IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

PLAINTIFFS' CORRECTED RESPONSE TO DEFENDANT'S SIXTH AND SEVENTH STATUS REPORTS

On September 13, 2011, defendant, in conjunction with his Sixth Status Report, lodged with the Court and provided to plaintiffs' counsel what defendant characterized as the "final" versions of (1) the Framework for Hispanic or Female Farmers' Claims Process ("Framework"), (2) the claim form and (3) the Settlement Agreement. Defendant's Sixth Status Report at 1-2. Plaintiffs' counsel have reviewed the documents submitted in connection with the proposed settlement program ("Program") for Hispanic and female farmers who were, and continue to be, victims of admitted and well-documented discrimination by the United States Department of Agriculture ("USDA") in the administration of its farm loan and non-credit farm benefit programs ("farm programs"). On September 18, 2011, defendant submitted his Seventh Status Report, which included a slightly revised claim form. Plaintiffs submit this response to both status reports.

While plaintiffs would welcome a fair and just claims process that does not discriminate among victims of USDA discrimination on the basis of race, ethnicity or gender, the Program unfortunately does not provide such a process. The Program instead provides a process that is a cynical trap for the unwary that, if allowed to be implemented, will lead untold numbers of Hispanic and female farmers to waive valid claims for a flawed and illusory claims process, thereby further victimizing farmers whom USDA has already victimized by decades of admitted discrimination in its farm programs. The Program is all the more cynical because it targets desperate Hispanic and female farmers who, in addition to suffering decades of discrimination, are now suffering through the worst recession since the Great Depression. To make matters worse, defendant seeks to give this cynical Program a veneer of legitimacy by appearing to pass it through the Court.

By this filing, plaintiffs merely seek to provide a further response to the Court's question regarding plaintiffs' "concerns about" the Program that defendant has lodged with the Court. Transcript of July 27, 2011 Status Conference at 8 ("7/27/11 Status Conf. Tr.") (Dkt. 206) Thus, this response is submitted for informational purposes and, as plaintiffs made clear at the last status conference, in responding to the Court's inquiry about the Program plaintiffs are not engaging in claims splitting. See 7/27/11 Status Conf. Tr. at 9. That being said, plaintiffs share the concerns expressed in Plaintiffs' Response to Defendant's Status Report filed October 14, 2011, in *Love v. Vilsack*, C.A. No. 1:00 CV02502, and offer these additional concerns for the Court's consideration.

The Program Places A More Onerous Evidentiary Burden On Hispanic Farmers.

Under the settlement in *In re Black Farmers Discrimination Litig.*, Misc. No. 08-mc-0511 (PLF) (Feb 18, 2010), the so-called *Pigford II* Settlement, in order to recover up to $50,000

in Track A, an African-American claimant must establish, by substantial evidence, each of the following elements:

a. The Class Member is an African-American who farmed, or attempted to farm, between January 1, 1981, and December 31, 1996;

b. The Class Member owned or leased, or attempted to own or lease, farm land;

c. The Class Member applied, or constructively applied, for a specific farm credit transaction(s) or non-credit benefit(s) at a USDA office between January 1, 1981, and December 31, 1996;

d. For claimants who applied—i.e., not constructively applied—for a specific farm credit transaction(s) or non-credit benefit(s), the farm loan(s) or non-credit benefit(s) for which the Class Member applied was denied, provided late, approved for a lesser amount than requested, encumbered by a restrictive condition(s), or USDA failed to provide an appropriate loan service(s);

e. USDA's treatment of the loan or non-credit benefit application(s) or constructive application(s) led to economic damage to the Class Member; and

f. The Class Member complained of discrimination to an official of the United States Government on or before July 1, 1997, regarding USDA's treatment of him or her in response to the application(s).

Pigford II Settlement Agreement, Section V.C.1 (Excerpts at Ex. 1).

Conversely, under the Program, in order to recover up to $50,000 in Tier 1, a Hispanic claimant must establish all of the comparable elements required of an African-American claimant and additionally demonstrate that "[a]t the time the claimant applied for the loan or loan servicing, he or she met all applicable USDA regulatory requirements for the loan or loan servicing" and that "[t]he USDA action was due to discrimination against the claimant, based on being Hispanic or female." Framework at 9-10. Compare *Keepseagle* Settlement Section IX.C.2. (Excerpts at Ex. 2).

With respect to African-American claimants who were discouraged from even applying for loans or non-credit benefits, in order to establish that the claimants "constructively applied,"

the farmer had to establish that he or she "made a *bona fide* effort to apply for a loan or non-credit benefit," by providing the following evidence:

> (1) the year in which the Class Member attempted to apply and the general time period within that year (e.g., late fall, early spring, sometime in January, February, or March);
>
> (2) the type and amount of loan or non-credit benefit for which the Class Member attempted to apply;
>
> (3) how the Class Member planned to use the funds (i.e., identification of crops, equipment, acreage, etc.); and
>
> (4) how the Class Member's plans for a farm operation were consistent with farming operations in that county/area in that year; and
>
> b) USDA actively discouraged the application. Active discouragement may be established by evidence of:
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> (1) statements by a USDA official that, at the time the Class Member wanted to apply, there were no funds available and therefore no application would be provided;
>
> (2) statements by a USDA official that, at the time the Class Member wanted to apply, there were no application forms available; or
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> (3) statements by a USDA official that, at the time the Class Member wanted to apply, USDA was not accepting or processing applications.

Pigford II Settlement Agreement, Section V.C.2.a.

In addition to providing the comparable foregoing proof, Hispanic farmers must demonstrate that "[a]t the time the claimant attempted to apply for the loan or loan servicing, he or she met the eligibility criteria for the loan or loan servicing under USDA's rules." Framework at 11. Hispanic farmers must also provide "[t]he names of other commercial or agricultural banks in the area from which the claimant unsuccessfully sought a loan." *Id.* Furthermore, the Hispanic farmers must provide "[a] sworn, verified, or notarized written witness statement from someone who witnessed the alleged incident" of discouragement or "[a] contemporaneous

written complaint of that incident filed with USDA, either individually or through a representative, within one (1) year of the alleged discriminatory action." *Id.* at 12.

The more onerous requirements placed upon Hispanic claimants regarding constructive applications are particularly pernicious because denying minority farmers applications was the heart of USDA's discriminatory policies and practices. Specifically, USDA operated under a cynical policy formulated by its Office of General Counsel ("OGC") that was designed to permit USDA to continue discrimination in the administration of its farm programs while making it more difficult for minority farmers to prove that discrimination. As Rosalind Gray, a former director of the Office of Civil Rights for all of USDA, explained in a declaration submitted in this case that under "the OGC's policy . . . no matter how blatant the discriminatory conduct might be, there can be no discrimination unless the applicant is 'eligible.'" Declaration of Rosalind Gray, dated April 6, 2002, ("Gray Decl.") ¶20 (Ex. 3). Ms. Gray also testified that "[t]o avoid finding a would-be applicant 'eligible,' county officials often simply refused to give minority farmers a loan application thereby making it impossible for the minority farmer to establish 'eligibility' under the OGC's policy," as per the policy set by the OGC *Id.*

Equally problematic is the requirement that Hispanic farmers, unlike African-American or Native American farmers, must produce "[a] contemporaneous written complaint of that incident filed with USDA…within one (1) year of the alleged discriminatory action." Framework at 12. Again, as former Director Gray testified, "[b]ased upon [her] first-hand knowledge[,] . . . many complaints were destroyed or not accepted at all" by USDA. Gray Decl. ¶20. The requirement is also inconsistent with the Court's prior ruling that § 741,[1] the statute permitting Hispanic and other minority farmers to sue USDA for damages dating back to January

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[1] Agricultural, Rural Development, Food and Drug Administration, and Related Agencies Appropriation Act, 1999, Pub. L. 105-277, § 741, 122 Stat. 2681-30 (codified at 7 U.S.C. § 2279 Note).

1, 1981, "does not require 'written' complaints...." *Love*, Dec. 13, 2001, Memorandum at 11. Indeed, the requirement that a Hispanic farmer asserting a constructive application claim must present a written copy of his complaint is contrary to USDA's own regulations which expressly provide that "[a] complaint *may be filed verbally* or in writing." USDA Notice AO-1174 at 3 (emphasis added) (Ex. 4). The regulation further provides that "[i]f a complainant makes an allegation in person, or through a telephone conversation, and is unable or unwilling to put the allegation in writing, the employees to whom the allegation is made must put the particulars of the complaint in writing." *Id.*

The Program Is A Trap For The Unwary.

Defendant has sent representatives throughout the country misleadingly characterizing the Program as an easy, non-adversarial process for which claimants do not need lawyers. The Framework and defendant's most recent revision to it demonstrate the true extent of defendant's misrepresentations. The "final" version of the Framework states that:

> This document provides general guidance and *does not confer any rights upon potential claimants or bind USDA or the United States in any way.* Before the Claims Period commences, the United States reserves the right unilaterally to modify the terms of this Program or the contents of this document.

Framework at 17 (emphasis added).

In the July 9, 2011 version of the Framework, the last sentence stated that "the United States reserves the right unilaterally to modify the terms of this Program or the contents of this document at any time." July 9, 2011 Draft Framework at 17. The change, which appears to be in response to criticism raised by plaintiffs' counsel at the July 27, 2011 status conference[2], is inconsequential and misleading because the revised "Disclaimer" still states that "[t]his document . . . *does not confer any rights upon potential claimants or bind USDA or the United*

States in any way." Framework at 17 (emphasis added). Given that disclaimer, it does not matter whether the government "reserves the right unilaterally to modify the terms of th[e] Program or the contents of th[e] document" either "[b]efore the Claims Period commences," as provided in the "final" Framework, or "at any time," as initially provided in the July 9, 2011 draft Framework. The revision merely provides the illusion of potential certainty.

Similarly, despite the alleged "non-adversarial" nature of the Program, the Framework expressly provides that "USDA has the right, but not the obligation, *to submit information to the adjudicator in response to any claim filed*." Framework at 8 (emphasis added). The Framework also provides that "USDA will take whatever actions it deems appropriate to review, audit, and monitor the proceedings, *including submissions of responses* to Claims Packages in selected cases. . . ." *Id.* at 14. (emphasis added). Not only does the Framework expressly reserve to USDA the right to submit selective, self-serving information in response to any Claims Package, but it does not provide claimants notice of any such submissions, the contents thereof, or an opportunity to respond to USDA's secret submissions. Indeed, the Framework expressly provides that "the Adjudicator's decision on a claim (including a constructive application claim) *will be based solely on the materials submitted by the claimant in the Claims Package and any materials that USDA may provide in response,*" none of which will be shared with the claimant. *Id.* at 8 (emphasized added).

The ability of USDA to submit selective, self-serving and undisclosed information in response to a Claims Package is all the more problematic because USDA expressly disavows any obligation to provide information in its possession that would assist claimants to prove their

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[2] 7/27/11 Status Conf. Tr. at 10.

claims. The Kafkaesque nature of the Program is brought into stark relief in the requirement that claimant must demonstrate, *without the benefit of any discovery*, that

> [t]he USDA action was due to discrimination against the claimant, based on being Hispanic or female. The claimant must set forth specific facts that support the conclusion that the USDA action was due to such discrimination. Conclusory statements, formulaic allegations, and general impressions will not be sufficient. Facts showing only that a Hispanic or female claimant was denied a loan or loan servicing (or received a loan or loan servicing on less favorable terms than requested) will not satisfy this element. Instead, the claimant must present specific facts that show by substantial evidence that the USDA action was due to discrimination based on the claimant being Hispanic or female.

Id. at 10.

Indeed, precisely because many African-American farmers in the *Pigford* I settlement had difficulty obtaining the evidence needed to prove their claims, Congress set forth in Section 14012 of the Food, Conservation and Energy Act of 2008, Pub. L. 110-246, 122 Stat. 1651 ("2008 Farm Bill"), the information that USDA would be required to provide to claimants upon request. Section 14012, in pertinent parts, provides that upon request, the Secretary shall provide to the claimant a report on farm credit loans and noncredit benefits, as appropriate, made within the claimant's county (or if no documents are found, within an adjacent county as determined by the claimant), by the Department during the period beginning on January 1 of the year preceding the period covered by the complaint and ending December 31 of the year following the period.

Section 14012(e)(1)(A).

Subpart B of that section further provides that

> A report under sub-paragraph (A) shall contain information on all persons whose application for a loan or benefit was accepted, including – (i) the race of the applicant; (ii) the date of the application; (iii) the date of the loan or benefit decision, as appropriate; (iv) the location of the office making the loan or benefit decision, as appropriate; (v) all data relevant to the decision-making process for the loan or benefit, as appropriate, and (vi) all data relevant to the servicing of the loan or benefit, as appropriate.

Section 14012(e)(1)(B).

Significantly, the *Pigford II* Settlement waives all rights to the data prescribed by Congress. In the Program, USDA imposes that waiver upon Hispanic and female farmers while it reserves the right to respond secretly and selectively to any Claims Package. Even at USDA, it is extremely unlikely that a loan official would admit in writing or before witnesses that a claimant's application was denied or otherwise subjected to adverse action because the claimant is Hispanic or female. It is equally unlikely that any individual would have enough personal knowledge of another's financial circumstances to prove that they are financially similarly situated. Yet under the Program, absent such extremely unlikely if not impossible circumstances, the Adjudicator could conclude that a claimant had failed to "present specific facts that show by substantial evidence that the USDA action was due to discrimination based on the claimant being Hispanic or female."[3] Framework at 10. Such a process is a prescription for untold thousands of claimants, who have been told by defendant that they have no need for legal representation, to waive valid claims as the price for pursuing an illusory claims process that in the final analysis is a cruel and cynical hoax.

Defendant's claim that the process will be independently administered does not make the process any less problematic. USDA has a sordid history of not only discriminating against minority farmers and refusing to investigate their discrimination claims[4], but of using a supposedly "independent" entity to rubberstamp agency actions. In 1994, USDA established "[a] new, independent, National Appeals Division (NAD)" to handle appeals from agency decisions. The Civil Rights Action Team Report on Civil Rights at the United States Department of Agriculture ("CRAT Report") at 23. (Ex. 5) The CRAT Report found serious questions about "the integrity of the new NAD appeals systems" and "the influence of OGC [USDA's Office of General Counsel] and the Justice Department over NAD." *Id.* According to the CRAT Report,

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[3] In this respect, African-American and Native Americans claimants face a similar fate because the settlements negotiated on their behalves free USDA of any obligation to assist claimants in proving their cases.

[4] See, *e.g.,* Gray Decl. ¶¶ 20 and 28.

based upon information received through the Freedom of Information Act, "when hearing officers ruled for the agencies, they were…[upheld] 98 percent of the time, but when they ruled for the farmer, these same hearing officers were…[reversed] over 50 percent of the time." Id. at 23-24. In the words of William Arens, a longtime farmers' advocate, testifying after the period covered by the Program,

> *[t]he Farm Loan Manager continues to discourage applications*, alter Farm and Home Plans, and deny applications with little or no effective oversight. *A manager need not fear that clearly erroneous and discriminatory decisions will be effectively corrected through the USDA appeal process.*

Declaration of William Hodgson Arens, dated November 19, 2003, ¶ 7 (emphasis added). (Ex. 6)

Such a history calls into question the integrity of a process that gives absolute, irrevocable authority to reject claims to a supposedly "independent" adjudicator who is selected and paid by USDA and required to "report[] to USDA on the progress of the Claims Process and the results of adjudication." Framework at 4. In addition, the fact that the Framework expressly grants USDA audit authority "to determine if the claims review process is . . . *functioning as prescribed*" and the authority to "monitor and oversee the efficiency of the Administrator's actions" raises serious concerns about the Program's integrity. *Id.* at 15 (emphasis added). For example, is there a "prescribed" percentage of claims that are to be approved or rejected? If not, how will USDA determine whether "the Program is functioning as prescribed"? What does USDA mean by the "efficiency of the Administrator's actions" and how does USDA intend to determine it? The concerns raised by such provisions are only heightened by the fact that even if USDA expressly stated in the Framework precisely how it interprets those provisions and how it would exercise the authority granted by them, any such statements would still "*not confer any rights upon potential claimants or bind USDA or the United States in any way*." Framework at 17 (emphasis added).

Now That The Program Is Final, The Court Should lift The Stay In The *Cantu* Case.

In the Sixth Status Report, defendant states that there will be some delay implementing the final Framework, owing to a challenge to the selection of the claims administrator. The Seventh Status Report indicates that the selection of the Administrator will be made by November 30, 2011.[5] The delay in selecting the claims administrator should not further delay consideration of *Cantu v. Vilsack*, C.A. No. 1:11CV00541 (RBW), which alleges that USDA and the Department of Justice, among others, have discriminated against Hispanic farmers in the administration of justice. Simply put, the administrator's identity has no bearing on the discrimination alleged in *Cantu*.

In order to make the best use of the current delay, plaintiffs urge the Court to address the pending *Cantu* case. This Court and the *Cantu* case are all that stand in the way of untold numbers of Hispanic and female farmers being further victimized by a cynical Program that is blatantly discriminatory on its face, and that encourages desperate discrimination victims to waive valid claims as the price to participate in a flawed and illusory claims process. Accordingly, plaintiffs request that the Court continue the stay in the instant case and address the pending motions in the *Cantu* case.

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[5] That status report also attaches a revised Claim Form which defendant indicates was "provided to [*Garcia*] plaintiffs counsel," following a "meeting with plaintiffs' counsel in *Love*." Seventh Status Report at 2. To the extent that defendant seeks to suggest that plaintiffs' counsel has been unwilling to meet with defendant as defendant erroneously suggested at the last status conference (7/17/11 Status Conf. Tr. at 4), any such suggestion is unfounded. At the last status conference, defendant's counsel stated that defendant was "very open to any . . . suggestions" and indicated that defendant's counsel was willing to meet to discuss such suggestions. *Id.* In response to that representation, plaintiffs' counsel, immediately upon the conclusion of the status conference, asked Ms. Olson when she would like to meet to discuss plaintiffs' concerns, some of which were raised during the status conference. *See id.* at 9-10. Although there were still four days left in July, Ms. Olson stated that she could not meet because she would be on vacation for the entire month of August. Anxious not to waste an entire month and to take advantage of defendant's newly expressed openness to discussion, which reflected a surprising reversal of defendant's previously stated position, plaintiffs' counsel, on August 4, 2011, wrote to Assistant Attorney General West requesting a meeting at any mutually convenient time with anyone connected to the case who was not vacationing the entire month of August. (A copy of the letter is attached as Ex. 7). To date, there has been no response to that letter. Instead, on September 13, 2011, Ms. Olson forwarded what she characterized as the "final"

Respectfully submitted

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versions of the documents lodged with the Court in connection with the Program. Defendant's Sixth Status Report at 1-2.