

**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)

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

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

INTRODUCTION

Appellants fully satisfied the requirements of Rule 23 for certification of proposed subclasses 1 and 2 of women farmers identified in their Third Amended Complaint. Despite meeting this burden, the District Court nevertheless denied Appellants' motion for class certification on grounds that do not withstand scrutiny.

The arguments offered by the Government in support of the District Court's ruling denying class certification do not overcome the District Court's patent errors. In its Opposition, the Government ignores proposed subclass 1 -- women who were denied loan applications on the basis of gender. The Government's commonality argument leveled at subclass 2 -- women who were denied loans on the basis of gender -- misstates relevant case law. The Government ignores the relevant case law by insisting that Appellants be held to a higher standard to demonstrate commonality for Rule 23 purposes. The Government's attack on Appellants' request for injunctive relief, as failing to predominate over a potential damages claim, mischaracterizes Appellants' prayer for relief and without basis impugns Appellants' intentions in bringing this case. Moreover, the Government's argument that class members could bring thousands of individual cases to vindicate the discrimination they have experienced rather than proceeding as a class was never a ground for the District Court's denial of the motion for class certification, and thus is not a proper subject for this appeal. It is also an obvious attempt to deprive women farmers of any legal remedy for the wrongs they have suffered. Here, where Appellants have demonstrated that common facts and issues predominate over individual

questions, a class action is the most appropriate, efficient means of accomplishing the injunctive relief sought by Appellants in order to bring long-delayed reform to USDA's farm loan programs.

ARGUMENT

I. **THE GOVERNMENT'S REPEATED MISSTATEMENTS FAIL TO DEFEAT CLASS CERTIFICATION**

In its Opposition, the Government has injected a number of extraneous or outright incorrect elements into the dispute in an effort to color this Court's view of the issues at bar in the Government's favor. As a threshold matter, these elements must be identified, and the distortion they cast on the issues here must be corrected.

• **This is not an across the board case.** The Government has repeatedly suggested in its Opposition that the two subclasses for which Appellants sought certification were in reality a single across the board class. Opp'n at 24-25, 28, 39, 41 & n.13. This is incorrect. There are two separate subclasses at issue here. Subclass 1 is comprised of women who were denied the opportunity to receive farm loan applications on the basis of gender. Subclass 2 encompasses women who applied for farm loans but were rejected on the basis of gender. Each of these classes is clearly delineated and represented by different class members whose claims and experiences are particular to the circumstances of each subclass. The implication of the Government's argument -- that across the board classes are held to a higher legal standard and are typically denied certification¹ -- is thus inapplicable here. See section II, *infra*.

• **Appellants do not seek \$3 billion in damages.** The Government states no less

¹ See, e.g., *General Tel. Co. v. Falcon*, 457 U.S. 147 (1982).

than four times in its Opposition that Appellants seek \$3 billion in damages. Opp'n at 2, 15, 19, 41. This is factually incorrect. The Third Amended Complaint, which is the operative pleading for purposes of this appeal, does not specify any amount of damages sought. In fact, there is nothing in the record that substantiates or even estimates any dollar amount in damages.

• **This case is not a revisitation of *Pigford v. Glickman*.**² In its Opposition, the Government repeatedly asserts that this case is merely a derivative of *Pigford*; that the muddle created by the *Pigford* settlement is the fate that would befall this case if the District Court had certified the subclasses; and that the District Court was right to look to the merits and resolution of *Pigford* in considering the class certification sought by the *Love* plaintiffs. Opp'n at 22, 47-48. There is no basis in the record for a comparison of this case to *Pigford* other than both cases involve groups of minority farmers who claim discrimination by USDA. The similarities stop there.

USDA's principal complaint about *Pigford* is the aftermath of the settlement to which USDA was a party. It is USDA, and not the *Love* Appellants, that is responsible for the post-settlement history of the *Pigford* case. Indeed, there are those who contend that the trouble with the *Pigford* settlement is that USDA failed to honor its obligations to the settling plaintiffs. See, e.g., Environmental Working Group, *Obstruction of Justice*, <http://www.ewg.org/reports/blackfarmers/part3.php> (last visited Nov. 12, 2005) (describing USDA's litigation over settlement claims which was unanticipated at the time of the settlement). Moreover, for class certification purposes, any comparison of this case to *Pigford* is inapt where the dissatisfaction with *Pigford* involved the parties'

² 185 F.R.D. 82 (D.D.C. 1999).

conduct post-settlement, and not the certification of the class. Neither the District Court nor the Government has criticized Judge Friedman's certification of the *Pigford* class, only the results of the parties' settlement. That is not an issue in this case.³

Accordingly, these improper references that lace the Government's Opposition should be disregarded as distractions from the real issues in this case, which are discussed below.

II. APPELLANTS HAVE ESTABLISHED COMMONALITY AND PREDOMINANCE SUFFICIENT TO CERTIFY SUBCLASS 1

In its ruling denying class certification, the District Court erred in failing to actually analyze subclass 1 under the requirements of Rule 23. [JA 1092, 1094] In its Opposition, the Government has also largely ignored subclass 1. Faced with the overwhelming evidence of the common experience of women who were routinely denied farm loan applications by USDA officials who were required without exception to distribute loans to all who requested them,⁴ the Government has attempted to dodge the

³ Moreover, the law of this Circuit precludes the District Court from assessing the merits of a case at the class certification stage, such as by considering Appellants' intended means of litigating the class action in the event that class certification is granted. *See Wagner v. Taylor*, 836 F.2d 578, 587 (D.C. Cir. 1987). *See also 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.”). The District Court's consideration of 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 *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 assess the merits of the instant case and assume that the unhappy results borne of a voluntary settlement of the *Pigford* case, to which the Government was a party, would be repeated here.

⁴ The Government asserts that “[d]ecisions regarding credit and benefits were at all times subject to some form of appeal.” Opp'n at 6. This is incorrect. Only adverse decisions can be appealed to the National Appeals Division (“NAD”). 7 C.F.R. §11.2 (2005). USDA's refusal to provide a loan application does not constitute an adverse decision and is accordingly not appealable. Similarly, if USDA takes no official action on a loan application, as reported by many putative class members who submitted declarations in support of the motion for class certification, there is no adverse decision that can be submitted to NAD. *See, e.g.*, JA 556 (woman farmer never received notification about the status of her loan application); JA 558-59 (woman farmer submitted two loan applications to FSA but was never apprised of the status of her loan applications). Moreover, pursuit of an appeal may be hampered by an appellant's lack of

issue by arguing that Appellants' two distinct subclasses are really a single across the board class. This is incorrect.

This is not a case where Appellants seek to certify an across the board class. An across the board class includes “all unequal employment practices alleged to have been committed by the employer pursuant to a policy of racial discrimination,” and may include, for example, both applicants and employees alleging discrimination against their employer. *See Falcon*, 457 U.S. at 153 (“For, under the Fifth Circuit’s across-the-board rule, it is permissible for ‘an employee complaining of one employment practice to represent another complaining of another practice, if the plaintiff and the members of the class suffer from essentially the same injury.’”) (citation omitted).

In this case, there are two distinct subclasses and each is represented by a class representative whose personal circumstances exemplify those of the subclass. For example, Joyce A. King was denied a farm loan application on the basis of gender, consistent with the experience of subclass 1 members. [JA 146-47] Similarly, Margaret Odom was denied a loan on the basis of gender, as were the members of subclass 2. [JA 143] This is not a case where the representatives are attempting to assert the interests of a broad range of farmers whose personal circumstances and interests are beyond those of the class representatives. Thus there is no reason for this Court to impose on Appellants the higher standards and procedural rigors applied in circumstances of an across the board class. *See, e.g., Falcon*, 457 U.S. at 147; *Hartman v. Duffey*, 19 F.3d 1459, 1471

sophistication and resources, her willingness to withstand reprisals by local officials, and her well-founded skepticism that a successful national appeal will actually result in a change to a decision made locally. For example, after Margaret Odom’s applications for farm ownership and operating loans were denied, she appealed to NAD, which ruled in her favor. [JA 143] Based upon NAD’s decision, Ms. Odom reapplied for the same loans, but again her applications were denied. [JA 143].

(D.C. Cir. 1994). Even the District Court recognized that *Falcon*'s standard for treatment of across the board classes is not directly applicable to this case. [JA 1090]

Moreover, in its zeal to try to make this case into one involving an across the board class, the Government ignores the obvious -- with the District Court's permission and without objection to subclasses by the Government -- Appellants deliberately divided the class members into subclasses, each of which must be considered on its own merits for Rule 23 purposes. Rule 23(c)(4) specifically provides for subclasses, each of which must be evaluated on its own merit for satisfaction of Rule 23 certification requirements. *See* 7B Charles A. Wright, Arthur R. Miller & Mary K. Kane, *Federal Practice & Procedure: Civil* § 1790; *LaDuke v. Nelson*, 762 F.2d 1318, 1332 (9th Cir. 1985) (discrete subclasses require separate treatment by the court with regard to class certification).

Nothing in the Government's Opposition demonstrates that the District Court correctly denied certification for subclass 1.

III. APPELLANTS HAVE MET THE COMMONALITY REQUIREMENTS OF RULE 23 FOR CERTIFICATION OF SUBCLASS 2

A. Common Issues of Law and Fact Make Class Certification for Subclass 2 Appropriate

The Government argues that the District Court was correct in finding commonality lacking for subclass 2. Specifically, the Government contends that the District Court's application of a sliding scale of subjectivity is acceptable in light of the holdings of *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977 (1988), and *Bacon v. Honda of America Manufacturing, Inc.*, 370 F.3d 565, 571-72 (6th Cir. 2004). Opp'n at 30, 35-37. The Government misreads and misapplies both *Watson* and *Bacon*.

Watson held that in circumstances where there are both objective and subjective criteria for decisionmaking, distinctions should not be made on the basis of a spectrum or degree of subjectivity and that the decisionmaking system should be considered subjective in nature. 487 U.S. at 989. While conceding this is indeed the holding of *Watson*, the Government argues that *Watson* is inapplicable here because it involved only an individual claim of discrimination, and class certification was not at issue. Opp'n at 35-36. But the Government misses the point of *Watson*. The teaching of *Watson* is that where a decisionmaking system features objective and subjective criteria, the courts properly treat the system as subjective. 487 U.S. at 989. The holding in *Watson* is the same whether applied in an individual case or class action context. See *Cook v. Billington*, No. 82-0400, 1988 WL 142376, at *3 (D.D.C. Dec. 13, 1988) (stating that the Supreme Court's decision in *Watson* relating to subjective decisionmaking "may present common questions of law or fact justifying class certification"); see also *Williams v. Boeing Co.*, 225 F.R.D. 626, 636 n.8 (W.D. Wash. 2005).

The Government's reliance on the Sixth Circuit's holding in *Bacon v. Honda of America*, is misplaced.⁵ The Government contends that in *Bacon*, the Sixth Circuit held that the constructive subjectivity of *Watson* cannot be applied for Rule 23 commonality

⁵ The Government also heavily relies on *Williams v. Glickman*, No. 95-1149, 1997 WL 198110 (D.D.C. Apr. 15, 1997) ("*Williams I*"), in support of its assertion that USDA's criteria for granting of farm loans are not entirely subjective within the meaning of *Falcon*. Opp'n at 31-32. The Government's reliance on *Williams II* is misplaced. The *Williams* case was very different from *Love*. In *Williams*, the court found that the plaintiffs' class was vague and overbroad, including all Black and Hispanic farmers who had suffered any discrimination in their dealings with USDA, and that numerosity was lacking. *Williams v. Glickman*, No. 95-1149, 1997 WL 33772612, at *5 (D.D.C. Feb. 14, 1997) ("*Williams P*"). Unlike the case at bar, the *Williams* putative class did not include requestors who were denied loan applications. The *Williams* plaintiffs premised their claim for commonality solely on the conclusory assertion that their claims presented common issues of fact and law, without presenting any declarations or statistical evidence, which the court found insufficient. *Williams I* at *5. Moreover, the *Williams* plaintiffs argued that the local officials ignored applicable standards, not that the system was premised on entirely subjective criteria. *Williams II* at *2.

purposes and that instead plaintiffs must demonstrate a decisionmaking system of actual subjectivity. Opp'n at 36. The Government misunderstands and misapplies the holding in *Bacon*. At issue in *Bacon* was an across the board class, and the Sixth Circuit's holding addressed the heightened standard required of plaintiffs in such circumstances.

In *Bacon*, the plaintiffs themselves were non-exempt line employees but their proposed class included line and supervisory employees who were turned down for a broad range of job promotions with vastly differing job qualifications, including education, experience, testing and other criteria. 370 F.3d at 571. The *Bacon* court determined that such an attempt to include across the board claims would require that plaintiffs identify an overarching policy of discrimination that permeated the wide range of promotion decisions challenged by the large class. *Id.* at 571 (“The only way Bacon and Harden can place such a diverse group under one umbrella is to demonstrate that Honda operated in a discriminatory fashion against all the workers in the class ‘through an *entirely* subjective decision-making process.’”) (quoting *Falcon*, 457 U.S. at 159 n.15) (emphasis in original).

The instant case simply does not present an across the board class that requires the application of a heightened standard for commonality purposes. Appellants' proposed subclasses are narrowly defined to include subclass 1, women requestors who were all denied a loan application form by USDA officials, in the context of a system in which it is mandatory to disseminate the application form, and subclass 2, women who were denied loans under a system of loan criteria that were subjective in all material respects. This is not a case where Appellants challenge aspects of the USDA farm loan system beyond the circumstances of their own discrimination.

Under the *Watson* holding, Appellants have demonstrated commonality. But even on the basis of the applicable criteria themselves,⁶ Appellants have demonstrated that with regard to subclass 2 that USDA's decisionmaking was not constrained by objective criteria.⁷ See Appellants' Opening Brief at 18-20. See also section III.B., *infra*.

B. The Loan Criteria Are Subjective, Not Merely Flexible

Throughout its Opposition, the Government argues that the loan criteria used by local USDA officials are flexible in order to take into account "consideration of local farming conditions and each farmers' specific circumstances." Opp'n at 27. The Government's semantics, referring to the criteria as flexible, do not hide its admission that USDA's criteria are subjective. The Government fails to point to any viable and informative guidelines established by USDA to assist the local decisionmakers. As USDA itself admits, local decisionmakers have been given free rein by USDA to grant or deny farm loans without any real check by USDA nationally. Moreover, despite USDA's awareness through numerous publications by respected institutions⁸ and farmer complaints that local officials were discriminating against women farmers in the

⁶ The Government argues that the different regulations governing loan eligibility at various times "underscore the differences among the claims of the proposed class members." Opp'n at 5 n.2. But the changes to which the Government refers did not alter the major, subjective criteria with regard to creditworthiness and the farm and home plan. Moreover, the additional loan criteria that became effective in 1997 relate only to those applicants with prior USDA loan history, and are thus inapplicable to subclass 2 members, who by definition were first-time applicants for USDA farm loans when their farm loan applications were discriminatorily rejected. [See JA 1075]

⁷ The Government argues that the District Court was entitled to rely "on the objective reasons for denial given to many applicants." Opp'n at 32-33 & n.9. But there can be no "objective reasons" for denial in light of USDA's articulated policy to deceive applicants about the real reason for their loan denials. It was official USDA policy to require local officials who were rejecting loan applications on the basis of the wholly subjective criterion of character to represent to applicants that the rejection was based on other grounds, so that the applicants would not become angry. [JA 1061] The District Court, like the applicants, had no way of knowing whether USDA was lying in its representations to the applicants as to why their applications were rejected. In light of USDA's admitted policy of deceit, the District Court should not have assumed that USDA's articulation of different reasons for rejecting loan applications were valid and that those different reasons undermined a finding of commonality. No analysis of the merits of either the case as a whole or of any individual's entitlement to a loan was required for the District Court to apply a well-deserved skepticism to USDA's stated reasons for loan rejection.

administration of the loan criteria, USDA did nothing to remedy the actions of local officials, thereby condoning and affirming their conduct. USDA's "conscious inaction" for more than 20 years transforms the Government's so-called "individual" actions of those local officials into a discriminatory pattern or practice that is national in scope, and appropriate for certification on that basis.

C. Appellants' Showing of a Common Pattern and Practice by USDA Officials in Refusing to Make Loans and Distribute Farm Loan Applications to Women Satisfies Commonality Requirements

The Government argues that Appellants cannot demonstrate commonality in the absence of a showing that USDA had an actual policy of refusing to grant loans or to provide loan applications to women farmers. Opp'n at 39-40. The Government misstates the applicable standard. In this Circuit, claimants must demonstrate that the challenged discriminatory treatment was based on the defendant's "standard operating procedure." *See Thomas v. Christopher*, 169 F.R.D. 224, 237 (D.D.C. 1997), *aff'd in relevant part*, *Thomas v. Albright*, 139 F.3d 227 (D.C. Cir. 1998) (citations omitted). The heightened standard urged by the Government, requiring Appellants to show that USDA operated under an articulated policy of discriminatory treatment, is contrary to the case law of this Circuit. *Id.* *See also McReynolds v. Sodexo Marriott Servs., Inc.*, 208 F.R.D. 428, 441 (D.D.C. 2002). Appellants in fact met the standard of demonstrating an articulated policy of discrimination through the 1,941 declarations of women who recounted their experiences in being denied loans and loan applications on the basis of gender, by the statistics provided by Appellants' expert that demonstrated that women were

⁸ [See JA 286, 379, 792-93, 830]

disproportionately denied farm loans,⁹ and by the myriad reports noting USDA's unchecked discrimination against women that has festered for decades. [JA 286, 379, 792-93, 830]

Moreover, contrary to the arguments of the Government and the Chamber, Appellants are not required to identify the specific practice or policy that adversely impacts them to prove a claim for disparate impact. It is undisputed that Congress amended Title VII in response to the decision in *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989), to provide that a claim of disparate impact may be established if the complaining party can demonstrate “that the elements of [an employer’s] decisionmaking process are not capable of separation for [impact] analysis, [then] the decisionmaking process may be analyzed as one . . . practice.” 42 U.S.C. § 2000e-2(k)(1)(B)(i).¹⁰ The *Wards Cove* standard had been applied in disparate impact cases prior to Congress' amendment of Title VII. *See, e.g., EEOC v. Joint Apprenticeship Comm. of the Joint Indus. Bd. of Elec. Indus.*, 895 F.2d 86, 90-91 (2d Cir. 1990) (examining disparate impact

⁹ The Government contends that Appellants' expert, Patrick O'Brien, did not demonstrate that the marked statistical disparities in the proportion and number of loans granted to women applicants was the result of common USDA policies and practices. Opp'n at 32-33. Similarly, *amicus curiae* the Chamber of Commerce of the United States (the “Chamber”), argued that Appellants' statistics do not show that the disparity in loans provided to women was caused by a pattern or practice of discrimination common to all class members or the disparate impact of a specific loan qualification criterion. Brief of the Chamber of Commerce of the United States as *Amicus Curiae* Supporting Appellee (“Chamber’s Brief”) at 21-22. The Government and the Chamber misapprehend the role of statistics in a class action case. Statistics, as quantitative measures, by themselves demonstrate that there is a disparity between groups. Appellants have shown, however, that the reason for the disparity that has adversely affected women applicants is the excessive, unchecked subjectivity in which local USDA decisionmakers engage in making loan applications decisions. Because the elements of USDA decisionmakers are not capable of separation, Appellants need not point to a specific criterion or element of the subjective decisionmaking process that has caused the discrimination. *See, e.g.,* 42 U.S.C. § 2000e-2(k)(1)(B)(i); *McClain v. Lufkin*, 187 F.R.D. 267, 272 (E.D. Tex. 1999) (holding that “the elements of [defendant’s] decision making process [were] not capable of separation for analysis” and thus analyzing it as one employment practice in certifying a disparate impact class).

¹⁰ The Chamber, an organization that seeks to decrease the class actions to which its members are subjected, completely disregards the amendment to Title VII, which dispenses with the requirement for plaintiffs to identify the particular elements of a defendant’s decisionmaking when those elements are not capable of separation for analysis, such as in the instant matter. *See* Chamber’s Brief at 9-10.

claim in light of the decision in *Wards Cove*); *Andrade v. Rice*, No. 01900795, 1990 WL 711702, at *9 (E.E.O.C. May 4, 1990) (applying the *Wards Cove prima facie* burden of proof to the commonality requirement). It must be presumed that with the amendment to Title VII, Congress also intended to change the standard for disparate impact claims raised in Title VII class actions. *See, e.g., McClain v. Lufkin*, 187 F.R.D. 267, 275 (E.D. Tex. 1999) (in a class action matter, analyzing the defendant's decisionmaking process as one employment practice because the elements of the decisionmaking process could not be separated).¹¹

Here, the elements of USDA's decisionmaking process are not capable of separation either for subclass 1 or subclass 2. As to subclass 1, USDA has never maintained any data memorializing why a requestor was not provided with a loan application, so a disappointed requestor could not ascertain where in the process the discrimination occurred. Similarly, with regard to subclass 2, the scant data actually maintained by USDA, does not identify where in the process the discrimination occurred. USDA destroyed all application data prior to October 1997,¹² except with regard to

¹¹ 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. Glickman*, 182 F.R.D. 341, 345 (D.D.C. 1998); *Massey v. First Greensboro Home Equity, Inc.*, No. 97-1292-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”).

¹² The Government's efforts to defend its inexcusable behavior with regard to the destruction of relevant evidence is without merit. USDA's internal guidelines prescribing the length of document retention do not give USDA permission to destroy information that would be relevant to a pending lawsuit. *See Silvestri v. General Motors Corp.*, 271 F.3d 583, 591 (4th Cir. 2001) (finding that the “duty to preserve material evidence arises not only during litigation but also extends to that period before the litigation when a party reasonably should know that the evidence may be relevant to anticipated litigation . . .”).

USDA has not bothered to try to explain why it suddenly chose to destroy information clearly relevant to *Love, Garcia* and *Keepseagle*. USDA does not even argue that its destruction of relevant information was accidental or that it was merely following long established USDA policy. USDA's unrepentant arrogance in destroying relevant information should not be permitted to insulate the agency from the effects of its conduct. While USDA's destruction of relevant evidence does not entitle Appellants to an automatic finding of commonality under Rule 23, Opp'n at 38, Appellants are entitled to an adverse inference against USDA because it failed to preserve relevant evidence within its control. *See Hartman v.*

closed loans, which are not pertinent to the two subclasses here. [JA 192 n.10].

Moreover, USDA record keeping in the aggregate does not identify the basis for loan rejection. Thus, it cannot be determined whether the discrimination occurred because of misapplication of the subjective loan criteria, USDA manipulation of the applicant's farm and home plan¹³ or otherwise. Accordingly, Appellants are required to make a showing that USDA engaged in a widespread practice of discrimination, but not the heightened standard of an articulated policy of discrimination against women farmers.

IV. THE DISTRICT COURT ERRED IN ITS ANALYSIS UNDER RULE 23(b)

A. The District Court Erred in Concluding that Monetary Damages Predominate Over Injunctive Relief for Members of Subclass 2

In its Opposition, the Government, not surprisingly, has endorsed the District Court's view that Appellants were required to "forswear" damages [JA 1096], but recast the District Court's finding into a holding that "individual damages were a huge part of this case and thus were 'far from incidental.'" Opp'n at 43. But the Government has not explained the basis for that assertion, which is particularly specious in the absence of any record on that point.¹⁴ There is nothing in the record that demonstrates the number of class members who would be seeking monetary damages, whether damages would be substantial or nominal, or an estimate of the total damages sought. Indeed, the Government asked no discovery of Appellants to elucidate any of the issues pertaining to damages, and the record is devoid of any such evidence.

Duffey, 973 F. Supp. 189, 196 (D.D.C. 1997). In this case, the adverse inference should have removed any basis for the District Court to criticize Appellants' statistical showing.

¹³ The farm home plan alone contains a number of subjective elements. By way of example, the plan must present a financially viable operation in light of potential profitability of the farm operation (which includes estimated expenses and a reasonable estimated sale price for the farm's products), as well as any non-farm income that the farmer expects to receive.

¹⁴ The District Court also did not explain the basis for its finding that Appellants' damages claim predominated over its request for injunctive relief. [JA 1096-97]

Moreover, throughout its Opposition, the Government continues to urge a policy that would, in effect, require plaintiffs to forswear damages and seek only narrow injunctive relief in order to obtain class certification. That is certainly not the intent of Rule 23(b)(2). *See, e.g.*, Fed. R. Civ. P. 23(b)(2) advisory committee notes. Nor is it the law of this Circuit, which has traditionally permitted class certification under Rule 23(b)(2) notwithstanding the existence of sizable monetary claims, provided that those claims are considered incidental when viewed in light of the requested injunctive or monetary relief. *See Eubanks v. Billington*, 110 F.3d 87, 92 (D.C. Cir. 1997); *Thomas v. Albright*, 139 F.3d 227, 235 (D.C. Cir. 1998) (Rule 23(b)(2) class recovered \$3.8 million, as well as significant injunctive relief); *see also Segar v. Smith*, 738 F.2d 1249, 1264 (D.C. Cir. 1984) (in class action, use of formula instead of individual proceedings, to determine monetary relief); *Thomas v. Christopher*, 169 F.R.D. at 234 (use of formula to distribute monetary relief based on amount of promotion delay experienced by each class member beyond median time experienced by male employees).

Coleman v. General Motors Acceptance Corp., 296 F.3d 443 (6th Cir. 2002), cited by the Government, does not dictate a different result. Opp'n at 44. In *Coleman*, the Sixth Circuit declined to certify a class under Rule 23(b)(2) because it concluded that the compensatory damages at issue -- the difference between the finance charge mark-up paid by each plaintiff and the average mark-up paid by white borrowers -- would have required "highly individualized determinations" that were incompatible with Rule 23(b)(2). *Coleman*, 296 F.3d at 447. In concluding that the damages were not compatible with class treatment, the Sixth Circuit distinguished between compensatory damages and back pay, the latter of which it observed involved "less complicated factual

determinations and fewer individualized issues.” *Id.* at 449. This Circuit has certified employment cases with back pay, including those entailing individualized damages computations. *See, e.g., Thompson v. Boyle*, 499 F. Supp. 1147, 1178 (D.D.C. 1979), *aff’d in relevant part and rev’d in part*, 678 F.2d 257 (D.C. Cir. 1982). Here there is no indication that the damages calculations would be any more individualized than back pay analyses. Accordingly, concerns expressed in *Coleman* should have no bearing here.

In the instant matter, there is no basis for the Government to conclude that the calculation of damages for class members would require such individualized determinations that they would overcome the common elements of the class members' claims. Although the proceedings before the District Court never reached the point where the plaintiffs were required to provide a plan for how to litigate the class members' damages claims going forward, there are in fact such examples that have been utilized in this Circuit and others. For example, in *Segar v. Smith*, this Court approved the use of a damages formula to determine monetary relief for class members. *Segar*, 738 F.2d at 1264. Similarly, in *Thomas v. Christopher*, the court employed a formula to distribute monetary relief to each class member. *Thomas v. Christopher*, 169 F.R.D. at 234; *see also In re Monumental Life Ins. Co.*, 365 F.3d 408, 419 (5th Cir. 2004) (rejecting concerns that damage computations tailored to individual circumstances of each class member precluded pursuit of monetary relief through a class process because “[t]he prevalence of variables common to the class makes damage computation ‘virtually a mechanical task’”).

The Government's assertion that the injunctive relief sought by Appellants is meaningless because it broadly mischaracterizes Appellants' prayer for relief and injects a

snide and unsupported skepticism about Appellants' intentions. There is no basis for the Government to suggest that Appellants are not genuine in their desire for injunctive relief. The relief requested is focused. For example, as part of its injunctive relief, Appellants request that USDA implement a new procedure whereby an independent body reviews denials of loan applications of female farmers. [JA 164] Appellants further seek that USDA design and implement an effective system for investigating and timely responding to complaints of gender discrimination in the farm loan process. [JA 164] Moreover, the request for far ranging injunctive relief does not disqualify a class for certification but rather is indicative of the measures needed to remedy the longstanding, pervasive discrimination. Broad-reaching injunctive relief that compels a party “to obey the law” is a basis for certification under Rule 23(b)(2), not rejection of class certification. *See, e.g., Roman v. Korson*, 152 F.R.D. 101, 108 (W.D. Mich. 1993) (certifying a Rule 23(b)(2) class where plaintiffs sought an injunction to enforce statutes and regulations relating to section 514 housing).

B. Litigation of Appellants' Issues as a Class Is Preferable to Litigation of Individual Cases

The Government lards its brief with multiple conclusory pronouncements that the District Court's denial of class certification was warranted because the putative class members' claims are best resolved individually, and that nothing is to be gained by litigating them as a class. Opp'n at 39-40. It is significant that the District Court itself made no such finding in its opinion denying class certification. Indeed, the Government's argument that no class is needed is without merit.

The Government asserts that Appellants' case is not the “the sort of ‘negative value’ suit” for which class certification is necessary to preserve individual claims.

Opp'n at 19. However, this plainly ignores the harsh economic realities facing the putative class members. This case presents exactly the type of "negative value" suit that warrants class treatment, where litigation costs could well exceed the women's limited personal financial resources, and even exceed their limited, if any, prospect of receiving monetary relief from the suit. *See In re Worldcom, Inc. Sec. Litig.*, 219 F.R.D. 267, 304 (S.D.N.Y. 2003) (class action involving "tens of thousands" of stockholders was superior to individual actions "given the expense and burden that such litigation would entail"), *appeal granted in part on other grounds sub nom., Hevesi v. Citigroup Inc.*, 366 F.3d 70 (2d Cir. 2004); *Green v. Wolf Corp.*, 406 F.2d 291, 301 (2d Cir. 1968) (class action deemed to be superior to individual actions where there were 2,200 putative class members who were harmed in challenged stock purchases). Granting class certification would enable class members to pursue their civil rights claims where they would not otherwise have the means to do so. As such, Appellants' proposed class action would be far superior to adjudicating their claims as individual actions.

The Government also suggest that Appellants' claims would be more efficiently adjudicated individually. Opp'n at 28, 41, 47. Yet once again, the Government blatantly ignores the nature of Appellants' civil rights claims. The class action mechanism would allow Appellants' claims of pattern or practice discrimination to be proven on a class-wide basis, rather than for each class member separately. *See Williams v. Boeing Corp.*, 225 F.R.D. at 634. Class adjudication would be immeasurably more efficient than requiring each woman farmer to file suit and individually establish proof of USDA's discriminatory conduct toward her. *See, e.g., Boggs v. Divested Atomic Corp.*, 141 F.R.D. 58, 67 (S.D. Ohio 1991) (individual claims would lead to repetition that "would

be manifestly unjustified” where some elements of proof and remedies sought would be common among all cases). Moreover, adjudicating Appellants’ claims as a class action would avoid the risk of inconsistent judgments in multiple jurisdictions and promote judicial economy. *See, e.g., Sanft v. Winnebago Indus., Inc.*, 214 F.R.D. 514, 526 (N.D. Iowa 2003). Finally, the broad, nationwide injunctive relief sought by Appellants, is most effectively pursued in a class action. *See, e.g., Coleman v. General Motors Acceptance Corp.*, 220 F.R.D. 64 (M.D. Tenn. 2004) (nationwide class certification was appropriate in light of broad declaratory and injunctive relief sought to redress nationwide violations of ECOA by the company), *on remand from*, 296 F.3d 443 (6th Cir. 2002).

Thus, it is clear that the Government’s repeated comments about how the putative class members’ claims should be resolved individually and not as part of a class action hold no weight. A class action is undoubtedly the superior mechanism for litigating these claims pursuant to Rule 23(b)(3).

V. THE DISTRICT COURT ERRED IN DISMISSING APPELLANTS’ CLAIM FOR FAILURE TO INVESTIGATE UNDER ECOA AND THE APA

The Government argues that Appellants do not state an actionable claim for failure to investigate under ECOA and the APA and that, as a result, the District Court properly dismissed the Appellants’ failure to investigate claim. The Government’s assertions, however, are unsubstantiated and lacking in legal support and thus do not bolster the District Court’s erroneous ruling. Consequently, this Court should determine that the District Court erred in dismissing Appellants’ claim that USDA did not investigate their discrimination complaints under ECOA and APA.

The Government has offered nothing to support its argument that the District Court properly dismissed the failure to investigate claim because USDA regulations do not create a judicially-enforceable duty to investigate discrimination complaints in a credit action. It cites to no cases to support its illogical proposition that a statute or regulation must specifically include an enforcement provision or else the statute or regulation may not be enforced. Opp'n at 48-49. Indeed, the Government's argument actually suggests that an agency may adopt regulations and then ignore them without impunity if the regulations do not include mandatory, enforcement obligations. Such an argument makes no sense, and it ignores 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).

Additionally, in support of its argument that the District Court properly dismissed Appellants' failure to investigate claims under ECOA, the Government asserts that the failure to investigate discrimination complaints does not constitute a reviewable "credit transaction." Opp'n at 49-50. The Government must lose on this argument because it has no legal basis to support its claim, and it ignores ECOA's implementing regulations and interpretive case law, which hold that complaints and the failure to investigate complaints constitute "credit transactions" under ECOA. *See, e.g.*, 12 C.F.R. § 202.2(m); *Chiang v. Veneman*, 385 F.3d 256, 265 (3d Cir. 2004).

In its Opposition, the Government contends that the investigation and handling of "administrative complaints of discrimination," such as the civil rights complaints asserted by women farmers against the USDA, do not implicate ECOA. Opp'n at 50 n.17. However, the cases cited in support of that assertion are inapposite. For example, *Capitol*

Indemnity Corp. v. Aulakh, 313 F.3d 200 (4th Cir. 2002), merely holds that as defined by ECOA, a surety bond does not satisfy the definition of “credit” and a surety is not a “creditor.” *Id.* at 203-04. Contrary to the Government’s contention, the court in *Aulakh* never stated that the processing of administrative complaints of discrimination fails to implicate ECOA. *See id.* Similarly, in *Lewis v. ACB Business Services, Inc.*, 135 F.3d 389 (6th Cir. 1998), the Sixth Circuit simply determined that the plaintiff did not make out a *prima facie* case of retaliation under ECOA; it did not conclude, however, that administrative complaints of discrimination are *per se* impermissible under ECOA. *Id.* at 406. Moreover, the Government cites absolutely no law to back its bald assertion that “investigation procedures,” as one of the components of a “credit transaction” under ECOA, only include a “creditor’s procedures for investigating an applicant’s credit-worthiness.” Opp’n at 50.

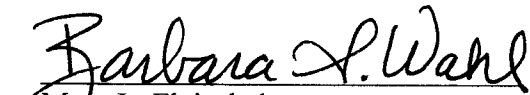
The Government further argues in its Opposition that Appellants’ failure to investigate claim cannot be brought under the APA and that the District Court properly dismissed that claim. The Government contends that because the Appellants have not identified a privately enforceable source of law that imposes a “mandatory duty on the USDA to investigate civil rights complaints,” USDA did not violate its own procedures, and Appellants are therefore not permitted to seek redress through the APA. Opp’n at 51. Once again, the Government has taken the legally unsupportable stance that if an agency’s regulations do not contain a mandatory enforcement provision, the agency may then ignore those regulations with impunity. This construction of the APA would provide an agency with the unfettered ability to ignore its own violations of its regulations unless a specific enforcement provision was actually included in the

regulations. Such an interpretation should not be countenanced by this Court. *See, e.g., Morton*, 415 U.S. at 235 (holding that an agency must enforce its own regulations).

CONCLUSION

For the foregoing reasons, as well as those set forth in their Opening Brief, 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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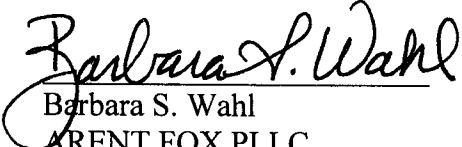
CERTIFICATE OF COMPLIANCE WITH RULE 32(A)

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

1. This reply brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 6,943 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 reply 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 reply brief.


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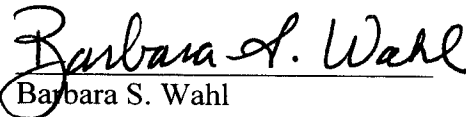
I hereby certify that on November 14, 2005, I served two true and correct copies of Reply Brief of Appellants upon all parties, representatives and attorneys in this cause of action, by serving same via first class, postage prepaid on:

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