary defined as “those linked with disassociated and outdated information management systems among USDA’s agencies.” Assistant Secretary for Civil Rights US Department of Agriculture Fiscal Year 2004 Civil Rights Initiatives, November 24, 2003 at 1 (Ex. 2). According to the Assistant Secretary, “[t]hese systems are unable to communicate with each other and, consequently, require Herculean efforts to reconcile.” Id.

⁶ Continuing the theme that plaintiffs are inappropriately seeking a lower burden of proof to certify their class, defendant grossly distorts plaintiffs’ argument in footnote 2 of her response. In that footnote, defendant asserts that:

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.

Defendant’s Response at 4 n. 2 citing Plaintiffs’ 12/05/03 Memorandum at 23. A fair reading of the passage cited by defendant makes clear that one would be hard-pressed to reach the conclusion that defendant purports to draw from the passage. As even a cursory reading establishes, the passage is actually directed to the Court’s 12/02/02 Order to the effect that “commonality is defeated ... by the large numbers and geographic dispersion of the decision-makers....” As plaintiffs explained, in so holding, the Court relied upon cases that theorized that large numbers and geographic dispersion of decision-makers are somehow inconsistent with class-wide disparate treatment. It was with

amended Title VII to modify the holding in Wards Cove, it was aware that that standard was incorporated in Fed. R. Civ. P. 23 insofar as disparate impact claims under Title VII and the ECOA were concerned.⁷ See, e.g., Cannon v. University of Chicago, 441 U.S. 677, 696-98 (1979); Washington Legal Foundation v. United States Sentencing Commission, 17 F.3d 1446, 1450 (D.C. Cir. 1994); Consumers Union of U.S. Inc. v. Federal Reserve Board, 736 F. Supp. 337, 341 (D.D.C. 1990) (“it is always appropriate to assume that Congress knows what the existing law – whether statutory or judicial precedent – is”).

Furthermore, defendant’s apparent notion that the burden of proof standard for the class certification inquiry should be more stringent than for the merits inquiry runs counter to a long line of authority. Indeed, courts have consistently held that the standard of proof applicable at the class certification stage is less stringent than at the merits stage. See, e.g., Eisen v. Carlisle & Jacqueline, 417 U.S. 156, 177 (1997); Latino Officers Ass’n v. New York, 209 F.R.D. 79, 81-82 (S.D.N.Y. 2002); Caridad v. Metro-North Commuter R.R., 191 F.3d 283, 291 (2d Cir. 1999). Thus, in the instant case, where defendant persists in her resolve to deny plaintiffs meaningful discovery and should the Court sustain that position, then to the extent that “the elements of [USDA’s] decision making process are not capable of separation for analysis, the decision making process can be analyzed as one ... practice.” 42 U.S.C. § 2000e-2(k) (I) (B) (i) (emphasis added).

respect to that theory that plaintiffs referred when they noted that the fact that “few class action cases are ever actually litigated to conclusion once a class has been certified, it is highly unlikely that any empirical evidence can be offered in support of such a theory.” Far from arguing for a reduced standard of proof in light of a lack of evidence, plaintiffs argued that a sterile untested theory should not stand in the way of substantial evidence of a pattern and practice of discrimination.

⁷ Further, defendant’s effort to distinguish the “facially neutral practice” when referring to the substantive claim of disparate impact and the “considerations” involved in certifying a class under Rule 23 falls flat and appears to be a distinction without a difference. See Defendant’s Response at 5 n.3. At no point does defendant explain why a decision making process that is incapable of separate analysis and hence deemed to be a “single practice” cannot be analyzed as such and constitute a fact common to the claims of all purported class members. See Buycks-Roberson v. Citibank Fed. Sav. Bank, 162 F.R.D. 322 (N.D. Ill. 1995).

C. Defendant Distorts And Misconstrues Plaintiffs' Use Of Public Documents Relating To USDA's Discriminatory Policies And Practices.

Defendant argues that plaintiffs mischaracterize the CRAT Report as “proving a discriminatory pattern that allegedly shows commonality.” Defendant’s Response at 6. Defendant further argues that the CRAT Report “merely contains USDA summaries of stories told ... in response to USDA customer and employee complaints of discrimination” (*id.*), ignoring the detailed findings of discrimination by USDA made on several occasions both by Congress and the Civil Rights Commission to the same affect which are cited in Plaintiffs’ 12/05/03 Memorandum. Plaintiffs rely upon the CRAT Report only to show that the practice and pattern of discrimination that plaintiffs uncovered in their review of the discovery produced to date and their own investigation coincides with and reinforces the pattern that USDA’s Civil Rights Action Team repeatedly heard from farmers in its investigation of discrimination in the administration of USDA credit programs. See, e.g., Plaintiffs’ 12/05/03 Memorandum at 10 and 34. In characterizing the fruits of its investigation, the CRAT Report noted that “[d]etails varied from family to family, but the general outlines of the stories told to the CRAT remained constant. . . .”⁸ CRAT Report at 15. (Emphasis added.)

Defendant also seeks to disparage the repeated findings of discrimination contained in the numerous public studies and investigations as well as the statement of then Secretary Glickman as lacking “any evidentiary value.” Defendant’s Response at 6 n.4. First, the statement of then Secretary Glickman, who was the original defendant in this case, constitutes an admission.

⁸ Defendant charges that “plaintiffs omit the only actual findings the Report contains that address allegations of discrimination.” Defendant’s Response at 6. Defendant cites a General Accounting Office (“GAO”) report for the proposition that “there is no evidence of uniform discriminatory treatment being accorded to minority farmers.” *Id.* at 7. Of course, there is no requirement that class members share all facts in common and the fact that the common practice may adversely affect class members in different ways does not defeat commonality. See, e.g., Tonya K. v. Chicago Bd. Of Education, 551 F. Supp. 1107, 1110 (N.D. Ill. 1982). Moreover, while the report notes a possible explanation for the disparities in approval and processing rates between minority and non-minority farmers (Defendant’s Response at 7), defendant did not include the response to that conjecture, *i.e.*, “that previous discrimination in USA programs has helped to produce these very conditions now used to explain disparate treatment.” CRAT Report at 22. The GAO found that the loan disapproval rate for minority farmers was 60% higher than the disapproval rate for non-minority farmers. *Id.* at 21.

Second, the discrimination findings made by Congress and the Civil Rights Commission, all of which were communicated to USDA with demands that reforms be made, have evidentiary value in a number of contexts, including demonstrating, inter alia, that USDA has for decades been on notice of the discrimination that infected its farm credit and non-credit programs. Furthermore, these many public reports are evidence that USDA's failure to take any meaningful action to eliminate the systemic discrimination described therein meant that USDA acquiesced in and ratified such discrimination, and thus is every bit as responsible for discriminatory actions of the various committees as if it expressly directed them to engage in such conduct.

Oddly, defendant takes strange comfort in the fact that under the Pigford Consent Decree only 13,000 of 21,000 claimants were able to prove discrimination and received damage awards. Id. at 7. Somehow defendant has been able to convince herself that 13,000 cases of proven discrimination shows there is "no consistent pattern of discrimination." Id. However, at a time when, according to the Agricultural Census (Ex. 3), there were only approximately 18,000 black farmers, any reasonable observer could only conclude the opposite when such a large portion of the total population of black farmers suffered the same fate.

Defendant devotes much of her argument to establishing that USDA's lending criteria are objective in hopes of demonstrating that hence plaintiffs' disparate impact claims must fail, ignoring the crucial point that plaintiffs allege both disparate impact and disparate treatment discrimination. Thus the Court, in considering the requisite intent to establish disparate treatment, is clearly entitled to examine the history of the defendant's practices as well as anecdotal evidence of class members, and "[defendant's] degree of opportunity to treat plaintiffs unfairly." See Lewis v. NCRB, 750 F.2d 1266, 1272 (5th Cir. 1985); Carroll v. Sears Roebuck & Co., 708 F.2d 183, 190 (5th Cir. 1983). Furthermore, such reports, in conjunction with anecdotal and statistical evidence "tends to flesh out the picture of alleged disparate treatment—and thus [is] useful in considering the class certification issue." Latino Officers Ass'n, 209 F.R.D. at 83 n.24 (court declined to strike plaintiffs' study of "disciplinary measures meted out in the 94th precinct" because such study was helpful at the class certification state). Indeed, the various

governmental and Congressional investigative reports, considered in conjunction with other evidence, compel the Court to infer that, insofar as Hispanic farmers are concerned, the discriminatory treatment documented is “more than a mere occurrence of isolated or ‘accidental’ or sporadic discriminatory acts” but is in fact USDA’s “standard operating procedure.”

International Brotherhood of Teamsters v. United States, 431 U.S. 324, 336 (1977); Segar v. Smith, 738 F.2d 1249, 1266 (D.C. Cir. 1984).

Significantly, this very sentiment was echoed by Ms. Rosalind Gray, former Director of the Office of Civil Rights at the USDA until 2000. In a sworn declaration, (Exhibit 7 to Plaintiffs Supplemental Memorandum In Support of Their Motion For Class Certification, Gray Decl. ¶ 28) Ms. Gray stated emphatically that,

[a]fter all of the investigations and findings of discrimination, after all the findings that FSA was not in compliance with civil rights regulations, after the millions paid by FSA in settlement of administrative complaints and after the many more millions in debt that FSA has forgiven, there still has not been any change in the way programs are administered. There were many recommendations for change. Yet the systemic exclusion of minority farmers remains the standard operating procedure for FSA. (emphasis added)

Ms. Gray was uniquely positioned at USDA to make the foregoing observations, which fully support the conclusion that discrimination was not an aberration at USDA but, again, was standard operating procedure.

D. Defendant’s Criticism Of Plaintiffs’ Commonality Showing Are Unsupported By Any Analysis Or Facts.

Defendant attacks plaintiffs’ commonality showing by arguing that multiple individual instances of alleged discrimination do not establish commonality. Defendant’s Response at 8-9. Given the nature of the current exercise, defendant’s criticism is nonsensical. The Court ordered plaintiffs to review 35 loan files and certain disaster relief files that defendant alleges constitute all of the files that USDA can find relating to the plaintiffs named in the Second Amended Complaint. The purpose of the exercise was to determine whether there was any commonality among the claims of the named plaintiffs. As previously noted, plaintiffs reviewed the proffered

files and determined that there are common questions of law and fact applicable to the plaintiffs. The file review revealed instances of discrimination that were similar to each other and similar to tactics and practices that, according to CRAT, were described to it by minority farmers during the CRAT investigation of discrimination. If plaintiffs had not found such similar incidents of discrimination upon examining plaintiffs' loan files, defendant would no doubt contend that not only was there no showing of commonality, but that plaintiffs lacked standing to pursue claims on their own behalf much less on behalf of others.

In addition, defendant offers no support for the argument that multiple instances of alleged discrimination do not show commonality other than the empty assertion itself as if it were somehow self-evident. Indeed, while defendant lists the names of some of the plaintiffs whose files were reviewed and whose claims were discussed in Plaintiffs' 12/05/03 Memorandum, defendant follows that listing with nothing more than the conclusory assertion that "those farmers' allegations of discrimination cannot be sorted out without individualized inquiries regarding the practices of various county committees." Defendant's Response at 8 (quoting Garcia v. Veneman, 211 F.R.D. 15, 22 (D.D.C. 2002)). However, at no point does defendant explain, for example, why the attempts to discourage Hispanic farmers from availing themselves of farm credit by denying them applications or, if the farmers obtained applications, by refusing to assist them in completing the applications would require "individualized inquiries regarding the practices of various county committees. . . ."

Defendant's contention that "[t]he only common thread binding the claims of 'discouragement' is that the putative class members suffered some sort of injury because they are Hispanic" (Defendant's Response at 9) is without merit. First, the discovery to date reveals that all the named plaintiffs were bound by the fact that USDA sought to discourage them and the putative class members from availing themselves of farm credit. That fact alone, as previously noted, violates ECOA, Regulation B promulgated pursuant thereto and USDA's own regulations. The discovery to date further demonstrates that the USDA used a discrete number of tactics and practices to effectuate its policy of discouraging Hispanic farmers from availing themselves of

farm credit, hence the five subclasses. Once plaintiffs have identified, as plaintiffs in the instant case have, questions of law and fact common to the class, there is no requirement that there can be no factual differences among the parties. See, e.g., Hartman v. Duffy, 158 F.R.D. 525, 537 (D.D.C. 1994), aff'd in part and rev'd in part 88 F.3d 1232 (D.C. Cir. 1996), cert. denied 520 U.S. 1240 (1997). Defendant's hollow protests to the contrary notwithstanding, the instant case and the discrete practices here are well within the bounds of that that is amenable to redress through class certification pursuant to Rule 23. See, e.g., Marisol v. Guiliani, 126 F.3d 372, 376-77 (2d Cir. 1997) (class certified where plaintiffs challenged a variety of aspects of the New York City child welfare system, including, inter alia, inadequate training and supervision of foster parents, the failure to properly investigate reports of suspected neglect and abuse, unconscionable delays in removing children from abusive homes and the inability to secure appropriate placements for adoptions, and where the claimed deficiencies in the treatment of the plaintiffs class implicated different statutory, constitutional and regulatory schemes); Buycks-Roberson, 162 F.R.D. at 331.

E. Defendant's Daubert Challenge Is Both Baseless And Premature.

Defendant launches a spirited attack on Dr. Pavlovic, his credentials and his analysis. However like most of her arguments, defendant's attack on Dr. Pavlovic is baseless and unfounded. First, Dr. Pavlovic has testified as an expert in a number of proceedings. See Second Declaration of Karl Richard Pavlovic ("Pavlovic Second Decl.") at ¶ 2 (Ex. 4). Specifically, he has provided expert opinion testimony involving and predicated upon statistical analyses performed by him before the Federal Energy Regulatory Commission, which follows the Federal Rules of Evidence. See, e.g., Trailblazer Pipeline Company, 2004 FERC LEXIS 76 at * 3 (following Rule 702). Moreover, Dr. Pavlovic can qualify, and has qualified, as an expert under Rule 702 on the basis of his experience and on-the-job training in statistics and econometrics. Pavlovic Second Decl. at ¶ 2. Indeed, it is fair to say that most of the projects listed by Dr. Pavlovic in Exhibit 1 to his declaration (Exhibit 9 to Plaintiffs' 12/05/03

Memorandum) involved statistical and econometric analyses performed by him. Pavlovic Second Decl. at ¶ 2. Dr. Pavlovic was hired by USDA's Forest Service in 1986 to prepare certain fixed and variable cost models that relied extensively upon a number of complex regressions that were prepared by him. *Id.* Second, the works of far less qualified witnesses than Dr. Pavlovic have been relied upon at the class certification stage. *See, e.g., Latino Officers Ass'n*, 209 F.R.D. at 88-89 (the court relied upon, among others, a study undertaken by a plaintiff who, in studying a single percent, found that Hispanics were disproportionately represented in disciplinary proceedings notwithstanding the fact that there was no indication in the record that the plaintiff had any training or experience in performing statistical analyses).

1. The class certification state is not an occasion to conduct a Daubert challenge.

Courts have spoken succinctly and uniformly on the issue of examining the merits of a case at the class certification stage. It should not be done. *Eisen*, 417 U.S. at 177. As one court stated, “[c]ourts have declined to engage in a Daubert analysis at the class certification stage of the action on the ground that an inquiry into the admissibility of the proposed expert testimony under Daubert would be an inappropriate consideration of the merits of the plaintiff’s claims.” *Bacon v. Honda*, 205 F.R.D. 466, 470 (S.D. Ohio 2001) (citing cases). Similarly where, at the certification stage, a defendant moved to exclude plaintiff’s expert opinion under Daubert the court made clear that the “Daubert inquiry was designed to shield the fact-finder at trial from flawed evidence. We are obviously not at trial . . . [and] a court at the class certification stage should not delve into the merits of an expert’s opinion, or indulge ‘dueling’ between opposing experts.” *In re Visa Check/Money Master Antitrust Litig.*, 192 F.R.D. 68, 76 (E.D.N.Y. 2000) (citing *Caridad v. Metro-North Commuter R.R.*, 191 F.3d 283, 292 (2d Cir. 1999) (quoting *Krueger v. New York Tel. Co.*, 163 F.R.D. 433, 440-41 (S.D.N.Y. 1995)). Thus, the case law

makes clear that the certification stage is not the time for a “battle of experts.”⁹ Caridad, 191 F.3d at 292-93.

2. To the extent that plaintiffs’ statistical analysis is deficient, it is because of deficiencies in the databases maintained by defendant.

Plaintiffs have never had any illusions about the quality of the data contained in USDA’s centralized databases or the utility of such data. Plaintiffs readily acknowledge that such data do not permit a sophisticated statistical analysis. Indeed, it was defendant’s attempts to limit plaintiffs’ class discovery to these largely useless databases that lead to a six-month delay in these proceedings in the second half of 2002. Dr. Pavlovic himself recognized the shortcomings of the database when he stated that the data, such as they are, support the anecdotal evidence of discrimination. In so stating, Dr. Pavlovic made clear, as did Plaintiffs’ 12/05/03 Memorandum at 28, that the databases were not susceptible to the type of sophisticated analysis called for by some cases. That being said, as plaintiffs have consistently maintained, defendant cannot limit plaintiffs’ discovery to what defendant, plaintiffs and the Court all know are useless and deficient databases and then be heard to complain about the sufficiency of plaintiffs’ statistical analysis. This is particularly so given the number of times USDA has been put on notice that its data collection and maintenance practices were deficient. Defendant should not be allowed to profit from this blatant disregard of repeated admonitions from, among others, Congress, the Civil Rights Commission and USDA’s own Office of Inspector General.

Dr. Pavlovic’s analysis was never intended to be a definitive statistical analysis and indeed cannot be because the data in the database do not contain the information for such an

⁹ Interestingly, defendant, when faced with the repeated findings of discrimination by Congress and the Civil Rights Commission, as well as admissions by then Secretary Glickman, the original defendant in this matter, all of which support plaintiffs’ claim of a well-documented pattern and practice of discrimination, argues that “consideration of the merits . . . is inappropriate at the class certification stage.” Defendant’s response at 4. However, with respect to Dr. Pavlovic, defendant argues “even if the Court were to find that Dr. Pavlovic qualified as an expert . . . it nonetheless should find his testimony that loan applications from Hispanics are approved at lower rates than those from white farmers . . . does not fit the circumstances of this case.” Id. at 12.

analysis. Pavlovic Second Decl. at ¶¶ 6-9. In essence, defendant is playing a cynical game of “gotcha” that plaintiffs choose not to play. *Id.* at ¶ 9. Recognizing the limitations of the database, Dr. Pavlovic performed an analysis that tends to support the plaintiffs anecdotal evidence. Assuming arguendo that Dr. Pavlovic were to perform the more time consuming county analysis, the analysis still would be susceptible to attack on the ground that it did not address citizenship, relative farm size etc, indeed all of the factors cited by Dr. Freeman that are not contained in the databases. *Id.*; see also Defendant’s Response at 13 (citing Dr. Freeman’s Decl. at ¶ 5 criticizing Dr. Pavlovic for not accounting for citizenship despite the fact that the database does not indicate when, if ever, citizenship played a role in a loan rejection.)

Furthermore, as previously noted, defendant’s assertion that in order to prove discrimination the rate at which discrimination is experienced should be uniform or within some unstated tolerance in all counties derives from a sterile theory that bears no relationship to reality and in all likelihood has never been empirically tested. This point is easily demonstrated by the example of the Holocaust survivors cited in Plaintiffs’ 12/05/03 Memorandum at 23. Under the theory of statistical uniformity, unless the extermination rate were uniform at the various concentration camps or within an unstated tolerance, there could be no showing of commonality for purposes of disparate treatment because there were multiple concentration camps, with commandants exercising independent discretion in the dispersed camps, notwithstanding the fact that they were all operating under the well-documented so-called “final solution,” i.e., a single policy of genocide. Simply put, such sterile and untested theories should not stand in the way of well-documented and undisputed evidence of a pattern and practice of discrimination such as exists in the instant case.

Furthermore, plaintiffs are alleging a scheme aimed at discouraging Hispanic farmers from availing themselves of access to farm credit. Because that scheme, as the discovery to date demonstrates, manifests itself in multiple tactics, it is necessary to establish subclasses constructed upon the principal types of discriminatory tactics employed. Precisely because the scheme is carried out by a limited number of means in various locations, it is unreasonable to

assume robotic precision in its implementation. Followed to its logical conclusion, the theory of statistical uniformity would, in effect, graft a stupidity requirement on Rule 23 for purposes of establishing disparate treatment discrimination where multiple facilities and decision makers are concerned. Indeed, in such circumstances, even assuming a well-documented policy of discrimination, only those decision makers who were stupid enough to carry out the company's discriminatory policies with lock-step precision would be susceptible to a class action alleging disparate treatment. Conversely, a loan company, for example, with an explicit policy of discouraging Hispanics from obtaining credit could thwart class certification on the basis of disparate treatment simply by having its credit managers coordinate their efforts so that each office has a different loan rejection rate, particularly where loan rejection is but one means of furthering the scheme of discouraging Hispanics from obtaining credit from that company.

II. PLAINTIFFS HAVE SHOWN A COMMON POLICY OR PRACTICE OF SUBJECTIVE DECISION MAKING

Defendant argues that the Court has already determined that the criteria for loan and benefit applications are largely objective and hence that determination must be deemed to be the law of the case. Defendant's Response at 14. Respectfully, as demonstrated in Plaintiffs' 12/05/03 Memorandum, the determination was made on the basis of a review of the criteria as set forth in the Code of Federal Regulations which were not in force for most of the period covered by the complaint in this case¹⁰. In addition, the determination was made without the benefit of any discovery. In any event, a court is not compelled to adhere to the "law of the case" doctrine where "the previous decision was 'clearly erroneous and would work a manifest injustice.'" Horn v. United States Department of Army, 284 F. Supp 2d 1,7-8 (D.D.C. 2003) (citing Kimberlin v. Quinlan, 199 F.3d 496, 500 (D.C. Cir. 1999)).

¹⁰ In any event, defendant's "law of the case" argument would be inapplicable to the extent there was no "actual decision" made regarding the subjectivity of the 1997 and earlier regulations. See United States v. Hatter, 532 U.S. 557, 566 (2001).

Indeed, it is fair to say that the Court made the “determination” before it had had full opportunity to examine how the criteria are interpreted and applied by the agency that is responsible for promulgating and administering the farm credit and benefit programs eligibility criteria. Thus, for example, the Civil Rights Commission and Congress, who studied how the programs actually operate, found the eligibility criteria, in practice, to be subjective.¹¹ See Plaintiffs’ 12/05/03 Memorandum at 16. More importantly, FmHA, the USDA agency responsible for promulgating and administering the loan criteria has stated unequivocally that the process is wholly subjective. As FmHA, in a proceeding in another federal court, made crystal clear, “the decisions on eligibility, feasibility, creditworthiness, etc. are unreviewable because they are subjective criteria, there is no law to apply, and they are wholly within FmHA discretion.” Motion and Brief of the United States for Summary Judgment Affirming Agency Action, C.A. No. 85-K-2103, at 7 (emphasis added) (Exhibit 6 to Plaintiff’s 12/05/03 Memorandum). USDA cannot now credibly be heard to say that “most of USDA’s loan criteria are, and always have been, objective....” Defendant’s Opposition at 17 (emphasis added). Predictably, at no point in her response does defendant address or even allude to the foregoing assertion which completely belies and undercuts defendant’s current litigation position. It is well settled that courts should, to the extent possible, defer to the agency’s interpretation of its rules and regulations where it is the agency that is charged in the first instance with promulgating and administering the rules. See Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 843 (1984) (deferring to agency interpretation of provisions not directly and

¹¹ In a similar vein, defendant asserts that the Farm and Home Plan (“FHP”) is an objective tool used to determine a farmer’s loan eligibility. Defendant’s Opposition at 15-16. Contrary to defendant’s assertion that the regulatory constraints on the “feasibility analysis [of the FHP] leave little, if any, room for subjectivity” the discovery to date and experience of those who work in this area and who studied the regulations of FmHA and FSA completely belie defendant’s assertion. For example, Bill Arens, a long time farmer’s advocate, states that “[a] major problem with utilization of Farm and Home Plans is that FSA employees can manipulate these plans to make a farmer ineligible for FSA loans and loan restructuring. Data used in the plans is easily manipulated by an FSA loan officer to make a farmer appear not to have a feasible plan.” Arens Decl. at ¶5. (Exhibit 5 to Plaintiffs’ 12/05/03 Memorandum.) A similar view was expressed by Stephen Carpenter of Farmers’ Legal Action Group, Inc., a highly regarded advocacy group with years of experience observing USDA’s lending practices. See Plaintiffs’ 12/05/03 Memorandum, Exhibit 12, p. 168.

unambiguously addressed by Congress); see also Skidmore v. Swift Co., 323 U.S. 134, 139 (1944) (deferring to agency's informal interpretation of provisions).

Based entirely upon the contention that USDA's lending criteria are objective, defendant argues that Buycks-Roberson is distinguishable from the instant case and hence plaintiffs' reliance on that case is misplaced. Defendant's Response at 17. However, because, as FmHA itself has admitted, USDA's lending criteria are wholly subjective, defendant's attempt to distinguish Buycks-Roberson, necessarily must fail. Indeed, as previously noted, the evidence from those who have studied USDA's lending practices and the admission of the very agency charged with promulgating and administering USDA's farm lending criteria make clear that the process is wholly subjective. Thus, like the situation in Buycks-Roberson based on the considerable discretion with respect to each loan applicant, the court found the subjective application of neutral underwriting criteria was standardized conduct. Indeed, in terms equally applicable to the instant case, the court held that "[t]his 'subjective decisionmaking' . . . is the practice which is generally applicable' to the class. 162 F.R.D. at 331.

III. PLAINTIFFS HAVE DISCLAIMED ANY SPECIFIC DAMAGE FIGURE.

Plaintiffs current lead counsel have noted on a number of occasions that they were not the original drafters of the complaint in this action. Indeed current counsel filed their notice of appearance in February 2002, some 18 months after the complaint was filed, long after the first two amendments of the complaint were accomplished and almost a year after the motion for class certification was filed. Subsequent thereto, current counsel have undertaken an analysis of the facts gleaned from the very limited discovery permitted to date as well as a comprehensive examination – utilizing a wide variety of sources – of the way in which USDA administers its farm loan and benefit programs. As a result of those substantial efforts, current counsel have formed two conclusions: first, that the paramount purpose of this lawsuit necessarily must be to secure, through remedial relief, the transparency and accountability central to the nondiscriminatory administration of these programs, and, second, that securing money damages

for those plaintiffs with provable claims arising from past discrimination, while also important, is a secondary objective achievable on a class basis only if a mechanism for doing so which is efficient, fair and free of fraud can be devised. Thus, the purpose of the motion to amend the complaint was simply to ensure that the complaint accurately describes the lawsuit as current counsel see it and intend to prosecute it. It adds no burden for defendant; to the contrary, by providing clarification of the allegations and the goals of the lawsuit, it permits a more efficient litigation process.

A review of Plaintiffs proposed Third Amended Complaint highlights plaintiffs' key goals in this case. Plaintiffs seek first and foremost declaratory and injunctive relief. As plaintiffs have noted, many plaintiffs wish to pass down to future generations their agricultural tradition. Fixing this system will enabling the plaintiffs' children to seek participation in the USDA's loan and benefits system on an equal, or at least non-discriminatory basis.

Importantly, plaintiffs seek to have defendant enjoined from engaging in future acts of discrimination in the administration of the USDA farm loan and non-credit benefit programs. To that end, plaintiffs seek to (1) require the USDA to adopt lending practices in conformity with the requirements of ECOA, (2) require USDA to remedy its discriminatory patterns and practices, (3) require the USDA to redesign its computerized data collection system such that transparency will be achieved and (4) require USDA to issue public annual reports detailing participation of Hispanic farmers in its farm credit and non-credit programs. To the extent that the court deems other relief "just and proper," plaintiffs would also seek to employ protocols which would protect the provision of such relief from fraud. To be sure, plaintiffs do not abandon their claim for monetary damages, as Hispanic farmers have been significantly harmed, for significant periods of time by USDA's actions. However, monetary damages are not central to plaintiffs' action. And, obviously, it is impossible at this stage of the litigation to hazard a guess at what the total monetary damages might be.

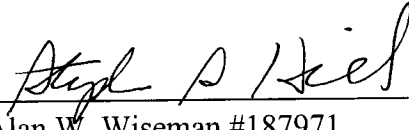
Defendant has incessantly trumpeted the \$20 billion damage figure contained in the initial complaint, which current counsel had no hand in drafting. Current counsel long ago disavowed

this damage figure. Defendant and its counsel nevertheless persist in waving the \$20 billion damage claim like the proverbial “bloody flag” in an unrelenting campaign to discredit this lawsuit. It is high time that such nonsense cease. Plaintiffs at least deserve to have the opportunity to state their claims and define their litigation goals in their own words, as they see fit, even if doing so discomforts defendant.

CONCLUSION

As the foregoing makes clear plaintiffs, on the basis of limited discovery to date and publicly available data, have demonstrated that there are a number of common questions of law and fact that unite the claims of the named plaintiffs. Such common questions of law and fact satisfy the requirements of Fed. R. Civ. P. 23(a) and 23(b). Should the court remain unconvinced however that class certification is warranted, then plaintiffs have demonstrated that they are entitled to additional discovery in support of their motion for class certification.

Respectfully Submitted,



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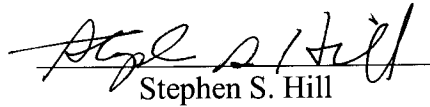
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Date: January 30, 2004

CERTIFICATE OF SERVICE

I hereby certify that on January 30, 2004 Plaintiffs' Reply to 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 the following:

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