

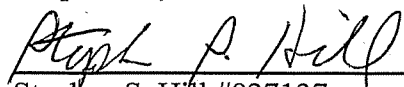
**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

_____)	
GUADALUPE L. GARCIA, JR., <i>et al.</i> ,)	
)	
Plaintiffs,)	
)	
v.)	Civil Action No. 1:00CV02445
)	(RBW)
TOM VILSACK, Secretary of the)	
United States Department of Agriculture,)	
)	
)	
Defendant.)	
_____)	

**PLAINTIFFS' MOTION TO REVIEW DEFENDANT'S
PROPOSED NOTICE AND TERMS OF CLASS-WIDE SETTLEMENT,
AND TO CERTIFY A SETTLEMENT CLASS**

Pursuant to LCvR 7, plaintiffs respectfully move that this Court review Defendants' Proposed Notice and Terms of Class-Wide Settlement set forth in defendant's September 27, 2010 Status Report and accompanying documents, and certify a Settlement Class in light of defendant's attempt to use this Court and this litigation to institute a class-wide settlement in circumvention of Fed. R. Civ. P. 23. Plaintiffs further request that the Court order defendant to hold in abeyance the proposed notice pending resolution of this motion. A memorandum of points and authorities is filed herewith in support of this motion. Pursuant to LCvR 7(m), plaintiffs have conferred with defendant's counsel who opposes this motion.

Respectfully submitted



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FOR THE DISTRICT OF COLUMBIA**

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**MEMORANDUM OF POINTS AND AUTHORITIES
IN SUPPORT OF PLAINTIFFS' MOTION TO REVIEW DEFENDANT'S
PROPOSED NOTICE AND TERMS OF CLASS-WIDE SETTLEMENT,
AND TO CERTIFY A SETTLEMENT CLASS**

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Date: October 6, 2010

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INTRODUCTION

Plaintiffs submit this memorandum of points and authorities in support of their motion for the court to review defendant's notice of proposed settlement, claims administration and settlement, and to certify a settlement class under Fed. R. Civ. P. 23 ("Rule 23").¹ In a September 27, 2010 status report ("Defendant's Status Report"), defendant announced a "proposed settlement" and administrative process to resolve the claims of Hispanic farmers on a class-wide basis, under the auspices of this court, but outside the protections of Rule 23. This proposed settlement follows ten years of litigation. The USDA admits the vast discrimination that is the subject of this litigation and seeks to compensate the victims for whom plaintiffs have pursued this litigation for a decade. The USDA's settlement proposal requires claimants either to intervene in this case or to file a separate case (tens of thousands in number), and dismiss their claims for the opportunity to recover an undetermined sum not to exceed \$50,000, which will be paid from the Judgment Fund.

The "proposed settlement" that defendant seeks to process through this court using this litigation raises concerns because defendant seeks to impose it upon potentially tens of thousands of Hispanic and female farmers without affording them the protections of Rule 23. One is compelled to ask, why is the federal government, in seeking to remedy decades of its admitted discrimination through this court (where this litigation has been pending for 10 years), trying to deny the victims of that discrimination the protections of Rule 23 and why is it reluctant to have a federal court review the notice, claims administration and proposed settlement? The answer is clear, the government seeks to avoid Rule 23 because the proposed notice and "proposed settlement" fall far short of the rule's requirements of fair and complete notice, a fair claims administration process, and the hearings required to ensure fair and just settlements. Moreover,

¹ The instant motion is precipitated by the threatened eminent publication of the notice announcing the "proposed settlement." In filing this motion, plaintiffs do not seek a lifting of the stay of the running of the statute of limitations and request that that stay remain in effect. Given the potential for the proposed notice to mislead putative class members, plaintiffs request that the court stay publication of the proposed notice and rollout of the "proposed settlement" pending consideration of this motion.

the government intends to ask the court to lift the stay of the running of the statute of limitations, which may result in thousands of Hispanic farmers losing their claims as a result of inadequate notice. If allowed to circumvent Rule 23, defendant will continue to discriminate against Hispanic and female farmers by imposing upon them a “settlement” that is substantially less favorable than the settlements provided to similarly situated African American and Native American farmers, which are subject to Rule 23 oversight, despite the fact that there is no legal or principled basis for such disparate treatment. Given the government’s proposed class-wide settlement of this case, the court should certify the case as a class action for settlement purposes to insure that plaintiffs receive all of the protections to which they are entitled.

PROCEDURAL BACKGROUND

This is one of four virtually identical cases brought on behalf of minority farmers to remedy decades of admitted discrimination by the United States Department of Agriculture (“USDA”) in its farm programs: *Pigford v. Glickman*, 185 F.R.D. 82 (D.D.C. 1999) (Friedman, J.) filed on behalf of African American farmers; *Keepseagle v. Veneman*, C.A. No. 99-3119 (EGS), 2001 U.S. Dist. LEXIS 25220 (D.D.C. Dec. 12, 2001) (Sullivan, J.), filed on behalf of Native American farmers; *Garcia v. Veneman*, 224 F.R.D. 8 (D.D.C. 2004) (Robertson, J.), filed on behalf of Hispanic farmers; and *Love v. Veneman*, 224 F.R.D. 240 (D.D.C. 2004) (Robertson, J.), filed on behalf of women farmers. It is undisputed that USDA has denied minority farmers equal access to farm credit programs in violation of the Equal Credit Opportunity Act, 15 U.S.C. §§ 1691 *et seq.* (“ECOA”), and non-credit benefit programs in violation of the Administrative Procedure Act, 5 U.S.C. §§ 550 *et seq.* (“APA”).

Secretary Glickman, the original defendant in all four cases, testified before Congress that USDA had a “long history” of unlawful discrimination against minority farmers and “[g]ood people lost their family land . . . because of the color of their skin.”² Similarly, Rosalind Gray,

² Testimony of Hon. Dan Glickman, Hearings Before The House Committee on Agriculture, Treatment of Minority and Limited Resource Producers By The United States Department of Agriculture, at 94, Ex. 1 to Plaintiffs’ Brief in Support of Their Claims Based on the Administrative Procedure Act filed August 28, 2006 (“Plaintiffs’ 8/28/06 Brief”) (Dkt. #150). (Ex. 1)

the former director of the USDA Office of Civil Rights (“OCR”), testified in 2002 that “the systemic exclusion of minority farmers *remains* the standard operating procedure of FSA [Farm Service Agency],”³ the USDA agency that administers farm credit and non-credit farm benefit programs.

To make matters worse, in the early 1980s, USDA secretly dismantled its civil rights enforcement capability while at the same time urging and continuing to urge victims of its discrimination to file complaints with it. Thereafter, USDA, in contravention of its own regulations, refused, and still refuses, to investigate the very complaints it urged farmers to file, thus making any pretense of civil rights enforcement by USDA a total sham. The predictable result of USDA’s willful refusal to investigate minority farmers’ duly filed discrimination complaints was to “exacerbate[] and prolong[] . . . discrimination in the administration of USDA’s programs.”⁴ *Keepseagle*, 2001 U.S. Dist. LEXIS 25220, at *29.

Upon learning that USDA had secretly dismantled its civil rights enforcement capability, Congress enacted § 741 (part of the Omnibus Consolidated and Emergency Supplemental Appropriations Act of 1999), which waived the statutes of limitation for farmers who filed complaints with USDA “before July 1, 1997 . . . alleg[ing] discrimination at any time . . . [from] January 1, 1981 . . . [through] December 31, 1996,” and permitted them to file civil actions directly in court (7 U.S.C. § 2279 note) or to pursue an optional administrative process. *See* § 741(b).⁵ Despite the passage of § 741, USDA has continued to refuse to investigate minority farmers’ discrimination complaints.

³ Declaration of Rosalind Gray, dated April 16, 2002 (“Gray Decl.”) at ¶ 28 Ex. 3 to Plaintiffs’ 8/28/06 Brief (Dkt. # 150) (Ex. 2) (emphasis added).

⁴ An example of the way in which USDA’s handling of civil rights complaints exacerbated and prolonged discrimination against Hispanic and other minority farmers was the policy announced by the USDA Office of General Counsel (“OGC”), which provided legal sufficiency review for USDA’s Office of Civil Rights (“OCR”), that “no matter how blatant the discriminatory conduct might be, there can be no discrimination unless the applicant is ‘eligible.’” *Id.* Consequently, “[t]o avoid finding a would-be applicant ‘eligible,’ county officials often simply refused to give minority farmers loan applications thereby making it impossible for minority farmers to establish ‘eligibility’ under the OGC’s policy.” *Id.* at ¶ 20.

⁵ Senator Robb, the principal sponsor of the provision, explained the need for the waiver:

Even when the OCR ostensibly began to process complaints in the late 1990s, it became clear that the process remained fatally flawed and the results mirrored those when USDA entirely ignored such complaints. Former OCR Director Lloyd Wright described his efforts in the late 1990s to address the backlog of complaints as follows:

[o]f . . . 350 processed complaints, there were initially only two potential findings of discrimination. Originally, I started to sign some of the decisions because superficially the reports appeared to support the “no finding of discrimination” decisions. However, after thoroughly examin[ing] the reports, I began to notice a pattern.

The team reviewers based their “no finding of discrimination” decisions largely on the accused agency’s initial preliminary inquiry. *The problem was that 99 percent of the time, the agency accused of discrimination investigated itself and invariably found no discrimination had occurred. These preliminary reports were self-serving. Based on my instructions, the team reviewers should have found that the files were incomplete since the only review of the complaint came from the accused agency.* The file should have also contained an independent investigation by OCR. Because the files did not contain independent investigation reports prepared by OCR, I refused to sign the no finding decisions.

Wright Decl. at ¶¶ 6-7, (Ex. 4) (emphasis added). The files contained no such independent reports because USDA had dismantled its civil rights investigatory capability. *Id.* at ¶ 7.

Moreover, as Rosalind Gray, Mr. Wright’s successor as USDA OCR Director, testified,

[b]ased upon my first-hand knowledge, *I can attest that many complaints were destroyed or not accepted at all.* After FSA complaint processing was transferred to the OCR, the FSA was initially responsible for preparing a preliminary investigatory report. . . . In preparing the preliminary report, FSA would send its non-civil rights investigators to interview *and often intimidate the complainant.*

Gray Decl. at ¶ 20 (Ex. 2) (emphasis added).

[T]he investigative unit at USDA’s [OCR] was abolished in 1983. Farmers whose complaints were pending at the time were led to believe their complaints were still being investigated, when they were not. Farmers who filed the complaints [there]after . . . were also led to believe that their complaints would be . . . investigated, despite the fact that USDA had no resources with which to conduct such investigations. . . . [N]one of these complaints were ever considered – but none of the farmers were told that was the case.

144 Cong. Rec. § 11,433 (daily ed. Oct. 5, 1998), Ex. 9 to Plaintiffs’ 8/28/06 Brief (Dkt. 150), attached hereto as Ex. 3; *see also* Declaration of Lloyd E. Wright (“Wright Decl.”), dated June 30, 2004, at ¶ 7 (Ex. 10 to Plaintiffs’ 8/28/06 Brief (Dkt. 150)), attached hereto as Ex. 4.

Reflecting on her tenure as OCR Director, Ms. Gray testified that:

Civil rights procedures were developed and published, but were not and are not followed. OCR dismissed hundreds of cases because they were not filed within 180 days of the “occurrence of the alleged discrimination.” Yet many complainants did not receive a letter of acknowledgment after filing their complaint for more than a year and it frequently required another year for the complaint to be investigated and still another year before a proposed finding in the case was rendered. Consequently, there have been countless farmers who have lost their land or died waiting for USDA to process their complaints.

Id. at ¶ 31 (emphasis added).

Former OCR Directors Wright and Gray were not alone in their bleak assessment of USDA's handling of discrimination complaints even after the dismantling of its civil rights investigatory capability had come to light and lawsuits were filed. In two internal reports, USDA admitted its continued failure to account for and to investigate discrimination complaints. CRAT Report at 22-25 (Ex. 5); Office of Inspector General, U.S. Department of Agriculture Evaluation Report for the Secretary on Civil Rights-Phase I Report No. 50801-2-Hq(1)(1997) at 6, 9 (“OIG Report”) (Ex. 6). Indeed, the CRAT Report concluded that “[t]he process for resolving program complaints has failed.” CRAT Report at 31 (Ex. 5). In March 2000, USDA's Office of Inspector General issued a supplemental report finding that USDA had not made any significant changes in processing discrimination complaints. Office of Inspector General Audit Reports Office of Civil Rights Status of Implementation of Recommendations made in Prior Evaluations of Programs Complaints, Audit Report 60801-4-Hq. at 1 (March 2000) (Ex. 7).

Against this backdrop, African American, Native American, Hispanic and women farmers alleged that USDA discriminated against them in the administration of its farm credit programs in violation of ECOA, and non-credit benefit programs in violation of the APA. They further alleged that when they complained of discrimination in those programs, USDA refused to investigate their complaints. Judges Friedman and Sullivan certified classes in the African American and Native American cases, respectively, on the basis of USDA's admitted failure to investigate the discrimination complaints of African American and Native American farmers

and, with the approval of the D.C. Circuit, those cases proceeded as class actions.⁶ Ultimately, the parties settled the *Pigford* case resulting in payments to date of over \$1 billion in damages, debt relief and tax payments to over 15,000 African American farmers.⁷ In the *Garcia* and *Love* cases, however, Judge Robertson ruled that such allegations do not state a cause of action under ECOA or the APA and hence refused to certify those cases as class actions for trial.

In the initial appeal, the D.C. Circuit affirmed the dismissal in *Garcia* and *Love* on the failure-to-investigate claims based on ECOA and remanded for further development of the same claims based upon the APA. *Garcia v. Johanns*, 444 F.3d 625, 637 (D.C. Cir. 2006); *Love v. Johanns*, 439 F.3d 723 (D.C. Cir. 2006). Significantly, in urging the D.C. Circuit to review the failure-to-investigate ruling upon which the question of class certification turned in the then-settled African American case and the still-pending Native American, Hispanic and women farmers cases, the government, referring to the *Garcia* case, stated:

This is one of those related cases now pending in district court alleging virtually identical claims against the USDA on behalf of different minority groups attempting to proceed as class actions. *Now that there is an actual conflict in the certification of class actions in virtually identical suits by Hispanic, female and*

⁶ *Pigford v. Glickman*, 206 F.3d 1212 (D.C. Cir. 2000) (approving consent decree); *Pigford v. Veneman*, 355 F. Supp. 2d 148, 151 (D.D.C. 2005); *Pigford v. Glickman*, 182 F.R.D. 341, 343 (D.D.C. 1998) (certifying class to pursue claims that “USDA failed properly to investigate those complaints” of discrimination in farm credit and non-credit farm benefit programs). In *Keepseagle*, Judge Sullivan certified a class pursuant to Fed. R. Civ. P. 23(b)(2) noting that “the systematic failure to process complaints of discrimination is a unifying characteristic of the class and raises common questions of fact and law.” *Keepseagle*, 2001 U.S. Dist. LEXIS 25220, at *29; *accord Pigford*, 182 F.R.D. at 348-49. In dismissing the government’s Fed. R. Civ. P. 23(f) petition, the D.C. Circuit held that it did not “see anything either novel or manifestly erroneous . . . about the district court’s conclusion that the farmers’ allegations concerning . . . [USDA’s] ‘failure to . . . investigate discrimination complaints,’ which ‘affected each class member,’ satisfy Rule 23(a)’s commonality and typicality requirements.” *In re Veneman*, 309 F.3d 789, 794 (D.C. Cir. 2002); *see also In re Veneman*, No. 04-5031, 2004 U.S. App. LEXIS 4219 (D.C. Cir. Mar. 3, 2004) (denying petition for a writ of mandamus).

⁷ Owing to alleged problems with the notice in *Pigford*, tens of thousands of African Americans filed late claims pursuant to the *Pigford* Consent Decree. Eventually, in 2008, Congress passed § 14012 of the Food, Conservation and Energy Act of 2008, Pub. L. 110-246, 122 Stat. 1651 (“2008 Farm Bill”), which permitted African Americans who missed the filing deadline to participate in the original *Pigford* Consent Decree to file new causes of action in district courts to have their claims considered on the merits. Consequently, in the summer of 2008, 17 complaints on behalf of over 28,000 African Americans were filed in this court pursuant to § 14012. Those cases were consolidated and styled *In re Black Farmers Discrimination Litigation*, Misc. No. 08-mc-0511 (PDF). Those consolidated cases are referred to as *Pigford II*, and the original *Pigford* case, which resulted in the entry of the *Pigford* Consent Decree, is referred to as *Pigford I*.

Native American farmers, review by this Court may well be appropriate to ensure that similarly-situated minority groups are treated consistently. However, one of the primary reasons for the varying class certification decisions in these cases is disagreement on the underlying legal issue: whether USDA's alleged "failure to investigate discrimination complaints" is actionable under either the APA or the ECOA. Because the viability of such a common "complaint process" claim among class members informs any assessment of the propriety of class certification in these cases, the Court's resolution of that threshold legal question is essential.

Defendant's Response to Plaintiffs' Petition for Permission To Take An Interlocutory Appeal Under Fed. R. Civ. P. 23(f), D.C. Cir. Dkt. No. 04-8008, at 19-20 (October 2004) (emphasis added).

On remand, Judge Robertson reaffirmed his dismissal of the APA failure-to-investigate claims in a single opinion applicable to both the *Garcia* and *Love* cases. *Love v. Connor*, 525 F. Supp. 2d 155 (D.D.C. 2007). Thereafter, on a petition for review, the D.C. Circuit affirmed the dismissal of the APA failure-to-investigate claims. *Garcia v. Vilsack*, 563 F.3d 519 (D.C. Cir. 2009). On January 19, 2010, the Supreme Court denied plaintiffs' petition for a writ of certiorari. *Garcia v. Vilsack*, 130 S. Ct. 1138 (2010).

The Proposed Settlement And Process

In February 2010, shortly after entering into a settlement agreement in the *Pigford II* cases, defendant began settlement discussions with counsel for the *Garcia* and *Love* plaintiffs. At the same time, defendant was conducting settlement discussions with counsel for the Native American farmers. Significantly, despite the D.C. Circuit's ruling with respect to the failure-to-investigate claims – the basis upon which classes were certified in the *Pigford I* case and the still-pending *Keepseagle* case – the defendant, nevertheless, concluded a purported class settlement with respect to the *Pigford II* cases (filing a motion for a settlement class), and has continued to negotiate a class settlement in the *Keepseagle* case pursuant to Rule 23. Defendant has thus far refused to stipulate a class for settlement purposes in the *Garcia* and *Love* cases, despite lodging with the court a class-wide settlement, without complying with Rule 23, thereby denying Hispanic and women farmers important procedural safeguards and substantive rights.

Defendant intends to mail to Hispanics and females identified on some undisclosed mailing list or lists, and post in USDA field offices, a notice – a copy of which defendant lodged with the court – stating that if the recipients believe that USDA improperly denied them loan benefits between 1981 and 2000 because they are Hispanic or female, they may be eligible to apply for compensation. The notice states that one may be eligible if one sought a farm loan or farm loan servicing during the relevant period and the “loan was denied, provided late, approved for a lesser amount than requested, or approved with restrictive conditions or USDA failed to provide appropriate loan service. . . .” Defendant’s Notice to Hispanic Farmers or Female Farmers. The notice will also include a toll-free telephone number and a website address instructing recipients having questions or seeking advice to “promptly contact a community organization for Hispanic or female farmers, or a lawyer.” *Id.* Defendant also proposes to include with the notice a two-page summary of the claims process (which it has yet to disclose). *In order to participate in the proposed settlement one “must first file a lawsuit or join an existing lawsuit in federal court alleging discrimination based on being Hispanic or female by the Farm Service Agencies in its loan servicing or loan making during the relevant period.”* Defendant’s

Summary of Claims Process at 2 (emphasis added). Tens of thousands of claimants thus are required to file complaints in federal courts around the country or intervene in this case as a precondition to participate in the settlement. Claimants must then enter into a settlement agreement with USDA agreeing to the dispute resolution process and *dismissing their court claims with prejudice*. *Id.* Claimants eligible for compensation will receive some undetermined sum up to \$50,000, depending on the number of claimants, and, if eligible, some form of debt relief. *Id.* The claims will be reviewed by a USDA-appointed adjudicator whose decisions will be unreviewable. At the same time, the government intends to ask the court to lift the stay of the running of the statute of limitations. Thus, if the notice is inadequate, Hispanic farmers will lose their claims.

ARGUMENT

I. COURT SUPERVISION OF THE SETTLEMENT PROCESS PURSUANT TO RULE 23 IS ESSENTIAL IN ORDER TO ENSURE FAIRNESS.

Defendant's Status Report announces defendant's intention to establish "a proposed settlement and administrative claims process" to settle the claims of plaintiffs in the pending *Garcia* and *Love* cases as well as the claims of possibly tens of thousands of Hispanic and women farmers who may ultimately move to intervene in the *Garcia* and *Love* cases or file separate actions in this court or other district courts throughout the United States.⁸ In addition to filing a status report, defendant has lodged with the court a proposed "Notice and Fact Sheet." In so doing, defendant attempts to suggest the appearance of court approval of or acquiesce to the

⁸ According to the 2007 Census of Agriculture, there are approximately 306,209 farms which have women as the principal operators and 55,570 farms which have Hispanics as the principal operators. *See* 2007 Census of Agriculture, Tables 50-52, attached hereto as Exs. 8-10, respectively. Those numbers represent a very conservative estimate of the universe of Hispanic and women farmers who may have been affected by USDA's admitted discrimination and do not include possibly thousands of Hispanics and women who were driven from farming or denied the opportunity to farm as a result of USDA's admitted discrimination. They also do include the total number of farm operators. *See, e.g.*, 2007 Census of Agriculture, Table 53, attached hereto as Ex. 11 (listing 82,462 Hispanic farmers and 985,182 women farmers as "all operators" reporting to the Census of Agriculture, instead of a "principal operator"); *see also* 2007 Census of Agriculture, Tables 54 and 57, attached hereto as Ex. 12 (listing 39,697 African American farmers as "operators.") Using the larger "all operators" numbers, Hispanic and women farmers outnumber African American farmers 27 to 1 (1,067,644 versus 39,697).

proposed settlement without actually complying with Rule 23's requirements. Because defendant's "proposed settlement" raises serious fairness and constitutional issues, the court should, at a minimum, review the lodged documents in light of the requirements of Rule 23 to make certain that the court is not being used to foist upon vulnerable minority farmers an unfair and discriminatory settlement and process. Indeed, as more fully set forth in Section III, the court should certify this case as a class action for purposes of settlement given the government's admission that a settlement on a class-wide basis is appropriate and manageable, and the government's involvement of the court in the process.

While defendant will no doubt argue that court review of the proposed settlement is unnecessary because Judge Robertson refused to certify this case and the *Love* case as class actions for trial, any such argument is simply wrong as a matter of law. "The Federal Rules of Civil Procedure, and the advisory committee notes thereto, expressly contemplate that a court may revisit its rulings on class certification . . ." at any time "until final judgment." *In re Terazosin Hydrochloride Antitrust Litig.*, Case No. 99- MDL-1317-Seitz/Klien, 2005 U.S. Dist. LEXIS 46189, at *12 (S.D. Fla. Mar. 17, 2005) ("*Terazosin*"); *see also* Fed. R. Civ. P. 23(c)(1)(C) ("an order [under Rule 23(c)(1)] may be altered or amended before final judgment."). Moreover, defendant's proposed class-wide settlement constitutes a sufficient changed circumstance to warrant the court to revisit a prior order denying class certification. *See Terazosin*, 2005 U.S. Dist. LEXIS 46189, at *16-17. Thus, despite defendant's assertions to the contrary, the issue of class certification remains very much alive in this case and plaintiffs and the other putative class members require the court's protection to prevent abuse.

The Supreme Court recognizes that class action proceedings present "opportunities for abuse," and that courts have "both the duty and the broad authority" to exercise control over class actions to prevent such abuse. *Gulf Oil Co. v. Bernard*, 452 U.S. 89, 100 (1981); *Manual for Complex Litigation*, § 21.12 (4th ed. 2004). The court should also prevent any communication of a settlement offer that would mislead or confuse the putative class members. *See Keystone Tobacco Co. v. U.S. Tobacco Co.*, 238 F. Supp. 2d 151, 154 (D.D.C. 2002); *Jenifer*

v. Delaware Solid Waste Auth., Civ. A. Nos. 98-270MMS, 98-565MMS, 1999 W L 117762, at *2 (D. Del. Feb. 25, 1999). Moreover, when evaluating a defendant's proposed settlement offer to putative class members, a court must ensure that the putative class members have sufficient information to fairly evaluate the settlement offer. *In re Gen. Motors Corp. Engine Interchange Litig.*, 594 F.2d 1106, 1139-49 (7th Cir. 1978).

Under a Rule 23 settlement, "claims, issues, or defenses . . . may be settled, voluntarily dismissed, or compromised only with the court's approval." Fed. R. Civ. P. 23(e). Moreover, with respect to any "proposed settlement, voluntary dismissal, or compromise[,] . . . [t]he court must direct notice in a reasonable manner to all class members who would be bound by the proposal." Fed. R. Civ. P. 23(e)(1). In addition,

[b]efore giving its approval, the Court must provide adequate notice to all members of the class, . . . conduct a "fairness hearing," and find, after notice and hearing that the "settlement is fair, adequate and reasonable and is not the product of collusion between the parties."

Pigford v. Glickman, 185 F.R.D. at 98 (quoting *Thomas v. Albright*, 139 F.3d 227, 231 (D.C. Cir. 1998)); accord *Equal Rights Ctr. v. Wash. Metro. Area Transit Auth.*, 573 F. Supp. 2d 205 (D.D.C. 2008); *In re Vitamins Antitrust Litig.*, 305 F. Supp. 2d 100, 104 (D.D.C. 2004). Rule 23 thus clearly authorizes the court to review and approve both the form and manner of notice. As set forth more fully herein, defendant's proposed notice and "proposed settlement" will mislead and confuse putative class members and encourage vulnerable minority farmers to compromise valuable rights on the basis of insufficient and misleading information.

1. Inadequate Notice

Both the notice and the manner in which defendant proposes to distribute it are unclear and fundamentally flawed. For example, defendant states that "USDA plans to post in its field office, and mail to Hispanic and female farmers, a summary notice and a fact sheet describing the claims process." Defendant's Status Report at 1. Defendant does not indicate whether the notice and fact sheet will be printed in both English and Spanish. Defendant also fails to provide

any information whatsoever concerning the mailing list USDA intends to use. Will it include only the names of Hispanic and women farmers currently on USDA mailing lists?⁹ Such a list might not include the names of Hispanics and women who were driven from farming years ago or denied the opportunity to farm owing to USDA's discrimination. Similarly, posting a notice in USDA field offices is unlikely to reach such individuals because they would have no reason to visit those offices.

Is there any plan for publication in newspapers and on radio and television? The experience in the *Pigford I* case underscores the gross inadequacy of defendant's proposed notice. In *Pigford I*, despite the fact that notices were mailed to black farmers known to defendant, posted in USDA offices, published in various newspapers and magazines as well as television and radio advertisements, tens of thousands of African Americans claimed not to have received notice. *See Pigford*, 185 F.R.D. at 102 ("Notice was mailed to all known class members. . . . The parties also exerted extraordinary efforts to reach class members through a massive advertising campaign in general circulation and African American targeted publications and radio and television stations.") (citations and footnotes omitted); *see also id.* at 91 (describing in detail the notice). Consequently, Congress ultimately enacted § 14012 of the 2008 Farm Bill to allow those farmers an opportunity to file new claims that resulted in the *Pigford II* cases. Defendant's proposed notice will undoubtedly set the stage for *Garcia II* and *Love II*. Moreover, at some time USDA intends to ask the court to start the running of the statute of limitations. So through the inadequate notice, Hispanic farmers will not be sufficiently apprised of the settlement and the statute will run, barring their claims.

2. Coerced Dismissal of Claims

In evaluating settlement communications with individual putative class members, the court must ensure that the individual has sufficient information to evaluate the settlement offer:

⁹ Plaintiffs further question the adequacy of USDA's "lists" and the reliance solely on USDA records. For example, of the 110 persons named in plaintiffs' then-pending complaint, defendant could locate files for only 37 named plaintiffs. *See* Transcript of April 29, 2003 Status Hearing at 12, attached hereto as Ex. 13.

[A]n offer to settle should contain sufficient information to enable a class member to determine (1) whether to accept the offer to settle, (2) the effects of settling, and (3) the available avenues for pursuing his claim if he does not settle. In contrast to judicial examination of a proposed class action settlement which entails consideration of the fairness of the settlement itself, judicial examination of the offer to settle individual claims largely entails only consideration of the accuracy and *completeness* of the disclosure.

In re Gen. Motors Corp., 594 F.2d at 1139-40 (emphasis added); *see also Keystone*, 238 F. Supp. 2d at 155 (adopting *In re General Motors* reasoning that it is critical that putative class members have sufficiently complete information to evaluate the settlement offer). An offer lacking sufficient information creates a “possible misleading of class members about the strength and extent of their claims and the alternatives for obtaining satisfaction of those claims.” *In re Gen. Motors*, 594 F.2d at 1139.

Under a Rule 23 process, “claims . . . may be settled [or] voluntarily dismissed . . . only with the court’s approval.” Fed. R. Civ. P. 23(e). Under defendant’s proposal, claimants must “dismiss[] with prejudice . . . [their] legal claims against USDA” without any court approval and before they have any idea of how much they will receive in the proposed administrative process. They must also dismiss their claims before they know by what standard, if any, their claims will be considered by an adjudicator who will be selected unilaterally by defendant, and whose decisions will be unreviewable. It is also unclear whether there will be any cap placed upon the fees that the adjudicator may charge for reviewing the claims, or the cost of processing the claims prior to adjudication. By requiring farmers to dismiss their claims against USDA before any of these essential facts are disclosed, defendant prevents the farmers from obtaining the information required to adequately assess the settlement offer. *See In re Gen. Motors*, 594 F.2d at 1139-40.

3. The Notice Does Not Adequately Explain Claimants’ Likely Recovery.

Although defendant states that the “proposed settlement” will include “debt relief,” defendant has not described how the “proposed settlement” will handle debt relief and damage awards; other than to say that each successful claimant will receive an equal amount up to

\$50,000 and those that also satisfy some yet-to-be described criteria will be eligible for some yet-to-be-determined amount of debt relief. An examination of the *Pigford II* settlement makes clear that the notice does not provide claimants sufficient information to determine what they can expect to recover in exchange for dismissing, in advance, their legal claims against USDA and is thus at best inadequate and possibly misleading. *In re Gen. Motors*, 594 F.2d at 1139-40; *Keystone*, 238 F. Supp. 2d at 155.

In the *Pigford II* settlement, all costs associated with the settlement, including administrative costs, attorneys' fees, damages, debt relief and taxes are subject to the settlement's funding cap. All non-damage costs reduce the amount available to pay damages. If the amount of money allocated for debt relief is insufficient to pay the total debt, the outstanding balance remains a debt of the farmer that accrues interest. Given the government's current insistence upon a funding cap of \$1.33 billion, any debt relief in the *Garcia* and *Love* cases will undoubtedly resemble the debt relief in the *Pigford II* settlement.¹⁰ Depending on the number of successful claimants and their eligible debts, a farmer could conceivably receive only a small percentage of the \$50,000, have only a small portion of his debt relieved, have his damage payment offset to cover a portion of the outstanding debt, and nevertheless find himself with no cash and still in debt to USDA.

The following examples demonstrate the plausibility of the foregoing scenario. In *Pigford I*, at a time when the Census of Agriculture estimated that there were between 27,000-30,000 farms operated by blacks, over 15,000 black farmers (approximately 50% of the estimated number of black farmers) filed successful claims. According to the 2007 Census of Agriculture, there were 306,209 farms operated by women and 55,570 farms operated by Hispanics for a total of 361,779 farms. Under the "proposed settlement," if all of the \$1.33 billion were used solely to pay damages, and if women and Hispanic farmers filed successful

¹⁰ Although defendant states that the sum of \$160 million has been allocated to cover debt relief, it is unclear whether that amount is part of or in addition to the up to \$1.33 billion that defendant proposes as the current settlement cap.

complaints in the same proportion as did black farmers in *Pigford I* (i.e., 50%), each successful claimant would recover approximately \$7,400 --without any amount being allocated for administrative costs, attorneys' fees, taxes or debt relief of any sort. If one simply adds the 25% payment to the Internal Revenue Service to cover the federal taxes onto the damage award as was done in *Pigford I* and *Pigford II*, the damage award would be reduced to approximately \$5,900, again without any amount being allocated for administrative costs, attorneys' fees or debt relief. Given such plausible scenarios, defendant should not be permitted to suggest to distressed and vulnerable minority farmers that they should consider, without the benefit of counsel, waiving their legal claims against USDA – with prejudice – and entering into a settlement agreement on the basis of vague statements that they may receive indeterminate amounts of money and “debt relief.” Such notice is clearly inadequate to enable farmers to “determine . . . whether to accept the offer to settle [or] . . . the effects of settling . . .” *In re Gen. Motors*, 594 F.2d at 1139-40.

4. The Notice Fails To Identify The Existing Lawsuits That Claimants May Join In Lieu of Filing New Lawsuits.

The proposed claims process is also problematic. According to the fact sheet, “[t]o be eligible for recovery in the administrative claims process, [a claimant] must first file a lawsuit or join in an existing lawsuit in federal court alleging discrimination based on your being Hispanic or female” Summary of Claims Process at 2. Although, there are only two lawsuits (*Garcia* and *Love*) that currently fit the definition of “an existing lawsuit in federal court” as set forth in the Summary of Claims Process, defendant does not identify the lawsuits or the firms involved to allow the claimants to avoid filing new lawsuits.

In addition to not identifying the pending lawsuits or the lawyers who have litigated these lawsuits for nearly a decade, defendant’s notice would direct Hispanic and female farmers requiring legal advice concerning the proposed settlement to “contact a community organization for Hispanic or female farmers or a lawyer.” It is clearly misleading to suggest that minority farmers, many of whom are of limited means as a result of years of discrimination by USDA, can

obtain adequate legal advice concerning the proposed settlement from “a community organization for Hispanic or female farmers” or from any lawyer. Critical to the proper operation of a settlement process pursuant to Rule 23 is the involvement of experienced and capable counsel. *See Radosti v. Envision EMI, LLC*, C.A. No. 09-887 (CKK), 2010 U.S. Dist. LEXIS 56373, at *40-41 (D.D.C. Jun. 8, 2010) (“A presumption of fairness, adequacy and reasonableness may attach to a class settlement reached in arm’s-length negotiations between experienced, capable counsel after meaningful discovery.”) (quoting *In re Vitamins Antitrust Litig.*, 305 F. Supp. 2d at 104).

5. The Process Imposes Unnecessary Burdens and Costs Upon Claimants.

Moreover, while the government has repeatedly stated that it wants as many victims of USDA’s discrimination as can be identified to have the opportunity to settle their claims, the proposed process is clearly at odds with that goal. Under a normal Rule 23 process, a claimant would merely complete a claim form, mail it to the claims administrator, and incur only the cost of postage, currently \$0.44. Under defendant’s “proposed settlement,” that same claimant would either have to “join” the *Garcia* case or file a new lawsuit in federal court incurring a \$350 filing fee. If he “joins” the *Garcia* case, he would have to then dismiss with prejudice his claims in order to participate in the settlement. Similarly, if he files a new lawsuit, he would have to then dismiss with prejudice his newly filed lawsuit in order to participate in the settlement. Such unnecessary procedural hurdles and fees call to mind the infamous voter eligibility tests and poll taxes of old that had as their purpose the suppression of minority franchise. If defendant is going to use this court and this litigation to settle claims, the court should not allow defendant to impose upon claimants unnecessary burdens and costs. Nor should the court permit its docket and the dockets of courts throughout the country to be clogged with thousands of unnecessary complaints.

6. Court Supervision Is Required To Prevent Harm To Claimants Through Abusive and Misleading Communications With Plaintiffs and Putative Class Members.

Court supervision of settlement process is also necessary to ensure that there is neither coercion nor abusive manipulation. The government and its agents have knowingly contacted plaintiffs and putative class members prior to the proposed announcement and described the blatantly discriminatory settlement proposal as a good deal and a “good start.” Inasmuch as claimants must dismiss with prejudice all of their claims against USDA, it is clearly misleading to suggest to farmers that accepting an immediate settlement is a “good start,” and the court should prevent such communications. *See Keystone*, 238 F. Supp. 2d at 154. Such communications also prey upon the anxiety and fears of vulnerable minority farmers, many of whom are suffering the effects of the current historic recession and all of whom are victims of decades of admitted discrimination by USDA. These improper contacts have included explicit instructions that plaintiffs not inform their counsel of the contacts. On information and belief, farmers are also being told that they can receive a quick settlement without the need of lawyers although such representations are inconsistent with the “proposed settlement.” The government has even made job offers to farmers who have met with defendant and/or his agents to discuss, *inter alia*, recruiting other farmers to settle their claims. In one such meeting, prior to the filing of the status report, the government raised the prospect of “debt relief” in addition to the take-it-or-leave-it \$50,000 capped damage awards although, in the nearly seven months of settlement discussions, the government had never mentioned debt relief. Such abusive conduct is also why Rule 23 requires that the parties have adequate legal representation. Such representation is particularly essential here where unfortunately the government has a well-documented history of discriminating against minority farmers and the government seems determined to carry that discrimination into the settlement process. The best way to keep the government honest and the minority farmers adequately protected is through the time-honored adversarial process enshrined in Rule 23. *See Radosti*, 2010 U.S. Dist. LEXIS 56373, at *40-41.

In Rule 23, Congress prescribed detailed and time-tested procedures with built-in

safeguards to cover situations such as this. The government seeks to circumvent those procedures and safeguards in its settlement with Hispanic and women farmers. If permitted to do so, the government will deny Hispanic and women farmers important procedural and substantive rights without any basis in law or fact.

II. THE PROPOSED SETTLEMENT DISCRIMINATES AGAINST HISPANIC FARMERS.

The “proposed settlement” unreasonably discriminates against Hispanic farmers in favor of African American and Native American farmers. Despite the D.C. Circuit’s ruling with respect to the failure-to-investigate claims on which the class certifications in both *Pigford I* and *Keepseagle* were based, the government has entered into a class settlement with the plaintiffs in the 17 cases comprising *Pigford II* and moved for a settlement class. In addition, rather than moving to decertify the class, the government is currently negotiating with Native Americans as a class respecting claims identical to those of Hispanic farmers. While a private party might well be able to enter into facially discriminatory settlements with similarly situated individuals or groups, the government is constrained by the Constitution from doing so. Simply put, the government cannot treat Native American, Hispanic and women farmers differently with respect to class certification. Clearly, given the government’s stated goal, it should settle all three cases pursuant to Rule 23.

What the government cannot lawfully do, and what the court cannot permit it to do, is pick favorites among minority groups that it concedes are similarly situated and bestow benefits upon the favored groups and penalize the disfavored groups. Yet, that is precisely what the government proposes to do. By its very terms, the “proposed settlement” discriminates against Hispanic farmers both in terms of substance and process. *Engquist v. Or. Dep’t of Agric.*, 553 U.S. 591, 597-98 (2008) (“[T]he [Equal Protection] Clause’s protections apply to administrative as well as legislative acts.”); *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 720 (2007) (“It is well established that when the government distributes burdens or benefits on the basis of individual racial classifications, that action is reviewed under strict scrutiny.”);

Adarand Constructors, Inc. v. Peña, 515 U.S. 200, 229-30 (1995) (“[W]henver the government treats any person unequally because of his or her race, that person has suffered an injury that falls squarely within the language and spirit of the Constitution's guarantee of equal protection.”); *Wengler v. Druggists Mut. Ins. Co.*, 446 U.S. 142 (1980) (striking down an administrative scheme that provided greater benefits based on sex because such a scheme violated Equal Protection); *Hernandez v. Texas*, 347 U.S. 475, 477-78 (1954) (confirming that Equal Protection extends to persons of Mexican descent with no less force than it does to African-Americans); *Settles v. U.S. Parole Comm'n*, 429 F.3d 1098, 1102 (D.C. Cir. 2005) (an Equal Protection claim exists “when the government erects a barrier that makes it more difficult for members of one group to obtain a benefit than it is for members of another group.”); *see also Elliot-Park v. Manglona*, 592 F.3d 1003, 1007 (9th Cir. 2010) (“The government may not racially discriminate in the administration of *any* of its services.”) (citing *Palmer v. Thompson*, 403 U.S. 217, 219-223 (1971)) (emphasis in original).

Between *Pigford I* and *Pigford II*, the government has either paid or agreed to pay African American farmers \$2.25 billion. Under the current “settlement proposal,” the government has offered Hispanic farmers some undefined part of \$1.33 billion to be shared with women farmers despite the fact that Hispanic and women farmers outnumber African American farmers by nearly 12 to 1 (361,779 (55,570 + 306,209) versus 30,599), Hispanic farmers alone outnumber African American farmers by nearly 2 to 1, and Hispanic farmers have substantially outnumbered African American farmers in every Census of Agriculture since 1992. The gross disparity in the funds allocated to cover damages is further exacerbated by the fact that the damage period applicable to Hispanic and women farmers is four years longer than the damage period defined in *Pigford I* and *II*. *See* n.8 *supra*.

In *Pigford I* and *II*, claimants were and are able to recover liquidated damages for discrimination with respect to non-credit benefit claims. *See, e.g., Pigford*, 185 F.R.D. at 96. Notwithstanding the fact that plaintiffs in *Garcia* have asserted timely non-credit claims, *see, e.g.,* Memorandum Order dated March 20, 2002, at 3 (“3/20/02 Order”) (Dkt. #47), the

“proposed settlement” does not permit Hispanic farmers to recover for discrimination in the administration of non-credit benefit programs.¹¹

In both *Pigford I* and *II* and in *Keepseagle*, the government has provided a two-track damage claims process: Track A for claimants whose damages do not exceed \$50,000 and Track B for those claimants able to prove damages greater than \$50,000. In *Pigford I*, in which claimants’ damages were paid from the Judgment Fund, there was no cap on the damages claimants could prove in Track B proceedings and no cap on the ultimate cost of the settlement. See *Pigford*, 185 F.R.D at 95 (“It is impossible to know precisely how much the overall settlement in this case will cost the government . . .”). In *Garcia*, by contrast, defendant would arbitrarily deny Hispanic farmers the opportunity to recover provable damages greater than \$50,000 in an inexpensive and abbreviated arbitration settlement process of the sort provided for African American and Native American farmers. Instead, Hispanics seeking such damages must file a separate federal lawsuit. Those who are unable to do so must waive the right to receive such damages in exchange for a yet-to-be determined amount not to exceed \$50,000.

In sum, while the government has been dragged kicking and screaming to the settlement table, the court should not permit the government to impose a class settlement upon Hispanic farmers without affording them the protections of Rule 23 and this court should not permit itself and this litigation to be used to facilitate a settlement that unlawfully discriminates against Hispanic farmers.

III. THE COURT SHOULD CERTIFY THE CLASS FOR SETTLEMENT PURPOSES

There is absolutely no dispute regarding the underlying discrimination that has given rise to this and the other three cases brought against USDA. The government has proposed a settlement in this case and has made clear it wants to settle all of the cases on a class-wide basis.

¹¹ Defendant falsely asserts that all of the *Garcia* plaintiffs’ APA claims were dismissed. As the 3/20/02 Order (Dkt. #47) makes clear, plaintiffs’ claims of discrimination in the administration of non-credit farm benefit programs in violation of the APA remain viable. *Id.* at 3. The only dismissed APA claims were the failure-to-investigate claims. *Garcia v. Vilsack*, 563 F.3d at 526-27.

Indeed, it has, in fact, gone a long way toward achieving that goal, a goal specifically endorsed and urged by Congress.¹² Unfortunately, the government has proposed class settlements of the Hispanic and women farmers cases that would deny those farmers the protections of Rule 23 and would also deny them procedural and substantive rights that it provides to similarly situated African American and Native American farmers.

Ostensibly, the government contends that Hispanic and women farmers can be denied procedural and substantive rights granted to other minority farmers solely because Judge Robertson refused to certify the *Garcia* and *Love* cases as class actions for trial. The government is, as a matter of law, simply wrong. *See supra* at 10. Moreover, given that the claims of class members in *Pigford I* and *Keepseagle* are identical to those in *Garcia* and *Love*, defendant must treat Hispanic and women similarly, under the court's supervision of Rule 23.

As previously noted, Judge Robertson's denial of certification of litigation classes in *Garcia* and *Love* for trial does not preclude the parties from stipulating to a settlement class or the court from certifying the cases as class actions for settlement. Indeed, in holding that the case was not appropriate for class certification for trial, Judge Robertson invoked the *Pigford* settlement dispute resolution mechanism¹³ to conclude that "if this case were permitted to proceed as a class action, it would 'quickly devolve into hundreds or perhaps thousands of individual inquiries about each claimant's particular circumstances'" *Garcia*, 224 F.R.D. at

¹² *See* § 14011 of the 2008 Farm Bill expressing the sense of Congress that "all pending claims and class actions brought against [USDA] by socially disadvantaged farmers . . . including Native American, Hispanic, and female farmers or ranchers based on racial, ethnic or gender discrimination in farm program participation should be resolved in an expeditious and just manner."

¹³ Describing that mechanism Judge Friedman noted,

[t]he Consent Decree accomplishes its purposes primarily through a two-track dispute resolution mechanism that provides those class members with little or no documentary evidence with a virtually automatic cash payment of \$50,000, and forgiveness of debt owed to the USDA (Track A), while those who believe they can prove their cases with documentary or other evidence by a preponderance of the evidence - the traditional burden of proof in civil litigation - have no cap on the amount they may recover (Track B). Those who like neither option . . . may opt out of the class and pursue their individual remedies in court or administratively before the USDA.

Pigford, 185 F.R.D. at 95.

16 (quoting *Garcia v. Veneman*, 211 F.R.D. 15, 24 (D.D.C. 2002)). The government is proposing similar dispute resolution mechanisms on a class-wide basis in *Pigford II* and *Keepseagle*. For Hispanic and women farmers, however, the government proposes a class-wide, one-track dispute resolution mechanism. Significantly, Judge Robertson recognized that if the case were being considered for settlement rather than trial, “[a] class action may indeed be superior to other methods of adjudicating the claims of Hispanic farmers.” *Garcia*, 211 F.R.D. at 24. In certifying this case as a class action for settlement purposes, the court would not improperly tip the balance in favor of settlement inasmuch as the government has already stated its desire to settle this case and the other pending cases on a class basis, but rather it would merely insure that the rights of Hispanic farmers who have been victimized by government discrimination are accorded equal treatment by the government in remedying that discrimination.

Furthermore, the government’s offer to settle all of the pending cases on a class basis constitutes a sufficient changed circumstance to permit the court to revisit the question of class certification. *See, e.g., Terazosin*, 2005 U.S. Dist. LEXIS 46189, at *16-17; *see also Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 619-20 (1997) (“settlement is relevant to a class certification” and can alleviate manageability concerns that otherwise may arise); 4 H. Newberg and A. Conte, *Newberg on Class Actions* (4th ed. 2002) § 11.27, at 56 (“[A] class might not have been certified were it not for the proposed class settlement. . . . Class action determinations are made in the context of all the circumstances of the case as it is then postured.”).

In *Terazosin*, the district court initially certified a class. The Eleventh Circuit vacated the order certifying the class and, on remand, the district court, following some discovery, denied plaintiffs’ renewed motion for class certification. Thereafter, the parties entered into a settlement and the plaintiffs asked the court to revisit the issue of class certification in light of changed circumstances. In considering the request, the court noted that the advisory committee’s notes with respect to Rule 23(c)(1) state that “[t]he provision . . . that permits alteration or amendment of an order granting or *denying* class certification is amended to set the cut-off point at final judgment rather than ‘a decision on the merits.’” *Terazosin*, 2005 U.S. Dist. LEXIS 46189, at

*13 (quoting the advisory committee notes to Rule 23) (emphasis supplied by the court). Citing changed circumstances as a result of the settlement, the *Terazosin* court “granted Plaintiffs’ motion for certification of a class” *Id.* at *16. Given the government’s plan to settle this case on a class-wide basis along with the other cases brought by similarly situated minority groups, this court clearly has authority under Rule 23 to revisit the certification issue and to certify a class for settlement purposes.

The proposed class is defined as follows:

Hispanics who farmed, or attempted to farm between January 1, 1981 and December 31, 1996, or between October 13, 1996 and the present, who applied or tried to apply for farm loans or farm-loan services or who farmed or attempted to farm, between January 1, 1981 and the present, and who applied or tried to apply for non-credit farm benefits and who believe that USDA discouraged them from applying for farm loans, farm-loan services or non-credit farm benefits, or denied or delayed their applications, or, if approved, approved them for less than the requested amount or imposed restrictions upon the proceeds or failed to give appropriate loan services because the applicants were Hispanic and who complained of the discrimination to USDA or other government officials.

The proposed definition conforms to the eligibility criteria described in defendants’ Summary of Claims Process and is consistent with the definition employed in cases involving similarly situated farmers.¹⁴ *See, e.g., Pigford*, 185 F.R.D. at 92. Moreover, in light of class settlements in virtually identical cases involving similarly situated minority groups, and the requirement that such settlement classes satisfy all the requirements of Rule 23, other than those addressing manageability for trial, *Amchem*, 521 U.S. at 620, there can be no basis for concluding that a similar settlement in this case would not also satisfy all of the relevant requirements of Rule 23.

¹⁴ The definition reflects the fact that the *Garcia* Third Amended Complaint was filed in 2006 and alleged that the discrimination is on-going and, indeed, continues to this very day. It also reflects the difference in the two-year statute of limitations applicable to the ECOA, 15 U.S.C. § 1691(f), and the six-year statute of limitations applicable to the APA, 28 U.S.C. § 2401(a).

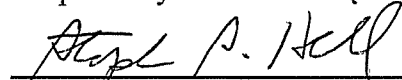
CONCLUSION

For the foregoing reasons this court should review the proposed settlement in light of the Rule 23, require defendant to comply with Rule 23 in order to ensure a fair and just settlement, and certify a class for settlement purposes.

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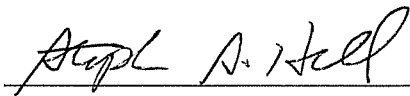
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Date: October 6, 2010

CERTIFICATE OF SERVICE

I hereby certify that on this 6th day of October, 2010, I have caused Plaintiffs' Memorandum of Points and Authorities in Support of Plaintiffs' Motion to Review Defendant's Proposed Notice and Terms of Class-wide Settlement, and to Certify a Settlement Class to be served by operation of the Court's electronic filing system upon defendant's counsel as follows:

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