
**In the United States Court of Appeals
For the District of Columbia Circuit**

Case No. 04-5449

**Rosemary Love, *et al.*,
*Appellants,***

v.

**Michael Johanns, Secretary, United States Department of Agriculture,
*Appellee.***

On Appeal from the United States District Court
for the District of Columbia
(Honorable James Robertson)

**BRIEF OF APPELLANTS
ROSEMARY LOVE, *ET AL.***

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(Continued from front cover)

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to D.C. Cir. Rule 28(a)(1), Appellants Rosemary Love, *et al.*, submit the following:

(A) Parties and Amici.

The Appellants and Plaintiffs below are Rosemary Love, Lind-Marie Bara Weaver, Gail Lennon, Margaret Odom, Joyce A. King, Phyllis L. Robertson, Edith L. Scruggs, Maryland B. Wynne, Mary L. Brown, and Joyce Acomb, on behalf of themselves and all others similarly situated.

Amici who have appeared before this Court in support of Appellants/Plaintiffs are National Women's Law Center, Impact Fund, National Employment Law Association, and Lawyers' Committee for Civil Rights Under Law.

The Appellee and Respondent below is Michael Johanns, Secretary, United States Department of Agriculture.

Amicus who has appeared before this Court in support of Appellee/Respondent is Chamber of Commerce of the United States.

(B) Rulings Under Review.

The rulings under review are (1) the Memorandum Opinion and Order issued by the United States District Court for the District of Columbia on September 29, 2004, reported at 224 F.R.D. 240 (D.D.C. 2004) (Robertson, J.) [JA 1086-100]; and (2) the unreported Memorandum and Order issued by the United States District Court for the District of Columbia on December 13, 2001, No. 1:00cv02502 (Robertson, J.) [JA 14-90].

(C) Related Cases.

There are no related cases as defined in Circuit Rule 28(a)(1)(C). *Garcia v. Johanns*, Nos. 04-5448, 05-5002 is an unrelated case involving different appellants and the same appellee, Michael Johanns, Secretary, U.S. Department of Agriculture, and raising similar but distinct issues on appeal. By order dated June 23, 2005, the D.C. Circuit declined to consolidate this appeal with the *Garcia* appeal, but ordered the two cases to be heard by the same panel on the same day.

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* *Authorities upon which Appellant chiefly relies are marked with asterisks.*

GLOSSARY

The following abbreviations are used in this brief:

APA	=	Administrative Procedure Act, 5 U.S.C. §§ 701 <i>et. seq.</i>
ECOA	=	Equal Credit Opportunity Act, 15 U.S.C. §§ 1691 <i>et. seq.</i>
USDA	=	United States Department of Agriculture
JA	=	Joint Appendix

JURISDICTION

The District Court had subject matter jurisdiction over this case pursuant to 15 U.S.C. § 1691, 15 U.S.C. § 1691e, 28 U.S.C. § 1331, 28 U.S.C. § 1343, 28 U.S.C. § 2201, 5 U.S.C. § 706 and 7 U.S.C. § 2279.

This Court has jurisdiction pursuant to Fed. R. Civ. P. 23(f) and Fed. R. App. P. 5, for the appeal of the District Court's decision dated September 29, 2004 denying Appellants' motion for class certification, and pursuant to 28 U.S.C. § 1292(b) for the appeal of the District Court's decision dated December 13, 2001 dismissing Appellants' claims under the APA and ECOA. Appellants submitted timely motions to certify the District Court orders for interlocutory review, on October 14, 2004 and December 17, 2004, respectively. This Court granted both of Appellants' petitions for interlocutory review, on December 16, 2004 and February 23, 2005, respectively.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Did the District Court err in denying certification for subclass 1 where all putative class members have experienced the identical treatment from USDA - - not being given loan applications on the basis of gender, despite a regulation that requires them to be provided?

2. Did the District Court err in denying class certification for subclass 2 by requiring predominantly subjective decision-making and a statistical analysis made impossible by the absence of USDA data?

3. Where Appellants demonstrate that common treatment of class members predominates over individual questions and that a class action is the most effective method of litigation, and Appellants seek primarily injunctive relief, is Fed. R. Civ. P. 23(b) satisfied?

4. Do Appellants' allegations of failure to investigate discrimination complaints state a claim under the APA and ECOA?

STATUTES AND REGULATIONS

All pertinent statutes and regulations are contained in an accompanying addendum.

STATEMENT OF THE CASE

Appellants in this case are women who farmed or attempted to farm and who were denied loan applications or loans from USDA on the basis of gender. They filed the lawsuit on October 19, 2000,¹ asserting class claims that arise under ECOA, 15 U.S.C. §§ 1691 *et seq.*

¹ Although ECOA contains a two-year statute of limitations, 15 U.S.C. § 1691e(f) (2004), Congress enacted legislation that retroactively extended the limitations period back to 1981 for certain claims

(2004), which prohibits gender discrimination in the extension of credit, and under the APA, 5 U.S.C. §§ 701 *et seq.* (2005). The APA claim for USDA's failure to investigate was dismissed by the District Court on December 13, 2001.

Appellants filed a Motion for Class Certification on January 16, 2004, seeking class certification for two of the subclasses set forth in the Third Amended Complaint: (1) women requestors who were refused USDA farm loan applications on the basis of gender, and (2) women applicants who were denied USDA farm loans on the basis of gender. On September 29, 2004, the District Court denied class certification, finding that Appellants failed to demonstrate sufficient commonality under Rule 23(a) and that the request for monetary relief precluded compliance with Rule 23(b)(2) or Rule 23 (b)(3).

The District Court stayed the proceedings so that Appellants could seek immediate appellate review of the class certification questions raised in its Opinion, and to appeal the dismissal of the failure to investigate claim under ECOA and the APA. This Court granted interlocutory review on both class certification and the ECOA/APA claim.

STATEMENT OF FACTS

According to the Census of Agriculture, there are more than 160,000 women who operate farms in the United States. [JA 923.1-23.3] However, the structures, policies and practices of USDA's farm loan programs, implemented by the Farm Service Agency, have vested virtually unrestrained authority in local officials, whose numbers were overwhelmingly male, to administer these programs. The result has been a consistent record of gross

against USDA, including Appellants' claims. Pub. L. No. 105-277, Div. A, § 101(a), 112 Stat. 2681-30 (Oct. 21, 1998) (codified at 7 U.S.C. § 2279).

discrimination against women, a record that USDA's Washington officials have seen fit to permit to continue unabated for more than forty years.

This litigation constitutes an effort by women, led by ten named plaintiffs and buttressed by 1,823 declarants, to change the system that has allowed, indeed supported, unconscionable disparate impact around the country. Appellants are women who have sought farm loans from USDA, but were discriminatorily denied those loans on the basis of gender. There are two subclasses at issue here: subclass 1 includes women who requested but were denied loan applications because of gender discrimination, while subclass 2 includes women who applied for but never received any loans as a result of gender discrimination.² Appellants' class claims arise under ECOA, which prohibits gender discrimination in the extension of credit. Appellants were discriminated against by USDA in obtaining loan applications and in the granting of farm loans as a result of a nation-wide system that has allowed (and ultimately encouraged) local officials to flout their obligations to women applicants by refusing to provide applications, and by denying loans on the basis of subjective and non-reviewable criteria. USDA's failure to even investigate their claims of gender discrimination also violates ECOA and the APA. Appellants have requested both monetary damages and an array of injunctive and declaratory relief that is intended to compel reform of USDA's long-standing pattern and practice of gender discrimination.

² Appellants also asserted a third subclass, for which certification has not yet been sought – women who obtained at least one farm loan, but experienced delays in receiving the loan or difficulty in obtaining loan servicing, or who were discriminatorily refused other loans. Subclasses 1 and 2, for which certification is presently sought, involve fewer potential issues of individual circumstances than the third subclass. Other class action farm loan cases against USDA, including *Pigford v. Glickman*, 185 F.R.D. 82 (D.D.C. 1999) (Friedman, J.), *aff'd*, 206 F.3d 1212 (D.C. Cir. 2000), *Keepseagle v. Johannes*, C.A. No. 99-03119 (D.D.C.) (Sullivan, J.), and *Garcia v. Johannes*, C.A. No. 00-2445 (D.D.C.) (Robertson, J.), have each been brought by single classes of plaintiffs, in contrast to the three distinct subclasses here.

USDA's history of gender discrimination is well known and the agency has stubbornly resisted change. For four decades, beginning in at least 1965 and continuing until the present, USDA's pattern and practice of discrimination against minority farmers, including women, has been the subject of much criticism. [JA 286, 379] USDA's gender discrimination continued to pervade its farm loan programs throughout the 1990s and even up to the present day. [JA 379] A study conducted for USDA by a private contractor reached the conclusion that women farmers' participation in USDA farm loan programs was significantly lower than males' and that women received on average smaller loans than did male farmers. [JA 792, 793] In 1997, USDA's own Civil Rights Action Team issued a report that described a continuing pattern and practice of discrimination against women and other minority farmers. [JA 286] USDA's persistent discrimination against women was noted by Secretary of Agriculture Dan Glickman, [JA 830], and by the U.S. Civil Rights Commission as late as 2003. [JA 379]

It is irrefutable that women have received far less than a proportionate share of farm loans based on the number of women farmers. The statistical evidence adduced by Appellants demonstrates that women farm operators received both fewer loans and fewer dollars than they should have received had the program operated fairly on a national basis. Appellants' expert, Patrick M. O'Brien, studied official USDA farm census and other data to conduct his analysis. [JA 230-31] These data from the national, state and county levels pertaining to farm operations and loans consistently demonstrate the adverse affects of a discriminatory system. For example, during the relevant time period, women comprised approximately 6.9 percent of farm operators but received only 3.2 percent of credit, less than half of what would be expected had the system operated proportionately. [JA 233] Nor did women fare any

better with regard to the number of loans. Nationally, women operators received only 52 percent of the number of loans they could have expected had they received a proportionate share of the loans. [JA 238] In approximately 77 percent of the counties nationwide, women received less than their proportionate share of USDA farm loans [JA 238], and in approximately 83 percent of the counties nationwide, women received less than their proportionate share of USDA loan monies. [JA 234] Appellants submitted 1,823 declarations from putative class members bringing to life these cold statistics and recounting their experiences with USDA's routine and persistent nationwide discrimination.

The structure of USDA's national loan system allows this gender discrimination to flourish. USDA's administrative headquarters in Washington, D.C. is the central authority for USDA's farm loan system. *See* 7 U.S.C. § 1921 (2004). USDA centrally issues loan-making criteria, establishes loan policy and mandates what data will be recorded and preserved. 7 U.S.C. § 1981 (2004). There is also a central National Appeals Division, where disappointed applicants may lodge challenges to loan decisions. 7 C.F.R. § 11.2 (2000). USDA also has a central Office of Civil Rights, where complaints of discrimination could theoretically be brought. 7 C.F.R. § 15.6 (2004). But as numerous congressional and other reports have documented, the Office of Civil Rights has been understaffed, overwhelmed and essentially non-functional for so many years that it could not be considered effective. [JA 383-84] In early 1983, the civil rights enforcement arm of USDA was effectively dismantled, leaving women no opportunity to have their complaints of gender discrimination investigated and redressed. *Keepseagle v. Veneman*, C.A. No. 99-03119, at 5 (D.D.C. Dec. 12, 2001) (Sullivan, J.), *petition for leave to appeal denied* (D.C. Cir. Oct. 29, 2002). Congress reacted to learning of USDA's gross deficiencies in investigating complaints of discrimination by

extending the statute of limitations under ECOA. Pub. L. No. 105-277, Div. A, § 101(a), 112 Stat. 2681-30 (Oct. 21, 1998) (codified at 7 U.S.C. § 2279). That extension permitted the filing of this lawsuit.

Notwithstanding USDA's centralized authority, it has chosen to operate a system in which decision-making with regard to individual farm loans is vested in the hands of USDA officials at the local level. *See, e.g.*, 7 C.F.R. § 7.2 (2000). The dissemination of loan applications and the decision to grant an applicant a loan are functions that are committed to the authority of local officials in county offices. [JA 803, 1096]

Although USDA regulations require that all persons requesting loan applications must receive them, this mandate is routinely ignored by USDA, and county offices all over the country have repeatedly refused to provide applications to women. Appellants submitted 1,082 declarations of women who had been refused applications. They were told that they were too early to apply for a loan, too late to apply for a loan, that it would be useless to apply for a loan, that their husband should apply for a loan, and even that farming is for men, not women. USDA had and has no check at the national level to ensure that loan applications are disseminated.

A woman who succeeds in applying for a loan is required to satisfy USDA eligibility requirements. Local officials determine whether these eligibility requirements are met. 7 C.F.R. § 1910.4 (2000). As noted by the District Court in *Garcia v. Veneman*, USDA at the national level has established criteria to be utilized by local officials in making determinations of eligibility for farm loans. [JA 12, 14-15] During the majority of the time period at issue, seven factors were to be considered by local USDA officials to determine eligibility: the applicant's (1) U.S. citizenship; (2) legal capacity to incur loan obligations; (3) education or

farming experience; (4) character; (5) commitment to carry out undertakings and obligations; (6) inability to obtain credit elsewhere; and (7) farm size. *See* 7 C.F.R. §§ 1941.12 (2000) (operating loan criteria), 1943.12(a) (2000) (ownership loan criteria), 764.4 (2004) (emergency loan criteria). Of these factors, only the threshold criteria of citizenship and legal capacity are truly objective. All the other factors are interpreted by local officials without meaningful guidance or review from USDA's central authority. For example, it is left to the discretion of the local official to determine whether a farmer meets the criterion of inability to obtain credit elsewhere. There are no meaningful guidelines as to how an applicant should demonstrate that she cannot borrow from a commercial lender or family member. So if an applicant can perhaps get a loan from a private lender at an exorbitant rate or with unworkable terms, she may nonetheless be found to be capable of obtaining credit elsewhere. Similarly, for many years the "farm size" criterion required that an eligible farm constitute a "family farm," which was loosely defined as a "farm which . . . [p]roduces agricultural commodities for sale in sufficient quantities so that it is recognized in the community as a farm rather than a rural residence." *See* 7 C.F.R. § 1941.4(d) (2000). It is left to the local county committees to distinguish between a family farm and a rural residence based on never articulated, amorphous community standards. Women applicants have even been told that farming is not "women's work." The consistent result has been rejected loan applications with the resultant need for many women to sell portions of their farms or to abandon farming.

SUMMARY OF ARGUMENT

The District Court erred in concluding that Appellants failed to demonstrate sufficient commonality under Fed. R. Civ. P. 23(a) to certify either subclass 1, women requesters who were not provided with farm loan applications because of gender discrimination, or subclass 2, women applicants who were denied USDA loans because of gender discrimination. The District Court simply ignored subclass 1 and did not analyze the common nature of the claims. With regard to subclass 2, while stating that Appellants need not demonstrate entirely subjective decision-making, the District Court actually applied a contrary test, fashioning an unprecedented, unworkable standard that utilizes a spectrum of objectivity, giving great weight to criteria that appear to be partially objective, but are in reality almost wholly subjective and susceptible to USDA manipulation. The District Court failed to credit Appellants' nearly two thousand declarations and statistical evidence showing the vast disparity in loans received by females as compared with males.

The District Court further erred in finding that Appellants could satisfy neither Rule 23(b)(2) nor Rule 23(b)(3). With regard to Rule 23(b)(2), the District Court improperly disregarded Appellants' request for important injunctive relief that would reform USDA's long standing discriminatory practices, and held that Appellants' mere request for compensatory damages proved that their monetary damages predominate over their claims for injunctive and declaratory relief. With regard to Rule 23(b)(3), issues common within each of the two subclasses plainly predominate over individual circumstances. Because there is a consistent USDA approach with results giving rise to an inference of discrimination, Appellants should not have been required to demonstrate that USDA operated pursuant to an "overarching policy" of discrimination to show commonality. The District Court again applied the wrong

standard for Rule 23(b)(3) purposes in focusing on class members' differences rather than on their similarities.

Finally, the District Court also erred in dismissing Appellants' claims under the APA and ECOA for failure to investigate their complaints of discrimination. Investigation of a complaint in connection with the extension of credit is specifically included within the actions governed by ECOA. The APA is also applicable because it provides a method for reviewing an action to which an administrative agency has committed, here the investigation of discrimination complaints.

In light of these significant errors, this Court should reverse the District Court's denial of class certification and order that the two subclasses be certified, with guidance for both this and other cases as to the proper standards to be applied. This Court should also reverse the District Court's Order dismissing Appellants' APA and ECOA claims for failure to investigate complaints and hold that Appellants have stated a valid cause of action.

ARGUMENT

I. APPELLANTS HAVE SATISFIED RULE 23(a) COMMONALITY

The District Court found that Appellants had satisfied all of the requirements of Fed. R. Civ. P. 23(a) except that of commonality.³ [JA 1087-88] Appellants' focus for this appeal is accordingly the precepts of Rule 23(a) commonality and the application of those legal concepts to USDA's farm loan decision-making system.

A. The District Court Erred in Finding That Appellants Failed to Demonstrate Commonality Where USDA Routinely Refuses to Disseminate Loan Applications to Subclass 1 Members.

The District Court conducted no analysis whatsoever with regard to the commonality of subclass 1 and simply included subclass 1 in its denial of certification under Rule 23(a) after discussing the commonality issues affecting primarily subclass 2. [JA 1092, 1094] Subclass 1 satisfies the commonality requirements of Rule 23(a) and should have been certified.

Subclass 1 is essentially the prototype for Rule 23(a) commonality. All subclass 1 members had the same experience – they requested and were denied farm loan applications. In support of its motion for class certification, Appellants submitted 1,082 declarations from putative subclass 1 members, all of whom were denied loan application forms. Women who requested applications have been informed that, for example, they were too early to apply for a loan, too late to apply for a loan, that they need not bother filling out an application because they were not eligible to receive a loan, or that their husbands should apply. [JA 536-43] The individual circumstances of the denials are immaterial, however, because there is no basis for

³ The District Court treated commonality and typicality together for Rule 23(a) purposes. *Id.*

refusing to distribute loan applications to requestors, pursuant to USDA's own regulations. *See, e.g., Chiang v. Veneman*, 385 F.3d 256, 265-66 (3d Cir. 2004) (affirming certification of class of individuals who sought to apply for USDA loans but were discriminatorily prevented from doing so by being refused applications or by being put on a permanent waiting list).

A USDA regulation requires that local officials provide a farm loan application to anyone who requests it, but that regulation has been routinely violated. 7 C.F.R. § 1910.4(b) (2000). USDA's central administration has and had no check to ensure compliance with its own regulation, thereby permitting local officials to flout the regulation and make their own decisions as to who will receive farm loan applications.

While this case involves the denial of credit brought under ECOA, it is very analogous to a failure to hire or failure to promote case brought under Title VII of the Civil Rights Act. In such a case, it would make no difference for class certification purposes if a woman at one location was explicitly told that the company did not hire women, while a woman at a different location was given an employment test more difficult than that given to men, and a woman at a third location was told vaguely that she did not have the "character" for the job. All women would be permitted to join together in a class action because of their common treatment by the company, resulting from the company's hiring practices. This common corporate practice, made possible because of the delegation of authority to the local official, has been the basis for numerous class actions pursuant to Title VII.⁴ *See, e.g., Shipes v. Trinity Industries*, 987 F.2d 311, 316 (5th Cir. 1993) (two facilities used "same subjective

⁴ Both in analyzing the ECOA statute and in evaluating the basis for class actions brought under ECOA, courts often look to the employment discrimination arena. [JA 1071 n.3] *See also Pigford v. Veneman*, 182 F.R.D. 341, 345 (D.D.C. 1998); *Massey v. First Greensboro Home Equity, Inc.*, No. 97-

criteria” and had common handbooks and procedures); *McReynolds v. Sodexo Marriott Servs., Inc.*, 208 F.R.D. 428, 441 (D.D.C. 2002)(companywide policy of delegated discretionary authority); *Morgan v. UPS*, 169 F.R.D. 349, 356 (E.D. Mo. 1996) (uniform personnel policies that permitted subjective decision making in decentralized structure); *Cook v. Billington*, No. 82-0400, 1992 WL 276936 (D.D.C. Aug. 14, 1992) (central policy making with subjective, decentralized decision making).

The issues presented by subclass 1 are analogous to those in public accommodation cases, where courts have certified classes in which common questions of law, as well as factual differences, are present. *See, e.g., Hewlett v. Premier Salons Int’l, Inc.*, 185 F.R.D. 211, 216-17 (D. Md. 1997) (finding commonality that was not negated by factual differences, *e.g.*, the type of service requested). USDA keeps no data whatsoever concerning the number of applications requested or distributed, precluding any “statistically valid” analysis. Yet the 1,082 declarations of putative subclass 1 members from all over the country vividly demonstrate the breadth of the problem and the sameness of the subclass 1 members’ experiences. [JA 536-43] This extensive anecdotal evidence reveals the repetitive, discriminatory conduct by USDA faced by women throughout the country. Their recitation of comparable treatment by local USDA officials around the country is not mere coincidence. Because USDA recorded and maintained no data with regard to the dissemination of loan applications (or the failure to disseminate the applications), no statistical evidence specifically comparing the number of men who did not receive applications could be adduced.⁵ The

1292-CIV-T-17, 1998 WL 231141, at *9 (M.D. Fla. Apr. 27, 1998) (“[i]n analyzing the ECOA statute, courts have frequently imported from the employment discrimination arena”).

⁵ Regarding subclass 1, USDA has never maintained data on the number of applications distributed or requested.

District Court failed to consider that the 1,082 declarations demonstrated the common experiences of subclass 1 members was the best available evidence of the actual operation of USDA's loan application system in the absence of any composite data, and thus an appropriate basis upon which to allow certification of the class.

Subclass 1 meets the commonality requirements of Rule 23(a). Women were denied even the opportunity to apply for loans. Yet, the Court below failed to even address the issue. That failure should be reversed and the subclass certified.

B. The District Court Erred in Requiring Predominantly Subjective Criteria, as well as in Rejecting Appellants' Statistical Analysis, and Subclass 2 Should Be Certified.

The District Court erred in denying class certification for subclass 2. While acknowledging that an entirely subjective decision-making system is not necessary, the District Court then applied a test that in fact requires complete subjectivity. Because various reasons were given to the 859 declarants whose loan applications were submitted but denied, the District Court ruled that Appellants had failed to provide "a substantial showing that would permit the inference that members of the class suffered from a *common policy of discrimination* that pervaded all of the challenged decisions." [JA 1094-95 (emphasis in original)] This Court and others, however, have held that such a common policy does exist when significantly subjective decision-making operates on a national basis with discriminatory results. The District Court erroneously ignored this teaching and should therefore be reversed.

The District Court similarly failed to credit 859 declarations submitted by Appellants in support of class certification of subclass 2. The declarations, coupled with statistical evidence that shows the disproportionately small numbers of loan dollars awarded to women

farmers, was discounted by the District Court as insufficient to establish commonality due to the lack of adequate statistical analysis. In so holding, the District Court both failed to apply the correct legal standard and to give appropriate weight to Appellants' evidence in support of class certification.

1. The District Court's Creation of a Subjectivity Spectrum

While acknowledging that an entirely subjective decision-making system is not required to establish Rule 23(a) commonality, *General Telephone Co. of the Southwest v. Falcon*, 457 U.S. 147, 158-59 & n.15 (1982), the District Court in actuality held otherwise.⁶ The District Court denied class certification for subclass 2, in part, because some objective criteria are to be considered by local USDA officials in their subjective decision-making processes.

The District Court created its own entirely new standard for determining how subjective a system must be in order to demonstrate a common policy of discrimination. The District Court formulated a subjectivity spectrum. At one end of the spectrum, the decision-making is entirely objective, at the other the decision-making is completely subjective. [JA 1091] While finding that "plaintiffs are certainly *correct* that the criteria set forth in USDA's regulations for making farm loans during the years in question were subjective *in many of their parts*," the District Court nonetheless held that several of the criteria "register more

⁶ As the District Court noted, the Supreme Court's commentary in *Falcon* on excessively subjective decision-making is not relevant here. [JA 1090] In *Falcon*, the plaintiff, a Mexican-American employee of the defendant, sought to represent a class of all Mexican-American employees and applicants, claiming across the board discrimination in hiring and promotions. *Falcon*, 457 U.S. at 151. In contrast, Appellants here seek to represent only those who have experienced the same discrimination as Appellants in the distribution of farm loan applications and in the granting of farm loans, and there are different class representatives for the two subclasses.

nearly at the ‘objective’ end of the subjectivity spectrum.”⁷ [JA 1092 (emphasis added)] It then concluded that because three of the seven criteria had objective elements, USDA’s loan decision-making are insufficiently subjective to demonstrate the requisite commonality. [JA 1092] The District Court’s analysis is a radical departure from any established measure for determining Rule 23(a) commonality and establishes an unworkable standard whose application would require a district court to conduct an impermissible review of the merits at the class certification stage.

Neither this nor any other circuit has ever utilized a spectrum of subjectivity standard to determine whether a decision-making system satisfies the commonality requirement. *See, e.g., Wagner v. Taylor*, 836 F.2d 578, 594 (D.C. Cir. 1987). Appellants have found no reported case in which such a standard has been recognized. As the court pointed out in *McReynolds v. Sodexo Marriott Services, Inc., Falcon’s* footnote “carved out an exception to the across-the-board rule for ‘entirely subjective *decisionmaking processes*,’ rather than requiring entirely subjective hiring criteria. 208 F.R.D. 428, 441-42 (D.D.C. 2002). The

⁷ The reasons for loan denial cited by the District Court as being more nearly objective than subjective are: (1) failure to meet collateral requirements; (2) poor credit; and (3) insufficient income. [JA 1092] However, this is inconsistent with the regulations, which provide little guidance on what constitutes “poor” credit, “insufficient” income, or sufficient collateral. Nor did the District Court consider why, loans were actually denied – on objective or subjective bases – and thus it is unclear how it could summarily dismiss Appellants’ claims of discriminatory treatment in the dissemination of farm loans by USDA. As the declarations submitted by Appellants show, many times women were told that their applications were being denied based on one or several of these subjective criteria, without USDA even conducting a review of their applications. [JA 992-23 (upon turning in her loan application, Edith Scruggs was informed by a local official that she did not have sufficient farming experience or collateral, despite her more than 15 years farming experience and farm equipment and property offered as collateral)]

cases cited by the District Court as the premise for a spectrum of objectivity standard, *Stastny v. Southern Bell Telephone & Telegraph*, 628 F.2d 267 (4th Cir. 1980), and *Hartman v. Duffey*, 19 F.3d 1459 (D.C. Cir. 1994), do not so hold and no sliding scale of subjectivity was employed.

In fact, in *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977 (1988), the United States Supreme Court acknowledged that excessive discretion can have measurable and consistent effects and that employment practices combining both objective and subjective attributes should be considered subjective. 487 U.S. at 989. *Watson* suggests that for commonality purposes, distinctions should not be made on the basis of a spectrum, or degree of subjectivity.

The District Court's spectrum of subjectivity standard is not only unprecedented, it also requires a district court to delve too deeply and impermissibly into the merits of the class's claim too early in the litigation. It is well settled that when considering a motion for class certification, a district court should not conduct a preliminary inquiry into the merits of a suit in order to determine whether the suit can be maintained as a class action. *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 177-78 (1974). Yet the District Court's new spectrum of subjectivity standard would require a court to reach far beyond a preliminary analysis and weigh potentially competing factual allegations regarding the subject criteria, how they are applied, what they mean and the guidance provided as to how they are interpreted. This level of scrutiny of the merits is excessive for a determination of class certification. *See Kuck v. Berkey Photo, Inc.*, 81 F.R.D. 736, 739 (S.D.N.Y. 1979) (“[o]nce plaintiffs have demonstrated . . . a reasonable basis for crediting the assertion that aggrieved individuals do exist in the broader class they propose, then it is inappropriate for this Court to attempt to resolve material

factual disputes on a motion for class certification.”); *see also Szabo v. Bridgeport Machines, Inc.*, 249 F.3d 672, 677 (7th Cir. 2001) (a definitive class certification decision must be made before a decision on the merits, and there should be “judicial willingness to certify classes that have weak claims as well as strong ones.”)

Additionally, the District Court’s reliance on several objective criteria in the face of many other subjective criteria is inconsistent with decisions from this Circuit and others, in which commonality has been found despite the existence of some objective criteria. *See Wagner v. Taylor*, 836 F.2d 578, 589, 594 (D.C. Cir. 1987) (holding that “subjective decisionmaking” can form the basis for commonality despite objective performance ratings); *Cook v. Billington*, C.A. No. 82-0400, 1992 WL 276936 (D.D.C. Aug. 14, 1992) (class certified where interview and other criteria were facially objective but subjectively applied); *Staton v. Boeing Co.*, 327 F.3d 938, 953 (9th Cir. 2003) (commonality found despite objective performance criteria); *Caridad v. Metro-North Commuter R.R.*, 191 F.3d 283, 291-93 (2d Cir. 1999) (emphasizing that “subjective decisionmaking” can form the basis for a commonality finding despite company-wide objective promotion and discipline policies).

The District Court’s spectrum of subjectivity test is not only unprecedented and an impermissible foray into the merits, it also fails to fairly appraise the loan criteria utilized by USDA in its decision-making. Only two of the criteria are plainly objective -- whether the applicant is a United States citizen, and whether she has the capacity to be legally bound. These two criteria are not meaningful for purposes of USDA’s decision-making process, but rather serve as threshold screening factors for an applicant’s eligibility. *See Davis v. Califano*, 613 F.2d 957, 965-66 (D.C. Cir. 1979) (“lack of meaningful standards to guide the promotion decision, whereby there is some assurance of objectivity . . . encourage(s) and

foster(s) discrimination.”). The weight of the loan eligibility criteria is focused on the more subjective criteria, and in particular on applicants’ farm and home plans, which incorporate various subjective aspects and are reviewed with great discretion by loan application decision-makers. *See* 7 C.F.R. § 1924.56 (2000).

Moreover, even the seemingly objective reasons for loan denials cited by the District Court as undercutting the inference of a common policy of discrimination are in fact not truly objective, but are susceptible to USDA manipulation and thus, truly subjective in their implementation by local officials. Each of the three criteria cited by the District Court as objective -- failure to meet the collateral requirements, poor credit and insufficient income -- are indeed subject to interpretation. The collateral requirements are ultimately determined for each applicant by local officials based on her individual farm and home plan. *See* 7 C.F.R. § 1924.56(b) (2000). An applicant’s credit worthiness is dependent on her prior credit work outs and debt forgiveness, the assessment of which is controlled by USDA.

The sufficiency of an applicant’s income is determined entirely on the basis of her farm and home plan, premised on whether the plan produces cash flow in light of production assumptions employed by local USDA officials, at their sole discretion. *See* 7 C.F.R. § 1924.56(b) (2000). One farm advocate has observed in her work representing women farmers that county supervisors arbitrarily considered crop yields to be lower than the applicant reported because they believed “a woman cannot handle that kind of work load.” [JA 105] As a result of their unfettered discretion, local officials were able to deny women’s loan applications by subjectively applying the loan eligibility criteria. [JA 540 (local official able to manipulate appraisal in order to deny woman’s farm loan application)] If it were going to

apply a spectrum of subjectivity standard, the District Court should at least have fully considered these factors. It failed to do so.

The District Court's focus on the fact that different reasons were provided to women for loan denial is misplaced.⁸ It is well settled in this Circuit, as well as others, that commonality does not require a showing of identical claims or facts among class members and that variations in the personal circumstances of individual plaintiffs are not a bar to commonality for class certification purposes. *See, e.g., Hartman v. Duffey*, 19 F.3d 1459, 1472 (D.C. Cir. 1994), *cert. denied sub. nom. Dillon v. Powell*, 534 U.S. 1078 (2002) (commonality found notwithstanding differences in job descriptions); *Chiang v. Veneman*, 385 F.3d 256, 265 (3d Cir. 2004) (commonality "does not require identical claims or facts among class member[s]"); *Marisol A., ex rel. Forbes v. Giuliani*, 126 F.3d 372, 377 (2d Cir. 1997) (commonality found despite the existence of unique characteristics of each putative class member). Indeed, there need only be a single issue of law or fact that is common to all proposed class members. *Bynum v. District of Columbia*, 214 F.R.D. 27, 33 (D.D.C. 2003) (citing to *Pendleton v. Schlesinger*, 73 F.R.D. 506, 508 (D.D.C. 1977), *aff'd*, 628 F.2d 102 (D.C. Cir. 1980)) ("[F]actual variations among the class members will not defeat the commonality requirement, so long as a *single aspect or feature of the claim is common to all proposed class members.*") (emphasis added); *Chang v. United States*, 217 F.R.D. 262, 270 (D.D.C. 2003).

⁸ Moreover, the District Court's unquestioning acceptance of the reasons USDA gave applicants for rejecting their applications was erroneous. USDA had a national policy that applicants rejected on the completely subjective criterion of character were not to be told that that was the reason for their rejection. [JA 1061] USDA had rationalized that telling an applicant that she lacked sufficient character to receive a USDA loan could anger an applicant, so she need not be told the truth. [JA 1061]

In sum, the District Court’s substitution of a subjectivity spectrum effectively requires predominantly or even entirely subjective decision-making in lieu of well-established precedent that provides for commonality based upon *excessively* or even merely partially subjective decision-making. The District Court’s use of this standard is an abuse of discretion.

2. Appellants’ Statistical Analysis Demonstrates Commonality

After finding Appellants’ assertions about the subjective nature of USDA’s loan system wanting for commonality purposes, the District Court summarily discounted 859 declarations of women farmers from across the country who were denied farm loans on the basis of their gender, as well as statistical evidence that shows the disproportionately small numbers and dollars of loans awarded to women. The District Court refused to consider Appellants’ statistical evidence because Appellants had failed to identify how many men and women farmers had applied for loans. [JA 1094] In so holding, the District Court failed to give appropriate weight to Appellants’ evidence and contravened applicable case law.

In support of certification of subclass 2, Appellants presented 859 declarations from women farmers from across the country who attested that they were denied loans based upon their gender. [See, e.g., JA 556-59, 920-23] Twenty-seven percent of subclass 2 members who submitted declarations received no official written response from USDA about their loan applications. [JA 965-77] [See, e.g., JA 556-57] More than fourteen percent of subclass 2 members who submitted declarations were told only that they were not qualified, which is the equivalent of no response. [JA 965-77] Other women were rejected on entirely subjective and discriminatory grounds. [JA 922 (FSA county loan officer told Edith Scruggs that “women cannot be serious about trying to farm and that it was a joke that [she] was actually

trying to farm for [her] living”)] The numerous declarations submitted reveal the repetitive, discriminatory conduct of USDA.

Additionally, Appellants introduced a plentitude of national statistics that demonstrate that women farmers received proportionately far fewer farm loans, both in terms of dollars lent and numbers of loans. [JA 233-35, 238-39] While women comprised 6.9 percent of farm operators, they received only 3.2 percent of the credit. [JA 233] Nationally women operators received only 52 percent of the loans they could have expected had they received a proportionate share of the loans. [JA 238]

The purpose of anecdotal and statistical evidence is to supplement a *prima facie* showing of an excessively subjective and discriminatory system that permits discrimination by demonstrating that the system has in fact operated to the detriment of the class members. *Wagner*, 836 F.2d at 592-93. Anecdotal evidence provides specific examples, while statistical evidence helps the court gauge the overall impact of the system on its participants. *Id.* At the class certification stage, plaintiffs need make less than a *prima facie* showing of their claims. *Id.* Statistical evidence, even if flawed, should be considered to aid the court’s analysis and should not be rejected out of hand. *See Bazemore v. Friday*, 478 U.S. 385, 400-01 (1986). “Deficiencies in the data base ‘may, of course, detract from the value of [statistical] evidence,’ but ordinarily would not obliterate its evidentiary value.” *Trout v. Lehman*, 702 F.2d 1094, 1101 (D.C. Cir. 1983)(quoting *Police Officers’ Ass’n v. Young*, 608 F.2d 671 (6th Cir. 1979), *cert. denied*, 452 U.S. 938 (1981) (citation omitted)).

The absence of perfect data is not fatal for a statistical analysis. *Palmer v. Schultz*, 815 F.2d 84, 99-100 (D.C. Cir. 1987), *on remand*, 662 F. Supp. 1551 (D.D.C. 1987), *aff’d in part*, 905 F.2d 1544 (D.C. Cir. 1990). Indeed, this Court has recognized that in class action

lawsuits “statistical evidence is virtually *always* lacking in [its] degree of precision ‘In most cases, conditions are far from ideal, with incomplete qualification data and non-random samples being the rule rather than the exception.’” *De Medina v. Reinhardt*, 686 F.2d 997, 1010 (D.C. Cir. 1982) (accepting imperfect statistics that documented discrimination claims) (quoting D. Baldus & J. Cole, *Statistical Proof of Discrimination* 26-27 (1980)) (emphasis added). Consequently, it is well established that plaintiffs may rely on some statistical evidence and anecdotal evidence to prove commonality in a motion for class certification. *See Wagner*, 836 F.2d at 592 (holding that “[t]he major role played by statistical evidence . . . does not preclude resort to proof of individual instances of discrimination”); *Valentino v. United States Postal Serv.*, 674 F.2d 56, 68 (D.C. Cir. 1982) (stating that class action plaintiffs may offer “a combination of statistical proof and individual testimony of special instances of discrimination” for establishing commonality).

Well-established case law from this Circuit provides that Appellants should not be penalized for USDA’s failure to maintain appropriate records and data that are necessary for their statistical analysis.⁹ *See Palmer*, 815 F.2d at 110. Indeed, this Court has specifically held that “plaintiffs cannot be legitimately faulted for gaps in their statistical analysis *when the information necessary to close those gaps was possessed only by the defendant*[].” *Id.* (emphasis added) (quoting *Trout v. Hidalgo*, 517 F. Supp. 873, 883 (D.D.C. 1981), *vacated on other grounds*, 465 U.S. 1056 (1984)).

⁹ With regard to subclass 2, USDA has chosen not to record and maintain data reflecting the basis for denial of a loan request, despite other extensive data it has recorded and maintained. Also, USDA has destroyed all application data prior to October 1997. These data were destroyed during USDA’s change from one data system to another, while this litigation was pending but before discovery had been initiated. USDA chose not to preserve this data, failing even to keep a single back-up copy of the

The District Court disregarded this principle and held Appellants to an impossible burden. Although the District Court was considering a motion for class certification and not Appellants' case on the merits, the District Court nonetheless rejected out of hand Appellants' statistical analysis showing a vast disparity between men and women in both the number and amount of loans, because Appellants' experts had failed to specify how many women and how many men had applied. [JA 1094] Appellants should not be penalized for the failure to provide data that USDA did not maintain. *Before the commencement of discovery in this case, although the case was already pending, USDA destroyed all relevant application data that were more than three years old, thereby precluding Appellants' experts from identifying the number of men and women applicants.* [JA 232] Appellants had no way to provide this information to the District Court and should not have been required to do so. The contrary result rewards a defendant for destroying information after a lawsuit was initiated. A court should not reject a deficient statistical analysis where "the defendants controlled the only sources of data on which statistical analyses could be based." *Trout v. Lehman*, 702 F.2d at 1102; *see also Bazemore*, 478 U.S. at 400 (regression analysis with imperfect data should nonetheless be considered and given due weight).¹⁰

Moreover, the District Court misapprehended Appellants' data. In the absence of available actual data pertaining to applications, Appellants' expert Mr. O'Brien made an assumption that the number of female applicants was consistent with the proportion of women

data. At the time it chose to destroy this data, USDA was already a defendant in this lawsuit, as well as in *Garcia v. Veneman*, *supra*, and *Keepseagle v. Veneman*, *supra*.

¹⁰ Here, USDA has criticized Appellants' statistical data but has failed to provide an alternative statistical analysis. As in *Bazemore*, USDA has adduced no evidence "to show that there was in fact no disparity" between women and men, or to demonstrate that any disparities that existed were the product of chance rather than unlawful discrimination. *See* 478 U.S. at 403 n.14.

in the farm operator pool. [JA 232-33] This assumption allowed Mr. O'Brien to conduct an effective statistical comparison. Appellants provided uncontradicted expert testimony that Mr. O'Brien's assumption was not only reasonable, it also employed a statistically appropriate methodology.¹¹ This approach has been found acceptable in the event applicant data is nonexistent.¹² *See Dukes v. Wal-Mart Stores, Inc.*, 222 F.R.D. 137, 162-63 (N.D. Cal. 2004).

The District Court's insistence on a more complex statistical analysis creates dangerous precedent. If the District Court's standard for statistical analysis is adopted, a defendant seeking to avoid liability for wrongful acts of discrimination merely needs to fail to record and maintain the data required for a sophisticated statistical analysis.¹³ The absence of satisfactory data should not immunize a defendant from wrongful conduct.

Given the compelling showing of the statistics to demonstrate the actual impact of the rejection of women's applications, and an unprecedented large number of persuasive and

¹¹ Appellant's expert Patrick M. O'Brien, utilized the best evidence available, including official USDA farm census and other data, to conduct statistical analysis that showed gross disparities between women and men who obtained farm loans from USDA. [JA. 230-31] His conclusions were reviewed for statistical soundness by another appellants' expert, Dr. Fritz Scheuren, the President of the American Statistical Association, and one of the foremost statisticians in the United States. [JA 545] Dr. Scheuren concluded that the methodology employed by Mr. O'Brien and the conclusions reached were statistically appropriate and fairly represent the shortfall in loans and money received by women. [JA 545]

¹² Even if data existed for applications submitted to USDA by men and women, that evidence would be tainted because, as Appellants assert on behalf of subclass 1 members, the USDA's practices discouraged, even prevented, women from obtaining and submitting loan applications. *See Wards Cove Packing Co. v. Atonio*, 490 U.S. 642, 651 n.7 (1989) ("[T]he analysis would be different if it were found that the dearth of qualified nonwhite applicants was due to practices on [the employers'] part which – expressly or implicitly – deterred minority group members from applying . . .") (citing *International Bhd. of Teamsters v. United States*, 431 U.S. 324, 365 (1977)); *Hemmings v. Tidyman's Inc.*, 285 F.3d 1174, 1187 n.17 (9th Cir. 2002).

¹³ *Cf. Dukes v. Wal-Mart*, 222 F.R.D. at 164 ("At bottom, [the Company] fails to grapple with the basic fact that any approach . . . will have a degree of uncertainty given the admitted lack of actual data . . . due to the company's wide-scale lack of job posting. . . . Rather, . . . [it] goes to the weight of

consistent declarations, contrasted with the utter absence of USDA data, the District Court should have credited the statistical evidence proffered by Appellants, and certified subclass 2.

II. APPELLANTS HAVE SATISFIED THE REQUIREMENTS OF RULE 23(b)

Rule 23 requires that the plaintiff satisfy not only the four requirements of Rule 23(a), but also one of the elements of Rule 23(b). In this case, Appellants sought certification pursuant to subsection (b)(2), and provisionally as a hybrid class under subsection (b)(2) with regard to liability and under subsection (b)(3) with regard to damages. The District Court erred in finding that Appellants could not satisfy either subsection (b)(2) or (b)(3).

A. The District Court Erred in Employing Standards That Are Inconsistent with Prevailing Jurisprudence.

1. Rule 23(b)(2)

The District Court found that Appellants had failed to satisfy Rule 23(b)(2) because their claims for injunctive relief do not predominate over their claims for monetary damages. [JA 1096-98] The District Court found compelling that the Appellants had not forsworn a claim for monetary relief and seemed to assume that a damage request is the litmus test, foreclosing compliance with Rule 23(b)(2). [JA 1096] The District Court rationalized its conclusion by asserting that a class action is not necessary because a single plaintiff can effect the non-monetary relief that Appellants have requested. [JA 1098] The District Court erred both in applying the wrong legal standard and in failing to analyze the facts and circumstances of this case as they pertain to Rule 23(b)(2).

the evidence, . . . highlight[ing] the presence of a significant fact issue affecting all class members which supports, rather than defeats, granting class certification.”).

Fed. R. Civ. P. 23(b)(2) requires that the defendant acted or refused to act on grounds generally applicable to the class, rendering final injunctive and declaratory relief appropriate. Fed. R. Civ. P. 23(b)(2). Certification under Rule 23(b)(2) is widely regarded as being particularly well-suited for civil rights actions where ““a party is charged with discriminating unlawfully against a class.””¹⁴ *In re Veneman*, 309 F.3d 789, 792 (D.C. Cir. 2002) (quoting Fed. R. Civ. P. 23(b)(2) (advisory committee notes)). It is well settled in this Circuit that the mere request for monetary damages does not mean that monetary damages predominate for Rule 23(b)(2) purposes. *Eubanks v. Billington*, 110 F.3d 87, 95 (D.C. Cir. 1997). There is no requirement that plaintiffs disclaim damages. *Thomas v. Albright*, 139 F.3d 227 (D.C. Cir. 1998); *Thomas v. Christopher*, 169 F.R.D. at 239.

In this case, Appellants have complained and provided evidence of an ongoing, systematic pattern and practice of discrimination whereby women farmers have been denied not only farm loans, but even the opportunity to apply for them. Their complaint makes clear that they request not only damages, but also equitable relief that institutes reforms in the way

¹⁴ It is well recognized in this Circuit as well as others that class certification is appropriate if it is unlikely that the class members would be able to pursue the claims on their own. *See Bynum*, 214 F.R.D. at 40. Due to the large number of putative members in subclasses 1 and 2, a class action is a far superior means by which to adjudicate this matter than other available adjudication methods. Also, the pursuit of individual litigation for women farmers would be cost prohibitive and would make it virtually impossible for these women to obtain relief. *See Amchem Prods., Inc.*, 521 U.S. 591, 617 (1997) (noting that Rule 23(b)(3) was enacted, in part, to vindicate ““the rights of groups of people who individually would be without effective strength [financially] to bring their opponents into court at all””) (citation omitted); *Klay v. Humana, Inc.*, 382 F.3d 1241, 1270-71 (11th Cir. 2004) (finding class certification appropriate in situations in which the amounts in controversy for individual cases would make it unlikely that plaintiffs would be able to pursue the claims as individuals); *Tardiff v. Knox County*, 365 F.3d 1, 7 (1st Cir. 2004) (certifying a class because the “vast majority of claims would never be brought unless aggregated because provable actual damages are too small.”). The other alternative – having each of the potential subclass members file separate lawsuits around the country – would inundate the court system, potentially obtain inconsistent results, and greatly impede judicial economy.

the agency operates.¹⁵ These equitable remedies include: a declaratory judgment that USDA's discriminatory practices exist and are unlawful; the issuance of a permanent injunction prohibiting USDA from engaging in discriminatory lending practices and prohibiting specific practices such as refusing to disseminate applications and applying more stringent standards to women; the issuance of a permanent mandatory injunction requiring USDA to adopt lending practices that conform with ECOA and the APA, and to adopt recordkeeping that facilitates future monitoring of USDA's loan practices; the issuance of an order mandating that USDA remedy its discriminatory practices by, among other things, implementing a new procedure whereby an independent body reviews denials of loan applications of female farmers, establishing a program to provide specific assistance to women applicants in completing loan applications and apprising them of their rights, and instituting an effective system for investigating and timely responding to complaints of gender discrimination in the farm loan process.

The District Court's finding that Appellants' damages claims are "far from incidental," [JA 1096], is not premised on any evaluation of the record. An analysis of the facts and circumstances of this case demonstrates that Appellants' claims for equitable relief predominate over their claims for monetary relief. In pursuing an array of equitable and remedial measures, Appellants seek to incorporate change to reform an agency with a history of continued discrimination against women and other minorities. [JA 284, 379, 830]

Implementation of real reforms of the nature sought by Appellants is unlikely to emanate from a court ruling pertaining to a single plaintiff who suffered a specific wrong. Indeed, the

¹⁵ The District Court granted Appellants leave to file an amended complaint on July 28, 2003. Appellants' Third Amended Complaint seeks substantial injunctive relief and an unspecified amount

individual litigants who have preceded Appellants have failed to accomplish such reform. *See, e.g. Mavity v. Glickman*, 1:00-cv-02518-JR (D.D.C. July 3, 2002).

It was inappropriate for the District Court to base its finding of lack of predominance on a prior class action against USDA, *Pigford v. Glickman, supra*. [JA 1099] The District Court's comparison to the *Pigford* case is inapt.¹⁶ The *Pigford* case, brought by African-American farmers frustrated by years of USDA's discrimination in the granting and servicing of farm loans, was settled in 1999 and the district court approved the settlement, which included a certification of the class. *Pigford v. Glickman*, 185 F.R.D. 82 (D.D.C. 1999) (Friedman, J.). The administration of the settlement of the *Pigford* case has proved to be cumbersome and unsatisfactory to many of the claimants because of the parties' structuring of the monetary relief portion of the settlement, a fact noted by the District Court in its class certification decision in *Garcia v. Veneman*, [JA 1083-84], and alluded to in its decision in this case [JA 1099]. *See also Pigford v. Johanns*, No. 04-5171 (D.C. Cir. July 15, 2005) (affirming district court's denial of late-filed claims by class members). But the administrative procedure set up by the parties in *Pigford* is not at issue in Appellants' motion for class certification and should not have been considered by the District Court. Indeed, the

in compensatory damages. [JA 164]

¹⁶ Similarly, the District Court's comparison of this case to that of plaintiff Sharon Mavity in *Mavity v. Glickman*, 1:00-cv-02518-JR (D.D.C. July 3, 2002), is also inappropriate. [JA 1099] Ms. Mavity, a woman farmer who brought an individual action for discrimination she allegedly suffered in USDA's farm loan program, was denied relief by the District Court because she failed to demonstrate that her injuries were a direct and proximate result of intentional discrimination. *Mavity, supra*, at 18-19. Ms. Mavity's failure on the merits is not an indictment of how Appellants here would prove their pattern-or-practice case and the evidence they would adduce at trial. Evidence of one is not dispositive of the other. *See Cooper v. Federal Reserve Bank*, 467 U.S. 867, 876 (1984) ("The crucial difference between an individual's claim of discrimination and a class action alleging a general pattern or practice of discrimination is manifest. The inquiry regarding an individual's claim is the reason for a particular employment decision, while 'at the liability stage of a pattern-or-practice trial the focus

Pigford settlement procedures are not an appropriate comparison with Appellants' burden for Rule 23(b)(3) purposes at this stage of the case. There was no basis for the District Court to assume that the unhappy results borne of a voluntary settlement of the *Pigford* case would be repeated here. Furthermore, the procedures utilized in the *Pigford* case for adjudication of individual claims are not the only model available to the court. Rather, courts in this Circuit have followed other models for disposition of class claims certified under Rule 23(b)(3). *See, e.g., Segar v. Smith*, 738 F.2d 1249, 1264 (D.C. Cir. 1984) (use of formula instead of individual proceedings to determine monetary relief); *Thomas v. Christopher*, 169 F.R.D. 224, 234 (D.D.C. 1996), *aff'd in relevant part, Thomas v. Albright*, 139 F.3d 227 (D.C. Cir. 1998) (Rule 23(b)(2) satisfied despite \$3.8 million award to plaintiff class members in addition to injunctive relief).

2. Rule 23(b)(3)

The District Court also erred in finding that provisional certification under Rule 23(b)(3) was inappropriate. Fed. R. Civ. P. 23(b)(3) requires that common questions of law or fact predominate over individual issues and that a class action is a superior method for adjudication of the dispute. Fed. R. Civ. P. 23(b)(3). The District Court concluded that as to subclass 1, Rule 23(b)(3) could not be satisfied because Appellants had “adduced no evidence . . . establishing that it is or ever was actually USDA policy to refuse to give loan application forms to women farmers.” [JA 1098] As to subclass 2, the District Court focused on the different reasons USDA had given for the loan denials, finding that those differences predominate. [JA 1098-99] Finally, the District Court took “an improper peek into the

often will not be on individual [] decisions, but on a pattern of discriminatory decisionmaking.”) (citing *Teamsters*, 431 U.S. at 360 n.46 (1977)).

merits,” [JA 1099], and, comparing this case to *Pigford v. Glickman, supra*, and *Mavity v. Glickman, supra*, concluded that individual issues are more prevalent than those common to the class. The District Court’s insistence on a showing of an articulated policy of discrimination, its focus on the differences rather than common issues, and its comparison of this case to two cases approached in wholly different ways all constitute reversible error.

In requiring Appellants to establish that USDA had a stated policy of discrimination behind its refusal to disseminate application forms to women and in finding that subclass 2 members were given different reasons for their rejections that defeat commonality, the District Court applied the wrong standard to its Rule 23(b)(3) review.¹⁷ In order to meet the predominance requirement of Rule 23(b)(3), Appellants are merely required to identify at least one common question of law or fact which predominates over individual questions affecting class members, not a more significant requirement of articulating an overarching policy of discrimination. *See* Fed. R. Civ. P. 23(b)(3); *see also Bynum v. District of Columbia*, 214 F.R.D. 27, 39 (D.D.C. 2003).

As with Rule 23(b)(2), “[t]here are no bright line tests for determining whether common questions predominate” for purposes of Rule 23(b)(3). *Jarvaise v. Rand Corp.*, 212 F.R.D. 1, 4 (D.D.C. 2002); *see also Bynum*, 214 F.R.D. at 39 (“There is no magic formula by which a court may make such a determination.”). Rule 23(b)(3) tests whether a proposed

¹⁷ Requiring plaintiffs to demonstrate an articulated policy of discrimination at the class certification stage would certainly doom most class actions and defeat its usefulness as a tool in civil rights cases. *See, e.g., Amchem Products, Inc.*, 521 U.S. at 614. Neither the USDA nor any other lender or employer is ever likely to have an express policy sanctioning gender discrimination. *See, e.g., Anderson v. Westinghouse Savannah River Co.*, 406 F.3d 248, 283 n.5 (4th Cir. 2005) (Employers are “on the whole, too sophisticated to profess their prejudices on paper or before witnesses,” such as would be necessary to establish a “policy of discrimination.”).

class is “sufficiently cohesive” such that the proposed class’ common questions of law or fact predominate over class members’ individualized issues. *See Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 623 (1997); *Bynum*, 214 F.R.D. at 39 (predominance requirement met based on common questions of law and fact, despite existence of individual questions such as the appropriate remedy); *Thomas v. Baca*, No. CV 0408448DDPSHX, 2005 WL 1200268 at *5 (C.D. Cal. May 17, 2005) (court found that commonality and predominance requirements met based on class members’ consistent claims of being forced to sleep on jail floors, against regulation). It is not necessary for all questions of law or fact to be common; it is only required that some questions are common and that they predominate over the individual questions. *See Chiang v. Veneman*, 385 F.3d 256, 273 (3d Cir. 2004); *Klay v. Humana, Inc.*, 382 F.3d 1241, 1254 (11th Cir. 2004); *Kerr v. West Palm Beach*, 875 F.2d 1546, 1558 (11th Cir. 1989). When determining whether class or individual issues predominate, “the claims, defenses, relevant facts, and applicable substantive law” are reviewed to “assess the degree to which resolution of the classwide issues will further each individual class member’s claim against the defendant.” *Klay*, 382 F.3d at 1254 (internal quotation omitted).

Here, with regard to subclass 1, there is no requirement that Appellants show an overarching policy of discrimination, particularly at this stage of the litigation, where local officials’ consistent and unchecked refusal to disseminate applications plainly violates a written regulation. For purposes of the claims of subclass 1, USDA’s refusal to disburse an application is the paramount issue; the excuse given for the refusal, the circumstances of the request and the refusal and other individual aspects of the request are not material to the allegations of discrimination asserted by subclass 1. For subclass 1, there are *no* criteria or decision-making processes – subjective or objective – for distributing applications except one:

if someone asks, she must be given an application form. USDA's own regulations clearly provide that USDA officials must provide loan application forms to *all* requestors, without exception. 7 C.F.R. § 1910.4(b) (2000) ("All persons requesting an application will be provided [one]."); 7 C.F.R. § 1910.3 (2000) ("The filing of written applications will be encouraged even though funds may not be currently available, since complete applications must be considered in the date order received . . ."). Where, as here, the class members have been uniformly denied the opportunity to even apply for USDA farm loans, that denial itself constitutes a common cognizable harm among class members. *See Matyasovszky v. Housing Auth. of Bridgeport*, 226 F.R.D. 35, 41 (D. Conn. 2005) (individualized factual circumstances "which could ultimately preclude their acceptance" was not a sufficient reason to find a lack of commonality among class members who were uniformly not provided the opportunity to apply for government benefits). Any reasons that might be proffered by USDA for refusing the requests of subclass 1 members to be provided with applications would be without basis, and thus would certainly not predominate.

Appellants have identified substantial common questions of law and fact among subclass 1 members – common issues which predominate among class members above any minimal individual issues that may arise: (1) whether USDA officials have refused to provide subclass members with farm loan applications upon request; (2) whether USDA has a legal obligation to provide all requestors with loan application forms; (3) if so, whether there has been a system-wide failure by USDA to disseminate loan application forms to women requestors; and (4) whether the evidence, including anecdotal and available statistical evidence, establishes that USDA has discriminatorily refused to disseminate application forms

to women, where there is no permissible reason for refusing to disseminate forms to all individuals upon request.

Moreover, even by the District Court's own admission, Appellants have provided evidence of a "policy of discrimination" which pervades USDA, even though Appellants are not required to do so. The District Court recognized that Appellants "had the better of the argument" in asserting that USDA at the national level "abetted or failed to prevent unlawful acts" by USDA officials throughout the country for 22 years, "even if only by looking the other way." [JA 1096] The District Court has also acknowledged, in its class certification decision in *Garcia v. Veneman* that "[p]roof of conscious inaction on the part of USDA (*i.e.*, acquiescence and ratification)" in the face of disproportionate treatment "might satisfy the first *Falcon* requirement of a "general policy of discrimination." [JA 1070] Yet in the face of this collective evidence of USDA's common practice of refusing to distribute application forms to women requestors, the District Court refused to acknowledge USDA's common policy and practice of discrimination against subclass 1 members.

Similarly, with regard to subclass 2, the District Court focused unduly on USDA's articulated reasons for denying the applicants' farm loans. [JA 1098-99] But there are more meaningful elements common to the treatment of the subclass 2 members than differences. The subclass 2 members have all been participants in a process where the centralized authority has devised a nation-wide system whereby local USDA officials exercise subjective judgment and nearly unfettered discretion in deciding which applicants receive farm loans. The local officials' decisions are purportedly premised on national guidelines, with national oversight of the decision-making and the availability of appeal and complaint mechanisms through a central, national mechanism. But in reality, national involvement in and oversight

of loan decision-making are not effective or meaningful and local officials are permitted to exercise excessive, subjective discretion, with discriminatory results.¹⁸ [JA 379, 383-86]. USDA's central oversight over its local offices' decision-making with regard to farm loans forms the basis of commonality among the members of subclass 2. Commonality is not destroyed by variation in the real or pretextual reasons proffered by local officials for discriminatorily denying loans to women. *See McReynolds*, 208 F.R.D. at 441-42 ("tens of thousands" of employment decisions "made by thousands of managers, at thousands of work sites" did not destroy commonality); *Hartman v. Duffey*, 19 F.3d at 1472 ("the potential for common issues of law and fact among applicants for different positions clearly exists regardless of individual differences in job descriptions or minimal qualifications").

The District Court's focus on the subclass 2 members' differences rather than their central and meaningful similarities was an abuse of discretion. *See, e.g., Gates v. Towery*, No. 04 C 2155, 2004 WL 2583905 (N.D. Ill. Nov. 10, 2004) (court should focus on class issues common to class members rather than on individual damages); *Thomas v. Baca*, No. CV 0408448DDPSHX, 2005 WL 1200268 (C.D. Cal. May 17, 2005) (under Rule 23(b)(3) analysis, central issue is whether detainees were required to sleep on jail floor, which predominated over individual questions on circumstances, procedures and damages).

¹⁸ Mr. O'Brien concluded that women were underrepresented in the loans they were awarded in approximately 2320 of 3004 counties through the country, as well as in the amount of money loaned in approximately 2486 of same 3004 counties. [JA 234, 238] Certainly that ratio supports the conclusion that the discrimination acted on a national, and not simply an isolated local, basis.

III. APPELLANTS HAVE STATED AN ACTIONABLE CLAIM FOR FAILURE TO INVESTIGATE UNDER ECOA AND THE APA

The District Court held that Appellants did not state a cause of action arising from USDA's failure to investigate their civil rights complaints because: (1) USDA's failure to investigate discrimination complaints does not constitute a credit transaction under ECOA, thus precluding reliance on ECOA as a means of relief; and (2) APA review is unavailable to Appellants because ECOA was the "adequate remedy" envisioned for USDA claims. [JA 103-04] The District Court was in error, however, because these rulings are contradicted by both USDA's own regulations and case law interpreting both ECOA and the APA.

USDA regulations expressly provide that an applicant may file a discrimination complaint with the USDA in connection with an adverse *credit* decisions. *See* 7 C.F.R. § 1910.2 (2000) (emphasis added). It is a basic principle of administrative law that an agency is bound to abide by and enforce its own regulations. *See Morton v. Ruiz*, 415 U.S. 199, 235 (1974) ("Where the rights of individuals are affected, it is incumbent upon agencies to follow their own procedures. This is so even where the internal procedures are possibly more rigorous than otherwise would be required."). USDA is bound by its own regulations to acknowledge that the failure to investigate a discrimination complaint is a credit action.

Moreover, the District Court misinterpreted ECOA in finding that the failure to investigate discrimination complaints does not constitute a reviewable "credit transaction." ECOA's regulations specifically define a credit transaction to include "every aspect of an application's dealings with a creditor regarding an application for credit or an existing extension of credit (including but not limited to, information requirements; *investigation procedures*; standards for creditworthiness; terms of credit; . . . and collection procedures)."

12 C.F.R. § 202.2(m) (2000) (emphasis added). Courts have uniformly held that ECOA is to be interpreted liberally to achieve its intention of elimination discrimination from our society. *See, e.g., Brothers v. First Leasing*, 724 F.2d 789 (9th Cir.), *cert. denied*, 469 U.S. 832 (1984). The failure to provide a loan application for discriminatory reasons “would be a prototypical ECOA violation, as it would deny members of a protected class any access to credit.” *Chiang v. Veneman*, 385 F.3d 256, 265 (3d Cir. 2004).

The District Court further erred in finding that Appellants are precluded from relying on the APA for a remedy. In addressing the application of the APA, the Supreme Court has held that “[t]he legislative material elucidating that seminal act [the APA] manifest a congressional intention that it cover a broad spectrum of administrative actions, and this Court has echoed that theme by noting that the Administrative Procedure Act’s ‘generous review provisions’ must be given a ‘hospitable’ interpretation.” *International Ladies’ Garment Workers’ Union v. Donovan*, 722 F.2d 795, 807 (D.C. Cir. 1983) (quoting *Abbott Labs. v. Gardner*, 387 U.S. 136, 140-41 (1967) (citation omitted)).

Here the APA is an appropriate avenue for redress for USDA’s failure to investigate discrimination complaints. USDA promulgated regulations requiring it to investigate complaints of discrimination related to farm loans. *See, e.g., 7 C.F.R. § 2.300* (2004). Having committed to its constituents that it will investigate their claims of discrimination, USDA’s failure to do so violates its own internal policy. An agency’s violation of its own procedure is redressed through the APA. 5 U.S.C. § 704 (2005). As this Court has previous held, an APA claim “is *not* one of discrimination . . . [but instead] charges that the agency, whether its motive was legal or illegal, failed to conform to its own regulations.” *McKenna v. Weinberger*, 729 F.2d 783, 781 (D.C. Cir. 1984) (emphasis in original). Since the failure to

investigate these claims constitutes a departure from USDA policy, a claim under the APA constitutes a proper avenue of recourse. Such an avenue should not have been foreclosed by the District Court.

CONCLUSION

For the foregoing reasons, Appellants respectfully request that the decisions of the District Court denying class certification and dismissing Appellants' claims under the Administrative Procedure Act and Equal Credit Opportunity Act be reversed, that this Court certify subclasses 1 and 2 and that the case be remanded to the District Court for further proceedings.

Respectfully submitted,



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CERTIFICATE OF COMPLIANCE WITH RULE 32(A)

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), I hereby certify that this brief complies with the type-volume limitations of Federal Rule of Appellate Procedure 32(a)(7)(B)(i):

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 9,814 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii) and Circuit Rule 32(a)(1)(2).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2000 in 12 point, Times New Roman font.

I understand that a material misrepresentation can result in the Court's striking the brief and imposing sanctions. If the Court so requests, I will provide an electronic version of the brief.



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CERTIFICATE OF SERVICE

I hereby certify that on August 29, 2005, I served two true and correct copies of Brief of Appellants, two true and correct copies of Addendum to Brief of Appellants, and one true and correct copy of the Joint Appendix, upon all parties, representatives and attorneys in this cause of action, by serving same via first class, postage prepaid on:

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