

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

GUADALUPE L. GARCIA, <i>et al.</i> ,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	Civil Action No. 00-2445 (JR)
	)	
MICHAEL JOHANNNS, Secretary,	)	
United States Department of Agriculture,	)	
	)	
Defendant.	)	
	)	

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PLAINTIFFS' REPLY BRIEF IN SUPPORT OF THEIR CLAIMS  
BASED ON THE ADMINISTRATIVE PROCEDURE ACT

INTRODUCTION

Plaintiffs' claims that the United States Department of Agriculture ("USDA") (1) has refused to investigate and process and continues to refuse to investigate Hispanic farmers' discrimination complaints and (2) has discriminated against and continues to discriminate against Hispanic farmers in the administration of non-credit farm benefit programs are cognizable under the Administrative Procedure Act ("APA"). 5 U.S.C. § 701 *et seq.* USDA's contrary arguments ignore the Supreme Court's authoritative construction of 5 U.S.C. § 704, the settled law of this circuit which permits Plaintiffs to pursue discrimination and APA claims, and the continuous nature of the unlawful conduct resulting from USDA's failure to investigate Plaintiffs' pending discrimination complaints. In sum, USDA has offered no basis for concluding that Plaintiffs' APA claims are not cognizable by the Court and Plaintiffs should be permitted to pursue their APA claims.

## ARGUMENT

### I. THE DENIAL OF NON-CREDIT BENEFIT CLAIMS ARE PROPERLY BEFORE THE COURT.

In arguing that Plaintiffs' non-credit benefit claims are not properly before the Court, USDA ignores the circumstances surrounding and the scope of the Court's March 20, 2002 Order ("3/20/02 Order") that was on appeal following the Court's certification pursuant to 28 U.S.C. § 1292(b). As the Court no doubt recalls, USDA's failure to investigate the discrimination complaints of African-American and Native American farmers provided the basis for the findings of commonality that, in turn, respectively supported the certification of broad classes in *Pigford v. Glickman*, 182 F.R.D. 343, 349 (D.D.C. 1998) (Friedman, J.), and *Keepseagle v. Veneman*, No. 95-3119, 2001 U.S. LEXIS 25220, at \* 29 (D.D.C. Dec. 12, 2001) (Sullivan, J.). The D.C. Circuit affirmed those holdings. *See, e.g., Pigford v. Veneman*, 206 F.3d 1212 (D.C. Cir. 2002); *In re Veneman*, 309 F.3d 789 (D.C. Cir. 2002), *petition denied*, No. 04-5031, 2004 U.S. App. LEXIS 4219 (D.C. Cir. Mar. 3, 2004). Notwithstanding those precedents, in this case and in *Love v. Johanns*, 224 F.R.D. 240 (D.D.C. 2004), the Court held, *inter alia*, that the failure to investigate discrimination complaints of Hispanic and female farmers did not constitute either a cause of action or a basis upon which commonality could be established.<sup>1</sup> That holding gave rise to Plaintiffs' APA claims asserted in the D.C. Circuit that were remanded for further development.<sup>2</sup> Indeed, the first issue raised by Plaintiffs' APA argument at the Court of Appeals

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<sup>1</sup> As this Court explained,

Judges Friedman and Sullivan have held . . . [t]hat it is the failure or refusal of [USDA] to investigate and deal with . . . the plaintiff[s]' claims that is the glue that holds those classes together. But I have held in this case . . . that there's no claim that arises out of that action. . . . [I]f that's not a claim, then I'm not quite sure where the commonality is in this case that would distinguish this case as Judge Friedman and Sullivan distinguished their cases from Judge Flannery's opinion in *William [v. Glickman]*, No. 95-1149, 1997 U.S. Dist. LEXIS 1683 (D.D.C. Feb. 14, 1997)].

*Love v. Veneman*, C.A. No. 00-2502, Jan. 10, 2002 Prehearing Conference, Transcript at 4-5.

<sup>2</sup> USDA contends that "[o]n appeal, plaintiffs apparently decided not to press [their APA claims] or present a full-fledged argument on it." Defendant's Opposition To Plaintiffs' Request For Administrative Procedure Act Review ("Opposition") at 1. In point of fact, Plaintiffs were *prevented* from making a more extensive APA argument

was whether the district court erred in holding that the Hispanic farmers' non-credit disaster relief claims do not constitute a basis for class certification. *See* Appellants' Opening Brief, filed in *Garcia v. Johanns*, No. 04-5448 (Aug. 29, 2005), at 48-49. Simply put, the claims that USDA (1) discriminated in the administration of non-credit farm benefit programs and (2) refused to investigate and process Hispanic farmers' complaints of discrimination in those and other farm programs are linked because, as the *Pigford* and *Keepseagle* courts held, the latter claims provide commonality for the former claims.<sup>3</sup>

Similarly, USDA incorrectly asserts that "because class certification has been denied," Plaintiffs' disaster benefit claims automatically become "individual claim[s] which should be [individually] litigated . . . ." Opposition at 6. In so doing, USDA ignores the Court's holding in its 3/20/02 Order that USDA's failure to investigate Hispanic farmers' discrimination complaints did not constitute a final decision, but even assuming that it did, Congress had provided an adequate alternative remedy in the form of an action pursuant to the Equal Credit Opportunity Act ("ECOA"), 15 U.S.C. § 1691 *et seq.* Significantly, in its Opposition, USDA does not press and indeed appears to abandon the finality holding of the 3/20/02 Order and focuses instead on the "other adequate remedy" holding portion of that order. However, inasmuch as the Court expressly found that Plaintiffs' viable farm benefit claims were not credit transactions as defined by ECOA (a finding confirmed by the D.C. Circuit), it follows ineluctably that ECOA cannot

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because USDA vigorously opposed and the D.C. Circuit denied Plaintiffs' motion to extend the word limits on the appeals briefs after the court, on its own motion, consolidated Plaintiffs' Fed. R. Civ. P. 23(f) and 28 U.S.C. § 1292(b) petitions for review. *See* Appellants' Motion to Extend Word Limit, dated July 20, 2005; Opposition To Appellants' Motion To Extend Word Limit, dated July 25, 2005; Reply of Plaintiffs-Appellants To Opposition To Appellants' Motion To Extend Word Limit, July 27, 2005; and Order, dated Aug. 10, 2005 (Exh. 1).

<sup>3</sup> Relying on a statement made by former counsel without the benefit of any discovery, USDA asserts that Plaintiffs' "non-credit claims comprise only about 1% of [Plaintiffs'] claims." Opposition at 5 n.4. Simply put, that uninformed statement does not reflect the current claims set forth in the Third Amended Complaint that reflects current counsel's extensive field investigation undertaken after assuming responsibility for the litigation in February 2002. *See, e.g.*, Third Amended Complaint ("Complaint") ¶ 117. Moreover, while in its 3/20/02 Order, the Court identified Ms. Morales as the only named plaintiff asserting non-credit farm benefit claims, there are many other plaintiffs named in the Complaint and putative class members who assert such claims and have in common, among other things, USDA's refusal to investigate their claims of discrimination in the administration of these non-credit programs. *See, e.g.*, Exhs. 2-30.

possibly provide an adequate alternative remedy to Hispanic farmers regarding either USDA's discrimination in the administration of its non-credit farm benefit programs or its refusal to investigate complaints about such discrimination under any conceivable definition of the "other adequate remedy" clause of Section 704. 5 U.S.C. § 704. Thus, by the Court's own logic, as expressed in its 3/20/02 Order, because the failure-to-investigate claim is, as Plaintiffs have shown, cognizable under the APA, at a minimum, it necessarily provides the needed commonality for Plaintiffs' APA claims based upon the discriminatory administration of USDA's non-credit farm benefit programs.

## **II. PLAINTIFFS' FAILURE-TO-INVESTIGATE CLAIMS ARE REVIEWABLE UNDER THE APA.**

### **A. There Is No Other Adequate Remedy For Plaintiffs' Failure-To-Investigate Claims.**

In asserting that Plaintiffs' failure-to-investigate claims are barred by Section 704's "other adequate remedy" clause, USDA completely ignores the Supreme Court's authoritative definition of that clause in *Bowen v. Massachusetts*, 487 U.S. 879, 903 (1988). Opposition at 6-7. In *Bowen*, the Supreme Court clearly held that Section 704's "other adequate remedy" clause has a very specific and limited meaning. Indeed, when, as USDA notes, "Congress did not intend the general grant of review in the APA to duplicate existing procedures for review of agency action," (Opposition at 6-7) the Supreme Court clarified that statement a few lines later in the same paragraph, noting that

*[a]t the time the APA was enacted, a number of statutes creating administrative agencies defined the specific procedures to be followed in reviewing a particular agency's action; for example, Federal Trade Commission and National Labor Relations Board orders were directly reviewable in the regional courts of appeals, and Interstate Commerce Commission orders were subject to review in specially constituted three-judge district courts. When Congress enacted the APA to provide a general authorization for review of agency action in the district courts, it did not intend that general grant of jurisdiction to duplicate the previously established special statutory procedures relating to specific agencies.*

487 U.S. at 903 (emphasis added) (footnotes omitted).<sup>4</sup>

Once the Supreme Court authoritatively defines a statutory provision such as the “other adequate remedy” clause of Section 704, lower courts are compelled to adhere to that definition.<sup>5</sup> Thus, reading *National Wrestling Coaches Ass’n v. Department of Education*, 366 F.3d 930 (D.C. Cir. 2004), and *Women’s Equity Action League v. Cavazos*, 906 F.2d 742 (D.C. Cir. 1990) (“*WEAL*”), as USDA does, to expand the limitations placed upon Section 704 by the Supreme Court is wholly inappropriate. In any event, those cases simply stand for the proposition that when a federal-fund recipient discriminates against individuals, those individuals must sue the discriminatory fund recipient rather than the federal government unless there is clear evidence that Congress intended the government itself to answer for such discrimination. *See, e.g., WEAL*, 906 F.2d at 750-51; *see also El Rio Santa Cruz Neighborhood Health Ctr., Inc. v. HHS*, 396 F.3d 1265, 1270-71 (D.C. Cir. 2005). Thus, those cases are clearly distinguishable from the instant case. Furthermore, even under the broader reading of Section 704’s “other adequate remedy” clause urged by USDA, the D.C. Circuit has expressly held that ECOA does not provide a

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<sup>4</sup> Despite USDA’s assertion to the contrary, Plaintiffs do not contend that *Bowen* “stand[s] for the proposition that the APA does not preclude additional judicial remedies as long as they are *different* from the remedies previously established by Congress.” Opposition at 8. To the contrary, as the quote makes clear, *Bowen* expressly limited the scope of the “other adequate remedy” clause of Section 704 to mean that the APA was not to duplicate “the previously established special statutory procedures relating to specific agencies,” 487 U.S. at 903, such as those identified in the quote and the Tucker Act, which is a statute that deals specifically with contract claims for money damages against the federal government. *See, e.g., Darby v. Cisneros*, 509 U.S. 137, 146 (1993) (“[w]e concluded [in *Bowen*] that ‘. . . Congress intended by that provision simply to avoid duplicating previously established special statutory procedures for review of agency actions’”); *Esch v. Yeutter*, 876 F.2d 976, 982 (D.C. Cir. 1989) (“[g]iven the limited purposes for Section 704’s enactment, the Court said, it is to be read narrowly”).

Rather than attempt to address the Supreme Court’s authoritative definition of Section 704’s “other adequate remedy” clause, USDA falsely asserts that all of Plaintiffs’ failure-to-investigate claims are about credit discrimination. *See* Opposition at 7 (“to the extent plaintiffs complain about USDA’s failure to investigate . . . complaints of discrimination . . . those complaints all arose out of precisely the same credit transactions on which plaintiffs’ ECOA claims are based”). *See, e.g., note 3 supra.* USDA also falsely asserts that “aside from a requested declaration that defendant’s actions are generally unlawful . . . none of the relief requested in the complaint pertains at all to the alleged failure to investigate.” Opposition at 7. *See, e.g., Third Amended Complaint Prayer for Relief, ¶¶ 4(f)* (“provid[e] for a period sufficient to ensure that long standing discriminatory practices finally end, a system by which Hispanic farmers and ranchers who are or have been aggrieved by conduct at local FSA offices have an opportunity for an expedited review via independent mediators”), 5 and 9 (“order such other and further relief, including but not limited to such specific remedies, as the Court deems just and proper”).

<sup>5</sup> *See Maislin Industries, U.S. Inc. v. Primary Steel, Inc.*, 497 U.S. 116, 131 (1990).

remedy for USDA's failure to follow its regulations in refusing to investigate the discrimination complaints of Hispanic farmers. *Garcia v. Johanns*, 444 F.3d 625, 636-37 (D.C. Cir. 2006). And, as previously noted, under *no* definition of Section 704 could ECOA ever constitute an "adequate remedy" for either USDA's discrimination in the administration of its non-credit farm benefit programs or its refusal to investigate complaints of discrimination in those programs. Thus, *Weal* and the other cases in that line relied upon by USDA simply do not bar Plaintiffs' APA claims based upon the USDA's refusal to investigate discrimination complaints.

Equally unavailing is USDA's attempt to distinguish *McKenna v. Weinberger*, 729 F.2d 783 (D.C. Cir. 1984), by arguing that allegations that USDA discriminatorily refused to follow its own regulations with respect to investigating and processing administrative complaints preclude Plaintiffs from pursuing both ECOA and APA claims. Opposition at 9 n.6. *Id.* As *McKenna* makes clear, the D.C. Circuit has held that an agency's failure to follow its own regulations gives rise to a separate cause of action in addition to the underlying employment discrimination charge because "the agency, *whether its motive was legal or illegal*, failed to conform to its own regulations."<sup>6</sup> *McKenna* 729 F.2d at 791 (emphasis added). *Accord Lynch v. Bennett*, 665 F. Supp. 62, 64-65 (D.D.C. 1987); *Nichols v. Agency for Int'l Dev.*, 18 F. Supp. 2d 1, 3 n.2 (D.D.C. 1998). Moreover, that holding is wholly consistent with the D.C. Circuit's recent holding that

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<sup>6</sup> Aside from the fact that *McKenna* makes clear that an APA claim exists regardless of the motives underlying USDA's failure to follow its own regulations, USDA's suggestion that its intentional refusal to follow its regulations because the complainants are Hispanic farmers would not be actionable under the APA flies in the teeth of well settled authority. First, it is well settled that Plaintiffs may assert alternative claims such as disparate impact and disparate treatment discrimination. *See, e.g.*, Fed. R. Civ. P. 8 (e)(2). Second, a hallmark of discrimination is treating similar situations differently because of racial or ethnic reasons, and such conduct constitutes the very definition of arbitrary and capricious agency action violative of the APA. *See, e.g.*, *Doe v. Casey*, 796 F.2d 1508, 1517-18 (D.C. Cir. 1986) ("[w]ithout doubt . . . the Director could not terminate Black employees simply because they are Black, female employees simply because they are female, or even blonde employees simply because they are blonde"), *aff'd in part and rev'd in part on other grounds sub nom. Webster v. Doe*, 486 U.S. 592 (1988); *Burlington N. & Santa Fe Ry. v. Surface Transp. Bd.*, 403 F.3d 771, 777 (D.C. Cir. 2005) ("Where an agency applies different standards to similarly situated entities and fails to support this disparate treatment with a reasoned explanation . . . its action is arbitrary and capricious and cannot be upheld"); *Olsen v. Albright*, 990 F. Supp. 31, 33 (D.D.C. 1997) (a decision to terminate a government employee who refused to enforce a policy improperly "based principally on . . . race, ethnicity, and national origin" was "'arbitrary,' 'capricious,' and contrary to law within the meaning of the [APA]'").

EOCA does not provide a remedy for USDA's failure to investigate Plaintiffs' discrimination complaints, *Garcia*, 444 F.3d at 636-37, and the Supreme Court's authoritative definition of Section 704's "other adequate remedy" clause. *Bowen*, 497 U.S. at 903.

**B. The Conduct Alleged Here Is Not Committed To Agency Discretion.**

What is at issue here is not sporadic or individual decisions to decline to investigate or take enforcement action with respect to discrimination complaints, but USDA's wholesale abdication of its responsibility to investigate and process Hispanic farmers' discrimination complaints concerning the administration of its farm credit and non-credit farm benefit programs. *See Heckler v. Chaney*, 470 U.S. 821, 833 n.4 (1985); *see also id.* at 838-39. In its brief, USDA does not dispute this key point. Given USDA's total abdication of that responsibility, there is clearly sufficient regulatory authority to guide the Court in determining whether USDA followed its regulations which clearly required it to investigate farmers' complaints of discrimination. *See* Plaintiffs' Brief at 18-19. Moreover, USDA ultimately promulgated departmental regulation DR-4330-3, which states USDA's investigatory objectives and sets forth discrete steps in the handling of civil rights complaints.<sup>7</sup> Hence, the Court has ample standards by which to review the USDA's total inactions and across-the-board refusal or failure to conduct any investigation.

USDA's heavy reliance upon *Slyper v. Attorney General*, 827 F.2d 821 (D.C. Cir. 1987), is simply misplaced. Opposition at 11-13. In *Slyper*, the question confronting the court was

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<sup>7</sup> For example, with respect to the nature of the investigation, DR 4330-3 provides, in pertinent parts, that:

[w]hen investigating complaints that allege discrimination in USDA-conducted programs and activities, [the Office of Civil Rights] will be guided by the legal standards, policies, and requirements that have been established in Federal statutes, regulations, Executive Orders, policies, and case law decisions related to discrimination based on race, color, national origin, gender, religion, age, disability, marital status, familial status, sexual orientation, or because all or part of an individual's income is derived from any public assistance source, and made applicable to federally assisted or conducted programs and activities.

DR-4330-3, 10(e)(3), p. 13. (Exh. 15 to Plaintiffs' Brief In Support Of Claims That Defendant's Unlawful Failure To Investigate Plaintiffs' Discrimination Complaints And The Discriminatory Denial Of Benefits Are Reviewable Under The Administrative Procedure Act ("Plaintiffs' APA Brief").)

“whether a district court has jurisdiction to review a decision by the United States Information Agency [“USIA”] not to recommend that two foreign doctors receiving training in the United States be granted a waiver of a statutory requirement that they return to their countries of origin for two years before being allowed to apply for foreign residency status in the United States.” 827 F.2d at 822. The statute in question provided that the two-year return requirement could be waived “upon the favorable recommendation of the Director [of the USIA].” 8 U.S.C. § 1182(e). Neither the statute nor USIA’s regulations, however, provided any guidance whatsoever concerning how the USIA Director should exercise its discretion in deciding whether to recommend a waiver. *Slyper*, 827 F.2d at 823. The *Slyper* plaintiff alleged that the USIA Director’s failure to recommend a waiver of the statute was arbitrary, unreasonable and an abuse of discretion. *Id.* at 823. The court concluded that the absence of any “standard or criterion upon which the Director [wa]s to base a decision to make or withhold a favorable recommendation” constituted “‘clear and convincing evidence’ of congressional intent to restrict judicial review in cases such as those we now face.” *Id.* (quoting *Abbot Laboratories v. Gardiner*, 387 U.S. 136, 141 (1967)).

In stark contrast to the instant case, the plaintiff in *Slyper* did not contend that USIA Director completely abdicated his duty to review such requests and make recommendations, but only that the Director had been arbitrary and unreasonable in failing to make a favorable recommendation. Here, from 1981 to 1989 USDA’s regulations *required it* to conduct investigations in accordance with the same regulations used to handle other administrative complaints. 7 C.F.R. § 15.52; *see also* Plaintiffs’ APA Brief at 18-20. From 1989 to 1999, USDA’s regulations mandated that the designated official<sup>8</sup> “will investigate the complaints” and that that official “will make determinations as to the merits of the complaint under this subpart and as to the corrective actions required to resolve the complaints.” Beginning in 1999, USDA’s

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<sup>8</sup> From 1981 to 1985, § 15.52(d) charged the Office of the Inspector General with investigating discrimination complaints. From 1985 to 1989 § 15.52(d) transferred that responsibility to the Assistant Secretary of Administration.

regulations mandated that the Director of the Office of Civil Rights “will investigate complaints” and “will make final determinations as to the merits of complaints under this part and as to the corrective actions required to resolve [program] complaints.” In violation of its own regulations, USDA did none of those things. Indeed, the instant case presents precisely the scenario that the *Slyper* court expressly acknowledged would be subject to review, *i.e.* the presence of “a colorable claim . . . of constitutional, statutory, or regulatory violation . . . .” *Slyper*, 827 F.2d at 824 (emphasis added) (citation omitted).

### III. THE COURT CLEARLY HAS JURISDICTION TO CONSIDER PLAINTIFFS’ APA CLAIMS.

The USDA’s final argument that the Court lacks jurisdiction to consider Plaintiffs’ APA claims is without merit. In support of its argument, USDA erroneously relies on *City of Los Angeles v. Lyons*, 461 U.S. 95 (1983), to assert that Plaintiffs lack standing to seek injunctive relief. Opposition at 13-15. In *Lyons*, the Supreme Court held that the plaintiff, an African-American man who had been the victim of the infamous chokehold used by Los Angeles police, lacked standing to seek an injunction against the use by police of a chokehold that had proven to be lethal in a number of instances because he could not credibly allege that he faced a realistic threat of being subjected to the chokehold in the future. *Lyons*, 461 U.S. at 105-06. The Court further found that a plaintiff seeking injunctive or declaratory relief cannot rely on past injury to satisfy the injury requirement but must show a likelihood that he or she will be injured in the future. *See id.* The instant case differs significantly from *Lyons*.

In *Lyons*, the unlawful conduct was completed once the plaintiff was released from the unlawful chokehold and the plaintiff was, in the Court’s opinion, unable to allege credibly that he would be subjected to a similar chokehold in the future. In stark contrast, the unlawful conduct at issue here continues because Plaintiffs have pending discrimination complaints that USDA, in violation of its own regulations, refuses to investigate and process. *See, e.g.*, Exhs. 2-38. Indeed, in some instances, complaints have been pending uninvestigated and unprocessed for more than twenty years resulting in continuing violations. *See, e.g.*, Exhs. 13 and 14 to Plaintiffs’ APA

Brief; *see also Friends of the Earth v. Laidlow Envtl. Servs., Inc.*, 528 U.S. 167, 184-85 (2000) (finding that plaintiffs' claims alleging defendant's continuous and pervasive violation of the law would cause plaintiffs to curtail their activity and would subject them to other harms are entirely reasonable and is enough for injury in fact); *Community for Creative Non-Violence v. Unknown Agents of the U.S. Marshals Serv.*, 797 F. Supp. 7, 17 (D.D.C. 1992) ("the past pattern of past actions by . . . [defendants] gives this court reason to believe there is a 'real and immediate threat' that their conduct will recur"). As the Supreme Court has made clear, "[a]t the core of the standing doctrine is the requirement that a plaintiff 'allege personal injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief.'" *County of Riverside v. McLaughlin*, 500 U.S. 44, 51 (1991) (quoting *Allen v. Wright*, 468 U.S. 737, 751 (1984)).

In alleging that Plaintiffs' complaints all took place in the period 1984-2000 (Opposition at 14), USDA ignores Mr. Garcia's complaint filed *this year* and the numerous complaints filed by Hispanic farmers within the past several years, none of which has been investigated despite explicit regulations requiring their prompt investigation. *See, e.g.*, Exhs. 26-38.<sup>9</sup> Significantly, according to Jimmy W. Jones, Sr., a former OCR Equal Opportunity Specialist who served in that capacity from 2001-2004, he and his colleagues "were told on numerous occasions by [their] supervisors that the majority of Hispanic farmer discrimination complaints *were not to be investigated* pending certification of a class . . . ." Declaration of Jimmy W. Jones, Sr. ¶ 5 (Exh. 39). Such instructions and OCR's well-documented refusal to investigate Hispanic farmers' discrimination complaints clearly violated USDA's regulations.

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<sup>9</sup> As a result of the Court's 3/20/02 Order, Plaintiffs have been denied any discovery concerning USDA's complaint processing and its ongoing refusal to investigate Hispanic farmers' discrimination complaints. Despite that lack of discovery however, Plaintiffs have been reliably informed that USDA maintains, among other databases, a spreadsheet listing the program complaints on file with OCR and the date on which a complaint file was created. Plaintiffs are further reliably advised that the spreadsheet lists over 500 individuals with Spanish surnames. Significantly, despite the undisputed fact that Hispanic farmers filed discrimination complaints throughout the 1980s and 1990s, of the more than 500 files only *one* was listed as being created prior to 1997 and approximately 400 were listed as being created subsequent to January 1, 2000. *See, e.g.*, Declaration of Lloyd E. Wright ¶ 11 (Exh. 10 to Plaintiffs' APA Brief) and Declaration of Rosalind Gray ¶ 20 ("many complaints were destroyed or not accepted at all") (Exh. 3 to Plaintiffs' APA Brief).

DR 4330-3, for example, requires OCR to complete its investigation within 180 days of the determination that the complaint is within USDA jurisdiction. That determination can be made immediately upon initial review of the complaint and well within the five-day period in which the OCR is required to “acknowledge to the complainant receipt of the complaint, in writing . . . .”<sup>10</sup> DR 4330-3, (10(b)(1), p. 12 (Exh. 15 to Plaintiffs’ APA Brief). Furthermore, as former OCR Director Rosalind Gray avers,

[b]ased upon my personal experience as the OCR Director, a competent reviewer should be able to determine whether a complaint asserts a claim within “USDA jurisdiction” in the time it takes to read the complaint allegations. Simply put, there can be no justification for complaints not being acknowledged, investigated, resolved or otherwise remaining open for years. The fact that farmers have not received any acknowledgment of their complaints much less had them investigated years after filing such complaints indicates to me that the system is still dysfunctional.

Supplemental Declaration of Rosalind D. Gray ¶ 7 (Exh. 40).

In addition, the USDA argues that because several of the named Plaintiffs allegedly have abandoned farming, Plaintiffs accordingly are unable to establish future harm. Opposition at 14. USDA’s argument lacks merit on at least two counts. First, it ignores the continuing nature of the violation that gives Plaintiffs sufficient standing to seek injunctive relief. *See, e.g., Friends of the Earth*, 528 U.S. at 184-85; *County of Riverside*, 500 U.S. at 51. Second, even with respect to those farmers who have been temporarily forced to suspend farming operations, their current ongoing injuries are “fairly traceable to” USDA’s systematic discrimination and, its systematic refusal to investigate farmers’ discrimination complaints in contravention of its regulations “and likely to be redressed by the requested [injunctive] relief.”<sup>11</sup> *County of Riverside*, 500 U.S. at 51.

<sup>10</sup> Complainants have the option of filing directly with the OCR or with “any USDA agency” such as the Farm Service Agency, which, in turn, is required to “refer the complaint to [OCR] within 5 calendar days of the date the complaint was received.” DR 4330-3, 10(a)(1)-(2).

<sup>11</sup> In addition, courts have long recognized a distinction for purposes of standing with respect to injunctive relief between cases brought by a single plaintiff, such as *Lyons*, and class actions involving continuing policies or conduct capable of repetition. *See, e.g., Lewis v. Tully*, 99 F.R.D. 632, 638 (N.D. Ill. 1983) (“[t]he Supreme Court has consistently distinguished between individual actions and class actions in applying the doctrine of . . . [standing]”); *see also DL v. District of Columbia*, No. 05-1437, 2006 U.S. Dist. LEXIS 59949, at 13 (D.D.C. 2006) (“The

And while the Garcia farms were sold at a foreclosure sale in 1999, Mr. Garcia is still farming. Second Supplemental Declaration of Lupe Garcia ¶ 3 (Exh. 38).<sup>12</sup> Moreover, while USDA still has not investigated any of his numerous complaints, it still takes adverse action against Mr. Garcia and continues to discriminate against him. *Id.* ¶ 4. Similarly, while the Jimenezes have not lost their farm, they did file a discrimination complaint in February 2003 that OCR has failed to acknowledge, much less investigate. Supplemental Declaration of Tony and Patricia Jimenez ¶¶ 5-6 (Exh. 35). Here, USDA's continuing failure to investigate past and current complaints demonstrates that USDA's unlawful conduct is ongoing both in terms of USDA's continued discrimination against Hispanic farmers in the administration of its credit and non-credit farm benefit programs and its refusal, contrary to its regulations, to investigate complaints of discrimination in such programs. Hence, Plaintiffs have made the necessary showing that the injury is real and immediate and satisfies the Article III case and controversy requirement.

### CONCLUSION

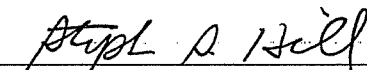
For the foregoing reasons and for the reasons set forth in Plaintiffs' opening brief, the Court should find that Plaintiffs can maintain their APA claims against the USDA for the unlawful failure to investigate discrimination complaints and for discriminatory denial of non-credit benefits.

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Supreme Court has unequivocally held that even if the named plaintiffs' individual claims are moot, the class action is not necessarily mooted.") While "the issues of 'mootness' and 'standing' . . . typically arise at different stages of the lawsuit, the essential inquiry is indistinguishable." *Lewis*, 99 F.R.D. at 639. In addition to courts distinguishing between individual versus class actions with respect to mootness and standing, "[t]here is authority to the effect that a court may respond to the pre-certification mootness of a class representative's claims by permitting substitution of a new class representative." *In re Thornburgh*, 869 F.2d 1503, 1509 (D.C. Cir. 1989) (noting also that "[s]ome courts have gone a step further and have permitted the original named plaintiffs to represent the class even after their own claims were mooted prior to certification."). *See n.3 supra*.

<sup>12</sup> As the example of Mr. Garcia makes clear, even if a farmer has lost his farm to foreclosure, he may still be able to lease farm land and there is no requirement that a farmer own land in order to participate in the farm credit and non-credit benefit programs at issue here. Moreover, as the supplemental declarations of Gloria Morales and Larry and Robert Chavarria make clear, they would readily return to farming if USDA were to end its discrimination against them. Supplemental Declaration of Larry Chavarria and Robert Chavarria ¶¶ 5-8, (Exh. 6); Supplemental Declaration of Gloria Orduno Morales ¶¶ 4-6 (Exh. 20).

Respectfully submitted,



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Dated: October 27, 2006