

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

GUADALUPE L. GARCIA, JR., <u>et al.</u> ,)	
)	
Plaintiffs,)	
)	
v.)	Case No. 1:00CV02445 (RBW)
)	
TOM VILSACK, Secretary of)	
Agriculture,)	
)	
Defendant.)	
_____)	

**USDA’S COMBINED
OPPOSITION TO PLAINTIFFS’ MOTION TO REVIEW DEFENDANT’S
PROPOSED NOTICE AND TERMS OF CLASS-WIDE SETTLEMENT,
AND TO CERTIFY A SETTLEMENT CLASS (Docket #182),
AND
OPPOSITION TO PLAINTIFFS’ EMERGENCY MOTION TO STAY
PUBLICATION OF DEFENDANT’S PROPOSED NOTICE OF A
CLASS-WIDE SETTLEMENT PENDING COURT REVIEW (Docket #185)**

INTRODUCTION

The United States Court of Appeals affirmed this Court’s decision declining to certify a class of Hispanic farmers in this case, Garcia v. Vilsack, 444 F.3d 625 (D.C. Cir. 2006).¹ The case is now limited to the individual claims of credit discrimination by the 81 farmers named as plaintiffs in the complaint. In order to provide relief to other Hispanic and female farmers who allege credit discrimination during the relevant statutory period without having to try potentially thousands of claims in district court on a case-by-case basis, USDA has elected to create an entirely voluntary alternative dispute resolution (ADR) program to settle those claims. This

¹ This Court has been affirmed twice in this case. See Garcia v. Vilsack, 563 F.3d 519 (D.C. Cir. 2009) (affirming dismissal of plaintiffs’ Administrative Procedure Act claims), cert. denied, 130 S. Ct. 1138 (Mem.) (2010).

program will allow those farmers who choose to participate to have their claims resolved expeditiously and at reduced cost to, and effort by, the government. Plaintiffs contend that USDA's voluntary program is a class-wide settlement that does not meet the requirements of Fed. R. Civ. P. 23 and ask the Court retroactively to certify the same proposed class that it and the Court of Appeals already rejected.² As we explain more fully below, plaintiffs' motion to certify a settlement class should be denied.

Under the anticipated ADR program, which USDA expects to announce next month, USDA will establish an administrative claims process designed to provide up to a total of \$1.33 billion to settle claims of Hispanic and female farmers who allege discrimination by USDA between 1981 and 2000. The non-adversarial process will be administered by a third-party neutral, who will make individualized determinations based on the evidence presented by each claimant. Successful claimants will receive up to \$50,000 each, plus tax relief on their award and relief of certain outstanding farm loans. Contrary to plaintiffs' repeated assertion that USDA is attempting to "impose" this settlement on farmers or trying to "coerce" potential claimants, whether any individual chooses to participate in the program is entirely up to the individual. Those farmers who wish to pursue other available legal remedies, including filing suit against USDA, may do so. Remarkably, plaintiffs and their attorneys – who claim to represent the best interests of Hispanic farmers – are now asking this Court to stop USDA from offering tens of thousands of farmers (the vast majority of whom are not even before this Court) the opportunity to participate in this program and receive compensation that, absent this program, will take years

² See 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 ("Pl. Class Cert. Memo.") (Docket #182).

to achieve, if it is achievable at all.

Plaintiffs' motion for class certification has two grounds. First, plaintiffs contend that a settlement class should be certified, with attendant Court oversight, because USDA has failed to meet Rule 23 requirements for adequate and proper notice to putative class members. This argument puts the cart before the horse. Class-wide notice is required only where a class has been certified. Here, class certification has been denied, eliminating the application of Rule 23's notice and court-oversight requirements. USDA's decision in its discretion to provide a voluntary ADR process for anyone who accepts its terms does not undermine the effect of the prior decisions denying certification of the same class which plaintiffs again seek to certify. The absence of class certification leaves no legal basis for plaintiffs to argue that the Court should halt the claims process with respect to all other Hispanic farmers or for the Court to grant such relief.

Second, plaintiffs' argument that USDA's failure to treat this case as a class action discriminates against Hispanic and female farmers in violation of the Equal Protection Clause should be rejected out of hand. Every case is different. While the claims procedure here is not identical to the claims processes addressed in other settlements, the suggestion that these differences violate the Constitution – particularly when the claims process here is entirely voluntary – is unsupportable. An essential element of an Equal Protection violation is an intent to discriminate. In this case, as in Love v. Vilsack (C.A. No. 00-2502 (RBW)), USDA has abided by the Court of Appeals decision that this is not a class action. USDA has also abided by the decisions of the district courts in Keepseagle v. Veneman, Civ. No. 99-03119, Memorandum Opinion and Order (D.D.C. Dec. 12, 2001), and Pigford v. Glickman, 182 F.R.D. 341, 348

(D.D.C. 1998), certifying classes. The notion that the Secretary's treatment of these cases in accordance with judicial rulings reflects an intent to favor African-Americans and Native-Americans over Hispanics and women is unsupported and inaccurate. In any event, the program is a fair one, designed to efficiently resolve the claims of those who decide that they prefer the ADR option to full-fledged litigation, and the program is structured in a manner that is comparable to the settlement procedures offered in other cases.

BACKGROUND

The sole remaining claims before the Court are the individual claims of discrimination brought under the Equal Credit Opportunity Act (ECOA), 15 U.S.C. §§ 1691-1691(f), by the 81 named plaintiffs. In 2006, the D.C. Circuit affirmed the district court's denial of class certification of plaintiffs' ECOA claims. Garcia v. Vilsack, 444 F.3d 625 (D.C. Cir. 2006). In 2009, the D.C. Circuit affirmed the district court's dismissal of the claims brought under the Administrative Procedure Act (APA), 5 U.S.C. §§ 701-706, by the Hispanic farmers in this case, and of the APA claims brought by female farmers in Love v. Vilsack, and remanded the cases to the district court on the named plaintiffs' individual claims under ECOA. Garcia v. Vilsack, 563 F.3d 519 (D.C. Cir. 2009). In January 2010, the Supreme Court denied plaintiffs' petitions for certiorari on the APA claims in Love and Garcia. 130 S. Ct. 1138 (Mem.) (2010).

As indicated in USDA's September 27, 2010 Status Report, the United States Department of Agriculture (USDA) is establishing an administrative claims process to provide up to a total of \$1.33 billion to farmers – including the named plaintiffs and potential plaintiffs in this case and in Love v. Vilsack – who allege discrimination by USDA based on being Hispanic, or based on being female, in making and servicing farm loans. Third-party contractors will administer and

adjudicate claims, and each claimant may receive up to \$50,000 each, plus tax relief and debt relief. Participation in this claims process is entirely voluntary. Besides the 81 named plaintiffs, other potential plaintiffs might also file complaints within the applicable statute of limitations, which has been tolled by order of this Court.³ Some or all of the named plaintiffs and potential plaintiffs may seek to participate in USDA's claims process. Their participation will be conditioned on the dismissal with prejudice of their legal claims against USDA.

As indicated in USDA's September 27 Status Report, the agency's initial roll-out of the proposed and entirely voluntary claims process will likely consist of USDA making a public announcement; issuing a press release; mailing a notice and other information about the program to Hispanic (and female) farmers; meeting with stakeholders; launching a website containing information about the claims process; and activating a call center to gather names and contact information from individuals who are interested in receiving material about the ADR process. Information will be made available in multiple languages.

USDA expects to formally announce the establishment of the claims process no sooner than next month. After the program is announced, USDA plans to engage in a robust outreach plan that may include posting of information in USDA field offices, publishing of information through various forms of media (such as newspapers, magazines, television, and radio), holding meetings around the country, and working with community and public interest groups. USDA will make every effort not to communicate with individuals it knows to be represented by counsel, and will indicate that non-represented individuals are free to seek whatever third-party

³ As part of the claims process, USDA will, at a later date, request that the Court lift the tolling of the statute of limitations.

assistance they desire. Detailed information about the proposed settlement and claims process will be provided following USDA's announcement.

After USDA filed its September 27 Status Report, plaintiffs filed their motion for certification of a settlement class, effectively seeking to halt USDA's program on grounds that it does not comport with Rule 23 notice and court-supervision requirements, see Fed. R. Civ. P. 23(c) & (d), and that USDA's failure to treat this case and Love v. Vilsack as class actions violates the Equal Protection Clause.⁴ Plaintiffs have also filed an "emergency" motion to stay the issuance of notice and the initiation of USDA's voluntary claims process until plaintiffs' motion to certify a settlement class is resolved.

ARGUMENT

I. PLAINTIFFS' MOTION FOR CLASS CERTIFICATION SHOULD BE DENIED

⁴ The assertion that "[t]here is absolutely no dispute regarding the underlying discrimination" that has given rise to this case, Pl. Class Cert. Memo. at 20, is erroneous. USDA has never conceded discrimination as to any named plaintiff or potential plaintiff. USDA opposed class certification on grounds that there was no nation-wide discriminatory USDA policy or practice that warranted the certification of a class of affected farmers. In opposing class certification, USDA did not deny that there may have been individual instances of discrimination with respect to certain farmers but asserted that the appropriate route for determining whether there had been such discrimination was to litigate the individual cases. Both this Court and the Court of Appeals agreed. To date, no individual case has been litigated, and there have been no findings of discrimination by any court.

Plaintiffs' reliance on the Civil Rights Action Committee Report ("CRAT") in support of their assertion that USDA discriminated, see Pl. Class Cert. Memo. at 5, undermines their position. The CRAT Report, published by USDA in 1997 in the wake of then-Secretary Glickman's listening sessions with minority farmers, states that "[a]pproval rates for the FSA direct and guaranteed loan programs in 1995 and 1996 varied by region and by state and showed no consistent picture of disparity between minority and nonminority rates." CRAT Report at 21. It also states that "[l]oan processing rates for the FSA direct and guaranteed loan programs also varied widely in 1995 and 1996 and again showed no consistent picture of disparity between minority and nonminority rates." Id.

A. This Is Not Class Action and Rule 23 Does Not Apply

Plaintiffs argue that USDA has proposed a “class-wide settlement,” and that a class should therefore be certified to bring USDA into compliance with Rule 23 requirements regarding court supervision and notice. Pl. Class Cert. Memo. at 9-18. This argument distorts the facts and erroneously assumes that this is a class action and that Rule 23 requirements apply.

1. USDA Is Proposing An Optional Administrative Claims Process, Not A “Class-Wide” Settlement

USDA is not proposing, and has never proposed, a “class-wide” settlement, nor has USDA ever “admitted” that settlement on a class-wide basis is appropriate or manageable in any way. See Pl. Class Cert. Memo. at 10. Rather, after the D.C. Circuit affirmed the denial of class certification, USDA unilaterally decided to establish an administrative claims process to provide up to a total of \$1.33 billion to farmers – potentially including the named plaintiffs and potential plaintiffs in this case and in Love v. Vilsack (C.A. No. 00-2502 (RBW)), and any potential plaintiffs who file suit – who allege discrimination by USDA based on being Hispanic, or based on being female, in making or servicing farm loans. Settlement of claims through this process is entirely voluntary.

If the 81 named plaintiffs do not like the program, they are free to ignore it and continue to litigate their claims before the Court. The same point is true as to any potential plaintiffs who file a complaint before the statute of limitations expires. Contrary to plaintiffs’ allegations, Pl. Class Cert. Memo. at 10, USDA is not involving the Court at all in the claims process or seeking Court approval of the process.⁵ Similarly, USDA is not purporting to reach “putative class

⁵ In the interests of full disclosure, USDA filed its Status Reports to advise the Court about the establishment and timing of the claims process, and about the agency’s intent to avoid

members,” Pl. Memo at 10, because this is not a class action and there are no putative class members to reach. The Court should not certify a class on the basis of a nonexistent class-wide settlement.

Nor should the Court certify a class based on false and unsupported allegations about the possible “abuse” of plaintiffs.⁶ Pl. Class Cert. Memo. at 10, 17. USDA is taking every precaution to avoid communicating with represented parties, and has asked plaintiffs’ counsel to identify its clients other than the 81 named plaintiffs so that they can be removed from USDA’s mailing lists. Plaintiffs’ counsel has not responded to USDA’s request or identified any additional clients. In addition, USDA has repeatedly invited plaintiffs’ counsel to participate in and contribute to the formulation of the claims process as well as USDA’s outreach efforts to Hispanic farmers. To this end, plaintiffs’ counsel have had numerous meetings with the government, including meetings with Secretary of Agriculture Vilsack, Assistant Attorney General Tony West, and Deputy Assistant Attorney General Ian Gershengorn. Therefore, there is no basis for the contention that plaintiffs have been abused or insufficiently informed about this program. See Pl. Class Cert. Memo. at 10-11.

2. This Lawsuit Is Not, And Cannot Be, A Class Action

Plaintiffs ignore the fundamental reality that, as a legal matter, this lawsuit is not a class

contact with represented parties in announcing the claims process. Several of the allegations in plaintiffs’ motion regarding the claims process are at odds with the information provided in the Status Report. To be clear, USDA is not seeking court approval of the ADR program, nor is such approval a prerequisite to proceeding with the claim process.

⁶ Plaintiffs’ motion to certify a class carelessly accuses USDA of engaging in various forms of outrageous conduct, including enticing Hispanic farmers through cash payments to solicit other farmers to sign up for USDA’s voluntary claims process. These fanciful allegations are wholly unsupported and USDA vigorously denies them.

action, and there can be no class-wide settlement. Rule 23(e) permits a settlement of a class action, but the provision does not come into play until a class has been certified. Fed. R. Civ. P. 23(e) (“The claims, issues, or defenses of a certified class may be settled . . .”). The D.C. Circuit affirmed the denial of class certification, Garcia v. Vilsack, 444 F.3d 625 (D.C. Cir. 2006), and plaintiffs declined to seek certiorari on that issue.⁷ Therefore, contrary to plaintiffs’ allegations, Pl. Class Cert. Memo. at 10-18, there is no class to supervise or class-wide settlement for the Court to manage; there are no putative class members at risk of being misled or confused -- and there can be no class counsel.⁸ Because no class has been certified, this Court’s jurisdiction is limited to the individual claims of the 81 plaintiffs named in the complaint. Plaintiffs have no legal basis for asking the Court to halt the voluntary claims process on behalf of all other Hispanic farmers. By the same token, the Court lacks jurisdiction to order relief with respect to any Hispanic farmers other than the 81 individual named plaintiffs.

Plaintiffs’ argument that their self-proclaimed class-wide settlement is a changed circumstance that warrants revisiting the Circuit’s ruling affirming the denial of class

⁷ This Court declined to certify a class only after affording plaintiffs the opportunity to conduct class discovery and to move for class certification **twice**. See Garcia v. Veneman, 224 F.R.D. 8 (D.D.C. 2004). With respect to the discovery, USDA produced the voluminous files of thirty-seven of the named plaintiffs because that is what the Court ordered it to do, having determined that the files would supply a representative sample of the types of claims at issue for purposes of showing a “colorable commonality claim” (which plaintiff failed to do), and that further discovery was “unlikely to change the picture.” Id. at 9-10. The claim that USDA was “unable” to locate the files of the remaining named plaintiffs, Pl. Class Cert. Memo. at 12 n.9, is misleading. USDA would have produced additional files if it had been ordered to do so, insofar as such files existed.

⁸ USDA’s relatively straightforward administrative claims process permits claimants to use attorneys but is designed so that claimants who do not desire legal assistance are able to participate. The ADR program limits attorneys’ fees to \$1,000 for each successful claimant.

certification, Pl. Class Cert. Memo. at 10, is equally unavailing. The relevant facts have not changed since the D.C. Circuit affirmed the denial of class certification, and there is no reason for this Court to alter or amend its findings that plaintiffs failed to meet the commonality requirement of Rule 23(a) and the requirements of either Rule 23(b)(2) or (3). USDA's establishment of a voluntary ADR process in which certain plaintiffs and other farmers may elect to participate, or alternatively proceed to litigate their individual claims, is not a changed circumstance that converts this case into a class action: these are precisely the claims the Court of Appeals found insufficient to certify a class.⁹ In the same vein, although certain individuals may meet USDA's prescribed threshold eligibility criteria for awards in a voluntary administrative claims process, that possibility does not convert those individuals into class members under Rule 23.

The D.C. Circuit affirmed the denial of class certification on the ground that plaintiffs have "failed to identify any centralized, uniform policy or practice of discrimination by the USDA that formed the basis for discrimination against Hispanic plan applicants with varied eligibility criteria in over 2700 counties nationwide over a 20-year period." Garcia, 444 F.3d at 632-33. All relevant circumstances are the same now as when the D.C. Circuit reached this conclusion, and there remains no basis for the certification of a class.¹⁰ See Amchem Prods., Inc.

⁹ This is not a case where rulings issued by the court after certifying a class warrant decertification or modification of the class definition. See Lightfoot v. District of Columbia, 246 F.R.D. 326, 334 n.6 (D.D.C. 2007) (courts "reassess class certification rulings as the case develops, and decertify a class or alter a certification decision if necessary in light of developments in the case") (citing cases).

¹⁰ In support of their argument that a class should be certified, plaintiffs quote the statement in Garcia v. Veneman, 211 F.R.D. 15, 24 (D.D.C. 2002), that "[a] class action may indeed be superior to other methods of adjudicating the claims of Hispanic farmers." Pl. Class

v. Windsor, 521 U.S. 591, 620 n.16, 621 (1997) (stating that proposed settlement classes “sometimes warrant more, not less, caution on the question of certification”). In fact, given the current posture of the case, class certification would be improper. See Bendectin Products Liability, 749 F.2d 300, 305 & n.10 (6th Cir. 1984) (reversing certification of a class for settlement purposes where district court had rejected class certification for trial purposes). This is not a situation in which the parties seek court approval of a settlement before the court has ruled on the issue of class certification, and thus jointly propose a settlement class. Instead, this is a situation in which, after the Court denied plaintiffs’ motion to certify a class, the government developed a voluntary administrative program that potentially includes the named plaintiffs and other claimants.

In plaintiffs’ odd view, the repeated denials of class certification by this Court and the

Cert. Memo. at 22. Plaintiffs omit the statement that followed, viz., “Without predominant [sic] of common questions of law or fact, however, that superiority is not enough to sustain class certification.” 211 F.R.D. at 24. Plaintiffs also fail to quote the Court’s subsequent observation as follows:

The history of the Pigford [v. Veneman, 1:97-cv-01978-PLF (D.D.C.)] (black farmers) class action litigation amply demonstrates that the certification of a plaintiff class to resolve decades of disputes about loans made or not made and disaster relief provided or not provided to thousands of individual farmers, working under disparate conditions and submitting applications to hundreds of different decision-makers (to say nothing of loan applications offered or not offered, loan applications delayed or not delayed, supervised bank accounts required or not required, and loan servicing provided or not provided), would be only the beginning of a lengthy and difficult process in which, as it turns out, it is the “questions affecting only individual members” that predominate. See Fed. R. Civ. P. 23(b)(3).

Garcia v. Veneman, 224 F.R.D. 8, 16 (D.D.C. 2004).

Affirmed by the Court of Appeals, this Court twice denied plaintiffs’ motion for class certification in the past. It should deny class certification a third time for the same reasons.

D.C. Circuit are insignificant events that do not preclude the parties from stipulating to (or this Court from certifying) a settlement class. The sole case on which plaintiffs rely for the proposition that class certification should be revisited involved a situation where class certification was initially granted by the district court. See Pl. Class Cert. Memo. at 22 (citing In re Terazosin Hydrochloride Litig., Case No. 99-MDL-1317-Seitz/Klein (S.D. Fla.), 2005 U.S. Dist. LEXIS 46189). When the district court certified a class for settlement purposes in that case, its findings that the plaintiffs “satisfied the numerosity, typicality, and commonality requirements of Rule 23(a), as well as the predominance and superiority requirements of Rule 23(b)(3) remain[ed] standing,” and its concerns about inadequate representation had been “resolved.” Terazosin, 2005 U.S. Dist. LEXIS 46189, at *12, *15. In contrast, in this case the District Court denied class certification in the present case and then was affirmed by the Court of Appeals. There is no reason for the Court to depart from those rulings now.

B. USDA’s Actions Are Not Discriminatory and Therefore Do Not Violate the Equal Protection Clause

Plaintiffs argue that USDA’s failure to enter into a class settlement in this case discriminates against Hispanic and women farmers in violation of the Equal Protection Clause because USDA entered into a class settlement in Pigford and Pigford II, involving African American farmers, and agreed to a class settlement in Keepseagle, involving Native American farmers.¹¹ This argument is without merit. Critically, USDA has agreed to a class settlement in Keepseagle, and entered into a consent decree in Pigford I, only because the court certified

¹¹ It goes without saying that plaintiffs in this case, who allege discrimination on the basis of ethnicity, lack standing to represent the interests of the plaintiffs in Love, see Pl. Class Cert. Memo. at 18, 19, who allege gender discrimination. See Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992) (Plaintiffs must allege that they have suffered “injury in fact.”).

classes in those cases – over USDA’s opposition. In Pigford II, if a class is certified at all, it will be certified under Rule 23(b)(1) because the amount of money available will be insufficient fully to fund the awards of successful class members.¹² By contrast, no class was certified in the instant case, or in Love, and Rule 23 therefore does not apply. USDA cannot now be deemed to be discriminating merely because it adheres to the law of the case in each of these actions. Moreover, the anticipated claims process is a fair one and is similar in structure to claims processes used in other cases.

The Equal Protection Clause “guarantees equal laws, not equal results,” Personnel Administrator of Mass. v. Feeney, 442 U.S. 256, 273 (1979). Thus, an equal protection violation must be traced to a discriminatory purpose, Washington v. Davis, 426 U.S. 229, 239, 242 (1976), for that is “the condition that offends the Constitution,” Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 16 (1971). See Cook v. Babbitt, 819 F. Supp. 1, 17 n.16 (D.D.C. 1993). Here, the fact that there is no settlement class cannot be traced to an intent to discriminate against Hispanics, but instead to the D.C. Circuit’s holding that no class can properly be certified in this case. Garcia v. Vilsack, 444 F.3d 625 (D.C. Cir. 2006). Given the

¹² Specifically, in Keepseagle, the district court certified a Rule 23(b)(2) class for purposes of pursuing equitable relief, explaining that it lacked a sufficiently developed factual record to rule on the appropriate treatment of the monetary claims. Keepseagle v. Veneman, Civ. No. 99-03119, Memorandum Opinion and Order at 34-35 (D.D.C. Dec. 12, 2001). Under Rule 23(f), the United States appealed the class certification decision regarding equitable relief, but after accepting the appeal, the Court of Appeals declined to hear it until all relevant issues had been fully briefed in the district court and remanded the matter for that purpose. In re: Anne M. Veneman, 309 F.3d 789 (D.C. Cir. 2002). The case is now fully briefed, but no district court decision has been forthcoming. In Pigford, the district court certified a class before the enactment of Rule 23(f) (effective Jan. 1, 1999), and the United States therefore was unable to appeal the class certification decision on an interlocutory basis. Pigford v. Glickman, 182 F.R.D. 341, 348 (D.D.C. Oct. 9, 1998).

absence of any intent to discriminate, USDA's determination that Rule 23 does not apply to this case does not violate the Equal Protection Clause. See Ross Learning, Inc. v. Riley, 960 F. Supp. 1238, (E.D. Mich. 1997) ("The fact that the Secretary offered favorable settlement terms to another school does not by itself create an equal protection violation. . . . The Equal Protection Clause does not promise equal results to all.").

II. PLAINTIFFS' REQUEST FOR A STAY SHOULD BE DENIED

Plaintiffs' motion to certify a settlement class seeks to stay the issuance of notice and the initiation of USDA's voluntary claims process until plaintiffs' motion is resolved.¹³ See Plaintiffs' Motion to Review Defendant's Proposed Notice and Terms of Class-Wide Settlement, and to Certify a Settlement Class (Docket #182) (requesting "that the Court order defendant to hold in abeyance the proposed notice pending resolution of this motion"). Plaintiffs subsequently filed an "emergency motion" seeking the same relief but this time on an "emergency" basis. See Plaintiffs' Emergency Motion to Stay Publication of Defendant's Proposed Notice of a Class-Wide Settlement Pending Court Review (Docket #185). The emergency motion says nothing new, and in fact, is simply an abbreviated version of the motion to certify a class. In both, plaintiffs assert that USDA's voluntary claims process violates Rule 23 notice and court-supervision requirements and should therefore be halted pending the certification of a settlement class.

Any sort of stay on this basis would be unjustified. Rule 23 does not apply because the D.C. Circuit has ruled that this is not a class action. Therefore, it would be inappropriate for the

¹³ Plaintiffs' counsel in Love have not joined in the Garcia plaintiffs' request to stay USDA's plans to roll out the claims process.

Court to stay the claims process so that Rule 23 requirements could be enforced, and plaintiffs have no right to stall the claims process on behalf of nonexistent class members.

Moreover, the “emergency” motion, while purporting to seek immediate relief, was filed pursuant to the routine motions rule, Fed. R. Civ. P. 7, rather than a rule providing for immediate, provisional relief. See, e.g., Fed. R. Civ. P. 65. Plaintiffs make no attempt to meet the stringent standards for emergency interim relief, see CityFed Fin. Corp. v. Office of Thrift Supervision, 58 F.3d 738, 746 (D.C. Cir. 1995), nor could they do so. In addition, as explained above, USDA does not expect to formally announce the claims process, and publish notice of it, until at least next month. Obviously, USDA would abide by any Court order suspending the initiation of the voluntary process, but given that plaintiffs have utterly failed to demonstrate the need for emergency relief and, in fact, have not even attempted to argue the requirements under Rule 65, there is no basis for any relief, much less the emergency relief sought. Nevertheless, given USDA’s intent to proceed with the impending announcement to provide relief to Hispanic and women farmers, USDA urges this Court to rule promptly to deny plaintiffs’ motion. Plaintiffs’ request for a stay should therefore be denied.

CONCLUSION

In their motion to certify a settlement class, plaintiffs insist that the “time-honored adversarial process” requires that a class be certified under Rule 23. Pl. Class Cert. Memo. at 17. It was this same “time-honored adversarial process” that has resulted in class certification being denied by every court that has considered the issue. Now, having found no success in litigation, plaintiffs seek to stop USDA from providing relief to the very same farmers whom plaintiffs (and their lawyers) purport to represent. There is no basis for this Court to preclude USDA from

reaching out to farmers who claim to have been victims of discrimination during this period and offering them the opportunity to participate in an entirely optional compensation program.

Accordingly, for all the reasons set forth above, plaintiffs' motion should be denied.

Respectfully submitted,

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