

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

ROSEMARY LOVE, et al.,)	
)	
Plaintiffs,)	
)	
vs.)	Case Number: 1:00CV02502
)	
THOMAS VILSACK, SECRETARY)	Judge: Walton, J.
UNITED STATES DEPARTMENT OF)	
AGRICULTURE,)	
)	
Defendant.)	
)	

**PLAINTIFFS' MOTION FOR COURT REVIEW AND SUPERVISION
OF FINANCIAL DISTRIBUTION TO WOMEN FARMERS,
AND FOR APPOINTMENT OF LEAD COUNSEL**

Plaintiffs, by and through their undersigned counsel, respectfully move for the Court to review and oversee the settlement and adjudication process that Defendant plans to offer to women farmers who have suffered discrimination in the granting of farm loans and loan servicing. In light of the proposed program's use of the judicial system and the taxing of judicial resources, as well as to ensure fairness to claimants, the Court should undertake review and supervision of this program.

In addition, Plaintiffs request that Arent Fox LLP be appointed lead counsel for prospective claimants who have suffered discrimination on the basis of gender and could apply for redress through the program. The appointment of Arent Fox LLP would assure appropriate management of the process, provide a liaison for the Court to plaintiffs, and ease the substantial burden on plaintiffs in navigating the process proposed by the government.

For the reasons described in the attached Memorandum of Law, Plaintiffs believe these steps are necessary to ensure fairness to litigants and other potential participants in the claims process.

Respectfully submitted,

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has been described to date, has serious shortcomings both in regard to USDA's use of the courts' resources and fairness to women farmers. Thus, Plaintiffs request that the Court play an active role in reviewing USDA's proffered settlement program to ensure appropriateness of process and fairness to claimants. The process being proposed by the government will require the cooperation of this Court and perhaps numerous other federal courts all over the country, which will be required to play an important role in the process.

As required by Local Rule 7(m), Plaintiffs' counsel conferred with Defendant's counsel, Peter Wechsler, on November 3, 2010 concerning this motion, and he advised that Defendant opposes this motion.

FACTUAL AND PROCEDURAL BACKGROUND

Initiated on October 19, 2000, Plaintiffs' action was brought on behalf of a putative class of women farmers who alleged that USDA has unlawfully discriminated against them because of their gender in connection with their efforts to obtain farm loans and loan servicing. The claims brought in this case are nearly identical to those asserted by three other groups of minority farmers against USDA. *See Pigford v. Glickman*, 185 F.R.D. 82 (D.D.C. 1999) (Friedman, J.) (African-American farmers); *Keepseagle v. Veneman*, C.A. No. 99-3119 (EGS), 2001 WL 34676944 (D.D.C. Dec. 12, 2001) (Sullivan, J.) (Native American farmers); *Garcia v. Veneman*, 224 F.R.D. 8 (D.D.C. 2004) (Robertson, J.) (Hispanic farmers).

There is no dispute that widespread discrimination against minority farmers occurred within USDA, particularly in its Farm Service Agency ("FSA") and predecessor agencies. *See, e.g.*, Testimony of Hon. Dan Glickman (former Sec'y of Agric.), Hearings Before The House Comm. on Agric., Treatment of Minority and Limited Resource Producers by the U.S. Dep't of

Agric., at 94 (Mar. 19 and July 17, 1997), attached hereto as Exhibit A (USDA has a “long history” of discrimination against minority farmers); Civil Rights at the United States Department of Agriculture: A Report by the Civil Rights Action Team, at 26-27, 44 (Feb. 1997), attached hereto as Exhibit B (acknowledging that USDA rules “have the effect of disqualifying many minority and disadvantaged farmers from participating in USDA programs, or significantly reducing benefits they may receive” and warning that “failure [of the Agency] to change will mean that minority farmers continue towards extinction.”); Testimony of Hon. Tom Vilsack (Sec’y of Agric.), Hearings Before U.S. S. Comm. on Appropriations, Agric. Subcomm. (Mar. 2, 2010), *available at* <http://appropriations.senate.gov/webcasts.cfm?method=webcasts.view&id=8017cf10-537f-4569-b4c8-d419fabaca24> (“We are very committed to trying to get these [women and minority farmer] cases resolved and closing this rather sordid chapter in USDA history.”).

Accordingly, USDA and Congress have each expressed their desire to bring these cases to a close. *See* Civil Rights at USDA: A Backgrounder on Efforts by the Obama Administration, *available at* http://www.ascr.usda.gov/about_cr_background.html (“USDA has made it a priority to resolve all of the civil rights cases facing the Department, including cases inherited by this Administration brought by black, Hispanic, Native American, and women farmers.”); Food, Conservation and Energy Act of 2008, Pub. L. 110-246 (codified at 122 Stat. 1651), at §14011 (“2008 Farm Bill”) (“[A]ll pending claims and class actions brought against [USDA] by socially disadvantaged farmers . . . including Native American, Hispanic, and female farmers or ranchers based on racial, ethnic or gender discrimination in farm program participation should be resolved in an expeditious and just manner.”).

Plaintiffs originally asserted claims under the Equal Credit Opportunity Act (“ECOA”), 15 U.S.C. § 1691 *et seq.*, and the Administrative Procedure Act (“APA”), 5 U.S.C. § 500 *et seq.* Congress retroactively extended the limitations period for certain discrimination-related claims against USDA dating back to 1981 until October 21, 2000 (two years after the enactment of the legislation). *See Agric. Rural Dev., Food and Drug Admin. and Related Agencies Appropriations Act, 1999, Pub. L. No. 105-277 (codified at 7 U.S.C. § 2297).* Congress took this extraordinary step in response to its belated recognition that in the early 1980s, USDA had dismantled its civil rights investigatory unit. *See Love v. Connor*, 525 F. Supp. 2d 155, 157 (D.D.C. 2007), *aff’d*, *Garcia v. Vilsack*, 563 F.3d 519 (D.C. Cir. 2009), *cert. denied*, 130 S. Ct. 1138 (2010).

Plaintiffs filed a Third Amended Complaint in 2003, and then, in 2004, sought certification of two subclasses for claims brought pursuant to ECOA. On September 29, 2004, this Court denied Plaintiffs’ motion for class certification. *Love v. Veneman*, 224 F.R.D. 240, 246 (D.D.C. 2004), *aff’d*, 563 F.3d 519 (D.C. Cir. 2009), *cert. denied*, 130 S. Ct. 1138 (2010). This Court subsequently dismissed Plaintiffs’ claims under the APA. 525 F. Supp. 2d at 161.

Plaintiffs’ commencement of this action on October 19, 2000 tolled the statute of limitations for putative class members. Because of this case, the statute of limitations remains indefinitely stayed for all putative plaintiffs. *See, e.g.*, Order at 1, July 19, 2010, Dkt. No. 111 (stay to remain in place).

The case has remained stayed following the dismissal of Plaintiffs’ APA claims, and for over a year, the parties have discussed settlement of Plaintiffs’ remaining claims. On September 23, 2010, Defendant filed a Status Report with the Court, along with a summary notice and fact

sheet describing the claims process the government intends to announce in the very near future. *See* First Status Report (Sept. 23, 2010), Dkt. No. 112, at 1 (plan to post notice and fact sheet). Defendant also filed on October 18, 2010, a Second Status Report with the Court, indicating that it will share certain documents with the Court and Plaintiffs in camera when it announces its settlement program, which may occur on or after October 20, 2010. *See* Second Status Report (Oct. 18, 2010), Dkt. No. 114.

In theory, Plaintiffs support approaching settlement through an administrative claims process, and have cooperated (and will continue to cooperate) with the government in improving and shaping the process. However, USDA's process as presented remains seriously flawed, and on the eve of the program's launch, Plaintiffs submit that a careful review by the Court of Defendant's proposal is necessary to ensure the fairness of a settlement process that may impact hundreds of thousands of individuals and to avoid an abuse of the judicial system that could seriously tax the courts' resources.

Summary of Defendant's Proposed Settlement Process¹

Defendant contemplates an administrative claims process whereby up to \$1.33 billion will be available for dissemination from the Judgment Fund to satisfy the claims of female and Hispanic farmers. Up to \$160 million will also be allotted by USDA for debt relief. *See* First Status Report, Dkt. No. 112, at 1; Statement of Work, Ex. A, at I.A-B (part of USDA's Request for Proposals for Administrator and Adjudicator, *available at* <https://www.fbo.gov/index?s=opportunity&mode=>

¹ The details of the administrative claims process provided herein are based upon publically available information.

form&id=c39132b0e09d331231c3ea8cf7bc3a11&tab=core&_cview=1 (select “Package”)), attached hereto as Exhibit C.

Claimants may only participate in the government’s settlement program if they first file a complaint in a federal district court. *See* Exhibit C hereto, Statement of Work, Ex. A, at V.A.² Claimants will then be required, almost immediately after filing their complaints, to dismiss their complaints, *with prejudice*, and to execute a form settlement agreement, which includes a release, supplied by the government. The claimant must submit proof of her filed complaint, proof of her dismissal with prejudice, and the fully executed settlement agreement releasing claims against the government, along with any other proof required, to the claims Adjudicator who will be appointed by USDA. *See id.* at VIII.C. Thus the government is requiring that a claimant must relinquish all claims she has asserted, or could have asserted, against the government prior to a claims Adjudicator making a determination on the merits of her claim or even deciding whether her claim will be accepted for processing. *See* First Status Report, Dkt. No. 112, at 1; Exhibit C, Statement of Work, Ex. A, at V.A-B, VI.A. The government may oppose claims and make submissions in connection with asserted claims, although the claimant will not know if the government has done so and she will have no opportunity to refute the government’s assertions. *See* Exhibit C, Statement of Work, Ex. A, at VIII.BA. A “successful claimant,” as determined by the Adjudicator, will receive an award of up to \$50,000 and partial tax relief of twenty-five percent of that award. *Id.* at IX.A. Awards will be reduced on a pro-rated basis if the \$1.33 billion allocated is inadequate to cover full payment to all “successful” claimants. *Id.* Claimants who receive a monetary award will also be eligible for relief of debt if

² Claims may be filed in this action by the addition of new plaintiffs, or if new cases are commenced in this or any other federal district court, the plaintiffs therein must pay the filing fee and commence a new case.

they can show that the debt was tied to the instance of discrimination on which they “succeeded.” *Id.* at X. Debt relief will also be pro-rated per claimant if, as aggregated, it would surpass the \$160 million cap. *Id.* The determination of the Administrator as to whether a claimant has submitted a timely and complete claim and the substantive decision of the Adjudicator on the merits are not reviewable or appealable. *Id.* at VIII.B.

ARGUMENT

I. The Court Should Not Allow the Government to Use the Court as a Clearinghouse for the Government’s Purposes Without Oversight of the Process.

USDA plans to use the offices of the Court to implement its offer of settlement for all female and Hispanic farmers, but to avoid any substantive review of the process by the Court. Plaintiffs are unaware of any precedent for such a use of the courts to accomplish a party’s settlement aims while simultaneously avoiding court review of the substance of the settlement and related procedures.

USDA presumably plans to use this Court’s resources, including processing by the clerk’s office, the docketing of claims, and application of the Court’s Rules, in order to facilitate the settlement program and have the tool of Rule 11 to use in connection with the process. Whatever slight use Rule 11 may be in compelling truthful filings,³ the Court should not allow USDA to selectively utilize only those aspects of the court process that serve the government’s interests. The court system is not meant to be a one-way street, favoring the government over individual citizens. USDA plans to provide claimants with stipulations of dismissal with prejudice and settlement agreements with releases, which claimants are to use in order to have

³ The program proposed by the government includes other tools available to the government to ensure truthful filings and defeat fraud. These tools include audits of the program and referring to federal authorities the names of claimants who appear to be making fraudulent or questionable filings.

the Adjudicator consider their claims. The government wants this Court to “bless” these documents in each claimant’s case without any meaningful review of the process leading to their filing or perhaps even these papers themselves. *See* Exhibit C, Statement of Work, Ex. A, at V.B (“The Claims Package will include such information as the Administrator determines is appropriate . . . , including copies of the proposed forms of the Complaint, the Settlement Agreement, and the Notice of Dismissal with Prejudice.”). The lack of any real review of the complaints filed will render the filing of such a pleading a mere formality - - a precondition mandated by the government in order for a claim to be reviewed by the Adjudicator. The complaints, regardless of what they assert, are to be immediately dismissed with prejudice, including all claims asserted erroneously or without knowledge of what conduct or legal claims the government’s settlement program is intended to cover. Nor is a plaintiff even allowed to wait and see if her claim form is accepted for consideration on the merits before she must dismiss her complaint with prejudice and release the government. The Court is to be used simply as a claims clearinghouse.

USDA, an executive agency, cannot use the judicial branch of government for its own purposes without some substantive oversight by the Court. *See* 16A Am. Jur. 2d Constitutional Law § 254 (“Executive officers cannot interfere with the courts or prevent them from exercising their inherent judicial functions.”); *see also* 16 C.J.S. Constitutional Law § 341 (“Decisions of executive and administrative officers are subject to judicial review based upon the concept of checks and balances and the separation-of-powers doctrine.”). USDA cannot impose this process on claimants and the court system and expect claimants to simply trust blindly that the process will be fair and equitable absent any review or oversight by the Court.

The burden USDA seeks to impose on judicial resources, both of this Court and of other federal courts across the country, is not trivial. According to USDA's 2007 Census of Agriculture, there are approximately 306,209 female principal farm operators and 55,570 Hispanic principal farm operators in the country. *See* 2007 Census of Agriculture, Tables 50-52, attached hereto as Exhibit D. The potential number of claimants who may apply for relief through the government's program is likely even larger, as these numbers do not include women and Hispanics who did not become farmers because they were denied loans or loan applications due to discrimination. Also, the period covered by the proposed claims process is nearly two decades. The federal courts could easily be overwhelmed with hundreds of thousands of plaintiffs bringing or joining lawsuits and then dismissing them. *See also* Exhibit C, Statement of Work, Amendment 0003, Response to Q. 2 (USDA anticipates sending notice of process to 600,000 individuals and sending 400,000 claims packages to potential claimants).

Clerks' offices in courts around the country will be required to collect filing fees, process and docket hundreds of thousands of complaints, many filed *pro se*, and of course comply with the usual court procedures, including collecting civil cover sheets, issuing summonses,⁴ and engaging in the other administrative work that is triggered by the filing of each new case. Clerks will also have to process and docket an individual stipulation of dismissal with prejudice for each claimant. As described further in this Memorandum, if this Court allows USDA to use federal judicial resources and certain Rules, but refuses to review and oversee the settlement process offered, the process may take a toll on the federal courts, and impact the court system for other litigants.

⁴ The government has not indicated whether it will waive service in these cases or, if service is required, what will happen to a plaintiff's complaint if she does not obtain good service on the government.

II. This Court Is Vested With the Authority to Review the Settlement at this Stage.

A. The Parties Have Approached This as a Putative Class-Wide Settlement.

USDA's proposed process is analogous to a class settlement for several reasons. First, the proposed settlement process would be available to provide redress for the claims of those women falling in the same class Plaintiffs proposed in this litigation. Plaintiffs brought their class action "on behalf of women farmers who farmed or attempted to farm who were discriminated against on the basis of gender in obtaining a farm loan, including the servicing and continuation of a loan from USDA during the period from January 1, 1981 through December 31, 1996, and timely complained about such treatment, or from the period October 19, 1998 through the present." Third Am. Class Action Compl. ¶ 65 (Apr. 14, 2003), Dkt. No. 50-1. USDA's process intends to dispose of the claims of women who "farmed, or attempted to farm, between January 1, 1981, and December 31, 1996, or between October 19, 1998, and October 19, 2000 [the date Plaintiffs' first class action complaint was filed]," and who can show a USDA action due to gender discrimination in loan applications or servicing. *See* Exhibit C, Statement of Work, Ex. A, at IX.B.⁵ Although Plaintiffs' request for class certification was denied, the government is preparing to settle with essentially the same putative class that Plaintiffs proposed.

Second, the relief being offered through this process is similar to that recently offered by the government on a class-wide basis in the *Keepseagle* and *Pigford II* cases. In *Keepseagle*, brought by Native American farmers, the government did not attempt to decertify a class based on claims brought under the APA, notwithstanding the D.C. Circuit's opinion on that issue in

⁵ A huge hurdle to putting past discrimination behind USDA is that the Agency is not attempting to handle the myriad claims that can be asserted by women who experienced discrimination between October 19, 2000 and the present.

this case and *Garcia*, see *Garcia v. Vilsack*, 563 F.3d 519 (D.C. Cir. 2009), and the government recently reached a class-wide settlement with the *Keepseagle* plaintiffs. See Settlement Agreement, *Keepseagle v. Vilsack*, C.A. No. 1:99CV03119 (EGS) (D.D.C. Nov. 1, 2010), Dkt. No. 576-1 (“*Keepseagle* Settlement”). In *Pigford II*, thousands of African-American farmers who missed the *Pigford I* filing deadline asserted discrimination claims, and the government entered a class-wide settlement and agreed to a settlement class, although *Pigford II* plaintiffs no longer have any actionable claims and have not been certified as a class. See Settlement Agreement at 12, *In re Black Farmers Discrimination Litig.*, Misc. No. 08-mc-0511 (PLF) (D.D.C. Feb. 18, 2010), available at http://benniethompson.house.gov/images/pigford_2_settlement.pdf (“*Pigford II* Settlement”).

The government’s proposed mechanism for adjudicating claims and the amount of the awards for women and Hispanic farmers are very similar to those contemplated under “Track A” of the *Keepseagle* and *Pigford II* settlements. See *Keepseagle* Settlement at 7, 21-23; *Pigford II* Settlement at 8, 23-25. The *Keepseagle* and *Pigford II* agreements specifically contemplate both preliminary and final review and approval by the Court. *Keepseagle* Settlement at 38-42; *Pigford II* Settlement at 39-41. The government’s settlement program for women and Hispanic farmers does not.

Finally, comparisons with other imminent class settlements aside, this process walks and talks like a class-wide settlement. The government plans to make this offer to all women farmers who would fit a class definition, and not just to those who are presently named Plaintiffs in this case. There will presumably be a notice period prior to the 180-day claims period running. Class members can choose to opt in or out of the settlement. See Exhibit C, Statement of Work,

Ex. A, at VI.D. Additionally, this Court has stayed the statute of limitations for all women who are within the class definition, and when this process moves forward, USDA will request that the stay be lifted for all potential claimants. *See id.* at VII.A. It appears that USDA will request the stay be lifted even for those putative plaintiffs whose claims arose after October 19, 2000, without giving them an administrative option for redress of their claims.

B. The Prior Denial of Class Certification Does Not Bar Court Intervention.

Plaintiffs' request for class certification was previously denied by Judge Robertson. *See Love v. Veneman*, 224 F.R.D. at 246. However, this earlier denial of certification does not bar the Court from becoming involved in the settlement process at this stage. *Cf. In re Terazosin Hydrochloride Antitrust Litig.*, Case No. 99-MDL-1317, 2005 U.S. Dist. LEXIS 46189, at *12 (S.D. Fla. Mar. 17, 2005) (certification of settlement class granted following denial of certification for trial).

While class concepts provide helpful background in this analogous situation, **Plaintiffs are not asking that the Court revisit class certification.** Rather, Plaintiffs submit that the Court should exercise its "equitable and inherent powers to ensure that all settling litigants are treated fairly." *In re Zyprexa Prods. Liability Litig.*, 433 F. Supp. 2d 268, 270 (E.D.N.Y. 2006). *See also Chambers v. NASCO, Inc.*, 501 U.S. 32, 43-44 (1991) (discussing inherent powers of courts which are "'governed not by rule or statute but by the control necessarily vested in courts to manage their own affairs so as to achieve the orderly and expeditious disposition of cases'") (citation omitted); *Teneyck v. Omni Shoreham Hotel*, 365 F.3d 1139, 1155-56 (D.C. Cir. 2004) (noting trial court's discretion to manage proceedings); *Beatrice Foods Co. v. New Eng. Printing & Lithographing Co.*, 899 F.2d 1171, 1177 (Fed. Cir. 1990) (same); *Bothwell v. Republic*

Tobacco Co., 912 F. Supp. 1221, 1226 n.7 (“[A] court possesses the inherent power to do those things necessary to ensure a fair and just process, as well as a fair and just final outcome.”); *Sea-Terminals, Inc. v. Indep. Container Lines, Ltd.*, No. 89 CIV. 6931 (MBM), 1990 WL 130766, at *2 (S.D.N.Y. Sept. 4, 1990) (“A court has broad discretion to ensure that both litigants are treated fairly.”). Given USDA’s proposal for how the Court is to be used in connection with the settlement process and the impact that use may have on the court system, potential claimants and other litigants, the Court should use its broad power to oversee the matter to ensure that the government’s process is fair to potential claimants and does not result in disastrous consequences for the court system and other litigants.

Courts routinely exercise their inherent powers to manage complex cases and ensure the orderly management of litigation. For example, in *In re Zyprexa*, 433 F. Supp. 2d at 269, the Eastern District of New York had before it a mass tort litigation (without a certified class), involving the claims of approximately 8,000 private individuals who had agreed to settle with the defendant. The court had already reviewed and approved the settlement agreement, and exercised its equitable powers to enforce that agreement by ordering attorneys to file support for their clients’ claims by a date certain. *Id.* at 269-70. The court commented that “[w]hile the settlement in the instant action is in the nature of a private agreement between individual plaintiffs and the defendant, it has many of the characteristics of a class action; it may be characterized properly as a quasi-class action subject to the general equitable power of the court.” *Id.* at 271. The court noted that some conventions that are required when a class is certified are appropriate in cases that resemble (but are not) class actions because the courts’ primary goal is always to “ensure that similarly situated individuals receive equal fairness

protections regardless of how the courts aggregated the litigation.” *Id.* at 272 (citation omitted).

The government’s settlement program has similar class-like features as described above, and this Court is vested with similar authority to review the settlement process and issue orders it deems necessary not only to insure fairness to the participants, but for management of the Court’s docket.

Additionally, trial courts have a specific inherent role in encouraging and assisting with the settlement of cases, particularly those that involve the public interest, as this case undeniably does:

In addition to recognizing that federal trial judges have an important role in settling cases, we have specifically endorsed the “larger role” of the court in the resolution through settlement of suits “affecting the public interest.” Where a case is complex and expensive, and resolution of the case will benefit the public, the public has a strong interest in settlement. The trial court must protect the public interest, as well as the interests of the parties, by encouraging the most fair and efficient resolution.

United States v. Glens Falls Newspapers, Inc., 160 F.3d 853, 856-57 (2d Cir. 1998) (internal citation omitted); *cf.* Manual for Complex Litigation (Fourth) § 22.91 (2010) (“In some MDL mass tort centralizations, courts have ordered claimants to complete questionnaires . . . to facilitate settlement negotiations or improve claim administration following settlement.”).

Plaintiffs want nothing more than the fair and efficient resolution of their claims, which have been pending in this Court for a decade. Given the expected involvement of the courts and their clerks’ offices in the settlement process, the similarities to a class resolution, the need to protect the putative plaintiffs, and the various fairness concerns described below, this Court’s scrutiny and management of the proposed settlement process is necessary.

III. Several Problems with the Currently Proposed Settlement Process Illustrate That Court Review Is Necessary to Ensure Fairness.

A. Notice to Potential Claimants May Not Be Adequate.

Adequate notice is essential to the success of any class-wide or other large-scale settlement. This is reflected most clearly in the *Pigford* cases, where despite the attempt at widespread notice in *Pigford I*, tens of thousands of African-American farmers missed the filing deadline, and Congress allowed them to file new claims under *Pigford II* by enacting § 14012 of the 2008 Farm Bill. See *Pigford II* Settlement at 10-11; Mem. Op. at 3, *Pigford v. Veneman*, C.A. No. 97-1978 (PLF) (D.D.C. Nov. 26, 2001), Dkt. No. 560 (68,000 requests to file after deadline were received). Here, USDA plans to post notices in its field offices and do some mailing of a summary notice and fact sheet. See First Status Report, Dkt. No. 112, at 1. Posting in field offices will not reach many women who were unable to farm or forced to give up farming due to USDA's discrimination, who no longer farm for other reasons, or who are not visiting Farm Service Agency offices during an off-season for their particular farm operation. USDA does not specify which of its databases, if any, it plans to use to prepare mailings to potential claimants. According to USDA, the Management of Agricultural Credit ("MAC") database, was delivered to the local servicing offices on January 28, 2000, the data was backloaded only to October 19, 1999, and USDA initially considered it to be only 80-85% reliable.⁶ USDA's earlier electronic database, the MRS system, would go back further than the MAC system, and would include the claims period proposed by the government's program but USDA has claimed not to have retained any copies of it. The database USDA compiled when

⁶ In addition, USDA has stated that its mainframe crashed in February and May 2002, and that some data may have been lost.

conducting its most recent Census of Agriculture is presumably the most complete and should be used for providing notice to potential claimants.

USDA should use *all* databases at its disposal to compile a master list of potentially eligible claimants. Even using all available databases, however, will not reach scores of potentially eligible women who were not permitted to receive farm loan applications or whose applications were never processed because of the Agency's gender discrimination. USDA's plans to issue a press release, meet with stakeholders, and launch a website and call center to collect contact information may be a good start, *see* First Status Report, Dkt. No. 112, at 1-2, but these steps are not enough.

USDA has not committed to an amount of funding for the notice process or agreed to hire an experienced firm to disseminate notice. This is in comparison, for example, to the settlement reached in *Keepseagle*, in which USDA has agreed that Plaintiffs' Class Counsel will contract with a company to disseminate court-approved notices, and will use some portion of an account of up to \$20 million that the government will provide for implementation costs of that claims program. *See Keepseagle* Settlement at 10-11; *see also Pigford II* Settlement at 12-13 (funding from USDA of up to \$10 million for implementation). In both *Keepseagle* and *Pigford II*, Plaintiffs' Class Counsel will be in charge of providing notice, while women and Hispanic farmers must trust that USDA will provide adequate notice on its own.⁷ This Court should act to ensure that notice of the claims process is adequately publicized before the running of the claims

⁷ In addition, women have no assurance that the government will actually award all of the funds it has allocated for this program. This is in comparison to both *Keepseagle* and *Pigford II*, in which the settlement agreements include a cy pres provision, whereby any funds not allocated to individual claimants will be awarded to nonprofit organizations working to assist minority farmers. *Keepseagle* Settlement at 31-32; *Pigford II* Settlement at 35.

period begins, whether by overseeing USDA's dissemination of notice, or by involving Plaintiffs' counsel in an arrangement similar to that in *Keepseagle* and *Pigford II*.

B. Several Procedural Aspects of the Settlement Program Are Favorable to USDA but Grossly Unfair to Claimants.

One of the most egregious aspects of the government's proposed process is that USDA will force women to enter a settlement agreement supplied by USDA and require women to formally relinquish all legal claims they have asserted or could have asserted against USDA *before* they have any idea if their administrative claim will be accepted for processing, if they even qualify for USDA's settlement program, and how much money and debt relief they may be awarded in the administrative process. These women must submit proof that they have dismissed any and all claims against USDA *with prejudice*, and release the government from all claims, prior to even knowing whether their claims packages will be *considered* by the Adjudicator. *See* Exhibit C, Statement of Work, Ex. A, at VI.A. Moreover, it can be expected that plaintiffs may inadvertently over-plead in their complaints, for example including a longer claims that fall outside of the period than permitted under the program, or asserting other viable claims not included in the program, and these claims will be swept into the required dismissal with prejudice. Claimants would be precluded from asserting these bona fide claims thereafter.

Women would have to agree to forgo all claims in court and enter this process with no clear idea of what standards the Adjudicator will employ or what type of evidence they are expected to provide in order to succeed on their claims. The only standard the government has articulated is that claims will be decided based on "substantial evidence." *See* Exhibit C, Statement of Work, Ex. A, at IX.B. This amorphous standard is listed in the Administrative Procedure Act as the standard by which reviewing courts should evaluate decisions made in

administrative proceedings. 5 U.S.C. § 706(2)(E). “Substantial evidence” has been defined as more than a “scintilla” but less than a preponderance of the evidence. *See Burns v. Office of Workers’ Comp. Programs*, 41 F.3d 1555, 1562 n.10 (D.C. Cir. 1994). Female farmers cannot be expected to understand what burden this vague standard places on them and how they can meet it. The Court should not sanction a process whereby claimants may be coerced into waiving all of their claims and relinquishing valuable legal rights without an adequate understanding of the process. *See, e.g.*, 31 C.J.S. Estoppel and Waiver § 106 (2010); *In re Gen. Motors Corp. Engine Interchange Litig.*, 594 F.2d 1106, 1139-41 (7th Cir. 1979).

A further process problem is presented by the fact that USDA has the right to submit evidence to the Adjudicator after any claim is filed, apparently without the claimant receiving notification that USDA has submitted evidence, a copy of that evidence, or an opportunity to respond. *See Exhibit C, Statement of Work, Ex. A, at VIII.B.* There is no provision for notifying a claimant when USDA has submitted evidence countering her claim. Moreover, debt relief may be based on information provided by USDA to the Adjudicator after a claimant makes her submission. *See id.* at X.C. A claimant who has experienced multiple events of discrimination and has obtained multiple loans has no way of knowing: 1) which single event of discrimination is the basis for her award; 2) which resulting loans may be the basis for debt relief; and 3) whether USDA’s records, which in the past have been notoriously deficient, have accurately listed the debt due and owing by the claimant. Compounding this problem is the fact that the program does not provide an opportunity for a claimant to seek reconsideration or appeal of the Adjudicator’s decision. *See id.* at VI.A. The government’s refusal to permit a claimant to know what information the government is submitting in refutation of a claim, and to provide her

with an opportunity to be heard, presents serious due process concerns. *Cf. Rafeedie v. I.N.S.*, 795 F. Supp. 13 (D.D.C. 1992)(alien’s due process rights were violated when he was given only one opportunity to submit information and argument on his own behalf, and was required to do so without knowing what confidential information the government had submitted against him). At the very least, women should be informed of what evidence USDA has submitted, and have an opportunity to refute it if they disagree.

C. Constructive Applicants and Certain Members of More than One Minority Group Will Face Additional Unnecessary Barriers to Recovery.

Those women who are “constructive applicants,” i.e., those who tried to apply for farm loans but were not given applications or whose applications were never processed, face an unnecessary heightened burden under the program as proposed. These applicants will be required to submit either a “sworn, verified, or notarized written witness statement from someone who witnessed the alleged incident” or a contemporaneous *written* complaint submitted to a U.S. government official within one year of the incident. *See* Exhibit C, Statement of Work, Ex. A, at IX.B.⁸ Applicants should not be penalized because they happened to be alone with an employee of the Farm Service Agency when that employee discriminated against them, or because the witnesses are now deceased, cannot be located, or do not recall specific details from decades ago. Similarly, it is unreasonable to expect that each woman discriminated against complained in writing within one year and still has a copy of that complaint filed, in some cases, nearly thirty years ago, and in all cases, at least nine years ago. Rather than employ these

⁸ These heightened evidentiary submissions are not required in the recent *Keepseagle* and *Pigford II* settlements. *See Keepseagle* Settlement at 22-23; *Pigford II* Settlement at 24-25 (requiring information from constructive applicants about the loan for which they tried to apply, but not requiring a witness statement or written complaint). USDA has not articulated why it believes that the possibility of false claims by constructive applicants is greater for female and Hispanic farmers than it is for African-American and Native American farmers.

draconian methods to weed out fraudulent claims, USDA has several ways to guard against fraud, including various audit procedures, some of which are described in their Request for Proposals. *See id.* at XI. The added burden the government is requiring simply imposes a further obstacle to recovery.

In addition, these constructive applicants will be specifically flagged by USDA for potential audits for fraud, and USDA will withhold all payments to those claimants selected for audits until the claim clears an audit. *See id.* at XI.C. The Agency is erecting unnecessary hurdles for these female farmers' claims. *Id.* at XI.D

Claimants who may be female *and* either Hispanic, Native American, or African-American are allowed only one recovery, even if USDA employees discriminated against them based on multiple bases. *See id.* at XIV.A. What is perhaps even more unfair for some of these claimants is that their claims will not be considered in this process if they were involved in *any way* in a claims process in *Pigford I*, *Pigford II*, or *Keepseagle*. *See id.* at XIV.B. While such a rule might conceivably make sense if the claimant received a decision on the merits concerning her same complaint of discrimination, USDA proposes to exclude from the process even those whose claims were never *considered* by an adjudicator in the other cases. *See id.* at XIV. This requirement seems designed as a way to reject potentially deserving claimants.

D. Provisions for Debt Relief Are Unclear, and Will Likely Lead to Claimants Not Receiving the Relief to Which They Are Entitled.

For many potential claimants in this process, debt relief is an absolutely essential piece of any settlement. The information USDA has offered to date concerning this portion of the settlement process is inadequate and the process for providing debt relief also appears to have serious deficiencies. First, the cap on debt relief of \$160 million is low, considering that hundreds of thousands of women and Hispanic farmers may be eligible. Second, claimants do not have enough information about how debt relief decisions will be made to allow them to make an informed decision about whether to give up all legal claims to participate in this process. USDA has proposed a “forward sweep” of debt *in the same loan program* related to an instance of discrimination proved to the Adjudicator. *See* Exhibit C, Statement of Work, Ex. A, at X.D. It is unclear whether claimants will have an opportunity to show that discrimination occurred in multiple loan programs, or that several instances of discrimination affected several different loans in different time periods. Nor is it clear whether claimants will have to make an additional showing to receive debt relief or whether they are entitled to debt relief upon a showing of eligibility for a cash award.

Finally, USDA has too much control over which debts are extinguished or restructured. If debt relief is pro-rated because the \$160 million cap is reached, “USDA will attempt to fully cancel as many eligible debts as possible for claimants who have more than one debt eligible for relief. If USDA is unable to fully cancel some of these debts, USDA may, *in its discretion*, partially cancel eligible debts, or service and/or restructure such debts.” *Id.* at X.A (emphasis added). Especially given USDA’s “unfortunate and checkered history with regards to civil

rights,” *see* Civil Rights at USDA: A Backgrounder on Efforts by the Obama Administration, the Adjudicator or the Court should oversee USDA’s exercise of discretion.

IV. Appointing Lead Counsel Would Aid in the Success of the Settlement Program and Improve Fairness for Claimants.

A. This Step is Necessary to Help Claimants Navigate the Process, Especially Given the Control USDA Seeks to Exert Over Any Payment of Attorneys’ Fees.

As illustrated above, the claims program proposed by USDA is complex, and many of its contemplated provisions provide formidable hurdles for potential claimants. In order to even be considered for the program, a claimant must know how to file a lawsuit in federal court. In order to protect her own interests, she should be knowledgeable about how to include in her complaint only those claims that are the subject of the program so that she will not forego future claims she might be entitled to assert. She must also properly file a dismissal with prejudice. She must then complete the claims package, which may require the inclusion of sworn statements in support of her claim. Of course the threshold determination of whether the woman farmer is even eligible for the program and whether her claims are best adjudicated through the program or litigation must first be made. Clearly this process would be extremely difficult if not impossible for a *pro se* litigant to navigate.

A knowledgeable attorney could be invaluable to a claimant attempting to understand and proceed through this administrative process, and yet as part of the program, USDA plans to dictate the parameters of any attorney/client relationship that is formed. Although the program requires a claimant to be personally responsible for any legal fees to be paid, USDA seeks to

limit legal fees to \$1,000 for a “successful” applicant⁹ and to prohibit the payment of any fees for claims that are rejected or denied by the Administrator. *See* Exhibit C, Statement of Work, Ex. A, at XIII. Although the government may be trying to lessen the likelihood that unscrupulous lawyers or even non-lawyers may prey on potential claimants, this provision of the program in reality provides no such protection. Beyond the concern about the government’s interference with the private right to contract, *see, e.g.*, U.S. Const. Art. I, Sec. 10, cl. 1; *Trs. of Dartmouth Coll. v. Woodward*, 17 U.S. 518, 595-96 (1819), this limitation may be contrary to already existing agreements, the arbitrary amounts might not reflect the reality of any given representation, and these requirements could cause some capable counsel to shy away from representing claimants (or from representing them adequately). Moreover, this provision does not reach non-lawyers who may “assist” claimants for a fee, and does not affect fees paid to counsel in advance of the claimant learning whether she is a successful applicant.

The traps into which an unsuspecting claimant could fall in this process without the guidance of an attorney are serious. By way of example, some women who do not even qualify for the program will likely give up their legal rights to file claims against USDA by dismissing complaints with prejudice before they are informed of their lack of eligibility. Also, a claimant who does qualify for the program could easily relinquish more rights and claims than are necessary to enable her participation in the process. A claimant could fail to meet the court’s requirements properly to file a legally valid complaint, and have her claims package rejected by USDA’s Administrator for this reason. The possibilities for serious problems are virtually endless.

⁹ The amount of legal fees is to be capped at 2% of the award. Thus if the awards are reduced pro rata from the \$50,000 award anticipated, the legal fees would be capped at a lower amount.

In the similar administrative processes set up for Track A claimants in *Keepseagle* and *Pigford II*, claimants will have Class Counsel available to assist them without further charge to any individual claimant. *See Keepseagle* Settlement at 16-17; *Pigford II* Settlement at 36. This Court should exercise its inherent and equitable powers to appoint lead counsel to provide similar services to women claimants.

Plaintiffs request that the law firm of Arent Fox LLP be appointed as lead counsel so that each female farmer who wishes to participate in the government's settlement program will have the option of the firm's assistance. Plaintiffs could still retain other counsel to assist them if they wished to do so.

B. This Court Has the Authority to Appoint Lead Counsel.

The authority for courts to appoint counsel to manage and oversee complex litigation in order to increase fairness and efficiency is well-established. *See, e.g., Vincent v. Hughes Air West, Inc.*, 557 F.2d 759, 774 (9th Cir. 1977) (by 1972 “the authority of the district courts regarding lead counsel was well-established”); *Bothwell*, 912 F. Supp. at 1226 (“[I]n seeking to administer justice and bring about a fair and just result, a court must sometimes exercise its inherent power to appoint individuals to act as ‘instruments’ of the court.”); *MacAlister v. Guterma*, 263 F.2d 65, 68-69 (2d Cir. 1958) (“Consolidation . . . and the appointment of general counsel is not new. It has long been recognized by the courts in New York as an expeditious means for handling litigation.”); Manual for Complex Litigation (Fourth) § 10.23 (2010) (“In addition to appointing counsel, the court in complex litigation has authority to supervise counsel appearing in the case.”).

Courts have exercised their power to appoint lead or other supervisory counsel in a variety of cases, including mass torts, *see, e.g., Vincent*, 557 F.2d 759; *In re Air Crash Disaster at Fla. Everglades*, 549 F.2d 1006, 1014-16 (5th Cir. 1977); products liability cases, *see, e.g., In re Zyprexa Prods. Liability Litig.*, 594 F.3d 113, 116-17 (2d Cir. 2010); *In re Prempro Prods. Liability Litig.*, MDL No. 4:03-CV-1507-WRW, 2010 WL 703151, at *1 (E.D. Ark. Feb. 23, 2010); and complex asbestos litigation, *see, e.g., Asbestos Claims Facility v. Berry & Berry*, 267 Cal. Rptr. 896, 904 (Cal. Ct. App. 1990) (“Given the burdens placed on the judicial system by that litigation, we conclude that the trial courts acted well within their inherent managerial powers when they appointed respondent as designated defense counsel . . .”).

This case presents a novel situation, in that it is not a class action, a consolidated action, or a multi-district litigation (although similar complaints may soon be filed throughout the country), but it involves the claims of potentially hundreds of thousands of individuals across the nation. The lack of an exact comparator is of no moment. “The hallmark of case management continues to be flexibility and innovation. It is often true that courts create procedures and approaches that have little express authority in the rules of procedure.” *Manual for Complex Litigation (Fourth)* § 10.155 (2010). The ability of the Court to appoint counsel in analogous cases is clear, and Plaintiffs ask that this Court employ that authority here.

Compensation for appointed lead counsel may be provided for in a variety of ways, including payment from a general settlement fund, *see, e.g., In re Zyprexa Prods. Liability Litig.*, 424 F. Supp. 2d 488, 491 (S.D.N.Y. 2006); payment of a portion of each individual attorney’s fee, *see, e.g., In re Aircrash Disaster at Malaga, Spain*, No. MDL 530, 1990 WL 209816, at *1 (E.D.N.Y. Dec. 10, 1990); or payment of some percentage of each plaintiff’s recovery, *see, e.g.,*

Vincent, 557 F.2d at 764. Here, Arent Fox could be paid a reasonable fee from the settlement fund for their work going forward as lead counsel, which fee could be determined by the Court based on a fee petition submitted at a later stage.¹⁰

The advantages to both potential claimants and the Court from the appointment of Arent Fox as lead counsel are patent. Arent Fox is familiar with the proposed program and has been in discussions with the government about it for some time. Arent Fox, which currently represents thousands of women farmers, would be able to assist potential claimants with all aspects of the program, including evaluation of their claims, and filing necessary documents in court. Claimants could become plaintiffs in the pending *Love* case, which would obviate the need for them to pay a filing fee for the commencement of a new lawsuit, which could be a hardship for many claimants. The Court would also benefit from having principal counsel to manage the plaintiffs' claims and to act as liaison to both the Court and its clerk's office when the inevitable problems with this novel program arise.

“While it is established that a plaintiff has no constitutional right to counsel in a civil case, . . . , counsel nevertheless may be necessary in a particular civil proceeding to ensure fairness and justice in the proceeding and to bring about a fair and just outcome.” *Bothwell*, 912 F. Supp. at 1227. This is just such a case. USDA will require female farmers to give up legal rights by dismissing court claims with prejudice before they know that their claims will be considered in the settlement program. These claimants, like those in *Keepseagle* and *Pigford II*, should have the assistance of counsel, if they so desire, built in to the program. The assistance of attorneys who are familiar with USDA loan programs, the long history of this litigation, and the

¹⁰ Plaintiffs' attorneys reserve the right to separately seek fees for past work, if and when they deem it appropriate.

intricacies of the claims process is necessary to put claimants on a more level playing field with USDA. The appointment of lead counsel can only help achieve the goal of compensating as many deserving women as possible.

CONCLUSION

Plaintiffs reiterate their support for an efficient administrative resolution of the claims of putative plaintiffs, and through counsel intend to continue to work with USDA to ensure that deserving female farmers are compensated. However, it is essential that any large-scale settlement be fair to potential claimants. Accordingly, Plaintiffs respectfully request that this Court play an active role in reviewing and supervising the proposed settlement plan, and that the Court appoint Arent Fox lead counsel to assist female farmers.

Respectfully submitted,

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