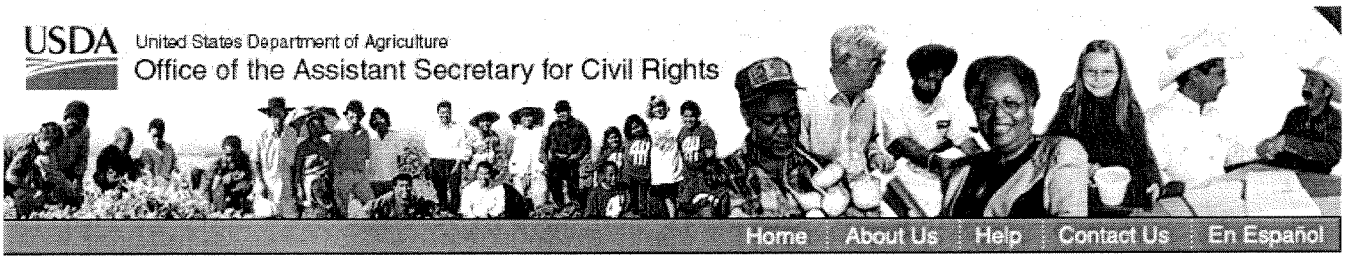

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Discrimination Complaint Filing

Pigford v. Glickman (now Pigford v. Vilsack)

Pigford v. Glickman is a class action lawsuit brought by African American farmers who alleged that USDA discriminated against them on the basis of their race in its farm credit and non-credit benefit programs. The Office of the Monitor was established by the Pigford v. Glickman Consent Decree to assist claimants and provide information about the relief that claimants are entitled under the Consent Decree. For information about this class action lawsuit, contact the Office of the Monitor.

By clicking on the link below, you will leave the USDA Web site and go to the Web site of the Office of the Monitor.
http://www.pigfordmonitor.org

See Also
- **Frequently Asked Questions**

I Want To...
- **Check the Status of My Program Discrimination Complaint**
- **Check the Status of My EEO Complaint**

Related Topics
- **Alernative Dispute Resolution (ADR)**
- **EEO Counselor List** (PDF 83KB)
- **U. S. Equal Employment Opportunity Commission**
- **National Appeals Division**
- **Merit System Proctection Board**

Pigford Remedy Claims Act FAQ's

Q: **How was the Pigford Claims Remedy Act enacted into law ?**

A: The earlier bills that were designed to address the plight of late filing claimants in the *Pigford v. Glickman* settlement were referred to both the House Committee on the Judiciary and the House Committee on Agriculture.[1] Because both Committees were crucial to the passage of legislation, the Committee Chairmen and other interested members adopted a cooperative and more streamlined approach of moving *Pigford* relief through the larger agricultural programs legislation. The Pigford Claims Remedy Act was enacted as Section 14012 of H.R. 2419, the "Food, Conservation, and Energy Act of 2008," Public Law No: 110-234, on May 22, 2008, following an initial veto by President Bush.

Q: **What does the Pigford Claims Remedy Act do for African-American farmers ?**

A: The Pigford Claims Act, Section 14012, provides a mechanism for a determination on the merits for late filing *Pigford* claimants, for both credit and non-credit claims, who met the prior defined class criteria. Simply put, if you were an eligible *Pigford* claimant, who filed a claim during the prior late claims period that expired on September 15, 2000, and your claim was dismissed as untimely, you will be permitted to re-file your claim for review under new procedures that will be set by the trial court.

Q: **Who has the right to file a claim under the Pigford Claims Remedy Act ?**

A: The intent of the Pigford Claims Act is to provide an opportunity for late filers to have their claims heard on the merits, following their earlier dismissal on a statute of limitations technicality. To be eligible for this relief, an individual must have previously submitted a late-filing request under section 5(g) of the consent decree. New claims, those not filed under the earlier deadline, are not covered by the Act. In addition, claims that failed after an earlier review on the merits are also ineligible for relief.

Q: **What is the deadline for filing my claim ?**

A: As in the process established by the District Court under the *Pigford v. Glickman* Consent Decree, the Court will set all filing deadlines and establish the procedures for adjudicating claims under Section 14012. In general, the Act establishes a two year statute of limitations for filing claims that runs from the date of enactment (May 22, 2008).

On May 28, 2008, a new class-action lawsuit was filed pursuant to Section 14012 in the Federal District Court for the District of Columbia on behalf of the five farmers and all other

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[1] *Pigford, et al.* v. *Glickman* (Civil Action No. 97-1978 (D.D.C.)(PLF) and *Brewington, et al.* v. *Glickman*; Civil Action No. 98-1693 (D.D.C.) (PLF).

Pigford late filers. The action, *Kimbrough, et al., v. Schafer*, seeks damages from USDA for decades of USDA racial discrimination in the operation of the agency's farm loan and support programs, and is intended to provide relief for the thousands of African-American farmers who were shut out of the 1999 settlement in the original discrimination lawsuit against USDA, *Pigford v. Glickman*.

Q: **What is the scope of relief under the Pigford Claims Remedy Act ?**

A: Foreclosure – Prior to adjudication of a claim, an individual filing pursuant to Section 14012 is protected from loan acceleration or foreclosure. This foreclosure protection, however, only applies to loans related to the Pigford claim and not the claimant's entire loan portfolio.

Damages – Claimants who allege discrimination related to a farm loan are permitted to seek liquidated damages of $50,000, or a discharge of the debt that was incurred as a result of the alleged discrimination that is the subject of the complaint, and a tax payment in the amount equal to 25 percent of the liquidated damages and loan principal discharged.

Noncredit Claims – Claimants who prevail on a claim of discrimination involving a noncredit benefit program of the USDA are entitled to a payment of $3,000, without regard to the number of such claims on which the claimant prevails.

Q: **Is the USDA required to supply claimants with data to supports claims of discrimination ?**

A: Yes – Not later than 120 days after the USDA receives notice of a complaint filed by a claimant under Section 14012, the Department is required to provide the claimant with a report on farm credit loans and noncredit benefits, as appropriate, made within the claimant's county (or if no documents are found, within an adjacent county as determined by the claimant), by the Department during the period beginning on January 1 of the year preceding the period covered by the complaint and ending on December 31 of the year following the period.

Such report is required to contain information on all persons, whose application for a loan was accepted, including:

- the race of the applicant;
- the date of application;
- the date of the loan decision;
- the location of the office making the loan decision; and
- all data relevant to the process of deciding on the loan.

The reports are not permitted to contain any information that would identify any specific person who applied for a loan from the USDA to protect borrower privacy. This early document disclosure should streamline the claims process by quickly allowing the claimants to determine whether there was a "similarly situated" farmer who received a loan for the purposes of making a prima facie case of discrimination under the terms of the consent decree.

Q: **As a claimant, am I permitted to pursue a claim for my actual damages ?**

A: Yes – A claimant who files a claim under Section 14012 for discrimination under subsection (b) (Determination on Merits) but not under subsection (f) (Expedited Resolutions) and who prevails on the claim shall be entitled to actual damages sustained by the claimant.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

TIMOTHY C. PIGFORD, et al.,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	Civil Action No.
	)	97-1978 (PLF)
DAN GLICKMAN, SECRETARY, THE UNITED STATES DEPARTMENT OF AGRICULTURE,	)	
	)	
Defendant.	)	
	)	
CECIL BREWINGTON, et al.,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	Civil Action No.
	)	98-1693 (PLF)
DANIEL R. GLICKMAN,	)	
	)	
Defendant.	)	

CONSENT DECREE

WHEREAS the parties desire to resolve amicably all the claims raised in these suits, including the plaintiffs' 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. § 551, et seq.; and

WHEREAS the parties have agreed upon mutually satisfactory terms for the complete resolution of all the claims that have, or could have, been asserted by the plaintiffs in this litigation; and

WHEREAS, in light of the remedial purposes of this Consent Decree, the parties intend that it be liberally construed to effectuate those purposes in a manner that is consistent with law; and

WHEREAS the parties have entered into this Consent Decree for the purpose of ensuring that in their dealings with USDA, all class members receive full and fair treatment that is the same as the treatment accorded to similarly situated white persons;

NOW THEREFORE, the plaintiffs and the defendant, Dan Glickman, Secretary of the United States Department of Agriculture ("USDA"), hereby consent to the entry of this decree with the following terms:

1. Definitions

The following terms shall have the following meanings for purposes of this Consent Decree.

(a) The term "adjudicator" shall mean (i) the person or persons who is/are assigned by the facilitator to undertake the initial review of, and where appropriate make recommended decision on Track A claims under ¶ 9, below; and (ii) JAMS-Endispute, Inc., which shall make the final decision in all Track A claims and resolve issues of tolling under ¶ 6, below.

(b) The term "arbitrator" shall mean Michael K. Lewis of ADR Associates, and the other person or persons selected by Mr. Lewis who meet qualifications agreed upon by the parties and by

Mr. Lewis and whom Mr. Lewis assigns to decide Track B claims under ¶ 10, below.

(c) The term "claimant" shall mean any person who submits a claim package for relief under the terms of this Consent Decree.

(d) The term "claim package" shall mean the materials sent to claimants who request them in connection with submitting a claim for relief under the provisions of this Consent Decree. The claim package will include (i) a claim sheet and election form and a Track A Adjudication claim affidavit, copies of which are attached hereto as Exhibit A; and (ii) associated documentation and instructions.

(e) The term "class counsel" shall mean Alexander J. Pires, Jr. and Phillip L. Fraas, Lead Counsel for members of the class defined in ¶ 2(a), infra. In addition, the following counsel and law firms have been acting, and will continue to act, as Of Counsel in this case: J.L. Chestnut, of Chestnut, Sanders, Sanders & Pettaway, P.C., Selma, AL.; T. Roe Frazer of Langston, Frazer, Sweet & Freese, P.A., Jackson, MS.; Hubbard Saunders, IV, of The Terney Firm, Jackson, MS.; Othello Cross, of Cross, Kearney & McKissic, Pine Bluff, AR., Gerard Lear of Speiser Krause, Arlington, VA.; and William J. Smith, Fresno, CA.

(f) The term "credit" shall mean the right granted by a creditor to a debtor to defer payment of debt or to incur debt and

defer its payment or to purchase property or services and defer payment therefor.

(g) The term "defendant's counsel" shall mean the United States Department of Justice.

(h) The term "discrimination complaint" shall mean a communication from a class member directly to USDA, or to a member of Congress, the White House, or a state, local or federal official who forwarded the class member's communication to USDA, asserting that USDA had discriminated against the class member on the basis of race in connection with a federal farm credit transaction or benefit application.

(i) The term "facilitator" shall mean the Poorman-Douglas Corporation, which shall receive claims pursuant to this Consent Decree and assign claims to adjudicators and arbitrators for final resolution. The parties may, by agreement and without the Court's approval, assign to the facilitator such additional tasks related to the implementation of this Consent Decree as they deem appropriate.

(j) The term "preponderance of the evidence" shall mean such relevant evidence as is necessary to prove that something is more likely true than not true.

(k) The term "priority consideration" means that an application will be given first priority in processing, and with respect to the availability of funds for the type of loan at issue among all similar applications filed at the same time; provided,

however, that all applications to be given priority consideration will be of equal status.

(l) The term "substantial evidence" shall mean such relevant evidence as appears in the record before the adjudicator that a reasonable person might accept as adequate to support a conclusion after taking into account other evidence in the record that fairly detracts from that conclusion. Substantial evidence is a lower standard of proof than preponderance of the evidence.

(m) The term "USDA" shall include the United States Department of Agriculture and all of its agencies, instrumentalities, agents, officers, and employees, including, but not limited to the state and county committees which administer USDA credit programs, and their staffs.

(n) The term "USDA listening session" shall mean one of the meetings of farmers and USDA's representatives conducted by USDA's Civil Rights Action Team between January 6, 1997 and January 24, 1997.

2. Class Definition

(a) Pursuant to Fed. R. Civ. P. 23(b)(3) the Court hereby certifies a class defined as follows:

> All African American farmers who (1) farmed, or attempted to farm, between January 1, 1981 and December 31, 1996; (2) applied to the United States Department of Agriculture (USDA) during that time period for participation in a federal farm credit or benefit program and who believed that they were discriminated against on the basis of race in USDA's response to that application; and (3) filed a discrimination complaint on

or before July 1, 1997, regarding USDA's treatment of such farm credit or benefit application.

(b) Any putative class member who does not wish to have his claims adjudicated through the procedure established by this Consent Decree may, pursuant to Federal Rule of Civil Procedure 23(c)(2), request to be excluded from the class. To be effective, the request must be in writing and filed with the facilitator within 120 days of the date on which this Consent Decree is entered.

3. Duties of Facilitator

(a) Poorman-Douglas Corporation shall serve as the facilitator and shall perform the following functions:

(i) publish the Notice of Class Settlement in the manner prescribed in ¶ 4, below;

(ii) mail claim packages to claimants who request them;

(iii) process completed claim packages as they are received;

(iv) determine, pursuant to the terms of this Consent Decree, which claimants satisfy the class definition as contained in ¶ 2(a);

(v) transmit to adjudicators claim packages submitted by claimants who contend that they are entitled to participate in the claims process due to equitable tolling of ECOA's statute of limitations under the particular circumstances of their claim;

(vi) transmit to the adjudicator the claims packages of class members with ECOA claims who elect to proceed under Track A;

(vii) transmit to the arbitrator the claims packages of class members with ECOA claims who elect to proceed under Track B;

(viii) transmit to the adjudicator the claims packages of class members who assert only non-credit benefit claims; and

(ix) maintain and operate a toll-free telephone number to provide information to interested persons about the procedure for filing claims under this Consent Decree.

(b) The facilitator's fees and expenses shall be paid by USDA.

4. Class Notice Procedure

(a) Within 10 days after the entry of the Order granting preliminary approval of this Consent Decree the facilitator shall mail a copy of the Notice of Class Certification and Proposed Class Settlement (a copy of which is attached hereto as Exhibit B) to all then-known members of the class.

(b) As soon as possible after entry of the Order granting preliminary approval of this Consent Decree the facilitator shall take the following steps:

(i) arrange to have 44 commercials announcing the preliminary approval of the Consent Decree and the time and place of the fairness hearing aired on the Black Entertainment Network, and 18 similar commercials on Cable News Network, during a two-week period;

(ii) arrange to have one-quarter page advertisements announcing the preliminary approval of the Consent Decree and the

time and place of the fairness hearing placed in 27 general circulation newspapers, and 115 African-American newspapers, in an 18-state region during a two-week period; and

(iii) arrange to have a full page advertisement announcing the preliminary approval of the Consent Decree and the time and place of the fairness hearing placed in the editions of TV Guide that are distributed in an 18-state region, and a half page advertisement in the national edition of Jet Magazine.

(c) USDA shall use its best efforts to obtain the assistance of community based organizations, including those organizations that focus on African-American and/or agricultural issues, in communicating to class members and potential class members the fact that the Court has preliminarily approved this Consent Decree and the time and place of the fairness hearing.

5. Class Membership Screening; Election by Claimant; Processing.

(a) The facilitator shall send claim packages to claimants who request them.

(b) To be eligible to obtain relief pursuant to this Consent Decree, a claimant must complete the claim sheet and return it and any supporting documentation to the facilitator. The claimant must also provide to the facilitator evidence, in the form described below, that he filed a discrimination complaint between January 1, 1981 and July 1, 1997:

(i) a copy of the discrimination complaint the claimant filed with USDA, or a copy of a USDA document referencing the discrimination complaint; or

(ii) a declaration executed pursuant to 28 U.S.C. § 1746 by a person who is not a member of the claimant's family and which (1) states that the declarant has first-hand knowledge that the claimant filed a discrimination complaint with USDA; and (2) describes the manner in which the discrimination complaint was filed; or

(iii) a copy of correspondence from the claimant to a member of Congress, the White House, or a state, local, or federal official averring that the claimant has been discriminated against, except that, in the event that USDA does not possess a copy of the correspondence, the claimant also shall be required to submit a declaration executed pursuant to 28 U.S.C. § 1746 by the claimant stating that he sent the correspondence to the person to whom it was addressed; or

(iv) a declaration executed pursuant to 28 U.S.C. § 1746 by a non-familial witness stating that the witness has first-hand knowledge that, while attending a USDA listening session, or other meeting with a USDA official or officials, the claimant was explicitly told by a USDA official that the official would investigate that specific claimant's oral complaint of discrimination.

(c) In order to be eligible for relief under ¶¶ 9 or 10, below, a claimant must submit his completed claim package to the facilitator postmarked within 180 days of the date of entry of this Consent Decree, except that a claimant whose claim is otherwise timely shall have not less than 30 days to submit a declaration pursuant to subparagraph (b)(iii), above, after being directed to do so without regard to the 180-day period.

(d) At the time a claimant who asserts an ECOA claim submits his completed claim package, he must elect whether to proceed under Track A, see ¶ 9, below, or Track B see ¶ 10, below, except that claimants whose claims arise exclusively under non-credit benefit programs shall be required to proceed under Track A. A class member's election under this subparagraph shall be irrevocable and exclusive.

(e) Each completed claim package must be accompanied by a certification executed by an attorney stating that the attorney has a good faith belief in the truth of the factual basis of the claim, and that the attorney has not and will not require the claimant to compensate the attorney for assisting him.

(f) Within 20 days of receiving a completed claim package the facilitator shall determine, pursuant to subparagraph (b), above, whether the claimant is a member of the class as defined by ¶ 2(a). If a claimant is determined to be a class member, the facilitator shall assign the class member a consent decree case number, refer the claim package to an adjudicator or an

arbitrator, as appropriate, and send a copy of the entire claim package to the class counsel and defendant's counsel along with a notice that includes the class member's name, address, telephone number, social security number, consent decree case number, and that identifies the track under which the class member is proceeding. If a claimant is found not to be a class member, the facilitator shall notify the claimant and the parties' counsel of that finding.

(g) A claimant who satisfies the definition of the class in ¶ 2(a), above, but who fails to submit a completed claim package within 180 days of entry of this Consent Decree may petition the Court to permit him to nonetheless participate in the claims resolution procedures provided in ¶¶ 9 & 10, below. The Court shall grant such a petition only where the claimant demonstrates that his failure to submit a timely claim was due to extraordinary circumstances beyond his control.

6. Tolling of ECOA's Statute of Limitations.

(a) In addition to the class defined herein, a person who otherwise satisfies the criteria for membership in the class defined in ¶ 2(a), above, but who did not file a discrimination complaint until after July 1, 1997, shall be entitled to relief under this Consent Decree by demonstrating, consistent with Irwin v. United States, 498 U.S. 89 (1990), that:

(i) he has actively pursued his judicial remedies by filing a defective pleading during the applicable statute of limitations period;

(ii) he was induced or tricked by USDA's misconduct into allowing the filing deadline for the applicable statute of limitations period to pass; or

(iii) he was prevented by other extraordinary circumstances beyond his control from filing a complaint in a timely manner, provided that excusable neglect shall not qualify as extraordinary circumstances.

(b) Within 10 days of a receiving a completed claim package from a person who did not file a discrimination claim until after July 1, 1997, the facilitator shall forward the claim to an adjudicator. The adjudicator shall then determine whether the claim is timely pursuant to subparagraphs (a)(i), (ii), or (iii), above. If the claim is found to be qualified under subparagraph (a), above, the adjudicator shall return the claim package to the facilitator, along with a written determination to that effect. The facilitator shall then process the claim pursuant to ¶ 5(f), above, and the claimant shall be eligible for the relief provided herein for class members. If the claim is found by the adjudicator to be untimely, the adjudicator shall return the claim package to the facilitator with a written determination to that effect. The facilitator shall promptly notify the claimant of the adjudicator's decision.

7. Interim Administrative Relief

Upon being advised by the facilitator that a claimant satisfies the class definition in ¶ 2(a), above, or that a claimant has met the criteria for equitable tolling under ¶ 6, above, USDA shall immediately cease all efforts to dispose of any foreclosed real property formerly owned by such person. USDA also will refrain from foreclosing on real property owned by the claimant or accelerating the claimant's loan account; however, USDA may take such action up to but not including foreclosure or acceleration that is necessary to protect its interests. USDA may resume its efforts to dispose of any such real property after a final decision in USDA's favor on the class member's claim pursuant to ¶¶ 9 or 10, below.

8. Response by USDA to a Track A Referral Notice

In any Track A case USDA may, within 60 days after receipt of the materials and notice the facilitator is required, pursuant to ¶ 5(f), above, to furnish to USDA with respect to persons who are determined to be class members, provide to the adjudicator assigned to the claim, and to class counsel, any information or materials that are relevant to the issues of liability and/or damages.

9. Track A – Decision by Adjudicator

(a) In cases in which a class member asserts an ECOA violation and has elected to proceed under Track A:

(i) the adjudicator shall, within 30 days of receiving the material required to be submitted by the class member under ¶ 5, along with any material submitted by defendant pursuant to ¶ 8, above, determine on the basis of those materials whether the class member has demonstrated by substantial evidence that he was the victim of race discrimination. To satisfy this requirement, the class member must show that:

(A) he owned or leased, or attempted to own or lease, farm land;

(B) he applied for a specific credit transaction at a USDA county office during the period identified in ¶ 2(a), above;

(C) the loan was denied, provided late, approved for a lesser amount than requested, encumbered by restrictive conditions, or USDA failed to provide appropriate loan service, and such treatment was less favorable than that accorded specifically identified, similarly situated white farmers; and

(D) USDA's treatment of the loan application led to economic damage to the class member.

(ii) The adjudicator's decision shall be in a format to be agreed upon by the class counsel and defendant's counsel, and shall include a statement of the reasons upon which the decision is based.

(iii) In any case in which the adjudicator decides in a class member's favor, the following relief shall be provided to the class member:

(A) USDA shall discharge all of the class member's outstanding debt to USDA that was incurred under, or affected by, the program(s) that was/were the subject of the ECOA claim(s) resolved in the class member's favor by the adjudicator. The discharge of such outstanding debt shall not adversely affect the claimant's eligibility for future participation in any USDA loan or loan servicing program;

(B) The class member shall receive a cash payment of $50,000 that shall be paid from the fund described in 31 U.S.C. § 1304 ("the Judgment Fund");

(C) an additional payment equal to 25% of the sum of the payment made under subparagraph (B), above, and the principal amount of the debt forgiven under subparagraph (A), above, shall be made by electronic means directly from the Judgment Fund to the Internal Revenue Service as partial payment of the taxes owed by the class member on the amounts paid or forgiven pursuant to those provisions;

(D) The injunctive relief made available pursuant to ¶ 11, below; and

(E) The immediate termination of any foreclosure proceedings that USDA has initiated against any of the class member's real property in connection with the ECOA claim(s) resolved in the class member's favor by the adjudicator; and the return of any USDA inventory property that formerly was owned by the class

member but which was foreclosed in connection with the ECOA claim(s) resolved in the class member's favor by the adjudicator.

(iv) If the adjudicator determines that a class member's claim is not supported by substantial evidence, the class member shall receive no relief under this Consent Decree.

(v) The decision of the adjudicator shall be final, except as provided by ¶ 12(b)(iii), below. The parties hereby agree to forever waive their right to seek review in any court or before any tribunal of the decision of the adjudicator with respect to any claim that is, or could have been decided by the adjudicator.

(b) In cases in which a class member asserts only non-credit claims under a USDA benefit program:

(i) the adjudicator shall, within 30 days of receiving the material required to be submitted by the class member under ¶ 5, along with any material submitted by defendant pursuant to ¶ 8, above, determine on the basis of those materials whether the class member has demonstrated by substantial evidence that he was the victim of race discrimination. To satisfy this requirement, the class member must show that:

(A) he applied for a specific non-credit benefit program at a USDA county office during the period identified in ¶ 2(a), above; and

(B) his application was denied or approved for a lesser amount than requested, and that such treatment was different than the treatment received by specifically identified, similarly

situated white farmers who applied for the same non-credit benefit.

(ii) The adjudicator's decision shall be in a format to be agreed upon by the parties, and shall include a statement of the reasons upon which the decision is based.

(iii) In any case in which the adjudicator decides in a class member's favor, the following relief shall be provided to the class members:

(A) USDA shall pay to the class member the amount of the benefit wrongly denied, but only to the extent that funds that may lawfully be used for that purpose are then available; and

(B) The injunctive relief made available pursuant to ¶11(c)-(d), below.

(iv) If the adjudicator determines that a class member's claim is not supported by substantial evidence, the class member shall receive no relief under this Consent Decree.

(v) The decision of the adjudicator shall be final, except as provided by ¶ 12(b)(iii), below. The parties hereby agree to forever waive their right to seek review in any court or before any tribunal of the decision of the adjudicator with respect to any claim that is, or could have been decided by the adjudicator.

(c) The adjudicator's fees and expenses shall be paid by USDA.

10. Track B – Arbitration

(a) Within 10 days of receiving the completed claim package of a class member who has elected to proceed under Track B, the arbitrator shall notify the class member and defendant of the date on which an evidentiary hearing on the class member's claim will be held. The hearing shall be scheduled for a date that is not less than 120 days, nor more than 150 days, from the date on which the hearing notice is sent.

(b) At least 90 days prior to the hearing described in subparagraph (a), above, USDA and the class member shall file with the arbitrator and serve on each other a list of the witnesses they intend to call at the hearing along with a statement describing in detail the testimony that each witness is expected to provide, and a copy of all exhibits that each side intends to introduce at such hearing. The parties shall be required to produce for a deposition, and for cross examination at the arbitration hearing, any person they identify as a witness pursuant to subparagraph (a), above.

(c) Each side shall be entitled to depose any person listed as a witness by his opponent pursuant to subparagraph (b), above.

(d) Discovery shall be completed not later than 45 days before the date of the hearing described in subparagraph (a), above.

(e) Not less than 21 days prior to commencement of the hearing described in subparagraph (a), above, each side shall (i)

notify the other of the names of those witnesses whom they intend to cross-examine at the hearing; and (ii) file with the arbitrator memoranda addressing the legal and factual issues presented by the class member's claim.

(f) The hearing shall be conducted in accordance with the Federal Rules of Evidence. All direct testimony shall be introduced in writing and shall be filed with the arbitrator and served on the opposing side at least 30 days in advance of the hearing. The hearing shall be limited in duration to eight hours, with each side to have up to four hours within which to cross examine his opponent's witnesses, and to present his legal arguments.

(g) The arbitrator shall issue a written decision 30-60 days after the date of the hearing. If the arbitrator determines that the class member has demonstrated by a preponderance of the evidence that he was the victim of racial discrimination and that he suffered damages therefrom, the class member shall be provided the following relief:

(i) actual damages as provided by ECOA, 15 U.S.C. § 1691e(a) to be paid from the Judgment Fund;

(ii) USDA shall discharge all of the class member's outstanding debt to the Farm Service Agency that was incurred under, or affected by, the program(s) that were the subject of the claim(s) resolved in the class member's favor by the arbitrator. The discharge of such outstanding debt shall not adversely affect

the claimant's eligibility for future participation in any USDA loan or loan servicing program;

(iii) The injunctive relief made available pursuant to ¶ 11, below; and

(iv) The immediate termination of any foreclosure proceedings that have been initiated against any of the class member's real property in connection with the ECOA claim(s) resolved in the class member's favor by the arbitrator, and the return of any USDA inventory property that was formerly owned by the class member but which was foreclosed in connection with the ECOA claim(s) resolved in the class member's favor by the arbitrator.

(h) If the arbitrator rules in the defendant's favor, the class member shall receive no relief under this Consent Decree.

(i) The decision of the arbitrator shall be final, except as provided by ¶ 12(b)(iii), below. The parties hereby agree to forever waive their right to seek review in any court or before any tribunal of the decision of the arbitrator with respect to any claim that is, or could have been decided, by the arbitrator.

(k). The arbitrator's fees and expenses shall be paid by USDA.

11. Class-Wide Injunctive Relief

(a) USDA will provide each class member who prevails under ¶¶ 9(a) or 10 with priority consideration, on a one-time basis, for the purchase, lease, or other acquisition of inventory property to the extent permitted by law. A class member must

exercise his right to the relief provided in the preceding sentence in writing and within 5 years of the date this order.

(b) USDA will provide each class member who prevails under ¶¶ 9(a) or 10 with priority consideration for one direct farm ownership loan and one farm operating loan at any time up to five years after the date of this Order. A class member must notify USDA in writing that he is exercising his right under this agreement to priority consideration in order to receive such consideration.

(c) Any application for a farm ownership or operating loan, or for inventory property submitted within five years of the date of this Consent Decree by any class member who prevails under ¶¶ 9 or 10, will be viewed in a light most favorable to the class member, and the amount and terms of any loan will be the most favorable permitted by law and USDA regulations. Nothing in the preceding sentence shall be construed to affect in any way the eligibility criteria for participation in any USDA loan program, except that outstanding debt discharged pursuant to ¶¶ 9(a)(iii)(A) or 10(g)(ii), above, shall not adversely affect the claimant's eligibility for future participation in any USDA loan or loan servicing program.

(d) In conjunction with any application for a farm ownership or operating loan or for inventory property submitted by a class member who prevails under ¶¶ 9 or 10, above, USDA shall, at the request of such class member provide the class member with

reasonable technical assistance and service, including the assistance of qualified USDA employees who are acceptable to the class member, in connection with the class member's preparation and submission of any such application.

12. Monitor

(a) From a list of three persons submitted to it jointly by the parties, or, if after good faith negotiations they cannot agree, two persons submitted by plaintiffs and two persons submitted by defendant, the Court shall appoint an independent Monitor who shall report directly to the Secretary of Agriculture. The Monitor shall remain in existence for a period of 5 years and shall not be removed except upon good cause. The Monitor's fees and expenses shall be paid by USDA.

(b) The Monitor shall:

(i) Make periodic written reports (not less than every six months) to the Court, the Secretary, class counsel, and defendant's counsel on the good faith implementation of this Consent Decree;

(ii) Attempt to resolve any problems that any class member may have with respect to any aspect of this Consent Decree;

(iii) Direct the facilitator, adjudicator, or arbitrator to reexamine a claim where the Monitor determines that a clear and manifest error has occurred in the screening, adjudication, or arbitration of the claim and has resulted or is likely to result in a fundamental miscarriage of justice; and

(iv) Be available to class members and the public through a toll-free telephone number in order to facilitate the lodging of any consent decree complaints and to expedite their resolution.

(c) If the Monitor is unable within 30 days to resolve a problem brought to his attention pursuant to subparagraph (ii), above, he may file a report with the parties' counsel who may, in turn, seek enforcement of this Consent Decree pursuant to ¶ 13, below.

13. Enforcement Procedures

Before seeking any order by the Court concerning the alleged violation of any provision of this Consent Decree, the parties must comply with the following procedures:

(a) The person seeking enforcement of a provision of this Consent Decree shall serve on his opponent a written notice that describes with particularity the term(s) of the Consent Decree that are alleged to have been violated, the specific errors or omissions upon which the alleged violation is based, and the corrective action sought. The person alleging the violation shall not inform the Court of his allegation at that time.

(b) The parties shall make their best efforts to resolve the matter in dispute without the Court's involvement. If requested to do so, the movant shall provide to his opponent any information and materials available to the movant that support the violation alleged in the notice.

(c) The person who served the notice of violation pursuant to subparagraph (a), above, may not move for enforcement of this Consent Decree until at least 45 days after the date on which he served the notice.

14. Attorney's Fees

(a) Class counsel (for themselves and all Of-Counsel) shall be entitled to reasonable attorney's fees and costs under ECOA, 15 U.S.C. § 1691e(d), and to reasonable attorney's fees, costs, and expenses under the APA, 28 U.S.C. § 2412(d) (as appropriate), that are generated in connection with the filing of this action and the implementation of this Consent Decree. Defendant reserves the right to challenge any and all aspects of class counsel's application for fees, costs, and/or expenses.

(b) Recognizing the fees, costs, and/or expenses already incurred, and given the anticipated fees, costs, and/or expenses to be incurred by class counsel in the implementation of this Consent Decree, defendant will make a one-time payment to class counsel of $1,000,000 as a credit toward class counsel's application for attorney's fees, costs, and/or expenses. The payment shall be made to class counsel and of counsel (payable to Alexander J. Pires, Jr. and Phillip L. Fraas) within 20 days of the date on which this Consent Decree is entered by the Court. This one-time payment shall be credited against any ultimate award or negotiated settlement of fees, costs, and expenses, and to the extent any such ultimate award or settlement is less than this

one-time payment, class counsel shall refund to defendant the entire amount by which this one-time payment exceeds the award or settlement amount.

(c) The provision of attorney's fees, costs, and/or expenses in this Consent Decree is by agreement of the parties and shall not be cited a precedent in any other case.

15. Parties' Respective Responsibilities

No party to this Consent Decree is responsible for the performance, actions, or obligations of any other party to this Consent Decree.

16. Fairness Hearing

(a) Upon the parties' execution of this Consent Decree, the parties shall transmit the Decree to the Court for preliminary approval; request that the Court schedule a fairness hearing on the Consent Decree; and request that the Court, upon issuance of an order granting preliminary approval of this Decree, issue an order setting aside the dates currently scheduled for trial and staying this litigation.

(b) Within 5 days of the execution of this Consent Decree by class counsel and defendant's counsel, the Notice of Class settlement provided for in ¶ 4, above, containing, inter alia, a notice of the fairness hearing on this Consent Decree shall be sent to all known, potential members of the class. The fairness hearing will be held at 10:00 AM on March 2, 1999, in Courtroom 20 of the E. Barrett Pettyman United States Courthouse at 3rd St. and

Constitution Ave., N.W., Washington, D.C. Any objections to the entry of this Consent Decree shall be filed not later than February 15, 1999.

17. Final Judgment

If, after the fairness hearing, the Court approves this Consent Decree as fair, reasonable, and adequate, a Final Judgment, the entry of which shall be a condition precedent to any obligation of any party under this Consent Decree, shall be entered dismissing with prejudice, pursuant to the terms of this Consent Decree and Rule 41(a)(1)(ii) of the Federal Rules of Civil Procedure, all claims in the litigation.

18. Releases

As provided by the ordinary standards governing the preclusive effects of consent decrees entered in class actions, all members of the class who do not opt out of this Consent Decree pursuant to ¶ 2(b), above, and their heirs, administrators, successors, or assigns (together, the "Releasors"), hereby release and forever discharge the defendant and his administrators or successors, and any department, agency, or establishment of the defendant, and any officers, employees, agents, or successors of any such department, agency, or establishment (together, the "Releasees") from -- and are hereby themselves forever barred and precluded from prosecuting -- any and all claims and/or causes of action which have been asserted in the Seventh Amended Complaint, or could have been asserted in that complaint at the time it was

filed, on behalf of this class, by reason of, or with respect to, or in connection with, or which arise out of, any matters alleged in the complaint which the Releasors, or any of them, have against the Releasees, or any of them. It also is expressly understood that any class-wide claims of race-based discrimination in USDA's credit programs by members of the class defined in ¶ 2(a), above are barred unless the operative facts giving rise thereto did not occur prior to the entry of this Decree.

19. Defendant's Duty Consistent With Law and Regulations

Nothing contained in this Consent Decree or in the Final Judgment shall impose on the defendant any duty, obligation or requirement, the performance of which would be inconsistent with federal statutes or federal regulations in effect at the time of such performance.

20. No Admission of Liability

Neither this Consent Decree nor any order approving this Consent Decree is or shall be construed as an admission by the defendant of the truth of any allegation or the validity of any claim asserted in the complaint, or of the defendant's liability therefor, nor as a concession or an admission of any fault or omission of any act or failure to act, or of any statement, written document, or report heretofore issued, filed or made by the defendant, nor shall this Consent Decree nor any confidential papers related hereto and created for settlement purposes only, nor any of the terms of either, be offered or received as evidence

of discrimination in any civil, criminal, or administrative action or proceeding, nor shall they be construed by anyone for any purpose whatsoever as an admission or presumption of any wrongdoing on the part of the defendant, nor as an admission by any party to this Consent Decree that the consideration to be given hereunder represents the relief which could be recovered after trial. However, nothing herein shall be construed to preclude the use of this Consent Decree in order to effectuate the consummation, enforcement, or modification of its terms.

21. No Effect if Default

Subject to the terms of ¶ 17, above, and following entry by the Court of Final Judgment, no default by any person or party to this Consent Decree in the performance of any of the covenants or obligations under this Consent Decree, or any judgment or order entered in connection therewith, shall affect the dismissal of the complaint, the preclusion of prosecution of actions, the discharge and release of the defendant, or the judgment entered approving these provisions. Nothing in the preceding sentence shall be construed to affect the Court's jurisdiction to enforce the Consent Decree on a motion for contempt filed in accordance with ¶ 13.

22. Effect of Consent Decree if Not Approved

This Consent Decree shall not become binding if it fails to be approved by the Court or if for any reason it is rendered

ineffective in any judicial proceeding before initially taking effect. Should it fail to become binding, this Consent Decree shall become null and void and shall have no further force and effect, except for the obligations of the parties under this paragraph. Further, in that event: this Consent Decree; all negotiations in connection herewith; all internal, private discussions among the Department of Justice and/or USDA conducted in furtherance of the settlement process to determine the advisability of approving this Consent Decree; and all statements made by the parties at, or submitted to the Court during, the fairness hearing shall be without prejudice to any person or party to this Consent Decree, and shall not be deemed or construed to be an admission by any party to this Consent Decree of any fact, matter, or proposition.

23. Entire Terms of Agreement

The terms of this Consent Decree constitute the entire agreement of the parties, and no statement, remark, agreement, or understanding, oral or written, which is not contained herein, shall be recognized or enforced.

24. Authority of Class Counsel

Class counsel who are signatories hereto hereby represent, warrant, and guarantee that such counsel are duly authorized to execute this Consent Decree on behalf of the plaintiffs, the members of the plaintiff class, and all Of-Counsel for the plaintiffs.

25. Duty to Defend Decree

The parties to this Consent Decree shall employ their best efforts to defend this Consent Decree against any challenges to this Consent Decree, in any forum.

Consented to:

ALEXANDER J. PIRES, Jr.

Conlon, Frantz, Phelan, Pires
& Leavy
1818 N. St., N.W.
Washington, D.C. 20036
(202) 331-7050

DAVID W. OGDEN
Acting Assistant Attorney General

PHILIP D. BARTZ
Deputy Assistant Attorney General

DENNIS G. LINDER
Civil Division

PHILLIP L. FRAAS
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1025 Thomas Jefferson St., N.W.
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(202) 342-1300

Of Counsel:
J.L. Chestnut
Othello Cross
T. Roe Frazer
Gerald R. Lear
Hubbard I Sanders, IV
Willie Smith

MICHAEL SITCOV
CAROLINE LEWIS WOLVERTON
DANIEL E. BENSING
CARLOTTA WELLS
Department of Justice
Civil Division
901 E Street, N.W.
Washington, D.C. 20004
(202)514-1944

SO ORDERED.

PAUL L. FRIEDMAN
United States District Judge

DATE:

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

TIMOTHY C. PIGFORD, et al.,
Plaintiffs,
V.
Civil Action No
97-1978 (PLF)

DAN GLICKMAN, SECRETARY,
THE UNITED STATES DEPARTMENT
OF AGRICULTURE,

Defendant.

CECIL BREWINGTON, et al.,
Plaintiffs,
V.
Civil Action No.
98-1693 (PLF)

DANIEL R. GLICKMAN,

Defendant.

NOTICE OF CLASS CERTIFICATION AND PROPOSED CLASS SETTLEMENT

TO: All African American farmers who (1) farmed, or attempted to farm, between January 1, 1981 and December 31, 1996; (2) applied to the United States Department of Agriculture (USDA) during that time period for participation in a federal farm credit or benefit program and who believed that they were discriminated against on the basis of race in USDA's response to that application; and (3) filed a discrimination complaint on or before July 1, 1997, regarding USDA's treatment of such farm credit or benefit application.

THIS NOTICE MAY AFFECT YOUR RIGHTS. IT INCLUDES INFORMATION THAT MAY REQUIRE YOUR RESPONSE. PLEASE IT READ CAREFULLY

Your rights may be affected by two lawsuits pending in this Court: Pigford, et al, v. Glickman, No. 97-1978 (D.D.C.) (PLF) ; and Brewington, et al, v. Glickman, No. 98-1693 (D.D.C.) (PLF) . The suits have been consolidated for settlement purposes. The plaintiffs in both suits are African American farmers who claim that the United States Department of Agriculture ("USDA") (1) discriminated against them on the basis of race; and (2) failed to investigate and/or properly respond to their complaints of discrimination in USDA farm credit and non-credit benefit

programs. Plaintiffs further claim that, as a result of USDA's actions, they are entitled to money damages and injunctive and declaratory relief, and to attorneys' fees and costs. USDA denies plaintiffs' claims and has asserted a number of legal defenses in each suit.

USDA and the plaintiffs in both suits have agreed, subject to the Court's approval, that the suits should be consolidated and settled together. The parties have also agreed that a plaintiff class should be certified that would apply to both suits. That class is defined as follows:

All African American farmers who (1) farmed, or attempted to farm, between January 1, 1981 and December 31, 1996; (2) applied to the United States Department of Agriculture (USDA) during that time period for participation in a federal farm credit or benefit program and who believed that they were discriminated against on the basis of race in USDA's response to that application; and (3) filed a discrimination complaint on or before July 1, 1997, regarding USDA's treatment of such farm credit or benefit application.

(Note: Claimants who filed discrimination complaints after July 1, 1997 may still be eligible for relief under this Consent Decree. Class counsel can provide such persons with more information on this matter.)

The parties have executed a consent decree which contains the terms of their proposed settlement, and have requested that this court approve it. The proposed Consent Decree will apply in like manner to every class member who does not timely elect to be excluded from the class (see below).

TERMS OF PROPOSED SETTLEMENT

Subject to court approval, the plaintiffs and defendant have agreed on a settlement of both the Pigford and Brewington cases under which African American farmers fitting the definition of the class described above will have an opportunity to obtain relief for the discrimination that they can prove they experienced. The settlement is in the form of a consent decree. The Consent Decree provides that persons who

satisfy that class definition may nonetheless opt-out of this class settlement and pursue their claims on their own if they so desire.

The Poorman Douglas Corporation has been designated to facilitate the settlement. Those members of the plaintiff class who seek relief under the Consent Decree's terms must request a claim package from the Poorman-Douglas Corporation. The class members must complete and mail the claim package to the Poorman-Douglas Corporation within 180 days from the date on which the Court approves the consent decree.

The claim package requires that claimants provide certain information about themselves, including the reasons they believe they were the victims of discrimination and when they filed complaints about that discrimination. Plaintiffs who seek relief under this Consent Decree must choose whether to bring their claims under either a "Track All adjudication process or the "Track B" arbitration process. While more information about these two procedures may be obtained from the attorneys for the class, the principal differences between the two tracks are as follows:

A. Track A claims will be decided by a neutral adjudicator without an oral hearing, based solely on the claim package that the class member submits, along with any written materials submitted by USDA. Class members choosing track A would be required to show by "substantial evidence" that they

experienced discrimination in a USDA credit or benefit program at any time between January 1, 1981 and December 31, 1996, that as a direct result of that discrimination they suffered economic damage, and that they had filed a complaint of discrimination with USDA between January 1, 1981 and July 1, 1997. "Substantial evidence" is a lower burden of proof than is required under Track B.

Class members who prevail under the Track A process would receive: (1) discharge of all outstanding debt to USDA that is affected by the discriminatory conduct they experienced, (2) a cash payment of $50,000, and (3) an additional payment made directly to the Internal Revenue Service equal to 25% of the sum of the principal amount of debt forgiven and the $50,000 (this payment to the IRS would be used to help pay any tax liability occasioned by the award).

B. Under Track B, class members' claims would be decided by an arbitrator after an oral hearing lasting not more than 8 hours, during which both the class member and USDA could present evidence. The class member would be required to demonstrate, by a "preponderance of the evidence" that he experienced discrimination in a USDA credit or benefit program at any time between January 1, 1981 and December 31, 1996, that as a direct result of that discrimination he suffered economic damage, and that he had filed a complaint of discrimination with USDA between January 1, **1981** and July 1, **1997**. The

preponderance of the evidence standard is a higher one than the "substantial evidence,' test that will apply to Track A claims.

Class members who succeed on their claims under Track B would be entitled to a cash payment equal to their actual damages, and forgiveness of all of outstanding USDA loans that were affected by the discriminatory conduct. Track B is not available to class members who assert only non-credit benefit claims. Class members who do not prevail on a claim under Track A or Track B will receive no monetary or injunctive relief, and have no right to appeal the adverse decision.

Class members who prevail on a claim under either track would also be entitled to additional declaratory and injunctive relief. This relief may include the return of inventory property and priority consideration for future loans.

HOW TO OBTAIN A CLAIM PACKAGE

If you decide to participate in this settlement, you must obtain a claim package. If a claim package is not attached to this Notice, you can request one by phone from the Facilitator at toll-free 1-800-646-2873, or by mail sent to the Facilitator at P.O. Box 4390, Portland, Oregon, 97208-4390. A completed claim package must be signed by an attorney. once you receive your claim package, you may contact class counsel to set up an appointment to meet with attorneys representing the class. Class counsel has agreed to provide you with the services of an attorney at no cost to you. In order to be considered for

relief under the Consent Decree, a completed claim package must be sent to the Facilitator postmarked not more than 180 days after the entry by the Court of the Consent Decree. If you have any questions about your claim package, please contact the Facilitator at 1-800-646-2873.

SETTLEMENT HEARING

The Court will hold a hearing in Courtroom 20 of the E. Barrett Pettyman United States Courthouse, 333 Constitution Avenue, Northwest, Washington, D.C. 20001, at 10:00 a.m. on Tuesday, March 2,, 1999, to determine whether to approve the proposed settlement. Objections to the proposed settlement by class members will be considered by the Court if such objections are filed in writing with the Clerk of the Court on or before February 15, 1999. Attendance at the hearing is not necessary; however, class members wishing to be heard orally in opposition to the proposed settlement should indicate in their written objection their intention to appear at the hearing.

Class members who support the proposed settlement do not need to appear at the hearing or take any other action to indicate their approval.

ELECTION BY CLASS MEMBERS

Persons who fall within the definition of the class may nonetheless elect to opt out of the suit and the settlement and pursue their claims against USDA independently. Whether you

remain a member of the class is entirely your decision. Your two options are listed below, along with factors that might affect your decision. Either choice will have legal consequences, which you should understand before making your decision. 1. If you do NOT wish to be a member of the class, you MUST complete and return the form titled " Request for Exclusion' within 120 days from the date upon which the Consent Decree is entered by the Court. This process is called "opting-out" of the plaintiff class that is bringing these suits. If you elect to opt-out of the suit, you will NOT be entitled to share in any amount of money that may be paid or awarded to plaintiffs in these cases, and you will not be permitted to submit a claim for compensation under the Tracks A or B procedures described above. You will be entitled, however, to seek relief on your own.

2.a. If you wish to remain a member of the class, do NOT complete the "Request for Exclusion" form. (Note: As a class member, you will be required to complete your claim package. SAA the section above entitled "How to Obtain a Claim Package.") By remaining a member of the class, you may be entitled to a cash award and/or other relief under Tracks A or B. If, after your claim is processed under Track A or B, it is determined that you are entitled to no relief, you will be bound by that result as well.

b. You may elect to appear by your own attorney. You may

also seek to intervene individually. If at any time you think that you are not being fairly and adequately represented by the below-named Class Counsel, you may advise the Court.

PLAINTIFFS, COUNSEL

The attorneys and law firms who are acting as class counsel for plaintiffs are:

Alexander J. Pires, Jr. Conlon, Frantz, Phelan, Pires & Leavy, LLP 1819 N Street, N.W., Suite 700 Washington, D.C. 20036	Phillip L. Fraas Tuttle, Taylor & Heron 1025 Thomas Jefferson Street, *N.W.* Washington, D.C. 20007

Six law firms are working with them as Of Counsel. Those lawyers and law firms are:

J.L. Chestnut
Chestnut, Sanders, Sanders
& Peitaway
1 Union Street
Selma, Alabama 36701

Othello C. Cross
Cross, Kearney & McKissic
100 South Pine Street
P.O. Box 6606
Pine Bluff, Arkansas 71611

T. Roe Frazer
Dennis Sweet
Langson, Frazer, Sweet & Freese
201 N. President Street
Jackson, Mississippi 39201

Gerard R. Lear
Speiser Krause
2300 Clarendon Blvd.,
Suite 306
Arlington, Virginia 22201

Hubbard T. Sanders, IV
The Terney Firm
401 East Capitol Street
200 Heritage Building
Jackson, Mississippi 39201

Willie Smith
2350 W. Shaw Ave.
Suite 154
Fresno, California 93711

ADDITIONAL INFORMATION

Any questions you have concerning the matters contained in this notice (and any corrections or changes of name or address) should NOT be directed to this Court, but rather should be directed in writing to:

Claims Facilitator
P.O. Box 4390
Portland, Oregon 97208-4390

If you decide to remain a member of the class and wish to communicate with Class Counsel as your attorney in this litigation, you may do so by writing:

ALEXANDER J. PIRES, JR. ESQ.
Conlon, Frantz, Phelan, Pires
& Leavy
1818 N STREET, NW
SUITE 700
WASHINGTON, DC 20036
(202) 331-7050

You may, of course, seek the **advice** and **guidance of your own** attorney if you desire. The pleadings and other records in **this** litigation may be examined and copied at any time during regular office hours at the Office of the Clerk, United States District Court for the District of Columbia, E. Barrett Pettyman United States Courthouse, 333, Constitution Avenue, Northwest, Washington, D.C. 20001.

REMINDER AS TO TIME LIMIT

If you do NOT wish to be a member of the class on whose behalf theses actions are being maintained, return the completed "Request for Exclusion" to the Court at the address listed on the attached form within 120 days from date on which this Court enters the Consent Decree.

If you do not request exclusion from the class and the consent decree is approved, you must submit your claim form to the Poorman-Douglas Corporation, along with supporting documentation and a certification by class counsel, within 180 days of the date on which the Court approves the Consent Decree.

SO ORDERED.

/S/
PAUL L. FRIEDMAN
United States District Judge

DATE: 1/5/99

Clerk of Court
United States District Court
for the District of Columbia

Enclosure:

Request for Exclusion

REQUEST FOR EXCLUSION

READ THE ENCLOSED LEGAL NOTICE CAREFULLY BEFORE FILLING OUT THIS FORM.

The undersigned has read the Notice of Class Action, dated January 5, 1999, and does NOT wish to remain a member of the plaintiff class certified in the cases Pigford, et al. v. Glickman, No. 97-1978 (D.D.C.) (PLF); or Brewington, et al. V. Glickman, No. 98-1693 (D.D.C.) (PLF) .

_____
Signature

_____
Printed Name

_____
Social Security Number

_____
Street Address

_____
City, State, and Zip Code

_____
Date

If you want to exclude yourself from the class, you must complete and return this form on within 120 days of the date on which the Court enters the Consent Decree to:

Claims Facilitator
P.O. Box 4390
Portland, Oregon 97208-4390

A separate request for exclusion should be completed and timely mailed for each person or entity electing to be excluded from the class.

Note: Please see highlighted text on pages 9 and 10 for the provisions of the consent decree.

TIMOTHY PIGFORD, et al., Plaintiffs, v. DAN GLICKMAN, Secretary, United States Department of Agriculture, Defendant. CECIL BREWINGTON, et al., Plaintiffs, v. DAN GLICKMAN, Secretary, United States Department of Agriculture, Defendant.

Civil Action No. 97-1978 (PLF), Civil Action No. 98-1693 (PLF)

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

185 F.R.D. 82; 1999 U.S. Dist. LEXIS 5220

April 14, 1999, Decided
April 14, 1999, Filed

DISPOSITION: [**1] Consent Decree approved and entered.

CORE TERMS: consent decree, farmer, settlement, claimant, track, objector, class member, discovery, statute of limitations, facilitator, arbitrator, preponderance, class action, discriminated, documentation, notice, revised, package, farm, prevail, opt, civil rights, injunctive relief, decree, negotiation, substantial evidence, recommendation, adjudicator, putative, similarly situated

LexisNexis(R) Headnotes

COUNSEL: For Plaintiffs: Alexander J. Pires, Jr., Conlon Frantz Phelan & Pires, Washington, DC.

For Plaintiffs: Philip L. Fraas, Washington, DC.

For Defendant: Michael Sitcov, Philip Bartz, U.S. Dept. Of Justice, Washington, DC.

JUDGES: PAUL L. FRIEDMAN, United States District Judge.

OPINIONBY: PAUL L. FRIEDMAN

OPINION:

[*85] OPINION

Forty acres and a mule. As the Civil War drew to a close, the United States government created the Freedmen's Bureau to provide assistance to former slaves. The government promised to sell or lease to farmers parcels of unoccupied land and land that had been confiscated by the Union during the war, and it promised the loan of a federal government mule to plow that land. Some African Americans took advantage of these programs and either bought or leased parcels of land. During Reconstruction, however, President Andrew Johnson vetoed a bill to enlarge the powers and activities of the Freedmen's Bureau, and he reversed many of the policies of the Bureau. Much of the promised land that had been leased to African American farmers was taken away and returned to Confederate loyalists. For most African Americans, the promise of forty [**2] acres and a mule was never kept. Despite the government's failure to live up to its promise, African American farmers persevered. By 1910, they had acquired approximately 16 million acres of farmland. By 1920, there were 925,000 African American farms in the United States.

On May 15, 1862, as Congress was debating the issue of providing land for freed former slaves, the United States Department of Agriculture was created. The statute creating the Department charged it with acquiring and preserving "all information concerning agriculture" and collecting "new and valuable seeds and plants; to test, by cultivation, the value of such of them as may require such tests; to propagate such as may be worthy of propagation, and to distribute them among agriculturists." An Act to establish a Department of Agriculture, ch. 71, 12 Stat. 387 (1862). In 1889, the Department of Agriculture achieved full cabinet department status. Today, it has an annual budget of $ 67.5 billion and administers farm loans and guarantees worth $ 2.8 billion.

As the Department of Agriculture has grown, the number of African American farmers has declined dramatically. Today, there are fewer than 18,000 African American [**3] farms in the United States, and African American farmers now own less then 3 million acres of land. The United States Department of Agriculture and the county commissioners to whom it has delegated so much power bear much of the responsibility for this

dramatic decline. The Department itself has recognized that there has always been a disconnect between what President Lincoln envisioned as "the people's department," serving all of the people, and the widespread belief that the Department is "the last plantation," a department "perceived as playing a key role in what some see as a conspiracy to force minority and disadvantaged farmers off their land through discriminatory loan practices." See Pls' Motion for Class Certification, Exh. B, Civil Rights at the United States Department of Agriculture: A Report by the Civil Rights Action Team (Feb. 1997) ("CRAT Report") at 2.

For decades, despite its promise that "no person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be otherwise subjected to discrimination under any program or activity of an applicant or recipient receiving Federal financial [**4] assistance from the Department of Agriculture," 7 C.F.R. ß 15.1, the Department of Agriculture and the county commissioners discriminated against African American farmers when they denied, delayed or otherwise frustrated the applications of those farmers for farm loans and other credit and benefit programs. Further compounding the problem, in 1983 the Department of Agriculture disbanded its Office of Civil Rights and stopped responding to claims of discrimination. These events were the culmination of a string of broken promises that had been made to African American farmers for well over a century.

It is difficult to resist the impulse to try to undo all the broken promises and years of discrimination that have led to the precipitous decline in the number of African American farmers in the United States. The Court has before it a proposed settlement of a class action lawsuit that will not undo all that has been done. Despite that fact, however, the Court finds that the settlement is a fair resolution of the claims brought in this case [*86] and a good first step towards assuring that the kind of discrimination that has been visited on African American farmers since Reconstruction will [**5] not continue into the next century. The Court therefore will approve the settlement.

I. BACKGROUND OF THE CASE

The plaintiffs in this case allege (1) that the United States Department of Agriculture ("USDA") willfully discriminated against them and other similarly situated African American farmers on the basis of their race when it denied their applications for credit and/or benefit programs or delayed processing their applications, and (2) that when plaintiffs filed complaints of discrimination with the USDA, the USDA failed properly to investigate and resolve those complaints. See Seventh Amended Complaint at 4-5. Plaintiffs allege that defendant's actions violated a number of statutes and the Constitution, but both sides agree that this case essentially is brought under the Equal Credit Opportunity Act, 15 U.S.C. ß 1691 ("ECOA"). See Transcript of Hearing of March 2, 1999, at 19. n1

n1 Most of the class members are complaining about racial discrimination in the USDA's credit programs. ECOA provides the statutory basis for claims of discrimination in credit transactions. See 15 U.S.C. ß 1691. A small number of class members, approximately 5% of the class, complain about the USDA's administration of its benefit programs, especially its disaster relief programs. See Seventh Amended Complaint at P 76. The benefit programs are not subject to ECOA, and the claims against the USDA for alleged acts of discrimination in these programs are brought under the Administrative Procedure Act, 5 U.S.C. ß 706. The differences between the two types of claims lead to slight variations in the burdens of proof and the relief provided.

[**6]

The Court certified this case as a class action on October 9, 1998, and preliminarily approved a Consent Decree on January 5, 1999. After a hearing held on March 2, 1999, the parties made some revisions to the proposed Consent Decree and filed a revised proposed Consent Decree with the Court on March 19, 1999. The Court now concludes that the revised proposed Consent Decree is fair, adequate and reasonable.

A. Factual Background

Farming is a hard way to make a living. Small farmers operate at the whim of conditions completely beyond their control; weather conditions from year to year and marketable prices of crops to a large extent determine whether an individual farmer will make a profit, barely break even or lose money. As a result, many farmers depend heavily on the credit and benefit programs of the United States Department of Agriculture to take them from one year to the next. n2 For instance, if an early freeze kills three-quarters of a farmer's crop one year, he may not have sufficient resources to buy seeds to plant in the following season. Or if a farmer needs to modernize his operations and buy a new grain harvester in order to make his operations profitable, he often [**7] cannot afford to buy the harvester without an extension of credit. Because of the seasonal nature of farming, it also is of utmost importance that credit and benefit applications be processed quickly or the farmer

may lose all or most of his anticipated income for an entire year. It does a farmer no good to receive a loan to buy seeds after the planting season has passed.

n2 The technical differences among USDA's various credit and non-credit programs are set forth in detail in a previous Opinion of this Court. See Pigford v. Glickman, 182 F.R.D. 341, 342-44 (D.D.C. 1998).

The USDA's credit and benefit programs are federally funded programs, but the decisions to approve or deny applications for credit or benefits are made locally at the county level. In virtually every farming community, local farmers and ranchers elect three to five member county committees. The county committee is responsible for approving or denying farm credit and benefit applications, as well as for appointing a county executive who [**8] is supposed to provide farmers with help in completing their credit and benefit applications. The county executive also makes recommendations to the county committee regarding which applications should be approved. The salaries of the county committee members and the county executives are paid from federal funds, but they are not considered federal [*87] government employees. Similarly, while federal money is used to fund the credit and benefit programs, the elected county officials, not federal officials, make the decision as to who gets the federal money and who does not.

The county committees do not represent the racial diversity of the communities they serve. In 1996, in the Southeast Region, the region in the United States with the most African American farmers, just barely over 1% of the county commissioners were African American (28 out of a total of 2469). See CRAT Report at 19. In the Southwest region, only 0.3% of the county commissioners were African American. In two of the remaining three regions, there was not a single African American county commissioner. Nationwide, only 37 county commissioners were African American out of a total of 8147 commissioners -- approximately [**9] 0.45%. Id.

Throughout the country, African American farmers complain that county commissioners have discriminated against them for decades, denying their applications, delaying the processing of their applications or approving them for insufficient amounts or with restrictive conditions. In several southeastern states, for instance, it took three times as long on average to process the application of an African American farmer as it did to process the application of a white farmer. CRAT Report at 21. Mr. Alvin E. Steppes is an African American farmer from Lee County, Arkansas. In 1986, Mr. Steppes applied to the Farmers Home Administration ("FmHA") for an operating loan. Mr. Steppes fully complied with the application requirements, but his application was denied. As a result, Mr. Steppes had insufficient resources to plant crops, he could not buy fertilizer and crop treatment for the crops he did plant, and he ended up losing his farm. See Seventh Amended Complaint at P 14.

Mr. Calvin Brown from Brunswick County, Virginia applied in January 1984 for an operating loan for that planting season. When he inquired later that month about the status of his loan application, a FmHA [**10] county supervisor told him that the application was being processed. The next month, the same FmHA county supervisor told him that there was no record of his application ever having been filed and that Mr. Brown had to reapply. By the time Mr. Brown finally received his loan in May or June 1984, the planting season was over, and the loan was virtually useless to him. In addition, the funds were placed in a "supervised" bank account, which required him to obtain the signature of a county supervisor before withdrawing any funds, a requirement frequently required of African American farmers but not routinely imposed on white farmers. See Seventh Amended Complaint at P 11.

In 1994, the entire county of Greene County, Alabama where Mr. George Hall farmed was declared eligible for disaster payments on 1994 crop losses. Every single application for disaster payments was approved by the Greene County Committee except Mr. Hall's application for four of his crops. See Seventh Amended Complaint at P 5. Mr. James Beverly of Nottaway County, Virginia was a successful small farmer before going to FmHA. To build on his success, in 1981 he began working with his FmHA office to develop a farm [**11] plan to expand and modernize his swine herd operations. The plan called for loans to purchase breeding stock and equipment as well as farrowing houses that were necessary for the breeding operations. FmHA approved his loans to buy breeding stock and equipment, and he was told that the loan for farrowing houses would be approved. After he already had bought the livestock and the equipment, his application for a loan to build the farrowing houses was denied. The livestock and equipment were useless to him without the farrowing houses. Mr. Beverly ended up having to sell his property to settle his debt to the FmHA. See id. at P 12.

The denial of credit and benefits has had a devastating impact on African American farmers. According to the Census of Agriculture, the number of African American farmers has declined from 925,000 in 1920 to approximately 18,000 in 1992. CRAT Report at

14. The farms of many African American farmers were foreclosed upon, and they were forced out of farming. Those who managed to stay in farming often were subject to humiliation and degradation at the hands of [*88] the county commissioners and were forced to stand by powerless, as white farmers received preferential [**12] treatment. As one of plaintiffs' lawyers, Mr. J.L. Chestnut, aptly put it, African American farmers "learned the hard way that though the rules and the law may be colorblind, people are not." Transcript of Hearing of March 2, 1999, at 173.

Any farmer who believed that his application to those programs was denied on the basis of his race or for other discriminatory reasons theoretically had open to him a process for filing a civil rights complaint either with the Secretary of Agriculture or with the Office of Civil Rights Enforcement and Adjudication ("OCREA") at USDA. USDA regulations set forth a detailed process by which these complaints were supposed to be investigated and conciliated, and ultimately a farmer who was unhappy with the outcome was entitled to sue in federal court under ECOA. See Pigford v. Glickman, 182 F.R.D. 341, 342-44 (D.D.C. 1998). All the evidence developed by the USDA and presented to the Court indicates, however, that this system was functionally nonexistent for well over a decade. In 1983, OCREA essentially was dismantled and complaints that were filed were never processed, investigated or forwarded to the appropriate agencies for conciliation. As a result, [**13] farmers who filed complaints of discrimination never received a response, or if they did receive a response it was a cursory denial of relief. In some cases, OCREA staff simply threw discrimination complaints in the trash without ever responding to or investigating them. In other cases, even if there was a finding of discrimination, the farmer never received any relief.

In December of 1996, Secretary of Agriculture Dan Glickman appointed a Civil Rights Action Team ("CRAT") to "take a hard look at the issues and make strong recommendations for change." See CRAT Report at 3. In February of 1997, CRAT concluded that "minority farmers have lost significant amounts of land and potential farm income as a result of discrimination by FSA [Farm Services Agency] programs and the programs of its predecessor agencies, ASCS [Agricultural Stabilization and Conservation Service] and FmHA [Farmers Home Administration]. . . . The process for resolving complaints has failed. Minority and limited-resource customers believe USDA has not acted in good faith on the complaints. Appeals are too often delayed and for too long. Favorable decisions are too often reversed." Id. at 30-31.

Also [**14] in February of 1997, the Office of the Inspector General of the USDA issued a report to Secretary Glickman stating that the USDA had a backlog of complaints of discrimination that had never been processed, investigated of resolved. See Pls' Motion for Class Certification, Exh. A (Evaluation Report for the Secretary on Civil Rights Issues). The Report found that immediate action was needed to clear the backlog of complaints, that the "program discrimination complaint process at [the Farm Services Agency] lacks integrity, direction, and accountability," id. at 6, and that "staffing problems, obsolete procedures, and little direction from management have resulted in a climate of disorder within the civil rights staff at FSA." Id. at 1.

The acknowledgment by the USDA that the discrimination complaints had never been processed, however, came too late for many African American farmers. ECOA has a two year statute of limitations. See 15 U.S.C. ß 1691e(f). If the underlying discrimination alleged by the farmer had taken place more than two years prior to the filing of an action in federal court, the government would raise a statute of limitations defense to bar the farmer's [**15] claims. For instance, some class members in this case had filed their complaints of discrimination with the USDA in 1983 for acts of discrimination that allegedly occurred in 1982 or 1983. If the farmer waited for the USDA to respond to his discrimination complaint and did not file an action in court until he discovered in 1997 that the USDA had stopped responding to discrimination complaints, the government would argue that any claim under ECOA was barred by the statute of limitations.

In 1998, Congress provided relief to plaintiffs with respect to the statute of limitations problem by passing legislation that tolls the statute of limitations for all those who filed [*89] discrimination complaints with the Department of Agriculture before July 1, 1997, and who allege discrimination at any time during the period beginning on January 1, 1981 and ending on or before December 31, 1996. See Agricultural, Rural Development, Food and Drug Administration, and Related Agencies Appropriations Act, 1999, Pub. L. No. 105-277, ß 741, 112 Stat. 2681 (codified at 7 U.S.C. ß 2297, Notes).

B. Procedural Background

From the beginning, this case has been a contentious and hard fought battle on [**16] both sides. The original complaint in this action was filed on August 28, 1997, by three African American farmers representing a putative class of 641 African American farmers. At an initial status conference on October 30, 1997, plaintiffs requested that the case be referred to Magistrate Judge Alan Kay for the purpose of discussing settlement. The government opposed that request. The Court refused to require the government to engage in settlement

negotiations if it was not prepared to do so in good faith and with an open mind, but it made clear that the case would move quickly.

From plaintiffs' perspective, the most important pieces of evidence necessary to ensure speedy resolution of the case were the files of the individual farmers that were held by the government. The Court ordered both sides to comply with their obligations under Rule 26(a)(1) of the Federal Rules of Civil Procedure by November 14, 1997, and it ordered the government to provide plaintiffs with any files in its possession on any farmer who was part of the putative class. See Order of November 4, 1997. The government complied with the Court's discovery ruling, and since then has continued to provide class [**17] counsel with the files of putative class members that it has. See Def's November 17, 1997, Report to the Court.

In the meantime, a number of motions to intervene were filed on behalf of putative class members represented by other attorneys. The two attorneys who originally had filed the Pigford action, Mr. Alexander Pires and Mr. Philip Fraas, stated in open court that any attorney was welcome to serve as of counsel in the case, on the condition that he or she would agree that (1) any compensation would be provided only under the attorneys' fees provisions of ECOA, 15 U.S.C. ß 1691e(d), or other statutory fee-shifting provisions, and (2) he or she would neither collect any fees from individual farmers nor enter into a contingent fee arrangement by which the attorney would take a percentage of the farmer's settlement or award. Class counsel also represented that any putative class member on whose behalf a motion to intervene was filed would be added as a named plaintiff in an amended complaint.

The motions to intervene subsequently were withdrawn, and a number of lawyers entered appearances as of counsel for plaintiffs. The resulting team of lawyers in the case represents [**18] an extraordinary range of experience, specialties and geography: Mr. Pires and Mr. Fraas, both of Washington D.C., have represented farmers in cases against the Department of Agriculture for many years; Mr. J.L. Chestnut from Selma, Alabama, Mr. Othello Cross from Pine Bluff, Arkansas, and Mr. Dennis Sweet, from Jackson, Mississippi, all are experienced civil rights lawyers; Mr. T. Roe Frazer from Jackson, Mississippi, and Mr. Gerard Lear of Arlington, Virginia both are complex litigation and class action specialists. In addition, Mr. Hubbard Saunders, IV, an attorney from Jackson, Mississippi with nearly twenty-five years of experience, and Mr. Willie Smith from Fresno, California have worked on the case.

By mid-November of 1997, the government had rethought its original position with respect to mediation and agreed to explore the option of settlement. The parties quickly agreed upon a mediator, Mr. Michael Lewis, but an agreement on the details of the mediation process required a number of status hearings and conference calls. Finally, in late December the parties agreed to stay the case for a period of six months during which time they would pursue mediation. The parties agreed [**19] to "commence" settlement discussions on a case-by-case basis but left open the possibility of discussing a global resolution of the case. See Order of December 24, 1997.

[*90] At a status conference just over two months later, however, there appeared to be a fundamental disagreement about the process of mediation: plaintiffs wanted to negotiate a settlement structure that would address the claims of all putative class members while the government continued to want to mediate claims on a case-by-case basis. Plaintiffs' counsel, in particular Mr. J.L. Chestnut, argued that the stay had to be lifted, legal issues briefed and decided, and a prompt and firm trial date set. If mediation continued on a case-by-case basis, Mr. Chestnut argued, "Well, Your Honor can look at my gray hair; I won't live that long. Many of my clients won't live that long. . . . Please, please give my people a trial date. It took us, Judge, 15 long miserable years to get here and now they want to go case by case. That will be another 15 years of injustice. The only way you can stop it, Your Honor, is a straightforward statement to the government: Settle it or try it." Transcript of Hearing of March 5, 1998, at 37-39. [**20]

The Court lifted the stay so that the parties could brief plaintiffs' motion for class certification and plaintiffs' motion for partial summary judgment on the issue of the statute of limitations. See Order of March 6, 1998. The Court also set a trial date of February 1, 1999. Id. Upon the representations of the parties that they wanted to continue trying to mediate the case with Mr. Lewis, the Court also extended the time for mediation. See Order of April 6, 1998.

In the meantime, plaintiffs had filed a second putative class action, Brewington v. Glickman, 185 F.R.D. 82, Civil Action No. 98-1693. The putative class in Brewington included those who had filed their discrimination complaints with the USDA after February 21, 1997, the cutoff date for the putative Pigford class, but before July 7, 1998, the filing date of Brewington. With the exception of the date of filing of discrimination complaints, the allegations of the Brewington complaint mirrored those of the Pigford complaint.

On October 9, 1998, the Court granted the motion for class certification in Pigford. The Court also ordered the parties jointly to file a draft notice to class members by October [**21] 30, 1998. At a status hearing on

October 13, 1998, plaintiffs informed the Court that Congress had passed a bill that would toll the statute of limitations for African American farmers who had filed complaints of discrimination with the USDA and that they would be withdrawing their motion for partial summary judgment on the statute of limitations issue as soon as the President signed the bill into law because that motion then would be unnecessary. On October 21, 1998, President Clinton signed into law the bill tolling the statute of limitations that had been enacted by Congress. See Agricultural, Rural Development, Food and Drug Administration, and Related Agencies Appropriations Act, 1999, Pub. L. No. 105-277, ß 741, 112 Stat. 2681 (codified at 7 U.S.C. ß 2297, Notes). The waiver of the statute of limitations provides that "a civil action to obtain relief with respect to the discrimination alleged in an eligible complaint, if commenced not later than 2 years after the enactment of this Act, shall not be barred by any statute of limitations." An "eligible complaint" is defined, in relevant part, as "a nonemployment related complaint that was filed with the Department of Agriculture [**22] before July 1, 1997 and alleges discrimination at any time during the period beginning on January 1, 1981 and ending December 31, 1996" in violation of ECOA or "in the administration of a commodity program or a disaster assistance program." See id.

Faced with a February 1, 1999, trial date, the parties continued their efforts at mediation with the help of Mr. Lewis. At some point after the March 5, 1998 status hearing, the focus of negotiations shifted from case-by-case analysis to structuring a global resolution of the claims of all class members. By December 1998, the parties had informed the Court that they were very close to agreeing upon a global settlement of plaintiffs' claims in both Pigford and Brewington. Finally, on January 5, 1999, the parties filed with the Court (1) a motion to consolidate the two cases, (2) a motion to alter the definition of the class certified in Pigford to include members of the Brewington action and to certify the class pursuant to Rule 23(b)(3) of the Federal Rules of Civil Procedure, (3) a motion [*91] for preliminary approval of a proposed Consent Decree, and (4) a notice to class members. The Court consolidated the two cases, preliminarily [**23] approved the Consent Decree, approved the notice to class members, notified class members of their right to file written objections by February 15, 1999, and scheduled a fairness hearing for March 2, 1999.

Within ten days after the preliminary approval of the Consent Decree, the facilitator mailed a copy of the Notice of Class Certification and Proposed Class Settlement to all then-known members of the class. n3 The facilitator also arranged a print notification program with one-quarter page advertisements in 26 general circulation newspapers for January 21, 1999, and in 100 African-American newspapers between January 13, 1999 and January 27, 1999. See Def's Memorandum in Support of Consent Decree (Declaration of Jeanne C. Finegan). The facilitator also arranged to have a full page advertisement announcing the preliminary approval of the Consent Decree and the time and place of the fairness hearing placed in the editions of TV Guide that were distributed in an 18-state region, and a half page advertisement in the national edition of Jet Magazine. See id. In addition, the facilitator aired 44 commercials announcing the preliminary approval of the Consent Decree and the time [**24] and place of the fairness hearing on the Black Entertainment Network and aired 18 similar commercials on the Cable News Network over the course of a two-week period. The facilitator estimates that on average, the print and television notice campaign "reached 87 percent of African-American farm operators, managers or others in farm-related industries, an average frequency of 2.4 times." Id. at 6. As of February 19, 1999, the facilitator had received 15,132 telephone calls as a result of its notification campaign. Id. at 7.

n3 The "facilitator" is the Poorman-Douglas Corporation. See Consent Decree at P 1(i). Among other responsibilities, the facilitator is required to mail copies of the Notice of Class Certification and Proposed Class Settlement to all known class members within ten days of the Court's preliminary approval of the proposed Consent Decree and to undertake an advertising campaign notifying potential class members of the class certification and proposed class settlement. See id. at PP 3, 4.

[**25]

The USDA exerted efforts to obtain the assistance of community based organizations, including those organizations that focus on African American and/or agricultural issues, in communicating to class members and potential class members the fact that the Court had preliminarily approved the Consent Decree and the time and place of the fairness hearing. Def's Memorandum in Support of Consent Decree (Declaration of David H. Harris). USDA officials also were notified that, to the extent possible, they had an obligation to communicate to class members information about the Consent Decree and the fairness hearing. The Court posted a copy of the proposed Consent Decree and the Notice of Class Certification on the Internet Website of the United States District Court for the District of Columbia. Finally, class counsel held meetings in counties throughout the country, particularly in the South, to notify farmers of the

settlement, the process for filing a claim package and the time, place and purpose of the fairness hearing.

The Court timely received approximately eighteen written objections from organizations or individuals. See Order of February 25, 1999. The Court also received a number [**26] of letters after the February 15, 1999 deadline which it also has considered. With the exception of one objection filed after the hearing, see Order of March 11, 1999, the Court has considered all letters and filings received before and since the hearing that have expressed objections to or comments on the proposed Consent Decree. Class counsel and counsel for the government also filed memoranda in support of the proposed Consent Decree and supplemental responses to the objections raised.

The Court conducted a fairness hearing on March 2, 1999, which lasted an entire day. The Court allocated time for all objectors who previously had filed written objections to the Consent Decree and also allocated time at the end of the day for others who wished to express their views. See Order of February 25, 1999. The Court provided time for class counsel and counsel for the government [*92] to explain the proposed Consent Decree and to discuss their view of its fairness. The Court heard from representatives of eight organizations that had filed written objections, six individuals who had filed written objections and ten individuals who had not filed written objections. The Court also heard from [**27] class counsel, counsel for the government and the mediator.

After the hearing, the Court sent a letter to the parties summarizing some of the objections that had been raised at the hearing and suggesting changes to the proposed Consent Decree that might alleviate some of the concerns raised. The Court indicated that it would not issue a final ruling on the fairness of the proposed Consent Decree until March 19, 1999, in the event that the parties wanted to file a revised proposed Consent Decree addressing the concerns raised at the hearing and by the Court. By letter of March 19, 1999, the parties transmitted to the Court a revised proposed Consent Decree which includes those changes or clarifications that the parties believed they could make to the proposed Consent Decree without fundamentally altering the framework and basis for their agreement. The Court posted the revised Consent Decree to the Court's Internet Website and issued an order granting any objector leave to file any comments with respect to the revisions to the proposed Consent Decree by March 29, 1999. The revised proposed Consent Decree now is before the Court to determine whether it is fair, reasonable and adequate. [**28]

II. CLASS CERTIFICATION

The Court originally certified a class pursuant to Rule 23(b)(2) of the Federal Rules of Civil Procedure for purposes of determining liability. The class was defined as

> All African-American farmers who (1) farmed between January 1, 1983, and February 21, 1997; and (2) applied, during that time period, for participation in a federal farm program with USDA, and as a direct result of a determination by USDA in response to said application, believed that they were discriminated against on the basis of race, and filed a written discrimination complaint with USDA in that time period.

Pigford v. Glickman, 182 F.R.D. at 352. Plaintiffs had asserted that the class could be certified under either Rule 23(b)(2) or Rule 23(b)(3) of the Federal Rules of Civil Procedure, but the Court found that it was most appropriate for purposes of determining liability to certify a class under Rule 23(b)(2), governing class actions seeking primarily injunctive or declaratory relief. At the time, the Court also noted that "if liability is found and the case reaches the remedy stage, the Court will have to determine the most appropriate mechanism for determining remedy. [**29] It is possible that at that point it would be appropriate to certify a class pursuant to Rule 23(b)(3). . . ." Id. at 351 (*citing* Eubanks v. Billington, 324 U.S. App. D.C. 41, 110 F.3d 87, 96 (D.C. Cir. 1997) (in class action seeking both injunctive and monetary relief, court may adopt "hybrid" approach and certify (b)(2) class for former and (b)(3) class for latter)).

By Order of January 5, 1999, upon motion of the parties, the Court vacated the Order certifying the class and certified a new class pursuant to Rule 23(b)(3) of the Federal Rules of Civil Procedure. The newly certified class is defined as:

> All African American farmers who (1) farmed, or attempted to farm, between January 1, 1981 and December 31, 1996; (2) applied to the United States Department of Agriculture (USDA) during that time period for participation in a federal farm credit or benefit program and who believed that they were discriminated against on the basis of race in USDA's response to that application; and (3) filed a discrimination complaint on or before July 1, 1997, regarding USDA's treatment of such farm credit or benefit application.

Order of January 5, 1999.

There are three [**30] changes to the substantive definition of the class. The first change relates to the time frame within which a class member is required to have filed his or her discrimination complaint with the USDA. Under the original class definition, a class member was required to have filed his complaint with the USDA before February 21, 1997. The putative class in Brewington included [*93] those who had filed their complaints of discrimination with the USDA between February 21, 1997, the cutoff date in Pigford, and July 7, 1998, the date of filing of the Brewington action.

The definition of the class certified by Order of January 5, 1999, modifies the class definition so that the filing date is consistent with the recently-enacted legislation tolling the statute of limitations. See Agricultural, Rural Development, Food and Drug Administration, and Related Agencies Appropriations Act, 1999, Pub. L. No. 105-277, ß 741, 112 Stat. 2681 (codified at 7 U.S.C. ß 2297, Notes). The legislation specifies that in order to toll the statute of limitations, a farmer must have filed his complaint of discrimination with the USDA before July 1, 1997, and the new class definition includes the same [**31] cut-off date. The resulting class has a broader definition than the original Pigford class but a slightly narrower definition than the proposed class definition in Brewington. The members of the proposed Brewington class who are not a part of the newly certified class -- that is, those who filed discrimination complaints after July 1, 1997 -- are on a different legal footing because the statute of limitations has not been tolled for them and resolution of their claims therefore is not appropriate in this action.

The second change also involves timing issues. The original class definition specified that class members must have farmed between January 1, 1983, and February 21, 1997, and applied for a credit or benefit program during that same time period. The definition of the class certified by Order of January 5, 1999, requires class members to have farmed or attempted to farm between January 1, 1981, and December 31, 1996, and to have applied for a credit or benefit program during that time period. As with the changed discrimination complaint filing dates, this change in class definition is consistent with the recently-enacted legislation tolling the statute of limitations. [**32] See Agricultural, Rural Development, Food and Drug Administration, and Related Agencies Appropriations Act, 1999, Pub. L. No. 105-277, ß 741, 112 Stat. 2681 (codified at 7 U.S.C. ß 2297, Notes).

The third change relates to the way in which a class member's complaint of discrimination was transmitted to the USDA. Under the original class definition, a class member must have filed a "written" complaint of discrimination with the USDA. The revised class definition provides that the class member must have "filed a discrimination complaint," and under the terms of the proposed Consent Decree, class members who have participated in "listening sessions" or have complained to members of Congress in certain case are deemed to have "filed" a discrimination complaint. See Consent Decree at P 1(h). None of the substantive changes to the class definition in any way affects the Court's analysis or conclusion that the case properly is certified as a class action. See Pigford v. Glickman, 182 F.R.D. at 344-45.

The primary difference between the class certified by the Court on October 9, 1998 and the class certified by the Court on January 5, 1999, is more procedural than substantive: [**33] the former was certified pursuant to Rule 23(b)(2) of the Federal Rules of Civil Procedure for purposes of determining whether the USDA is liable to class members and the latter was certified for all purposes pursuant to Rule 23(b)(3). n4 Rule 23 provides that all class members in a Rule 23(b)(3) class action are entitled to notice and an opportunity to exclude themselves from -- or "opt out" of -- the class and pursue individual remedies. See Rule 23(c)(2), Fed. R. Civ. P. The Rule contains no explicit opt-out provision with respect to a class certified pursuant to Rule 23(b)(1) or Rule 23(b)(2), although a court [*94] may have discretion to permit class members to opt out of the class in (b)(1) and (b)(2) actions. See Eubanks v. Billington, 110 F.3d at 92-95. The parties in this case agreed that it was more appropriate -- and fairer to members of the class -- to ask the Court to certify the class under Rule 23(b)(3) for all purposes, particularly since the proposed settlement involves primarily monetary relief. See id. at 95. The decision to certify the class pursuant to Rule 23(b)(3) was made largely in order to allow class members to opt out of the class if they wanted to [**34] pursue their remedies individually either before the USDA or by separate court action.

n4 An action may appropriately be certified pursuant to Rule 23(b)(2) of the Federal Rules of Civil Procedure if "the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole."

An action may appropriately be certified pursuant to Rule 23(b)(3) of the Federal Rules of Civil Procedure if the Court finds that "the questions of law or fact common to the members

> of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy."

The Court already has determined that a class exists and that the class meets the four criteria of Rule 23(a) of the Federal Rules of Civil Procedure. See Pigford v. Glickman, 182 F.R.D. at 346-50. Because [**35] the Court has certified the class under Rule 23(b)(3) of the Federal Rules of Civil Procedure, it also must ensure that the separate and additional requirements of (b)(3) are satisfied before approving the proposed settlement. See Amchem Products, Inc. v. Windsor, 521 U.S. 591, 622, 138 L. Ed. 2d 689, 117 S. Ct. 2231 (1997) (court's fairness analysis for settlement purposes under Rule 23(e) cannot substitute for determination whether class is appropriately certified in the first place); Thomas v. Albright, 139 F.3d 227, 234 (D.C. Cir.) (requirements of predominance and superiority in subsection (b)(3) are additional to requirements of subsection (a) which apply to all class actions), *cert. denied*, 142 L. Ed. 2d 480, 119 S. Ct. 576 (1998).

Rule 23(b)(3) requires the Court to find (1) that questions of law or fact common to members of the class predominate over questions affecting only individual members, and (2) that a class action is "superior to other available methods for the fair and efficient adjudication of the controversy." Rule 23(b)(3), Fed. R. Civ. P. It is designed to cover cases in which a class action would promote "'uniformity of decision as to persons similarly [**36] situated, without sacrificing procedural fairness or bringing about other undesirable results.' The Advisory Committee had dominantly in mind vindication of 'the right of groups of people who individually would be without effective strength to bring their opponents into court at all.'" Amchem Products, Inc. v. Windsor, 521 U.S. at 615, 617 (quoting Rule 23, Fed. R. Civ. P., Adv. Comm. Notes). This is just such a case.

The ultimate settlement of this action envisions the creation of a mechanism on a class-wide basis that will then be utilized to resolve the individual claims of class members outside the traditional litigation process, most of them (Track A) in a rather formulaic way. Most members of the class lack documentation of the allegedly discriminatory transactions at issue. Without any documentation of those transactions, it would be difficult if not impossible for an individual farmer to prevail in a suit in federal court under a traditional preponderance of the evidence standard. The parties acknowledge, however, that it is not the fault of class members that they lack records. Since class members' lack of documentation is at least in part attributable to the passage [**37] of time which has been exacerbated by the USDA's failure to timely process complaints of discrimination, there is a common issue of whether and how best to provide relief to class members who lack documentation, and that common issue "predominate[s] over any questions affecting only individual members." See Rule 23(b)(3), Fed. R. Civ. P. This class action and its settlement as proposed in the Consent Decree provide a mechanism to address that common issue. See Amchem Products, Inc. v. Windsor, 521 U.S. at 619 ("Settlement is relevant to a class certification").

In addition to the lack of documentation making individual adjudication of most claims so difficult, the sheer size of the class makes the prospect of individual adjudication of damages virtually unmanageable. For this or any other court to adjudicate the individual claims of the 15,000 to 20,000 African American farmers now estimated to be members of the class would take years or perhaps even a decade or more. Any "fair and efficient" resolution of the claims therefore necessitates the implementation of some sort of class-wide mechanism such as the creative [*95] and speedy Track A/Track B procedures proposed by the parties [**38] in the Consent Decree. The Court therefore finds that "a class action is superior to other available methods for the fair and efficient adjudication of the controversy." See Rule 23(b)(3), Fed. R. Civ. P. The Court concludes that this action appropriately is certified for resolution pursuant to Rule 23(b)(3) of the Federal Rules of Civil Procedure. The remaining question is whether the proposed Consent Decree is fair, adequate and reasonable under Rule 23(e).

III. PROVISIONS OF PROPOSED CONSENT DECREE

The proposed Consent Decree, as revised after the fairness hearing and jointly filed by the parties on March 19, 1999, is a negotiated settlement that resolves all of the claims raised by plaintiffs in the Seventh Amended Complaint. The purpose of the Consent Decree is to ensure that in the future all class members in their dealings with the USDA will "receive full and fair treatment" that is "the same as the treatment accorded to similarly situated white persons." Consent Decree at 1-2. As with all settlements, it does not provide the plaintiffs and the class they represent with everything they sought in the complaint. Instead it is a negotiated settlement intended to achieve much [**39] of what was sought without the need for lengthy litigation and uncertain results. See Stewart v. Rubin, 948 F. Supp. 1077, 1087 (D.D.C. 1996) ("inherent in compromise is a yielding of absolutes and an abandoning of highest hopes"), *aff'd* 326 U.S. App. D.C. 337, 124 F.3d 1309 (D.C. Cir. 1997). It is impossible to know precisely how much the overall settlement in this case will cost the government, in part because the exact size of the class has not been

determined and because the Consent Decree provides for debt relief that is dependent on the amount of debt that individual class members owe to the USDA, but plaintiffs estimate that the settlement is worth at least $ 2.25 billion, the largest civil rights settlement in the history of this country. See Pls' Response to Post-Hearing Submissions at 7.

The Consent Decree accomplishes its purposes primarily through a two-track dispute resolution mechanism that provides those class members with little or no documentary evidence with a virtually automatic cash payment of $ 50,000, and forgiveness of debt owed to the USDA (Track A), while those who believe they can prove their cases with documentary or other evidence by a preponderance of the evidence [**40] -- the traditional burden of proof in civil litigation -- have no cap on the amount they may recover (Track B). Those who like neither option provided by the Consent Decree may opt out of the class and pursue their individual remedies in court or administratively before the USDA. The essential terms of the proposed Consent Decree and settlement are summarized below.

Under the terms of the proposed Consent Decree, any class member has the right to opt out of the class and pursue his remedies either administratively before the USDA or in a separate court action. See Consent Decree at P 2(b). A class member who opts out of the class cannot collect any relief under the settlement, but he retains all of his legal rights to file his own action against the USDA. In other words, if a class member opts out of the class, nothing in this settlement affects him. Any class member who wishes to opt out of the class must file a written request with the facilitator within 120 days of the date on which the Consent Decree is entered. See id.

Those who choose to remain in the class have 180 days from the entry of the Consent Decree within which to file their claim packages with the facilitator. [**41] Consent Decree at P 5(c). n5 When a claimant submits his claim package, he must include evidence that he filed a discrimination claim with the USDA between January 1, 1981 and July 1, 1997. See id. at P 5(b). n6 In the absence of documentation [*96] that a complaint was filed with the USDA, a claimant may submit a declaration from "a person who is not a member of the claimant's family" stating that he or she has first-hand knowledge that the claimant filed the complaint. See id. n7 A claimant also must include a certification from an attorney stating that the attorney has a good faith belief in the truth of the factual basis of the claim and that the attorney will not require compensation from the claimant for his or her assistance. See id. at P 5(e). n8

n5 The Court may grant an extension of this 180 day period "where the claimant demonstrates that his failure to submit a timely claim was due to extraordinary circumstances beyond his control." Consent Decree at P 5(g).

n6 For a claimant who otherwise meets the class definition but who filed his complaint of discrimination after July 1, 1997, the claims package will be forwarded to JAMS-Endispute, Inc. JAMS-Endispute, Judicial Arbitration and Mediation Services Endispute, is a California-based corps of retired judges with offices throughout the country that provides alternative dispute resolution mechanisms. JAMS-Endispute will determine whether the claimant should be allowed to proceed as a class member despite his failure to timely file his discrimination complaint. See Consent Decree at PP 1(a)(ii), 6. [**42]

n7 For purposes of the proposed Consent Decree, a "discrimination complaint" means either a communication directly from the class member to the USDA or a communication from the claimant to a member of Congress, the White House, or a state, local, or federal official who forwarded the communication to the USDA asserting that the USDA had discriminated against the claimant on the basis of race in connection with a federal farm credit transaction or benefit application. Consent Decree at P 1(h).

n8 Class counsel is available to perform these services without charge to the claimant.

At the time that they submit their claim packages, claimants asserting discrimination in credit transactions also must choose between two options: adjudication of their claims under the Track A mechanism or arbitration of their claims under the Track B mechanism. Consent Decree at P 5(d). n9 The choice made between Track A and Track B has enormous significance. Under Track A, the class member has a fairly low burden of proof but his recovery is limited. Under Track B, there is a higher burden of proof but the recovery [**43] is unlimited. The claims facilitator, the Poorman-Douglas Corporation, has 20 days after the filing of a claims package within which to determine whether the claimant is a member of the class and, if he is, to forward the materials to counsel for the USDA and to the appropriate Track A or Track B decision-maker. Id. at P 5(f)

n9 Claimants asserting discrimination in non-credit benefit programs are only entitled to proceed under Track A. Consent Decree at P 5(d).

Under Track A, a claimant must submit "substantial evidence" demonstrating that he or she was the victim of race discrimination. See Consent Decree at PP 9(a)(i), 9(b)(i). Substantial evidence means something more than a "mere scintilla" of evidence but less than a preponderance. See Burns v. Office of Workers' Compensation Programs, 309 U.S. App. D.C. 400, 41 F.3d 1555, 1562 n. 10 (D.C. Cir. 1994). Put another way, substantial evidence is such "relevant evidence as a reasonable mind might accept to support [the] conclusion," even when "a [**44] plausible alternative interpretation of the evidence would support a contrary view." Secretary of Labor v. Federal Mine Safety and Health Review Comm'n, 324 U.S. App. D.C. 154, 111 F.3d 913, 918 (D.C. Cir. 1997). n10

n10 The Consent Decree defines "substantial evidence" as "such relevant evidence as appears in the record before the adjudicator that a reasonable person might accept as adequate to support a conclusion after taking into account other evidence in the record that fairly detracts from that conclusion." Consent Decree at P 1(l).

A claimant asserting discrimination in a credit transaction can satisfy this burden by presenting evidence of four specific things: (1) that he owned or leased, or attempted to own or lease, farm land; (2) that he applied for a specific credit transaction at a USDA county office between January 1, 1981 and December 31, 1996; (3) that the loan was denied, provided late, approved for a lesser amount than requested, encumbered by restrictive conditions, or USDA failed to provide [**45] appropriate loan service, and such treatment was less favorable than that accorded specifically identified, similarly situated white farmers; and (4) that USDA's treatment of the loan application led to economic damage to the class member. See Consent Decree at P 9(a)(i). A claimant asserting discrimination only in a non-credit benefit program can satisfy his burden by presenting evidence (1) that he applied for a specific non-credit benefit program at a USDA county office between January 1, 1981 and December 31, 1996, and (2) that his application was denied or approved for a lesser amount then requested and that such treatment was less favorable [*97] than that accorded to specifically identified, similarly situated white farmers. See id. at P 9(b)(i).

The USDA has sixty days after it receives notice of a Track A referral to provide the adjudicator and class counsel with any information relevant to the issues of liability and damages. Consent Decree at P 8. After receiving any material from the USDA, the facilitator will either make a recommendation with respect to whether the claim should be approved or indicate its inability to make a recommendation. The entire packet of material, [**46] including the submissions by the claimant and the USDA and the recommendation of the facilitator, then is referred to a member of JAMS-Endispute, Inc., for a decision which is to be made within 30 days. See id. at P 9(a). That decision is final, except that the Monitor, whose responsibilities are discussed further below, shall direct the adjudicator to reexamine the claim if he determines that "a clear and manifest error has occurred" that is "likely to result in a fundamental miscarriage of justice." See id. at PP 9(a)(v), 9(b)(v), 12(b)(iii).

If the adjudicator finds in the claimant's favor and the claim involves discrimination in a credit transaction, the claimant will receive (1) a cash payment of $ 50,000; (2) forgiveness of all debt owed to the USDA incurred under or affected by the program that formed the basis of the claim; (3) a tax payment directly to the IRS in the amount of 25% of the total debt forgiveness and cash payment; (4) immediate termination of any foreclosure proceedings that USDA initiated in connection with the loan(s) at issue in the claim; and (5) injunctive relief including one-time priority loan consideration and technical assistance. Consent Decree [**47] at PP 9(a)(iii); 11. If the adjudicator finds in the claimant's favor and the claim involves discrimination in a benefit program, the claimant will receive a cash payment in the amount of the benefit wrongly denied and injunctive relief including one-time priority loan consideration and technical assistance. Id. at P 9(b)(iii).

Track B arbitration is the option for those who have more extensive documentation of discrimination in a credit transaction. Under Track B, an arbitrator will hold a one day mini-trial and then decide whether the claimant has established discrimination by a preponderance of the evidence. Consent Decree at P 10. n11 Class counsel will represent any claimant who chooses Track B, or a claimant may be represented by counsel of his choice if he so desires. Track B is designed to balance the need for prompt resolution of the claim with the need to provide adequate discovery and a fair hearing. The entire Track B process will take a maximum of 240 days. During the first 180 days, there is a mechanism for limited discovery and depositions of witnesses. Following the one day mini-trial, the arbitrator will render a decision within 30 to 60 days. Id. at P 10(g). [**48]

n11 The arbitrator will either be Mr. Michael Lewis, the mediator, or will be a person selected by Mr. Lewis from a list of arbitrators pre-approved by class counsel and counsel for the government. See Consent Decree at P 1(b); Letter of March 19, 1999 from the Parties to the Court at P 1.

If the arbitrator finds that the claimant has demonstrated by a preponderance of the evidence that he was the victim of racial discrimination and that he suffered damages from that discrimination, the claimant will be entitled to actual damages, the return of inventory property that was foreclosed and other injunctive relief, including a one-time priority loan consideration. Consent Decree at PP 10(g), 11. As with Track A claims, the decision of the arbitrator is final except that the Monitor shall direct the arbitrator to reexamine the claim if he determines that "a clear and manifest error has occurred" that is "likely to result in a fundamental miscarriage of justice." See id. at PP 10, 12(b)(iii).

The proposed [**49] Consent Decree also provides for an independent Monitor who will serve for a period of five years following the entry of the decree. The Monitor will be appointed by the Court from a list of names proposed by the parties and cannot be removed "except upon good cause." Consent Decree at P 12(a). The Monitor is responsible for making periodic written reports to the Court, the Secretary of Agriculture, counsel for the government and class counsel, reporting on the good faith implementation of the Consent Decree and efforts to resolve disputes [*98] that arise between the parties under the terms of the decree. Id. at P 12(b). n12 He or she will be available to class members and members of the public through a toll-free telephone number to facilitate the lodging of Consent Decree complaints and to expedite their resolution. Id. at P 12(b)(iv).

n12 The parties indicated in their letter of March 19, 1999, that one of the changes to the original Consent Decree would be that the Monitor would provide copies of his report to the Court. That change was not reflected in the revised Consent Decree that was filed by the parties on March 19, 1999, but the parties have since filed a corrected page 21 of the revised Consent Decree so that the Monitor in fact will be required to provide copies of the report to the Court. See Notice of Filing of April 9, 1999.

[**50]

The Court retains jurisdiction to enforce the Consent Decree through contempt proceedings. Consent Decree at P 21. If one side believes that the other side has violated the terms of the Consent Decree, there is a mandatory procedure for attempting to resolve the problem with the assistance of the Monitor that the parties must follow before filing a contempt motion with the Court, but the Court remains available in the event that the terms of the decree are violated. Id. at P 13. Finally, the Consent Decree provides that class counsel shall be entitled to reasonable attorneys' fees and costs under ECOA, 15 U.S.C. ß 1691e(d), and under the Administrative Procedure Act, 28 U.S.C. ß 2412(d), for the filing and litigation of this action and for implementation of the Consent Decree. Id. at P 14(a).

IV. FAIRNESS OF PROPOSED CONSENT DECREE

Under Rule 23 of the Federal Rules of Civil Procedure, no class action may be dismissed, settled or compromised without the approval of the Court. Rule 23(e), Fed. R. Civ. P. Before giving its approval, the Court must provide adequate notice to all members of the class, id., conduct a "fairness hearing," and find, after notice and hearing, [**51] that the "settlement is fair, adequate and reasonable and is not the product of collusion between the parties." Thomas v. Albright, 139 F.3d at 231. In performing this task, the Court must protect the interests of those unnamed class members whose rights may be affected by the settlement of the action.

In this circuit there is "no obligatory test" that the Court must use to determine whether a settlement is fair, adequate and reasonable. Osher v. SCA Realty I, Inc., 945 F. Supp. 298, 303-04 (D.D.C. 1996). Instead the Court must consider the facts and circumstances of the case, ascertain what factors are most relevant in the circumstances and exercise its discretion in deciding whether approval of the proposed settlement is fair. n13 By far the most important factor is a comparison of the terms of the compromise or settlement with the likely recovery that plaintiffs would realize if the case went to trial. See Thomas v. Albright, 139 F.3d at 231 ("The court's primary task is to evaluate the terms of the settlement in relation to the strength of plaintiffs' case"); Isby v. Bayh, 75 F.3d 1191, 1199 (7th Cir. 1996) ("the relative strength of plaintiffs' case on the merits [**52] as compared to what the defendants offer by way of settlement, is the most important consideration"); Maywalt v. Parker and Parsley Petroleum Co., 67 F.3d 1072, 1079 (2nd Cir. 1995) ("the primary concern is with the substantive terms of the settlement: Basic to this is the need to compare the terms of the compromise with the likely rewards of litigation") (internal citations and quotations omitted). Having carefully considered all of

the objections that have been [*99] filed with the Court or expressed at the fairness hearing in relation to the strength of plaintiffs' case, the Court concludes that the settlement is fair, adequate and reasonable and is not the product of collusion between the parties. n14

n13 The Third Circuit has adopted a nine-factor test for determining the fairness of a settlement of a class action, see Girsh v. Jepson, 521 F.2d 153 (3rd Cir. 1975), while the Tenth Circuit has adopted a four factor test, see Gottlieb v. Wiles, 11 F.3d 1004, 1014 (10th Cir. 1993), and the Eleventh Circuit has developed a six factor test. See Bennett v. Behring Corp., 737 F.2d 982 (11th Cir. 1984). Other circuits, including ours, have not imposed such rigid sets of factors, instead recognizing that the relevant factors may vary depending on the factual circumstances. See Thomas v. Albright, 139 F.3d at 231; Torrisi v. Tucson Elec. Power Co., 8 F.3d 1370, 1375-76 (9th Cir. 1993), *cert denied sub nom*, Reilly v. Tucson Elec. Power Co., 512 U.S. 1220, 129 L. Ed. 2d 834, 114 S. Ct. 2707 (1994). To the extent that the factors enumerated by the other circuits are at all relevant to the determination of whether this Consent Decree is fair, adequate and reasonable, however, the Court has considered and addressed those factors in this Opinion. [**53]

n14 The Court has received written objections or comments from the following organizations: Black Farmers and Agriculturists Assoc.; Black Farmers of North Carolina; Central Piedmont Economic Assoc.; Concerned Black Farmers of Tennessee, Arkansas, Mississippi, Georgia and North Carolina; Coordinating Council of Black Farm Groups; Kansas Black Farmers Assoc.; Land Loss Prevention Project; Federation of Southern Cooperatives Land Assistance Fund; Lawyers' Committee for Civil Rights Under Law; NAACP; National Black Farmers; National Council of Community Based Organizations in Agriculture; National Family Farm Coalition; Oklahoma Black Farmers and Agriculturalists Assoc.; and United States Dept. of Agriculture Coalition of Minority Employees.

The Court has received written objections or comments from the following individuals (on behalf of themselves and/or on behalf of other class members): Theodore F.B. Bates; Robert R. Binion; Abraham Carpenter, Jr.; Leonard C. Cooper; Harold M. Dunkelberger; George and Larry Ephfrom; Percy Gooch, Sr.; Estell Green, Jr.; Patricia Gibson Green; Brown J. Hawkins; Clarence Hardy; George and Patricia Hildebrandt; George Hobbs; Dave J. Miller; Jessie Nimmons; Timothy C. Pigford; Amelia Roland Washington; Roy L. Rolle, Jr.; Luis C. Sanders; Herbert L. Skinner, Jr.; Gregory R. Swecker; V.J. Switzer; George M. Whitehead; Gladys R. Todd and Griffin Todd, Sr.; Andrew Williams; Jerome Williams; and Eddie and Dorothy Weiss.

All of the organizations and most of the individuals who had submitted written comments or objections spoke at the hearing on March 2, 1999. In addition, the following individuals spoke at the hearing: Mattie Mack; Kevin Pyle; Sherman Witchler; Eddie Slaughter; Ridgeley Mu'Min Muhammed; Willie Frank Smith; John Bender; Troy Scroggins; and Willie Head.

All of the objections and comments, whether received in the form of letters to the Court or as formal filings, have been filed as part of the official record of this case. To the extent possible, the Court has attempted to address all of the objections that have been raised. Whether or not specifically mentioned in this Opinion, the Court has carefully considered the objections and appreciates the extent to which the objectors have shared their thoughts and views.

[**54]

A. The Process of Settlement

Preliminarily, the Court considers those objections that address the fairness of the way in which the settlement negotiations were conducted, the amount of discovery completed at the time of settlement, the definition of the class, whether there is any evidence of collusion between class counsel and counsel for the government, and whether class members have had adequate notice and opportunity to be heard on the proposed settlement. See Thomas v. Albright, 139 F.3d at 231; Durrett v. Housing Authority of City of Providence, 896 F.2d 600, 604 (1st Cir. 1990); Mars Steel v. Continental Ill. Nat. Bank and Trust, 834 F.2d 677, 683 (7th Cir. 1987); Girsh v. Jepson, 521 F.2d 153 (3rd Cir. 1975); Osher v. SCA Realty I, Inc., 945 F. Supp. at 304.

1. Timing of Settlement and Extent of Discovery Completed

Some of the objectors maintain that settlement came too early and that class counsel undertook insufficient

discovery in this case before settling it. A review of the history of the case, however, reveals that "there has been a literal mountain of discovery provided and reviewed." Transcript of Hearing of March 2, 1999 at 170 (Comments [**55] of Mr. J.L. Chestnut). Less than three months after the case was filed, the Court ordered the USDA to open its files to plaintiffs within fifteen days. On the fifteenth day, the government provided plaintiffs with ten boxes of documents containing approximately 35,000 to 40,000 pages of records related to approximately 105 pending claims of race discrimination. See Def's November 17, 1997 Report to the Court, Declaration of Arnold Grundeman at P 4. Three days later, the government delivered an additional 20,000 pages related to another 30 pending cases of discrimination. See id. at P 5. At the time, the government represented that it was continuing to search for files, many of which had already been sent to a federal records repository. Since that time, the government has continued to provide plaintiffs with the files of class members.

The problem for plaintiffs has been that files simply do not exist for many class members. Providing additional time for discovery would not have solved that problem. As class counsel has pointed out, on the issue of liability of the USDA, the government's own [*100] documents and own admissions are the most damning evidence. See Transcript of [**56] Hearing of March 2, 1999 at 184 (Comments of Mr. Alexander Pires) ("I have an office full of admissions. I have tape recordings of Mr. Glickman. I have tape recordings of Governemnt officials. I've interviewed everybody there is to interview. I have documents. I have the CRAT Report annotated. I have all the [Office of the Inspector General] Reports"). There really was no other discovery that could have made a difference. The same is true on the issue of damages. The government delivered to class counsel all of the files it had on individual class members. But without documentary evidence that does not exist, an individual farmer would be hard-pressed to provide evidence beyond his own testimony, and additional discovery from the government would not be helpful.

In addition, a relatively extensive amount of litigation had occurred by the time the parties agreed to a settlement. The issue of class certification had been extensively briefed by the parties and decided by the Court. Plaintiffs' motion for summary judgment on the issue of the statute of limitations was fully briefed when the statute of limitations was tolled by legislative action. The government also had filed a motion [**57] for judgment on the pleadings and for partial summary judgment that was fully briefed. In sum, the discovery, investigation and legal research conducted by class counsel before entering into settlement was thorough and supports the fairness and reasonableness of the settlement. See Isby v. Bayh, 75 F.3d at 1200.

2. Class Definition

The class is defined to include all African American farmers who (1) farmed, or attempted to farm, between January 1, 1981 and December 31, 1996; (2) applied to the United States Department of Agriculture (USDA) during that time period for participation in a federal farm credit or benefit program and who believed that they were discriminated against on the basis of race in USDA's response to that application; and (3) filed a discrimination complaint on or before July 1, 1997, regarding USDA's treatment of such farm credit or benefit application. Some characterize this class definition as too narrow. They claim that the class should be broadened to include all African American farmers who claim to have faced discrimination in credit transactions or benefit programs with the USDA, regardless of whether they filed a complaint of discrimination with [**58] the USDA.

The legal issues for those who never have filed a discrimination complaint, however, are much more difficult than those facing the members of the class as currently defined. The statute of limitations issue still exists for those who never have filed complaints of discrimination because Congress tolled the statute of limitations only for those who filed discrimination complaints by July 1, 1997. Moreover, from the beginning, plaintiffs' complaint only sought relief for those who had filed discrimination complaints with the USDA. Accordingly, the Consent Decree in this case cannot provide relief for those who never purported to complain to the USDA in any way about the alleged discrimination. Cf. United States v. Microsoft, 312 U.S. App. D.C. 378, 56 F.3d 1448, 1460 (D.C. Cir. 1995).

Some also have objected that the class as currently defined does not include all members of the putative Brewington class because under the current class definition, the farmer is required to have filed a complaint of discrimination prior to July 1, 1997, while the proposed class in Brewington would have included African American farmers who had filed their discrimination complaints [**59] prior to July 7, 1998. As previously discussed, see page 20 above, the statutory waiver of ECOA's two-year statute of limitations as recently enacted by Congress applies only to those farmers who filed complaints of discrimination by July 1, 1997. The claims of those who do not meet that deadline face separate and additional legal barriers not faced by the class as currently defined. Broadening the class would inject legal and factual issues into the case that are not now present and would only serve to hinder a fair, reasonable and adequate settlement for the African

American farmers who are a part of the class as currently defined. The Court therefore concludes that this class definition is appropriate.

[*101] The Consent Decree also requires each class member to provide proof that he filed a "discrimination complaint" with the USDA. The term "discrimination complaint" is defined broadly to include "a communication from a class member directly to USDA, or to a member of Congress, the White House, or a state, local or federal official who forwarded the class member's communication to USDA, asserting that USDA had discriminated against the class member on the basis of race in connection [**60] with a federal farm credit transaction or benefit application." Consent Decree at P1(h). In the absence of specified documents, a class member may submit an affidavit from a non-family member stating that he or she has personal knowledge that a discrimination complaint was filed and describing the way in which it was filed. See Consent Decree at P 5.

Some objectors maintain that it is unfair to require an affidavit from someone who is not a family member because, as Mr. Vernon Breckinridge put it, "getting loans from USDA is just like you go to a normal bank and get a loan. You don't normally go around and tell everybody in the neighborhood that you've gone to the bank to secure a loan." Transcript of Hearing of March 2, 1999 at 101. While it may be that some will be precluded from obtaining relief because they cannot use affidavits from family members, the class membership determination is designed to be mechanistic so that it can be done quickly by the facilitator. If family members were permitted to submit affidavits, the facilitator would be required to make credibility determinations that inevitably would slow the process of determining class membership.

3. Asserted Collusion [**61]

The Court finds that there is absolutely no evidence of collusion between the class counsel and counsel for the government. See Thomas v. Albright, 139 F.3d at 231. From the outset, all settlement negotiations were conducted in the presence of the mediator, Mr. Michael Lewis, a neutral and detached mediator with twenty-five years of experience who has mediated many complex class action cases including employment and environmental cases. Mr. Lewis has stated quite emphatically that there was no collusion in this case: "If this case represented collusion or the negotiations in this case represented collusion I as a mediator never ever want to mediate a case in which the parties are at each others' throats. To term this negotiation intensive . . . understates the difficulty. This was an arduous negotiation. It took a year. It was hard fought." Transcript of Hearing of March 2, 1999 at 21-22.

Nor has the Court has seen any evidence of collusion or other impropriety on the part of counsel on either side. From the day this case was filed, Mr. Alexander Pires has tenaciously asserted that his clients had a right to receive relief from the government. Even faced with difficult statute [**62] of limitations issues and a serious lack of documentation, he has never wavered from his fundamental position that the government had wronged generations of African American farmers and must provide compensation. Even when settlement negotiations were ongoing, both sides maintained their positions and continued to assert the interests of their respective clients in every filing and at every status conference. At the status hearing on March 20, 1998, for example, Mr. Chestnut pleaded for a trial date because he had no faith that the case would settle and he wanted to protect the interests of the class. Government counsel continued to file motions and protect the legal interests of the USDA. Certainly the Court can attest to the fact that the parties litigated vigorously all of the issues that were or logically could have been raised.

4. Notice, Opportunity to Be Heard and Reaction of the Class

When a class is certified and a settlement is proposed, the parties are required to provide class members with the "best notice practicable under the circumstances." Rule 23(c)(2), Fed. R. Civ. P.; see Eisen v. Carlisle and Jacquelin, 417 U.S. 156, 172-77, 40 L. Ed. 2d 732, 94 S. Ct. [**63] 2140 (1974). The Court concludes that class members have received more than adequate notice and have had sufficient opportunity to be heard on the fairness of the proposed Consent Decree. [*102] See Durrett v. Housing Authority of City of Providence, 896 F.2d at 604.

First, the timing and breadth of notice of the class settlement was sufficient under Rule 23. Notice was mailed to all known class members by January 15, 1999, nearly six weeks before the fairness hearing and a month before the deadline for comments, providing class members with ample time to submit their objections. See Maywalt v. Parker and Parsley Petroleum Co., 67 F.3d at 1079; Torrisi v. Tucson Elec. Power Co., 8 F.3d 1370, 1374-75 (9th Cir. 1993), *cert denied sub nom*, Reilly v. Tucson Elec. Power Co., 512 U.S. 1220, 129 L. Ed. 2d 834, 114 S. Ct. 2707 (1994). n15 The parties also exerted extraordinary efforts to reach class members through a massive advertising campaign in general circulation and African American targeted publications and radio and television stations. See pages 15-16 above.

n15 One objector maintains that notice was insufficient because the facilitator did not

advertise in the United States Virgin Islands. With the exception of that one objection, no one appears to believe that the scope of the notice provided was insufficient.

[**64]

Second, the content of the notice was sufficient because it "fairly apprised the . . . members of the class of the terms of the proposed settlement and of the options that are open to them in connection with [the] proceedings." See Maywalt v. Parker and Parsley Petroleum Co., 67 F.3d at 1079 (internal quotations omitted). The notice provided class members with information on the class, the purpose and timing of the fairness hearing, opt-out procedures and deadlines, and the deadline and process for filing claims packages. In addition, it provided telephone numbers for the facilitator and for class counsel to the extent that anyone had any questions.

Third, the Court gave objectors ample opportunity to present their objections to the Consent Decree. As noted above, the Court considered all of the written objections that were filed and provided objectors with an opportunity to present their objections orally at the fairness hearing. While the Court denied a request for an evidentiary hearing made by one group of objectors, see Order of March 11, 1999, the Court is not obligated to hold an evidentiary hearing, especially in view of the fact that it accepted and considered [**65] affidavits in place of testimony. See Jones v. Nuclear Pharmacy, Inc., 741 F.2d 322, 325 (10th Cir. 1984); Weinberger v. Kendrick, 698 F.2d 61, 79 (2nd Cir. 1982), *cert. denied sub nom*, Coyne v. Weinberger, 464 U.S. 818, 78 L. Ed. 2d 89, 104 S. Ct. 77 (1983); cf. United States v. Cannons Engineering Corp, 899 F.2d 79, 93-94 (1st Cir. 1990).

Finally, because the Court has received a number of objections, it is clear that class members do not unanimously support the settlement. It is significant, however, that there are relatively few objections to the settlement in comparison with the size of the class. See Thomas v. Albright, 139 F.3d at 232. This is a large class. As of March 26, 1999, 16,559 farmers had requested claims packages from the facilitator, and the facilitator already has received 1686 completed claim packages. By contrast, only 85 farmer class members have elected to opt out of the class. See Pls' Response to Post-Hearing Submissions of Objections at 6-7. Given the low rate of opt-outs and the relatively small percentage of class members objecting to the Consent Decree, the Court concludes that those objections do not warrant rejecting the [**66] Consent Decree. See Thomas v. Albright, 139 F.3d at 232 (settlement can be fair even if "a significant portion of the class and some of the named plaintiffs object to it"). n16

n16 Certain of the original named plaintiffs, including both Mr. Timothy Pigford and Mr. Cecil Brewington, have objected to the terms of the settlement. The Court has carefully considered their objections but nonetheless concludes that the settlement is fair, adequate and reasonable. See Thomas v. Albright, 139 F.3d at 232 (fact that named class representatives object to proposed settlement does not preclude court from finding that settlement is fair).

B. Substantive Fairness: Likely Recovery at Trial Compared with Terms of Proposed Settlement

As our court of appeals has said, in considering a proposed class action settlement, [*103] the Court first must compare the likely recovery that plaintiffs would have realized if they had gone to trial with the terms of the settlement. See Thomas v. Albright, 139 F.3d at 231. The Court [**67] must look at the settlement as a whole and should not reject a settlement merely because individual class members claim that they would have received more at trial. The Court should scrutinize the terms of the settlement carefully, but the discretion of the Court to reject a settlement is restrained by the "principle of preference" that encourages settlements. See Durrett v. Housing Authority of City of Providence, 896 F.2d at 604; Stewart v. Rubin, 948 F. Supp. at 1086. The Court has received approximately sixty written submissions from forty-three groups or individuals objecting to or commenting on the fairness of the settlement. The Court also heard from numerous individuals and organizations at the fairness hearing on March 2, 1999. n17 Some of the objectors have argued persuasively that the settlement could have included broader relief, but that is not the test. See Stewart v. Rubin, 948 F. Supp. at 1087 ("the Court [should not] make the proponents of the agreement justify each term of settlement against a hypothetical measure of what concessions might have been gained"). The question is whether the structure of the settlement and the substantive relief including [**68] the amount of money provided are fair and reasonable when compared to the recovery that plaintiffs likely would have realized if the case went to trial. The Court concludes that they are.

n17 With one exception, see Order of March 11, 1999, the Court has considered all objections and comments that it received by April 2, 1999. Some of those who have submitted objections do not appear to be members of the class and therefore lack standing to challenge the fairness of the Consent Decree, see Mayfield v. Barr, 300

U.S. App. D.C. 31, 985 F.2d 1090 (D.C. Cir. 1993), but the Court has considered their objections anyway.

The settlement provides a measure of certainty for most class members. The vast majority of class members probably will be entitled almost automatically to recovery under Track A, while Track B, which has no cap on the amount of damages available, provides those with stronger cases with the opportunity to realize greater recoveries. It is clear from the structure and terms of the settlement [**69] that class counsel were trying to strike a delicate balance between ensuring that as many class members as possible would receive compensation and ensuring that any compensation was adequate for the harm suffered. In striking this balance, class counsel were forced to recognize that most of the members of the class had little in the way of documentation or proof of their claims and likely would have recovered nothing if they were required to prove their cases by the traditional preponderance of the evidence standard. Track A was devised to provide a set amount of compensation for those class members who could meet only a minimal burden of proof, while Track B was not so limited. The Track A/Track B mechanism also ensures that this compensation is distributed as promptly as possible.

The Court is sympathetic to the reasons that various class members would have wanted class counsel to strike the balance differently in their negotiations. Nonetheless, the Court is not persuaded that striking a different balance would have been either achievable in the negotiating process or more favorable to all or even most members of the class. It certainly is not convinced that a better result would [**70] have been achieved by taking this case to trial where a substantial number of class members would have been unable to prove their claims by a preponderance of the evidence and thus would have recovered nothing. While each class member understandably wants the settlement to provide the greatest possible compensation to himself, the Court cannot conclude that the final balance struck by class counsel is anything but fair.

1. Likely Recovery If Case Had Proceeded to Trial

If the case had proceeded to trial, plaintiffs would have had in their possession strong evidence that the USDA discriminated against African American farmers. The reports of the Inspector General and the Civil Rights Action Team provide a persuasive indictment of the civil rights record of the USDA and the pervasive discrimination [*104] against African American farmers. There does not appear to be much dispute that racial discrimination has occurred throughout the USDA and that the USDA and the county committees discriminated against African American farmers for decades in evaluating their applications for farm credit and benefits. In addition, when Congress took the unprecedented action of tolling the statute of limitations [**71] for ECOA, one of plaintiffs' major obstacles to establishing defendant's liability to the class was removed.

The problem is that even with that evidence, 80 to 90 percent of the class members lack any documentary evidence of the alleged discriminatory denial of credit or benefits to them. See Pls' Response to Written Objections at 11; Transcript of Hearing of March 2, 1999 at 180 (Mr. Alexander Pires) ("What would happen . . . in this case if we went to trial? 90 percent of our clients do not have files. . . . 90 percent do not have files"). In order to recover damages under ECOA at a trial, a class member would have to be able to establish by a preponderance of the evidence a discriminatory denial of loans or terms of credit, the extent of the injury to him caused by the denial and the amount of damages he suffered. Absent any documentation, this would have been an impossible burden for the majority of class members. In addition, many class members lack any documentation to prove that they ever filed a complaint of discrimination with the USDA and therefore would have encountered great difficulty in even establishing their membership in the class. With no documentary evidence [**72] that they fall within the parameters of the class, it is not at all clear that those plaintiffs would have been able to recover anything.

Some objectors have suggested that the issue of damages could have been resolved by trying the claims of representative members of the class. See Transcript of Hearing of March 2, 1999 at 46. As Mr. Alexander Pires explained, however, "I would never take the thousands of clients we have now and say bet your claim on those 12 or 13 cases that are your lead cases. Even though we helped pick them. I know what's in those 12 cases, and that's risky." Id. at 180. In fact, class counsel discovered during the process of negotiating the settlement that mediating the cases individually was risky. When the parties were in the initial stages of settlement negotiations, they agreed to mediate twelve individual test cases: six chosen by the government and six chosen by plaintiffs. The lack of documentation presented serious obstacles to the resolution of those cases. The parties worked for an entire month trying to settle eight of those twelve cases, and at the end of that month, not one case had been resolved. See Transcript of Hearing of March 5, [**73] 1998 at 32.

Moreover, bringing this case to trial likely would have been a very complex, long and costly proposition. Practically speaking, prevailing class members likely would not have obtained relief for many years. Trial on

the issue of liability was scheduled to last the month of February 1999. Trial probably would have involved a number of experts, and the government probably would have raised a number of legal issues for the Court to resolve. Even if the Court devoted all of its resources and time to deciding the issue of liability, it is unlikely that a decision would have been issued before the summer of 1999. If the Court had found the USDA liable, it then would have had to resolve the issue of remedy for each farmer. A mechanism for establishing class or subclass membership and for resolving issues of individual damages for each farmer in the class or subclass would have been necessary. If the remedy phase were tried on an individual basis for each farmer -- as the government might have urged again as it has in the past, because of the acknowledged lack of documentation in so many cases -- the remedial process would have dragged on for years. If the remedy phase were not [**74] tried on an individual basis for each farmer, it is not inconceivable that a mechanism much like that negotiated in this settlement ultimately would be utilized. Even barring the inevitable appeal that the government would have taken in the event that plaintiffs prevailed, it is unlikely that any class member would have received any recovery for his injury for many years.

By contrast, the settlement negotiated by the parties provides for relatively prompt [*105] recovery. The claim of a claimant who chooses Track A will be resolved within 110 days of the date that the claim is filed. For those who choose Track B, the wait is a little longer because of discovery and trial, but the total time required is at most 240 days from the date that the claim is filed. Because neither side may appeal, the claimant will receive his compensation long before he would have if the case had gone to trial.

2. Overall Structure of Settlement: Track A and Track B

As currently structured, class members have three options: they have 120 days after the entry of the Consent Decree within which to notify, the facilitator if they want to opt out of the class altogether, they may remain in the class and choose [**75] Track A or they may remain in the class and choose Track B. n18 Those who do not opt out have 180 days from the entry of the decree within which to file their claim packages and, for those who choose Track A, to submit their proof. Consent Decree at PP 5(c), 5(d).

n18 For those class members who allege only discrimination in a benefit transaction, Track B is not an option.

A number of class members complain that they lack sufficient information to select among these three options and that the settlement is structured to force class members to choose Track A. At meetings throughout the country, class counsel currently is making every effort to reach all class members, to explain the options and to sit down with individual class members to provide advice. See Pls' Response to Post-Hearing Submissions, Exh. C. The turnout for these meetings has been overwhelming and has far exceeded everyone's expectations: literally hundreds of farmers show up for each meeting. It has become clear that there are more class [**76] members than anyone had anticipated and some class members contend that although they show up at the meetings, class counsel does not have time to meet with them. Class counsel is in the midst of scheduling more meetings and providing more time for each meeting, and they have assured the Court that they will be able to meet with all class members prior to the deadline for filing claim packages.

Those who assert only discrimination in non-credit, benefit transactions, rather than discrimination in credit transactions, do not have the option of proceeding under Track B, see Consent Decree at P 5(d), and one objector complains that those who have faced discrimination in the USDA's benefit programs ought to be allowed to proceed under Track B. The problem is that programs that do not involve credit transactions are not subject to ECOA. The cause of action for those who allege discrimination in benefit programs arises solely under the Administrative Procedure Act, 5 U.S.C. ß 706, which does not provide for the same measure of damages as is provided under ECOA. For that reason, those who allege only that they have suffered discrimination in a benefit program are afforded a slightly [**77] different form of relief than the relief provided for those who suffered discrimination in a credit transaction with the USDA. In other words, the different statutory predicates for the two different kinds of claims restricted the solutions that counsel could negotiate in each context.

A class member who selects Track A must submit "substantial evidence" demonstrating that he was a victim of race discrimination in a credit or benefit transaction with the USDA. Consent Decree at PP 9(a), 9(b). Some have objected that the "substantial evidence" standard is too high a burden of proof. Part of that concern stems from a misunderstanding of the "substantial evidence" standard. While the phrase "substantial evidence" makes it sound as though the burden of proof is high, the substantial evidence standard actually is one of the lowest possible burdens of proof known to the law. A "substantial evidence standard" is significantly easier for the claimant to meet than a "preponderance of the evidence" standard. A

"preponderance of the evidence" standard means that the claimant has to show that it is more likely than not that discrimination happened, while under a "substantial evidence" standard, [**78] the claimant only has to provide a reasonable basis for the adjudicator to find that discrimination happened. [*106] See Consent Decree at P 1(l); see also page 28 above. The substantial evidence standard therefore should not be a bar to the claims of most class members.

In order for a claimant to prevail under Track A, he must present specified evidence, including evidence that he was treated less favorably than a "specifically identified, similarly situated" white farmer. See Consent Decree at PP 9(a)(i)(C), 9(b)(i)(B). Some objectors contend that it will be too difficult for some claimants to present evidence of a specific, similarly situated white farmer who received more favorable treatment, especially since there is no right to discovery under Track A. At this point, however, class counsel has amassed a significant amount of material regarding the treatment by the USDA of both African American farmers and white farmers, and claimants will be able to call upon that material in completing their claim packages. Class counsel should be able to provide most claimants with the evidence they need.

Under Track B, after limited discovery the claimant has a one day mini-trial before [**79] an arbitrator, and the claimant has the burden of establishing by a preponderance of the evidence that the USDA discriminated against him in a credit transaction. There are a number of objections to the Track B mechanism. First, the original Consent Decree defined Track B arbitrators as Michael Lewis and "any other person or person who he assigns to decide Track B claims." Some objectors contended that the definition of arbitrator was too vague and that those who were thinking about choosing Track B would have no way of knowing who the arbitrator might be. As Mr. James Morrison put it, "If Mr. Lewis chooses to have distinguished jurists, lawyers, former judges, I think he has that right as the four corners of the document gives him the authority. But if he wishes to choose Mickey Mouse, he could choose Mickey Mouse." See Transcript of Hearing of March 2, 1999 at 75. The parties addressed this concern in the revised Consent Decree by defining arbitrators as either Michel Lewis or "other person or persons selected by Mr. Lewis who meet qualifications agreed upon by the parties and by Mr. Lewis and whom Mr. Lewis assigns to decide Track B claims. . . ." See Consent Decree at P [**80] 1(b). The parties have specified that Mr. Lewis will "develop a single list of alternates which the parties would pre-approve and from which Mr. Lewis can select an arbitrator for any arbitration that he is unable to handle himself." See Letter of March 19, 1999 from Parties at P 1. While a claimant may not know the identity of the arbitrator at the time that the claimant chooses Track B, he will know who the potential candidates are and that they were not unilaterally selected by Mr. Lewis. In addition, class counsel can provide background information about the people on the list so the claimant will be able to make a more informed decision about whether he wants to select Track B.

Track B provides for limited discovery prior to the one day mini-trial. Discovery is limited essentially to an exchange of lists of witnesses and exhibits and depositions of the opposing side's witnesses. See Consent Decree at P 10(b)-(d). Some contend that discovery should be much broader. While it undoubtedly is true that the Track B mechanism anticipates less discovery than is ordinarily provided in the course of civil litigation, the Track B mechanism also resolves the claim much more quickly [**81] than an ordinary civil case would be resolved, in large part because of the shortened discovery period. Expanding the scope of discovery would take significantly more time, and class counsel in their judgment reasonably weighed the possible benefits of additional discovery, against the delays that would ensue and determined that this was an adequate amount of discovery. n19

n19 In fact, several objectors contend that the Track B mechanism, even with the shortened discovery period, takes too long to resolve claims. It is clear from the tensions between these two sets of objections that class counsel had to strike a delicate balance between resolving Track B claims expeditiously and obtaining the necessary discovery, and the balance finally struck appears eminently reasonable to the Court.

A hearing on a Track B claim lasts eight hours. Consent Decree at P 10(f). There is no live direct testimony. All direct testimony [*107] is submitted in writing. The eight hours at the hearing are comprised entirely of cross-examinations: [**82] each side is allotted four hours to cross-examine any witness of the opposing side. Several objectors contend that the claimant should be able to present live direct testimony, rather than presenting it only in written form. As with the Track B discovery issue, class counsel clearly was trying to balance the need for expedition with the need to ensure that the process produces just results. Again, the Court cannot conclude that the balance that counsel ultimately struck renders the terms of the settlement unfair. n20

n20 The Court also notes that it is not unprecedented to conduct hearings in this way, even in trials in federal court. See Transcript at 51; Charles R. Richey, "Rule 16 Revised and Related Rules: Analysis of Recent Developments for the Benefit of Bench and Bar," 157 F.R.D. 69, 83-84 (1994).

----------End Footnotes----------

In order to prevail on his claims, a Track B claimant must prove by a preponderance of the evidence that "he was the victim of racial discrimination and that he suffered damages therefrom." See Consent [**83] Decree at P 10(g). One objection maintains that this standard is too high and that claimants will be unable to meet this standard. To the extent that a claimant is concerned that he lacks sufficient evidence to meet the preponderance of the evidence standard, the traditional standard in civil litigation in all states and federal courts in this country, Track A provides a safer option. A claimant who cannot meet the preponderance of the evidence standard is not barred from all relief; instead, he is required to choose Track A rather than choosing Track B. Another objector also contends that a Track B claimant should not be required to establish economic damage in order to prevail on a Track B claim, and that the claimant should be able to prevail even if he can only establish emotional injury. As class counsel has pointed out, however, the economic damage requirement stems from ECOA, which provides the cause of action for all Track B claimants.

Some objectors complain about the Track A/Track B structure because those claimants who select Track B and fail to demonstrate by a preponderance of the evidence that they were the victims of race discrimination and that they suffered economic [**84] harm as a result will recover nothing under the settlement, see Consent Decree at P 10(h), rather than being permitted to proceed under Track A if they lose under Track B. The decision whether to proceed under Track A or under Track B therefore takes on a great deal of significance. If a claimant who has sufficient evidence to meet Track A requirements but insufficient evidence to prevail in Track B nonetheless chooses Track B, he will receive nothing.

As class counsel and counsel for the government have pointed out, however, there simply is no way that those who fail on a Track B claim could be permitted to proceed under Track A without entirely undermining the settlement. The settlement is designed to resolve the claims of all class members as promptly as possible. Because of the absence of documentary proof in most cases, the vast majority of claimants will select Track A, and Track A is designed to be a mechanistic way to deal with claims very quickly. Track B, by contrast, involves a much lengthier, fact-specific inquiry, but it is anticipated that very few class members will opt for Track B. If there were a fallback mechanism to provide relief for claimants who failed in [**85] their Track B claims, every class member would choose Track B and the settlement structure would collapse under its own weight. See Letter of March 19, 1999 from the Parties to the Court at 4 (if a class member whose claim was denied under Track B nonetheless were permitted to recover under Track A, "virtually every class member who elects to seek relief under the Decree would choose to proceed under Track B. Not only would such a change increase exponentially the cost to the parties of implementing the Decree, it also would make it impossible for the parties or the arbitrator to come close to adhering to the deadlines for disposition of Track B claims imposed by P 10(a)-(e). Thus this change would make the Decree unworkable").

Finally, the decisions of the adjudicators on Track A claims and the decisions of the arbitrators on Track B claims are final; [*108] there is no right to appeal those decisions, except that the Monitor shall direct the arbitrator or adjudicator to reexamine the claim if he determines that a "clear and manifest error has occurred" that is "likely to result in a fundamental miscarriage of justice." Consent Decree at PP 9(a)(v), 9(b)(v), 10(i), 12(b)(iii). Many [**86] objectors contend that the absence of appeal rights renders the settlement structure unfair and/or that it gives the arbitrators and adjudicators too much power. As Mr. Willie Head expressed it, "would you send your sons and daughters off to war with one bullet." Transcript of Hearing of March 2, 1999 at 165. While the objection has force, class counsel made a strategic decision not to press for appeal rights because the government would have insisted that any appeal rights be a two-way street. See Transcript of Hearing of March 2, 1999 at 179. Any appeal process inevitably would delay payments to those claimants who prevailed on their claims. Since it is anticipated that most class members will prevail under the structure of the settlement, the Court concludes that the forfeit of appeal rights was a reasonable compromise.

3. Track A Relief: The $ 50,000 Objection

Any claimant who prevails on a Track A claim for discrimination in a credit transaction will receive: (1) a cash payment of $ 50,000; (2) forgiveness of all debt owed to the USDA incurred under or affected by the program that formed the basis of the claim; (3) a tax payment directly to the IRS in the amount of 25% [**87] of the total of the debt forgiveness and cash payment; (4) immediate termination of any foreclosure action that USDA initiated in connection with the loan(s) at issue in

the claim; and (5) injunctive relief including one-time priority loan consideration and technical assistance. This relief package is the source of two objections.

Many objectors claim that a $ 50,000 cash award is insufficient to compensate them for the losses they sustained as a result of the USDA's discrimination. As Mr. Willie Head expressed it, "imagine that your home has been taken, your land has been taken, your automobile has been taken, and then you can make a decision and see if $ 50,000 will be enough for you." Transcript of Hearing of March 2, 1999 at 165-66. Putting a monetary value on the damage done to someone who has experienced discrimination at the hands of the government obviously is no easy matter, and it is probable that no amount of money can fully compensate class members for past acts of discrimination. It is quite clear, as the objectors point out, that $ 50,000 is not full compensation in most cases.

To the extent that a specific value can be put on such compensation, however, class counsel [**88] have thoroughly researched the issue and provided persuasive evidence that the amount is fair. n21 As class counsel points out, every claimant who prevails under Track A will receive not $ 50,000 but at least $ 62,500 (the sum of a $ 50,000 cash payment plus $ 12,500 in tax relief). And most who prevail under Track A will receive much more than that. The government estimates that the average African American farmer carries government debt of approximately $ 100,000, and those debts will be forgiven under Track A; in addition, the settlement provides for a tax payment of 25% of the debt forgiveness. See Pls' Response to Post-Hearing Submissions, Exh. A (Declaration of Dr. Mervin J. Yetley) at P 5(c)-(d). The average cash value of relief for a claimant who prevails under [*109] Track A therefore totals $ 187,500. Id. at P 6. Class members undoubtedly would have liked to have received a larger settlement. But $ 187,500 is a significant amount of money, especially in view of the fact that a claimant who lacks the detailed records required in a normal civil action to prove his case by a preponderance of the evidence need only establish his claim by substantial evidence in order to receive [**89] that compensation. The Court therefore concludes that class counsel had an adequate basis for agreeing to this amount and that it is fair and reasonable.

n21 To the extent that objectors are claiming that class counsel had no economic basis for agreeing to settle the case for the amount they did, that argument is belied by the fact that class counsel consulted a number of economists. See Pls' Response to Post-Hearing Submissions. Moreover, while one objector submitted affidavits from other economists that contend that the value of class members' claims may have been worth more than $ 50,000, those economists do not take into account the breadth of relief provided by the settlement. See id., Exh. A (Declaration of Dr. Mervin J. Yetley).

Class counsel also conducted an extensive study of the settlement of four previous civil rights actions in which plaintiffs alleged egregious violations of civil rights, including the case brought by Japanese Americans interned during World War II and the Tuskegee case involving the claims of African Americans injected with syphilis as part of government experiments. See Pls' Response to Post-Hearing Submissions at 2, n.2. Class counsel reasonably concluded that this settlement, which affords class members greater monetary relief than that afforded to individuals in those four cases, was fair and adequate.

[**90]

Some objectors also contend that the tax relief provided under Track A is insufficient because it may not cover all the federal taxes owed on the settlement and because it does not cover state taxes. Any effort to determine the exact amount of federal tax owed on a settlement, however, would have required scores of auditors and inevitably would have resulted in delays. The logistical problems presented by a provision covering state taxes would have been even more complicated, since every state has a different method of assessing income taxes and different tax rates. Again, class counsel in its judgment determined that a flat tax payment was in the best interests of the class and in assuring a prompt resolution of the claims, and the Court is unwilling to second-guess that judgment.

4. Other Objections to Individual Relief

The failure of both Track A and Track B to include certain measures of individual relief also has led to objections. First, some contend that the USDA should provide relief from loans owed to creditors other than the USDA. They argue that because the USDA discriminated in its credit programs, many African American farmers either had to obtain loans from private [**91] banks at very high interest rates or had to buy their equipment and supplies on credit from private companies at high interest rates. They therefore seek to have all of those loans forgiven or at least to have loans that were guaranteed by the USDA forgiven. Class counsel clearly tried to negotiate for as much debt forgiveness as possible. But as Mr. J.L. Chestnut put it,

"There is no likelihood the United States government is going to go around to . . . commercial banks paying off private loans of black farmers, whether it relates to discrimination or not. Nobody is going to be able to negotiate that with the United States government. How do I know that? Because I tried." Transcript of Hearing of March 2, 1999 at 168.

Second, some have objected that the Consent Decree does not contain a provision to protect a class member's settlement award from his bankruptcy estate. The parties to this action cannot, however, determine whether the bankruptcy estate has a right to a claimant's settlement award. Those matters are controlled by operation of the bankruptcy laws and will turn on issues such as whether the claim is considered the property of the estate. See 11 U.S.C. ß 541. Those [**92] matters properly are resolved in bankruptcy court between the parties to those actions and cannot be resolved by the parties to this action.

Third, a claimant who prevails under Track B is entitled to "any USDA inventory property that was formerly owned by the class member but which was foreclosed in connection with the ECOA claim(s) resolved in the class member's favor by the arbitrator." See Consent Decree at P 10(g)(iv). With that one exception, however, the Consent Decree has no provision for returning land to prevailing claimants. A number of objectors have stated the need for more extensive land return provisions. Again, this was a matter that class counsel clearly tried to negotiate, and they obtained the best possible resolution they could.

Finally, one objector expressed concern that the credit records of many claimants have been damaged by the discrimination they experienced at the hands of the USDA and that it therefore will be difficult for those farmers to obtain credit from the USDA or others in the future. In response to that objection, the parties agreed to revise the Consent Decree to include a provision stating that "outstanding debt discharged pursuant to [Track [**93] A or Track B] shall not adversely affect the claimant's eligibility for future participation in any USDA loan or loan servicing program." See Consent Decree at P 11(c). In sum, while some class members clearly [*110] would have liked the terms of the settlement to be slightly different, the terms of the settlement are fair when compared with the likely recovery plaintiffs would have obtained at trial.

C. Monitoring and Enforcement Provisions

Some objectors contend that at the very least the enforcement and monitoring provisions of the Consent Decree must be strengthened. The Consent Decree provides for the appointment of a Monitor for a period of five years to track and report on the USDA's compliance with the terms of the Consent Decree. Under the original proposed Consent Decree, the Monitor was appointed by the Secretary of Agriculture, subject to class counsels' approval. A number of objections noted that the USDA did not have any incentive to appoint a strong and independent Monitor, and that the Monitor provision therefore needed to be changed. In response to those concerns, the parties revised the Monitor provision so that the Court now appoints the Monitor from a list of [**94] names submitted by the parties. See Consent Decree at 12(a). The Monitor is removable only for "good cause."

A number of objections also noted that the original proposed Consent Decree appeared to prevent the Court from exercising jurisdiction in the event that the USDA did not comply with the terms of the decree. The law is clear that the Court retains jurisdiction to enforce the terms of the Consent Decree. See Spallone v. United States, 493 U.S. 265, 276, 107 L. Ed. 2d 644, 110 S. Ct. 625 (1989); Beckett v. Air Line Pilots Ass'n, 301 U.S. App. D.C. 380, 995 F.2d 280, 286 (D.C. Cir. 1993) (principle is well-established that trial court "retains jurisdiction to enforce consent decrees and settlement agreements"); Twelve John Does v. District of Columbia, 272 U.S. App. D.C. 235, 855 F.2d 874, 876 (D.C. Cir. 1988) (in action to enforce terms of consent decree, district court "unquestionably had power to hold the District of Columbia in civil contempt for violations of the consent decree"). The parties also have clarified that the Court retains jurisdiction to enforce the terms of the Decree.

D. Absence of Provisions Preventing Future Discrimination

The stated [**95] purpose of the Consent Decree is to "ensure that in their dealings with the USDA, all class members receive full and fair treatment that is the same as the treatment accorded to similarly situated white persons." Consent Decree at 2. The Consent Decree does not, however, provide any forward-looking injunctive relief. It does not require the USDA to take any steps to ensure that county commissioners who have discriminated against class members in the past are no longer in the position of approving loans. Nor does it provide a mechanism to ensure that future discrimination complaints are timely investigated and resolved so that the USDA does not practice the same discrimination against African American farmers that led to the filing of this lawsuit. In fact, the Consent Decree stands absolutely mute on two critical points: the full implementation of the recommendations of the Civil Rights Action Team and the integration and reform of the county committee system to make it more accountable and representative. The absence of any such provisions has led to strong, heart-felt objections. It also

has caused the Court concern. After comparing the terms of the settlement as a whole with the [**96] recovery that plaintiffs likely would have received after trial, however, the Court cannot conclude that the absence of any such prospective injunctive relief renders the settlement as a whole unfair.

There are several legal responses to the objections about the lack of forward-looking injunctive relief. First, while plaintiffs sought both declaratory and monetary relief in the complaint, they never sought an injunction requiring the USDA to restructure or to fire people who may have engaged in discrimination. See Complaint at 40-42; Seventh Amended Complaint at 60-63. All of the objectors who seek to have the USDA restructured therefore are going beyond the scope of the complaint in this case. The role of the Court in approving or disapproving a settlement is limited to determining whether the settlement of the case before it is fair, adequate and reasonable. The Court cannot reject the Consent Decree merely because it [*111] does not provide relief for some other hypothetical case that plaintiffs could have but did not bring. Cf. United States v. Microsoft, 56 F.3d at 1459-60 (court cannot "reformulate the issues" or "redraft the complaint").

Second, nothing in the Consent Decree [**97] authorizes the USDA to engage in illegal conduct in the future, and the Consent Decree therefore should not be rejected for its failure to include such prospective injunctive relief. See Isby v. Bayh, 75 F.3d at 1197 ("we cannot approve a class action settlement which either initiates or authorizes the continuation of clearly illegal conduct . . . [but] we are mindful that . . . any illegality or unconstitutionality must appear as a legal certainty on the face of the agreement before a settlement can be rejected on this basis") (internal citations and quotations omitted).

Third, even if plaintiffs had prevailed on their ECOA claims at trial, it is not at all clear that the Court could have or would have granted the broad injunctive relief that the objectors now seek. The injunctive relief that the objectors seek, essentially an injunction requiring the USDA to change the way it processes credit applications, may be authorized where plaintiffs prove a constitutional violation, see Hills v. Gautreaux, 425 U.S. 284, 297, 47 L. Ed. 2d 792, 96 S. Ct. 1538 (1976), but plaintiffs in their Seventh Amended Complaint do not allege a constitutional violation and they have not undertaken [**98] to prove one. Moreover, while ECOA authorizes the Court to "grant such equitable and declaratory relief as is necessary to enforce the requirements imposed under this subchapter," 15 U.S.C. ß 1691e(c), in employing its broad equitable powers the Court must exercise "the least possible power adequate to the end proposed." See LaShawn A. v. Barry, 330 U.S. App. D.C. 204, 144 F.3d 847, 854 (D.C. Cir. 1998) (*quoting* Spallone v. United States, 493 U.S. 265, 280, 107 L. Ed. 2d 644, 110 S. Ct. 625 (1990)).

Those legal responses, however, provide little comfort to those who have experienced discrimination at the hands of the USDA and who legitimately fear that they will continue to face such discrimination in the future. The objections arise from a deep and overwhelming sense that the USDA and all of the structures it has put in place have been and continue to be fundamentally hostile to the African American farmer. As Mr. Leonard Cooper put it, "You cannot mediate . . . institutionalized racism." Transcript of Motions Hearing of March 2, 1999 at 142. Another class member expressed it more personally: "They have humiliated me and my family since [1989]. . . . And I was just [**99] wondering if there couldn't be something put in the provisions that would stop these FSA agents from humiliating and degrading [us] as they do. . . . my wife has almost had a nervous breakdown by dealing with our agent and he continues to do the same things that he has done in the past and I just wish there was some way for you to put something in that provision that would stop some of that stuff." Id. at 146.

Most fundamentally, these objections result from a well-founded and deep-seated mistrust of the USDA. A mistrust borne of a long history of racial discrimination. A mistrust that is well-deserved. As Mr. Chestnut put it, these objections reflect "fear which reaches all the way back to slavery. . . . That objection, you heard it from many today, it really asks you to retain jurisdiction over this case in perpetuity. Otherwise they say USDA will default, ignore the lawful mandates of this Court, and in time march home scot-free while blacks are left holding the empty bag again." Transcript of Hearing of March 2, 1999 at 172. The Court cannot guarantee class members that they will never experience discrimination at the hands of the USDA again, and the Consent Decree does [**100] not purport to make such a guarantee. But the Consent Decree and the Court do provide certain assurances.

First, under the terms of this Consent Decree, the USDA is obligated to pay billions of dollars to African American farmers who have suffered discrimination. Those billions of dollars will serve as a reminder to the Department of Agriculture that its actions were unacceptable and should serve to deter it from engaging in the same conduct in the future.

Second, the USDA is not above the law. Like many of the objectors, the Court was surprised and disappointed by the government's [*112] response to the Court's modest proposal that the Consent Decree include a simple sentence that in the future the USDA

shall exert "best efforts to ensure compliance with all applicable statutes and regulations prohibiting discrimination." Letter from the Court to Counsel, dated March 5, 1999; see Response Letter from the Parties to the Court, dated March 19, 1999. Whether or not the government explicitly states it in this Consent Decree, however, the Constitution and laws of the United States continue to forbid discrimination on the basis of race, see, eg., U.S. CONST. amend. V; 15 U.S.C. ß 1691; [**101] 42 U.S.C. ß 2000d, as do the regulations of the USDA. See 7 C.F.R. ß ß 15.1, 15.51. The actions of the USDA from now into the future will be scrutinized closely -- by class members, by their now organized and vocal allies, by Congress and by the Court. If the USDA or members of the county committees are operating on the misapprehension that they ever again can repeat the events that led to this lawsuit, those forces will disabuse them of any such notion.

Most importantly, the farmers who have been a part of this lawsuit have demonstrated their power to bring about fundamental change to the Department of Agriculture, albeit more slowly than some would have wanted. Each individual farmer may feel powerless, but as a group they have planted seeds that are changing the landscape of the USDA. As a group, they spurred Secretary Glickman in 1996 to look inward at the practices of the USDA and to examine African American farmers' allegations that the discrimination of the USDA was leading them to the point of financial ruin. As a group, they led Secretary Glickman to create the Civil Rights Action Team, a team that recommended sweeping changes to the USDA and to the county committee system. [**102] Indeed, in February 1997, the USDA Civil Rights Action Team itself recommended that the county committee system be revised by converting all county non-federal positions, including the county executive directors, to federal status, that the committee selection process by changed, that voting members of underrepresented groups be appointed to state and county committees, and that county committees be removed from any farm loan determinations. CRAT Report at 64-65.

As a group, the farmers mobilized a broad coalition within Congress to take the unprecedented action of tolling the statute of limitations. As a group, they brought Secretary Glickman to the negotiating table in this case and achieved the largest civil rights settlement in history. And as a group, they have made implementation of the recommendations of the CRAT Report a priority within the USDA. See Statement of February 9, 1999, by Secretary Dan Glickman, Before the Subcommittee on Agriculture, Rural Development, and Related Agencies Committee on Appropriations, United States Senate ("I also want to emphasize the importance that the President and I have placed on USDA civil rights issues; this priority is reflected in [**103] the [FY 2000] budget. The President's budget provides the necessary funding to continue to carry out the recommendations of the Civil Rights Action Team (CRAT) as well as the recommendations of the National Commission on Small Farms which supports our civil rights agenda"). While the USDA landscape has remained resistant to change for many seasons, the labors of these farmers finally are beginning to bear fruit. This settlement represents one significant harvest. It is up to the Secretary of Agriculture and other responsible officials at the USDA to fulfill its promises, to ensure that this shameful period is never repeated and to bring the USDA into the twenty-first century.

V. CONCLUSION

Forty acres and a mule. The government broke that promise to African American farmers. Over one hundred years later, the USDA broke its promise to Mr. James Beverly. It promised him a loan to build farrowing houses so that he could breed hogs. Because he was African American, he never received that loan. He lost his farm because of the loan that never was. Nothing can completely undo the discrimination of the past or restore lost land or lost opportunities to Mr. Beverly or to all of the other [**104] African American farmers whose representatives came before this Court. Historical discrimination cannot be undone.

[*113] But the Consent Decree represents a significant first step. A first step that has been a long time coming, but a first step of immeasurable value. As Mr. Chestnut put it, "Who really knows the true value, if there is one, for returning a small army of poor black farmers to the business of farming by the year 2000 who otherwise would never make it back? I am not wise enough to put a dollar value on that and I don't think anybody on this planet is wise enough to reduce that to dollars and cents." Transcript of Hearing of March 2, 1999 at 171. The Consent Decree is a fair, adequate and reasonable settlement of the claims brought in this case. It therefore will be approved and entered.

SO ORDERED.

PAUL L. FRIEDMAN

United States District Judge

DATE: 4/14/99

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

TIMOTHY C. PIGFORD, et al., Plaintiffs, v. MIKE JOHANNS, SECRETARY, THE UNITED STATES DEPARTMENT OF AGRICULTURE, Defendant.	Civil Action No. 97-1978 (PLF)
CECIL BREWINGTON, et al., Plaintiffs, v. MIKE JOHANNS, Defendant.	Civil Action No. 98-1693 (PLF)

ARBITRATOR'S NINTH REPORT ON THE LATE-CLAIM PETITION PROCESS

The Court has held that "all putative class members seeking permission to late file under Section 5(g) of the Consent Decree are directed to review the terms of that provision, as interpreted by the Court and the Arbitrator. If, having reviewed the requirements for eligibility under Section 5(g), petitioners believe that they are entitled to late file, petitioners must seek permission directly from the Arbitrator, Michael K. Lewis." *Pigford v. Veneman*, 201 F. Supp. 2d 139 (D.D.C. May 10, 2002); see also, *Pigford v. Glickman*, No. 97-1978 (D.D.C. Dec. 20, 1999); *Pigford v. Glickman,* No. 97-1978 (D.D.C. Jul. 14, 2000). This is

the Arbitrator's ninth semi-annual report on the status of the review of late-claim petitions pursuant to Paragraph 5(g) of the Consent Decree.

Background

Since December 20, 1999, the Arbitrator has had the responsibility of determining whether a putative claimant who missed the October 12, 1999 deadline may file a late claim. A putative claimant may file late if he "demonstrates that his failure to submit a timely claim was due to extraordinary circumstances beyond his control." Consent Decree, ¶5(g). In the Memorandum Opinion and Order of November 26, 2001, the Court found that the Arbitrator's "late-claim petition processes are more than sufficient to ensure that Section 5(g) of the Consent Decree is properly and justly applied and to assure that fair process is afforded." *Pigford v. Veneman*, 173 F. Supp. 2d 38, 40 (D.D.C. 2001). As a result, the Court has declared that "it has retained no authority to review the Arbitrator's rulings on petitions to late file... Nor has it retained authority to control or review the procedures that the Arbitrator employs to reach his decisions." *Pigford v. Veneman*, 2003 U.S. Dist. LEXIS 9210, *4 (D.D.C. Jun. 4, 2003). Further, the Court ruled that it "will not consider any such petition, either at the first instance or following denial and/or reconsideration by the Arbitrator." *Pigford v. Veneman*, No. 97-1798 (D. D.C., filed Sept. 13, 2004).

On August 9, 2005 and September 1, 2005, the Court again had occasion to pass upon the Arbitrator's authority. *Pigford v. Johanns*, No. 97-1798 (D. D.C., filed Aug. 9, 2005) (docket numbers 1168, 1171, 1172 & 1173); *Pigford v. Johanns*, No. 97-1798 (D. D.C., filed Sept. 1, 2005). In those orders, the Court reaffirmed the Aribitrator's processes and decisions, denying fourteen motions by individuals seeking to overturn rulings of the Arbitrator in their petitions and requests for reconsideration.

Processes and Procedures

Forms & Filing

Since the issuance of the First Report, there have been no changes to the procedures relating to the filing of a petition to file a late claim. Approximately 66,000 petitions were filed by the September 15, 2000 deadline, and an additional 7,800 putative claimants filed petitions after that deadline. Only a few putative late claimants have been able to convince the Arbitrator that the Facilitator or the Arbitrator misread the postmark on their late claim petition. All other late claims postmarked after September 15, 2000 have been rejected as outside the scope of the July 14, 2000 order.

Categorization & Research

The categorization and research methods described in the first report remain in use. The Arbitrator continues to use the same criteria in the review process. On January 3, 2005, the Court reaffirmed its finding that notice of the Consent Decree was adequate. *Pigford v. Veneman*, No. 97-1798 at 19-24 (D. D.C., filed January 3, 2005).[1] In August and September 2005, the Court denied to motions from fourteen would-be late claimants[2] who asserted that lack of notice was sufficient to require approval of their late-claim petitions, the Court reaffirmed its finding regarding adequacy of the notice. *Pigford v. Johanns*, No. 97-1798 (D. D.C., filed Aug. 9, 2005) (docket numbers 1168, 1171, 1172 & 1173); *Pigford v. Johanns*, No. 97-1798 (D. D.C., filed Sept. 1, 2005). As the notice was adequate, the

[1] The Arbitrator is unaware of any pending appeal or motion for reconsideration of that order and thus considers it to be the final word from the Court on the issue of timeliness.
[2] *Pigford v. Johanns,* No 97-1978 (docket numbers 1174, 1175, 1176, 1178, 1187, 1188, 1189, 1190, 1191, 1192, 1993, 1194, 1195, 1196, 1197, 1198, 1199 & 1200).

Arbitrator must continue to hold that lack of knowledge of the settlement cannot amount to extraordinary circumstances beyond a petitioner's control.

As of March 31, 2004, the Arbitrator had completed all initial decisions on the petitions and notified the petitioners. Although the Arbitrator had utilized researchers to investigate late claim petitions where further research was necessary to make an informed decision, they are no longer needed. Any additional timely petitions discovered after this point have been and will continue to be reviewed on a priority basis; only one such petition has been discovered since the last report. Of the 65,952 timely petitions, 63,836 were denied and 2,116 were approved.[3]

Reconsideration

As described in prior reports, putative claimants whose late claim petitions are denied may make a written request for reconsideration. The reconsideration process remains as described in those reports.

Putative claimants have a 60-day window in which to submit a request for reconsideration. A total of 23,936 requests for reconsideration have been filed, 20,685 of which were sent within the 60-day deadline. As the numbers indicate, slightly under one-third of all denied petitioners have made timely requests for reconsideration. As of the date of this report, the period for filing timely requests for reconsideration has expired.[4] All timely requests for reconsideration have been recorded by the Facilitator and forwarded to the Arbitrator.

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[3] The Claims Facilitator continues to review the petitions to consolidate duplicates.

[4] On rare occasions, the Arbitrator has permitted the resetting of the 60 day window in circumstances in

Requests for reconsideration were distributed to researchers for investigation. The researchers reviewed the underlying petition, the information from any interviews with the petitioner, any previously submitted documentation, and the information submitted with the request for reconsideration. Researchers contacted some of the putative claimants for further clarification. Upon completing his or her investigation, each researcher drafted an individually tailored response to the request for reconsideration for the Arbitrator's review. All requests for reconsideration have been investigated by researchers and have been returned to the Arbitrator's office for further review.

As of the filing of the Eighth Report on July 11, 2005, the Arbitrator had made decisions regarding 10,745 reconsideration requests. As of the filing of this report, the Arbitrator has made decisions in a total of 17,279 reconsideration requests, approving a total of 113 petitions.[5] The Arbitrator's decision on a reconsidered petition is final.

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which the petitioner was not properly notified of the initial rejection and of the opportunity to request reconsideration.

[5] In the Eighth Report, the Arbitrator reported the approval of 140 petitions. The apparent decrease in the number of approved requests for reconsideration captured in this report results from the consolidation of duplicate petitions.

Results to Date

The status of the late claim process is presented below in tabular form. As noted in the Fourth Report, as of May 27, 2003, the Claims Facilitator began including Late Claim Petition information in its weekly status report. The Facilitator reports the number of affidavits and requests for reconsideration filed. The Arbitrator is using the Claims Facilitator's methodology, which inflates all petition numbers due to the fact that individual petitioners have filed multiple petitions to file claims and requests for reconsideration.

Approximate number of Petitions to File Late Claims:	73,800
Approximate number filed before Sept. 15, 2000:	66,000
Number of petitions approved:	2,116
Number of petitions denied:	63,836
Approximate number of Requests for Reconsideration:	24,000
Approximate number filed within 60 days:	20,700
Number of reconsideration requests decided:	17,279
Number of reconsideration requests resulting in approval of petition:	113

Conclusion

The Arbitrator's review of late claim petitions is proceeding consistent with the Arbitrator's previous reports. As noted in the Sixth Report on the Late-Claim Petition Process, he has notified nearly all those who will have prevailed on their request for reconsideration of his decision. The Arbitrator is conducting a thorough review of the remainder to ensure that no petitioner who should prevail upon reconsideration is overlooked. As things stand now, all those who do not prevail on their request for

reconsideration will receive detailed letters explaining the Arbitrator's decision by the end of January 2006.

Date: November 30, 2005

Respectfully submitted,

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