FACT SHEET ABOUT
KEEPSEAGLE, et al. v. VILSACK
Native American Farmers & Ranchers' Class-Action Lawsuit Against the U.S. Department of Agriculture for Decades of Discrimination in Farm Loans

This case charges the USDA with denying thousands of Native American farmers and ranchers the same opportunity to obtain farm loans that USDA routinely provided to white farmers, causing Native Americans to lose billions of dollars in credit. The case also brings to light USDA's failure to maintain its civil-rights office and, specifically, USDA's failure to accept or investigate the many civil-rights complaints filed by Native American farmers and ranchers.

WHEN DID THIS CASE BEGIN? It was filed in November 1999 in the U.S. District Court for the District of Columbia, which is in Washington, D.C.

WHO IS A MEMBER OF THIS CLASS? The Court has ruled that this case may proceed as a class action. You are a member of the class and a participant if at any time **between 1981 and 1999:**

1. **You are Native American and have been farming or ranching, and**
2. **You, or someone on your behalf, complained in writing or orally, about discrimination in farm-loan programs, and**
3. **You tried to obtain a loan or servicing of a loan from the USDA.**

WHAT'S THE STATUS OF THE CASE? After years of work, plaintiffs and USDA have completed the fact finding process called discovery. The court has not yet set a trial date, but we hope one will be set soon. However, on December 4, 2009, at the request of the USDA, the Court stayed the litigation (i.e., put it on hold) for two months, so that the parties can focus on negotiating a settlement agreement. That stay has been extended through mid-April 2010. Plaintiffs have already obtained over two million pages of documents from USDA and data on who received loans and debt servicing from USDA, when the loans were issued, and their amounts.

- The documents reveal the widespread, harsh, and offensive discrimination that USDA committed against Native Americans over several decades.
- An expert who spent 27-years in the USDA's Economic Research Service has used USDA's own data to determine that there have been large differences in the amount of money loaned to white and Native American farmers that suggest the presence of discrimination.
- USDA officials and employees have also given testimony, as have Native American farmers and others, which show that USDA operated its farm loan programs in a discriminatory way.

WHAT DO THE PLAINTIFFS WANT FROM THIS CASE? **The plaintiffs seek:**

1. To change the way USDA makes loan and debt-servicing decisions, so that decisions are fair and that Native American applicants have an equal chance to obtain loans and debt servicing.
2. To ensure that all applicants for loans and debt servicing get the technical assistance they need from USDA to prepare applications for loans and debt servicing that have a fair chance of success.
3. The payment of money to members of the class who were improperly denied loans or debt servicing by the USDA at any time between 1981 and 1999, to compensate for the revenues that would have been earned had the rancher or farmer received his fair share of loan or debt servicing.

WHAT EVIDENCE OF DISCRIMINATION EXISTS IN THIS CASE? **While the volume of evidence in this case is too large to list in detail, it is summarized here.**

1. **USDA and other government agencies have issued formal reports that find USDA's loan and debt servicing programs have not been equally accessible to Native Americans as to white farmers and ranchers.** These reports, published after thorough investigations, also find that USDA's civil-rights office has been ineffective at least since the early 1980s, and that civil-rights complaints were lost, destroyed, or simply not investigated.

   In the words of the USDA and the former Secretary of Agriculture:

   - "Minority farmers lost significant amounts of land and potential farm income as a result of discrimination by [USDA] programs" and there are disparities between "non-minority loan processing and American Indian loan processing."[1]
   - "The civil rights problems at USDA have been a long time in the making. Some of them are a result of regulatory requirements, some of poor policies, some of benign neglect, and some of program officials who have allowed personal bias to influence their decisions."[2]
   - "The process for resolving program complaints has failed" and there is an absence of accountability for civil-rights compliance "throughout USDA's massive field structure."[3]

2. **USDA's highly subjective rules about who should receive loans and debt servicing permitted local decision-makers to favor their friends and family, and to discriminate against Native Americans, rather than treat all applications equally as the law requires.**

3. **USDA's own data shows Native Americans received less loan and debt-servicing money from USDA than they should have received.** Patrick O'Brien, an expert in agricultural economics and a 27-year veteran of USDA's Economic Research Service, concluded that:
   - Native American farmers received only half the USDA loans *and* half to two-thirds of the loan servicing agreements they should have received from 1981 to 2007, contributing to a "cumulative $ 3 billion shortfall" in the credit.[4]
   - As a result, Native American farmers suffered actual economic damages of well over $1 billion.[5] In addition, they likely suffered even more in non-economic harm from the destruction of families, the loss of a way of life and emotional injury, all caused by the systemic denial of equal access to credit and the exposure to discrimination.

4. **USDA employees referred to Native Americans in demeaning and stereotyped ways, revealing bias against Native Americans.**

WHAT CAN YOU DO TO HELP THE CASE? **If you want more information about this case, you may call us toll free at 1-888-822-0844 or check our website, http://www.cohenmilstein.com/cases.php?CaseID=95**

THE LAWYERS FOR THE CASE ARE:

Joseph M. Sellers
Christine E. Webber
Llezlie Green Coleman
Cohen Milstein Sellers & Toll
Washington, D.C.

David J. Frantz
Conlon, Frantz & Phelan
Washington, D.C
Phillip L. Fraas
Washington, D.C.

Sarah Vogel
Sarah Vogel Law Firm
Bismarck, N.D.

Anu Varma
Patton Boggs
Washington., DC

Paul M. Smith
Michael T. Brody
Jenner & Block LLP
Washington, D.C. & Chicago, Ill.

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1 Civil Rights Action Team, U.S. Department of Agriculture, *Civil Rights at the United States Department of Agriculture* (1997) ("CRAT Report"), at 21, 30.

2 Letter From Dan Glickman, Secretary of Agriculture, to Edward I. Koch, Sept. 8, 1997, at 1.

3 CRAT Report at 31, 47.

4 Final Expert Rebuttal Report of Patrick M. O'Brien, November 2009 ("O'Brien Final Rebuttal Report"), at 2-3, 5-7; Expert Rebuttal Report of Patrick M. O'Brien, July 2009 ("O'Brien July Rebuttal Report"), 48.

5 O'Brien Final Rebuttal Report at 6-7.

Keepseagle v. Vilsack Class Action Settlement
Damages Fact Sheet

Under the settlement agreement, the U.S. Department of Agriculture will pay $680 million dollars to thousands of Native American farmer and rancher class members. The damages will be distributed to eligible class members who file claim forms within a six-month time period, which is expected to begin early in 2011.

Keepseagle class members will have an option to file individual claims under either of two "Tracks": Track A or Track B:

- Track A will permit eligible class members to seek an award of damages up to $50,000, by providing a limited amount of information with which they demonstrate under oath that 1) they are Native Americans who farmed or ranched between 1981 and 1999; 2) they were the subject of discrimination by being denied a USDA loan or denied loan servicing by USDA between 1981 and 1999, subject to minor exceptions.; and 3) that they complained about the discrimination to the USDA directly or through a representative, subject to minor exceptions.

- Track B will permit eligible class members to seek an award of damages up to $250,000. In addition to satisfying the requirements to succeed in Track A, class members must also provide substantially more evidence about the discrimination they suffered, as well as proof of the actual economic losses they suffered. The legal standards in Track B are similar to the standards eligible class members would face if they tried their claims in federal court.

How the $680 million figure was determined:

The Plaintiffs negotiated the payment of $680 million in damages by relying heavily upon the expert analysis of Patrick O'Brien, an independent agricultural economist who was employed by the USDA's Economic Research Service for 27 years. In an expert report filed with the U.S. District Court for the District of Columbia, Mr. O'Brien estimated that Native Americans suffered economic losses of $776 million during the period from 1981 to 2007 that could be attributed to discrimination by the USDA.

The payment of $680 million in damages represents 88 percent of $776 million, the total economic losses that Native Americans suffered during the period from 1981 to 2007.

The payment of $680 million in damages also represents 88 percent of the economic losses the Plaintiff class could have recovered at trial if they prevailed at every stage of the litigation.

In addition to this payment of damages, the settlement also provides for debt relief to eligible class members in an amount up to $80 million.

Additional information about the *Keepseagle v. Vilsack* settlement is available at www.IndianFarmClass.com, or by calling, toll free, 1-888-233-5506.

If You are a Native American Who Was Denied a Farm Loan or Loan Servicing by the USDA,

You Could Receive Benefits from a Class Action Settlement.

A federal Court authorized this Notice. This is not a solicitation from a lawyer.

- A $760 million Settlement with the United States Department of Agriculture ("USDA") has been reached in the *Keepseagle v. Vilsack* class action lawsuit. The lawsuit claimed the USDA discriminated against Native Americans by denying them equal access to credit in the USDA Farm Loan Program.

- You may be eligible for a payment of up to $50,000 or more and forgiveness of some or all of your outstanding USDA loans if you applied for or attempted to apply for a farm loan or loan servicing from the USDA between **January 1, 1981 and November 24, 1999** (*see* Question 4).

- The USDA has also agreed to make some changes to its farm loan programs to help make sure that these programs meet the needs of Native American farmers and ranchers.

YOUR LEGAL RIGHTS AND OPTIONS IN THE SETTLEMENTS	
SUBMIT A CLAIM FORM	The only way to get money and any loan forgiveness from the Settlement.
EXCLUDE YOURSELF FROM THE SETTLEMENT	Get no benefit from this Settlement. If you want to pursue your claim on your own or want to file a claim of discrimination in another lawsuit charging the USDA with discrimination against African Americans, Women or Hispanics, you should choose this option.
OBJECT/COMMENT	Remain in the Settlement and write to the Court about any concerns you have about the Settlement.
GO TO A HEARING	Remain in the Settlement and ask to speak in Court about the fairness of the Settlement.
DO NOTHING	Get no money or loan forgiveness. Give up rights to sue the USDA about the claims in this lawsuit.

- These rights and options – **and the deadlines to exercise them** – are explained in this notice.

- The Court in charge of this case still has to decide whether to approve the Settlement. Payments will be made if the Court approves the Settlement and after any appeals have concluded and the claims process is completed. **Please be patient.**

For More Information: Call 1-888-233-5506 or Visit www.IndianFarmClass.com

What This Notice Contains

BASIC INFORMATION

1. Why is there a notice?

You have a right to know about a proposed Settlement, and about your options, before the Court decides whether to approve the Settlement.

The Court in charge of the case is the United States District Court for the District of Columbia, and the case is called *Keepseagle v. Vilsack*, 1:99cv03119 ("Keepseagle"). The people who sued are called Plaintiffs and the person they sued, the Secretary of the USDA in his official role, is called the Defendant.

2. What is this lawsuit about?

The lawsuit claims that the USDA denied thousands of Native American farmers and ranchers the same opportunities to get farm loans or loan servicing that were given to white farmers and ranchers. Plaintiffs also claim that the USDA did not do outreach to Native American farmers and ranchers or provide them with the technical assistance they needed to prepare applications for loans and loan servicing.

The Settlement does not mean the USDA violated any laws. The USDA denies it did anything wrong.

3. Why is this a class action?

In a class action, one or more people, called class representatives (in this case, George Keepseagle, Marilyn Keepseagle, Luke Crasco, Gene Cadotte, Keith Mandan, Porter Holder, Claryca Mandan, John Fredericks, Jr. (deceased), and Basil Alkire (deceased)), sue on behalf of people who have similar claims. All these people may make their claims together in a "class" as "class members," and one court resolves the issues for all class members except for those who exclude themselves from the class.

WHO IS IN THE SETTLEMENT

To see if you are entitled to benefits from the Settlement, you first have to determine if you are a Class Member.

4. How do I know if I am a Class Member?

The Class includes all Native American farmers and ranchers who:

- Farmed or ranched or attempted to farm or ranch between January 1, 1981 and November 24, 1999; **and**
- Sought, or attempted to seek, a farm loan from the USDA during that period; **and**
- Complained about discrimination to the USDA orally or in writing either on their own or through a representative, such as a tribal government, during the same time period.

Because of a law passed by Congress, excluded are claims of Class Members who **either**:

- Experienced discrimination only between January 1 and November 23, 1997, **or**
- Complained of discrimination only between July 1 and November 23, 1997.

5. Who is considered a Native American?

A Native American includes any citizen of the United States who meets one or more of the requirements listed below:

- Is a member of a tribe, band, nation, or community, including any Alaska Native village or regional or village corporation (as established in the Alaska Native Claims Settlement Act) which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians, also known as a "federally recognized tribe," **or**
- Is a member of any Indian group that has been formally recognized as an Indian tribe by a State legislature or other similar organization vested with State tribal recognition authority, also known as a "state recognized tribe," **or**
- Is a member of any Indian tribe or "Native group" (according to 43 U.S.C. § 1602.(c) and (d)) that asked the United States government for Federal recognition, **or**
- Represented himself or herself as a Native American before November 24, 1999. This can be confirmed by providing:
    - A credible written narrative, submitted under "penalty of perjury" (under oath), describing in detail the circumstances of his or her Native American ancestry that will convince the independent evaluators that it is genuine.

For the purposes of this Settlement, membership in an Indian tribe will be defined by the laws or rules of the Indian tribe in which you say you are a member. You will need to verify your tribal membership by providing a copy of an official tribal document that states that you are a member of the Indian tribe, such as:

- An identification card that states that you are currently a member of the Indian tribe, **or**
- A letter or statement from the tribal government that states that you are regarded as a member of the Indian tribe.

6. I'm still not sure if I'm included.

If you are still not sure whether you are included, you can call 1-888-233-5506, visit the website www.IndianFarmClass.com, or write to Keepseagle Settlement, PO Box 3560, Portland, OR 97208-3560.

7. What if I am eligible for more than one USDA farmer discrimination settlement?

In addition to this Settlement in *Keepseagle*, there are several other USDA farmer discrimination cases:

- *Pigford v. Vilsack* ("Pigford I" or the "Black Farmers Case"),
- *In re Black Farmers Discrimination Litigation* ("Pigford II"),
- *Love v. Vilsack* ("Women Farmers Case"), and
- *Garcia v. Vilsack* ("Hispanic Farmers Case").

You can only submit a claim in one of these cases as they all address the same kind of discrimination and claims.

If you submit, or have submitted, a claim for benefits in the *Pigford I* case, then you are **not** eligible to submit a claim in this Settlement.

If you submitted a claim in the *Pigford II* case and believe that you are also eligible to submit a claim in this Settlement, you may withdraw your claim from the *Pigford II* case and submit a claim here. If you do not withdraw your claim, you will not be eligible for benefits in this Settlement.

If you are eligible to submit a claim in either the Women Farmers or the Hispanic Farmers case and also believe you are eligible to submit a claim in this Settlement, you can only submit a claim in one of these cases. You need to decide in which case you will submit a claim.

The USDA and the Claims Administrator(s) for each of these cases will be sharing information to make sure that claims will only be paid once.

THE SETTLEMENT BENEFITS

8. What does the Settlement provide?

The government will provide up to $760 million to settle the lawsuit. After deducting certain amounts, including attorneys' fees and awards (*see* Question 27), two funds will be created. The first fund will pay Class Members who submit valid claims. The second fund will provide up to $80 million for full or partial loan forgiveness to qualifying Class Members. In addition, the USDA will pay up to $20 million (not included in $760 million) for the costs of administering the settlement.

If any money remains in the Settlement Fund after all payments to class members and expenses have been paid, then it will be donated to one or more organizations that have provided agricultural, business assistance, or advocacy services to Native Americans.

More details are in the Settlement Agreement, available at www.IndianFarmClass.com.

9. What else does the Settlement provide?

The Settlement provides for improvements in the delivery of Farm Loan Program services to Native Americans. Those changes include:

- Creating a Council for Native American Farming and Ranching. The Council will include Native American, Alaska Native leaders, Farm Service Agency ("FSA") and USDA officials and will meet twice a year. This Council will be responsible for ensuring the farm loan program is fully responsive to the particular needs of the Native American and Alaska Native farmers and ranchers.
- Creating a position for a USDA Ombudsperson for Native and Other Socially Disadvantaged Farmers and Ranchers to serve as a point of contact for these farming and

ranching communities and to track civil rights complaints and address any related programmatic issues.

- Reviewing farm loan program guidelines, considering suggestions from Class Counsel and the Council for Native American Farming and Ranching to make them more responsive to the needs of Native Americans.
- Improving the oversight of farm loan program operations.
- Enhancing the ability of Native Americans to continue to farm and ranch by establishing 10-15 regional venues to provide technical training and support and developing a plain language guide to the application for farm loans and loan servicing. If funds are available, the USDA will also fund and staff consolidated sub-offices at Tribal Headquarters on Indian Reservations.

For Class Members who show evidence of discrimination in the claims process, for a certain period of time the USDA has also agreed to suspend foreclosures, debt acceleration payments, and referring to the Treasury requests to offset or withhold other federal benefits that are used to pay down outstanding loans.

10. How much money can I get?

Your actual payment cannot be determined yet. The amount of money you are eligible to receive will depend on whether you file a claim under Track A or Track B. It will also depend on the total number of Class Members who make successful claims.

In order to receive a share of the money in the Settlement, you must file a claim through either the Track A or Track B procedure.

Track A – If you file a claim on this track and your claim is successful, you may get a payment up to $50,000 for your discrimination claim. You will also be eligible to get an additional 25% of that amount which will be paid directly to the IRS to reduce any income tax you may owe on the money awarded to you (*see* Question 17 below). The amount that will actually be paid to those who qualify will depend upon the number of Class Members who make successful claims through Track A.

Track B – If you file a claim on this track and your claim is successful, you may get a payment up to up to $250,000 for your discrimination claim. Track B requires more proof of discrimination than Track A (*see* Question 18 below). The amount that will actually be paid to those who qualify will depend upon the number of Class Members who make successful claims through Track B.

USDA Loan Forgiveness – USDA will provide up to $80 million to forgive outstanding loans of qualifying Class Members who file a successful claim through Track A or Track B. If you have certain USDA loans you may be eligible for loan forgiveness as well as an additional payment made to the IRS of 25% of the loan forgiven to reduce any income tax you may owe (*see* Questions 11 - 13, and 19 below).

11. How will my payment be determined?

An independent evaluator will review claims made through Track A and Track B and determine how much you should be paid. For Track B claims only, an experienced agricultural economist may assist the independent evaluator in assessing the financial value of your claims.

12. What USDA loans are eligible for forgiveness?

All outstanding federal farm program debt and any interest or penalties, including operating loans, farm ownership loans, emergency loans, economic emergency loans, and debts restructured through any Part 766 loan (formerly Part 1951-S loan) or other farm loan program servicing options are eligible for forgiveness.

13. How much USDA loan forgiveness can I get?

The amount of loan forgiveness (the "Debt Relief Award") you will get will depend on the number of successful claims that are filed. If the total amount of loan forgiveness requested by eligible Class Members is ***less than*** $80 million, then each qualifying Class Member with outstanding debt will get full loan forgiveness for eligible loans. If the total amount of loan forgiveness requested by eligible Class Members is ***more than*** $80 million, then the Claims Administrator will determine how much loan forgiveness each Class Member with a successful claim will get based on when he or she got his/her loan from USDA. The process for calculating "Debt Relief" is described exactly in Part E of Section IX of the Settlement Agreement. The Settlement Agreement is available at www.IndianFarmClass.com.

The amount of loan forgiveness you will receive will be determined after all claims have been reviewed. Do not expect decisions on who receives loan forgiveness and those amounts before 2012. **Please be patient.**

There is additional money set aside to help reduce any income tax you may owe for the loan forgiveness you receive ("Debt Relief Tax Awards"). The money for these tax awards will be paid directly to the IRS.

Furthermore, if your claim is successful and you are delinquent in payment on a FSA loan that does not receive full loan forgiveness, the USDA will offer an additional round of Primary loan servicing after the amount is determined of any loan forgiveness you are eligible to receive.

14. Can I get another USDA farm loan if I get loan forgiveness?

Yes. Even if you have loans forgiven, you will be eligible to be considered for new farm loans from the USDA.

How to Get Benefits – Submitting a Claim

15. How do I submit a claim?

You will need to submit a complete Claims Package in order to get benefits from the Settlement. You can register to get a Claims Package at the website or by calling the toll-free number. After the Court grants final approval of this Settlement (*see* Question 30), everyone who registers will be mailed a Claims Package. The deadline to file a completed Claims Package will be 180 days from the date of final approval of this Settlement.

A completed Claims Package must include each of the items below:

- A completed Claim Form which is signed under oath that the information is true,
- A statement that you want loan forgiveness and a completed Authorization to Disclose Debt Information Form (this is only necessary if you are asking for loan forgiveness), **and**
- If you are a member of an Indian tribe, a copy of an official tribal document that states that you are a member. If you are not a member of an Indian tribe, a written narrative describing in detail the circumstances of your Native American ancestry (*see* Question 5).
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In addition to the information above, if you are submitting a claim for someone who is deceased, you will also need to provide:

- A death certificate for that person, **and**
- Proof that you are that person's legal representative. If no one has been chosen to be the legal representative, then you need to state in the Claim Form, or submit a separate sworn statement explaining, why you think you will be appointed the legal representative of his or her estate.

In addition to the information above, if you are submitting a claim for someone who has a physical or mental limitation, you will also need to provide:

- Proof that you are that person's legal representative, **or**
- A statement in the Claim Form, or submit a separate sworn statement explaining, why that person is not able to submit his or her own claim and why you think you have the right to submit a claim for that person.

If more than one person submits a claim for someone who is deceased or someone who is unable to submit a claim due to a physical or mental limitation, then the neutral evaluator who will be looking at claims will decide which person can file that claim. More information on this process is available in section IX of the Settlement Agreement. The Settlement Agreement is available at www.IndianFarmClass.com.

16. Can I get help filing a Claims Package?

Yes. After the Settlement is granted final approval there will be many meetings held throughout the country to help you fill out a Claims Package. The dates and times for these meetings will be posted on the website or you can call the toll-free number 1-888-233-5506 to find a meeting near you. If you register you will be mailed information on any meetings that will be held in your area along with the Claims Package. You are encouraged to attend a meeting to get help filling out a claim.

17. What documentation is required for a Track A claim?

Other than proof of tribal membership (if applicable), no documentation is required for a Track A claim but the Claims Package will ask you a few questions about whether:

- You are a Native American who farmed or ranched, or attempted to farm or ranch, between January 1, 1981 and November 24, 1999; **and**
- You owned or leased, or attempted to own or lease, or had grazing rights on or authorization to use farm or ranch land; **and**
- You applied or attempted to apply for a specific farm credit transaction(s) at a USDA office between January 1, 1981 and November 24, 1999 (this means you made a good faith effort to apply for a loan or loan servicing); **and**
- Your farm loan(s) or servicing option was denied, provided late, approved for a lesser amount than requested, given a restrictive condition(s) or the USDA failed to provide an appropriate loan service(s); **and**
- The USDA's treatment of your loan or loan servicing application(s) caused you financial harm; **and**
- You complained of discrimination, orally or in writing, to the USDA directly or through a representative, such as a tribal government, regarding the way the USDA treated your loan or loan servicing application.

You will need to provide the following information:

- The year in which you attempted to apply and the general timeframe within that year (such as late fall, early spring, sometime in January, February, or March); **and**
- The type of loan or loan servicing for which you applied; **and**
- How you planned to use the funds (such as crops, equipment, acreage); **and**
- How your plans for a farm operation were consistent with farming operations in that county/area in that year; **and**
- Where you went to seek a loan or servicing; **and**
- If the USDA actively discouraged your application, information about what they did.

18. What documentation is required for a Track B claim?

The standard of proof for Track B claims is a higher standard than what will be applied to Track A claims. **You will need to provide documentation that meets the evidence requirements of a Federal court and proves that:**

- You are a Native American who farmed or ranched, or attempted to farm or ranch, between January 1, 1981 and November 24, 1999; **and**
- You owned or leased, or attempted to own or lease, or had grazing rights on farm or ranch land; **and**
- You actually applied for a specific farm credit transaction(s) at a USDA office between January 1, 1981 and November 24, 1999; **and**
- You were offered a farm loan(s) or servicing option that was denied, provided late, approved for a lesser amount than requested, given a restrictive condition(s) or the USDA failed to provide an appropriate loan service(s); **and**
- Your loan or loan servicing application(s) was treated less favorably than that given a specifically identified, similarly situated white farmer(s); **and**

- The USDA's treatment of your loan or loan servicing application(s) caused you financial harm; **and**
- You complained of discrimination to the USDA directly or through a representative, such as a tribal government regarding the way the USDA treated your loan or loan servicing application(s).

If you choose to submit a claim under Track B and are unsuccessful you will not be eligible to receive a Track A payment or loan forgiveness.

19. How do I ask for loan forgiveness?

You will need to request loan forgiveness on the Claim Form and sign and return an Authorization to Disclose Debt Information Form. Both forms will be included in your Claims Package. After the Court grants final approval to the Settlement, these forms will be mailed to anyone who registered for a Claims Package. They will also be available at the website or by calling the toll-free number.

20. When will I get my payment?

Payments will not be made until after the Court grants final approval to the Settlement and after all Claims Packages are reviewed. This cannot happen until after **Month 00, 2011**. Please be patient.

REMAINING IN THE SETTLEMENT

21. What happens if I do nothing at all?

If you do nothing, you will not get any money or loan forgiveness from the Settlement. You will be bound by the Court's decisions. Unless you exclude yourself, you won't be able to start a lawsuit, continue with a lawsuit, or be part of any other lawsuit against the USDA about the legal issues in this case, ever again.

22. What am I giving up to stay in the Settlement?

Unless you exclude yourself from a Settlement, you can't sue the USDA, continue to sue, or be part of any other lawsuit against the USDA about the legal issues in this case. It also means that all of the decisions by the Court will bind you. The "Release of Claims" is described more fully in Section XVIII of the Settlement Agreement and describes exactly the legal claims that you give up if you remain in the Settlement. The Settlement Agreement is available at www.IndianFarmClass.com.

EXCLUDING YOURSELF FROM THE SETTLEMENT

If you don't want a payment from the Settlement, and you want to keep the right to sue or continue to sue the USDA on your own about the legal issues in this case, then you must take steps to get out of the Settlement. This is called excluding yourself – or "opting out" of the Class.

23. How do I get out of the Settlement?

To exclude yourself from the Settlement, you must send a letter that includes the following:

- Your name, address, and telephone number,
- A statement in your own handwriting saying that you want to be excluded from *Keepseagle v. Vilsack*, 1:99cv03119, and
- Your signature.

You must mail your exclusion request, postmarked no later than **Month 00, 2010**, to:

Keepseagle Settlement Exclusions
PO Box 3560
Portland, OR 97208-3560

24. If I don't exclude myself, can I sue the USDA for the same thing later?

No. Unless you exclude yourself, you give up the right to sue the USDA for the claims that the Settlement resolves. If you have a pending lawsuit, speak to your lawyer in that lawsuit immediately. You must exclude yourself from this Class to continue your own lawsuit.

25. If I exclude myself, can I still get benefits from the Settlement?

No. You will not get any money or loan forgiveness if you exclude yourself from the Settlement. However you may benefit from the changes in policy for the USDA farm loan program.

THE LAWYERS REPRESENTING YOU

26. Do I have a lawyer in this case?

The Court has appointed the law firms of Cohen Milstein Sellers & Toll PLLC (1100 New York Ave, NW, Suite 500, West Tower, Washington, DC 20005), Conlon, Frantz & Phelan (1818 N St, NW, Suite 400, Washington, DC 20036), Jenner & Block LLP (1099 New York Ave, NW, Suite 900, Washington, DC 20001), Patton Boggs LLP (2550 M St NW, Washington, DC 20037), Stinson Morrison Hecker (1150 18th St NW, Suite 800, Washington, DC 20036), and Sarah Vogel Law Partners (222 N 4th St, Bismarck, ND 58501) to represent you as "Class Counsel." You do not have to pay Class Counsel. If you want to be represented by your own lawyer, and have that lawyer appear in court for you in this case, you may hire one at your own expense.

27. How will the lawyers be paid?

Class Counsel will ask the Court for an award of attorneys' fees and expenses, in an amount of up to 8% of the $760 million Settlement amount. These attorneys' fee pay for work the attorneys have performed on behalf of the Class for the past 11 years and for work yet to be done in helping

to administer the settlement. Class Counsel will also ask the Court to award up to $950,000 to the class representatives, who helped the lawyers on behalf of the whole Class.

If you would like to review the request submitted to the Court for an award of attorneys' fees and expenses, you may go to www.IndianFarmClass.com/CourtDocs any time after December 1, 2010. If you want to review the basis for the awards to the class representatives, you may go to www.IndianFarmClass.com/CourtDocs any time after November 1, 2010, to read the Motion for Preliminary Approval.

If you choose to hire your own attorney to assist you with a Track A or Track B claim you need to know a few things:

- You will have to pay that attorney with your own money.
- Your attorney will have to agree to follow the Court's orders in this case.
- If you are awarded a Track A payment, your attorney will be eligible to receive only 2% of your award.
- If you are awarded a Track B payment, your attorney will be eligible to receive only 8% of your award.

COMMENTING ON THE SETTLEMENT

You can tell the Court that you don't agree with the Settlement or some part of it.

28. How do I tell the Court what I think about the Settlement?

If you have comments about, or disagree with, any aspect of the Settlement, including the requested attorneys' fees, you may express your views to the Court by writing to the address below. The written response should include your name, address, telephone number, the case name and number (*Keepseagle v. Vilsack*, 1:99cv03119), a brief explanation of your reasons for objecting, and your signature. The response must be postmarked no later than **February 1, 2011,** and mailed to:

Keepseagle Settlement Comments
PO Box 3560
Portland, OR 97208-3560

29. What's the difference between objecting and asking to be excluded?

Objecting is simply telling the Court that you don't like something about the Settlement. You can object to the Settlement only if you do not exclude yourself from the Settlement. Excluding yourself from the Settlement is telling the Court that you don't want to be part of the Settlement. If you exclude yourself from the Settlement, you have no basis to object to the Settlement because it no longer affects you.

THE COURT'S FAIRNESS HEARING

30. When and where will the Court decide whether to approve the Settlement?

The Court will hold a Fairness Hearing at **Time x.m.** on **Month 00, 2010**, at the United States District Court for the District of Columbia (333 Constitution Ave., NW, Washington, DC 20001). The hearing may be moved to a different date or time without additional notice, so it is a good idea to check www.IndianFarmClass.com for updated information. At this hearing the Court will consider whether the Settlement is fair, reasonable, and adequate. The Court will also consider how much to pay Class Counsel. If there are objections or comments, the Court will consider them at this time. After the hearing, the Court will decide whether to approve the Settlement. We do not know how long these decisions will take. **Please be patient.**

31. Do I have to come to the hearing?

Your attendance is not required, even if you properly mailed a written response. Class Counsel is prepared to answer the Court's questions on your behalf. If either you or your personal attorney want to attend the hearing, you may attend at your expense. As long as any objection or comment you filed was postmarked before the deadline, the Court will consider it.

32. May I speak at the hearing?

Yes. You may ask the Court for permission to speak at the Fairness Hearing. To do so, you must send a letter saying that it is your "Notice of Intent to Appear in *Keepseagle v. Vilsack*." It must include your name, address, telephone number, and signature as well as the name and address of your lawyer, if one is appearing for you. Your Notice of Intent to Appear must be postmarked no later than **Month 00, 2010**, and be sent to the address listed in Question 28.

GETTING MORE INFORMATION

33. How do I get more information?

This Notice summarizes the Settlement. You can get more information about the Settlement at www.IndianFarmClass.com, by calling 1-888-233-5506, or writing to Keepseagle Settlement, PO Box 3560, Portland, OR 97208-5506. You can register for a Claims Package at the website or by calling the toll-free number.

The United States Department Of Agriculture: Filed Case

This page is dedicated to the The United States Department Of Agriculture class action. It contains links to all court documents related to the The United States Department Of Agriculture class action that Class Action World has been able to obtain from various class action law firms and other class action information sources. Although the goal of Class Action World is to provide a comprehensive library of all court documents related to the The United States Department Of Agriculture class action, it has not been possible to do so. The staff of Class Action World continually seeks to obtain additional court documents related to the The United States Department Of Agriculture class action. Therefore, the The United States Department Of Agriculture class action case documents that appear on this Filed The United States Department Of Agriculture class action case page today, may be supplemented by additional identified The United States Department Of Agriculture class action case documents tomorrow. If you do not find the The United States Department Of Agriculture class action case document that you are looking for, it would be prudent to periodically visit this The United States Department Of Agriculture Filed class action case document page. Class Action World staff updates this The United States Department Of Agriculture class action case document page to reflect newly identified documents as expeditiously as possible. However, due to the logistics involved in the process, it may take a few days for newly identified The United States Department Of Agriculture class action documents to be reflected on this Filed The United States Department Of Agriculture class action page. Where multiple copies of a The United States Department Of Agriculture class action case document are available, Class Action World has selected the most legible copy. All The United States Department Of Agriculture class action documents identified below are believed to be copies of The United States Department Of Agriculture class action case documents actually filed with the courts. However, Class Action World has not authenticated each and every document. Therefore, Class Action World makes no warranty regarding authenticity.

Case 1

Sixth Amended Complaint (Class Action) (145 KB)
UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA _____ George B. Keepseagle P.O. Box 509 Fort Yates, ND 58538-0509 : : and : Luther Crasco HC 63 Box 5040 Dodson, MT 59524 : : and : John Fredericks P.O. Box 509 Halliday, ND 58636 : Case Number:1:99CV03119 : Judge Emmet G. Sullivan and Gene Cadotte P.O. Box 200 McLaughlin, SD 57642 and : SIXTH AMENDED COMPLAINT (CLASS ACTION) : : : : Basil Alkire Star Route Box 129 Fort Yates, ND 58538 : : and : Keith and Claryca Mandan P.O. 70 New Town, ND 58763 : : and : ON BEHALF OF THEMSELVES AND ALL OTHERS SIMILARLY SITUATED, INCLUDING, BUT NOT LIMITED TO THE FOLLOWING INDIVIDUAL PLAINTIFFS : : : vs. : Mike Johanns, Secretary THE UNITED STATES DEPARTMENT : OF AGRICULTURE 14th and Independence Avenue, S.W. : Washington, D.C. 20250 : Defendant. :
_____ SIXTH AMENDED CLASS ACTION COMPLAINT _____

Plaintiffs' Second Notification That They Seek Class-Wide Monetary Relief And Memorandum In Support Of Such Request (0.52 MB)
UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA GEORGE P. KEEPSEAGLE, et al., Plaintiffs, : Case No.: 1:99CV03119 (EGS) v. : Judge Emmet G. Sullivan MIKE JOHANNS, Secretary, : United States Department of Agriculture : Defendant. : PLAINTIFFS' SECOND NOTIFICATION THAT THEY SEEK CLASS-WIDE MONETARY RELIEF AND MEMORANDUM IN SUPPORT OF SUCH REQUEST I. INTRODUCTION On December 12, 2001, this Court certified a class pursuant to Rule 23(b)(2), Fed. R. Civ. P., and permitted the class to seek injunctive and declaratory relief. See Mem. Op. and Order, dkt. no. 134. At that time, the Court deferred ruling on whether monetary relief could be sought on a class-wide basis because the absence of a developed record made it "impossible for the Court to make a finding that claims for individual compensatory relief will not destroy the class cohesion." Id. at 34-35. Subs

Opinion & Order (104 KB)
UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA
_____ GEORGE P. KEEPSEAGLE, et al., Plaintiffs, v. ANN VENEMAN, Defendant. Civil Action No.: 99-3119 (EGS) OPINION & ORDER This class action suit is brought by and on behalf of Native American ranchers and farmers who applied for United States Department of Agriculture ("USDA" or "the Agency") farm loans and

benefit programs between January 1, 1981 and November 24, 1999. The class makes two claims: (1) that USDA discriminated against them on the basis of race in processing their farm program applications; and (2) that USDA did not investigate their complaints of discrimination. Plaintiffs bring their claims under the Equal Credit Opportunity Act ("ECOA"), 15 U.S.C. §§ 1691, et seq., the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 551, et seq., the Declaratory Judgment Act ("DJA"), 28 U.S.C. §§ 2201, et seq., and Title VI of the Civil Rights Act of 1964 ("Title VI"), 42 U.S.C. § 2000d. The government moves for

Memorandum Opinion And Order (59 KB)
UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA GEORGE P. KEEPSEAGLE, et al., v. ANN VENEMAN, Plaintiffs, Civil Action No. 99-03119 (EGS) [17] [127] Defendant. FILED DEC 1 2 2001 NANCY MAYER WHITTINGTON, CLERK U.S. DISTRICT COURT MEMORANDUM OPINION AND ORDER Pending before the Court is plaintiffs' motion for class certification. The Court has considered plaintiffs' motion and proposed order, defendant•s opposition, and plaintiffs' reply thereto, all pertinent portions of the record, counsels' representations at oral argument on July 13, 2001, and the relevant statutory and case law. Plaintiffs have fulfilled all the requirements to justify class certification of this action. Accordingly, on September 28, 2001, the Court granted plaintiffs' motion for class certification pursuant to Fed. R. Civ. P. 23(b)(2). This Memorandum Opinion and Order sets for the justification for the Court's September 28, 2001 Order, further orders plaintiffs to file a proposed order outlining appropriate su

Fifth Amended Class Action Complaint (For Declaratory Judgment, Review Of Agency Action, Violations Of Equal Credit Opportunity Act, Violations Of Title VI Of Civil Rights Act Of 1964 And Other Relief) (0.93 MB)
UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA George B. Keepseagle P.O. Box 509 Fort Yates, ND 58538-0509 : : and : Luther Crasco HC 63 Box 5040 Dodson, MT 59524 : : and : John Fredericks P.O. Box 509 Halliday, ND 58636 : : Case Number: 1:99CV03119 Judge Emmet G. Sullivan and Gene Cadotte P.O. Box 200 McLaughlin, SD 57642 : : : FIFTH AMENDED CLASS ACTION COMPLAINT (Containing 838 Plaintiffs) and : Basil Alkire Star Route Box 129 Fort Yates, ND 58538 : : and : Keith and Claryca Mandan P.O. 70 New Town, ND 58763 : : and : ON BEHALF OF THEMSELVES AND ALL OTHERS SIMILARLY SITUATED, INCLUDING, BUT NOT LIMITED TO THE FOLLOWING INDIVIDUAL PLAINTIFFS: : : : Gary Alkire 1031 100 Street Fort Yates, ND 58538 : : and : Jerome K. Alkire P.O. Box 413 Fort Yates, ND 58538 : : and : Diana F. Allen P.O. Box 834 Harlem, MT 59526 : : and : LeRoy J. Ames P.O. Box 916 Lodge Grass, MT 59050 : : and : James Anderson HC 52 Box 582 Froid, MT 59226 : : and : J.D. Anderson HC 52 Box 583

For more class actions resources regarding The United States Department Of Agriculture click here

Case 2

Third Amended Class Action Complaint (For Declaratory Judgment, Violatin Of Equal Credit Opportunity Act, And Administrative Procedure Act And Other Relief) (75 KB)
IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA _____ RoseMary Love P.O. Box 1399 Great Falls, MT 59403 and Lind Marie Bara-Weaver 4845 Belle Terre Parkway C-8 Palm Coast, FL 32164 and Margaret Odom P.O. Box 143 Sardis, GA 30456 and Gail Lennon 295 County Road 149 Lookout, CA 96054 and Joyce L. Acomb 8317 State Route 63 N Dansville, NY 14437 and Case Number 1:00CV02502 Judge: Robertson, J. THIRD AMENDED CLASS ACTION COMPLAINT : : : : : : : : : : : : : : : : Edith L. Scruggs : 1106 Brentwood Pine Bluff, AR 71601 : and : Maryland B. Wynne : 9209 Dyson Road Pine Bluff, AR 71603 : and : Joyce A. King : 211 Dan Gill Road Dumas, AR 71639

For more class actions resources regarding The United States Department Of Agriculture click here

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued September 6, 2002 Decided October 29, 2002

No. 02-5021

In re: Ann M. Veneman, Secretary of Agriculture,
Petitioner

Appeal from the United States District Court
for the District of Columbia
(No. 99cv03119)

Charles W. Scarborough, Attorney, U.S. Department of Justice, argued the cause for petitioner. With him on the briefs were Roscoe C. Howard, Jr., U.S. Attorney, and Robert M. Loeb, Attorney, U.S. Department of Justice.

Joseph M. Sellers argued the cause for respondents. With him on the brief were Suzette M. Malveaux, Alexander Pires, Jr., David Frantz, and Phillip L. Fraas.

Michael L. Foreman, Elaine R. Jones, Norman J. Chachkin, Paul M. Smith, Ian Heath Gershengorn, and John Dossett were on the brief for amici curiae in support of respondents.

Before: Tatel and Garland, Circuit Judges, and Williams, Senior Circuit Judge.

Opinion for the Court filed by Circuit Judge Tatel.

Tatel, Circuit Judge: Rule 23(b)(2) of the Federal Rules of Civil Procedure permits certification of class actions not "exclusively or predominantly [for] money damages." This petition for interlocutory review presents the following question: In a case involving requests for both monetary and equitable relief, may a district court certify a Rule 23(b)(2) class as to equitable relief only without first determining whether, looking at the complaint as a whole, plaintiffs' monetary claims predominate over their equitable claims? Although this issue is both unsettled and fundamental--factors that may justify interlocutory review pursuant to Rule 23(f)--we nevertheless deny the petition because the critical questions required to resolve it are entirely unbriefed and because we are satisfied that the issue will not escape appellate review.

I.

The United States Department of Agriculture administers several farm credit and benefit programs under the direction of its Farm Service Agency ("FSA"). See Consolidated Farm and Rural Development Act, 7 U.S.C. s 1921 et seq.; 7 C.F.R. s 2.42(28). Farmers seeking FSA loans or subsidies apply to local county committees made up of farmers elected by other farmers. Pigford v. Veneman, 206 F.3d 1212, 1214 (D.C. Cir. 2000). If the county committee approves the application, the farmer receives the benefit. If the committee denies the application, the farmer may appeal to a state committee and then to a federal review board. Pigford v. Glickman, 182 F.R.D. 341, 343 (D.D.C. 1998). Farmers believing that their applications have been denied on the basis of race can file complaints either directly with the FSA or with the Department. Id.

Alleging that the Department discriminated against them on the basis of race in its administration of these programs, seven Native-American farmers filed this action in the United States District Court for the District of Columbia on behalf of

themselves and others similarly situated. The lawsuit followed the Department's release of a self-critical report that had been prompted by longstanding accusations of racial discrimination in the administration of agricultural programs. Civil Rights Action Team, USDA, Civil Rights at the United States Department of Agriculture 2-3 (1997), available at http://www.usda.gov/news/civil/cr_next.htm. Noting that "discrimination in program delivery ... continues to exist to a large degree unabated," id. at 2, the report found significant disparities between the Department's treatment of minority and nonminority farmers, such as "lower participation and lower loan approval rates for minorities in most [agency] programs," and substantial inequalities in loan processing rates, including "disparities between nonminority loan processing and American Indian loan processing" in certain states, id. at 21. Since "complaints [were] processed slowly, if at all," id. at 25, farmers found "little relief" in the Department's complaint process, "which, if anything, often ma[de] matters worse," id. at 22. According to the report, Department officials did little to improve the Department's record of civil rights enforcement; indeed, "during the early and mid-1980's USDA leaders had effectively dismantled USDA's civil rights apparatus," and "numerous reorganizations" since that time had left "civil rights at USDA ... in a persistent state of chaos." Id. at 47 (internal quotation marks omitted). Minority farmers, the report concluded, "have lost significant amounts of land and potential farm income as a result of discrimination by [USDA] programs." Id. at 30.

Proceeding under the Equal Credit Opportunity Act, 15 U.S.C. ss 1691-1691f, the Administrative Procedure Act, 5 U.S.C. s 706(2)(A), and Title VI of the Civil Rights Act of 1964, 42 U.S.C. s 2000d et seq., the farmers, seeking both equitable and monetary relief, allege discrimination in the Department's handling of applications and in its failure to investigate and process their discrimination complaints. Four similar suits have been filed: An action on behalf of African-American and Latino farmers was dismissed, Williams v. Glickman, No. 95-1149 (D.D.C. filed June 16,

1995); another action brought by a class of African-American farmers has been settled, see Pigford v. Veneman, 292 F.3d 918 (D.C. Cir. 2002); and actions on behalf of Latino farmers, Garcia v. Veneman, No. 00-2445 (D.D.C. filed Oct. 13, 2000), and female and other farmers alleging discrimination on the basis of age, sex, marital status, race, color, national origin, or religion, Love v. Veneman, No. 00-2502 (D.D.C. filed Oct. 19, 2000), remain pending in district court.

In a motion for judgment on the pleadings, or in the alternative, for summary judgment, the Department argued (among other things) that the farmers' claims regarding its failure to process their complaints were actionable under neither the APA nor the ECOA. The district court denied the motion without prejudice, and the farmers moved to certify a class consisting of "[a]ll Native-American farmers and ranchers who believe that USDA discriminated against them on account of their race in their applications for, or USDA's administration of, USDA farm programs ... and who complained of that discrimination to the USDA."

Under the Federal Rules of Civil Procedure, a class can be certified if it meets Rule 23(a)'s four requirements--numerosity, commonality, typicality, and adequacy of representation--and if it falls into one of the three categories of class actions described in Rule 23(b). Fed. R. Civ. P. 23(a), 23(b); Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 613-16 (1997). Rules 23(b)(2) and (b)(3)--the two categories at issue in this case--have different requirements depending primarily on the nature of the relief sought. Rule 23(b)(2) certification is appropriate where plaintiffs seek declaratory or injunctive relief for class-wide injury. Such certification is particularly well-suited for civil rights actions where "a party is charged with discriminating unlawfully against a class." Fed. R. Civ. P. 23(b)(2) advisory committee notes. According to the Advisory Committee Notes, however, (b)(2) certification is not proper where "the appropriate final relief relates exclusively or predominantly to money damages." Id.

In contrast to Rule 23(b)(2), class certification pursuant to Rule 23(b)(3) is appropriate even where plaintiffs seek only

monetary damages so long as "questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and ... a class action is superior to other available methods for the fair and efficient adjudication of the controversy." Fed. R. Civ. P. 23(b)(3). Certification pursuant to Rule 23(b)(3), however, comes with certain procedural requirements: Because members of a class seeking substantial monetary damages may have divergent interests, due process requires that putative class members receive notice and an opportunity to opt out. See Fed. R. Civ. P. 23(c)(2); Robinson v. Metro-North Commuter R.R. Co., 267 F.3d 147, 165-66 (2d Cir. 2001). By contrast, Rule 23(b)(2) imposes no similar requirements because a class seeking primarily equitable relief for a common injury is assumed to be a cohesive group with few conflicting interests, giving rise to a presumption that adequate representation alone provides sufficient procedural protection. See Robinson, 267 F.3d at 165 (noting the presumption that an adequate class representative in a (b)(2) action "will generally safeguard absent class members' interests and thereby satisfy the strictures of due process").

Seeking both equitable and monetary relief, the farmers asked the district court to certify a so-called "hybrid" class: a (b)(2) class for their equitable claims and a (b)(3) class for their monetary claims. In support of this request, the farmers relied on language in Eubanks v. Billington, 110 F.3d 87 (D.C. Cir. 1997), which held that district courts may grant opt-out rights in (b)(2) class actions either by certifying a (b)(3) class as to claims for monetary relief or by exercising their discretion under Rule 23(d)(5) to allow opt-outs from the (b)(2). Id. at 96. The district court, however, certified only a (b)(2) class and--central to this case--instead of determining whether plaintiffs' monetary claims predominate over their equitable claims, the district court limited the class to pursuing equitable relief, explaining that it lacked a sufficiently developed factual record to rule on the appropriate treatment of the monetary claims. Keepseagle v. Veneman, No. 99-3119, mem. op. at 36 (D.D.C. Dec. 12, 2001). Also, the class the district court certified--all Native-American farm-

ers and ranchers who filed a discrimination complaint with the Department between January 1, 1981, and November 24, 1999--was narrower than the one the farmers had sought. Keepseagle v. Veneman, mem. op. at 36.

Proceeding under Fed. R. Civ. P. 23(f), which allows courts of appeals, "in their discretion," to entertain interlocutory appeals of class certification decisions, the Department now mounts two challenges to the district court's class certification decision. First, the Department claims that the farmers' complaint-processing allegations fail Rule 23(a)'s commonality and typicality requirements. Second, the Department argues that the district court lacked authority to certify a (b)(2) class without first determining whether the "appropriate final relief relates exclusively or predominately to money damages." Fed. R. Civ. P. 23(b)(2) advisory committee notes.

II.

Before considering the merits of the Department's petition, we must address the farmers' argument that we lack jurisdiction because the petition was untimely. Rule 23(f) gives litigants ten days to petition the court of appeals for review of an order granting or denying class certification. In this case, the Department filed its 23(f) petition on October 12, fourteen calendar days after the district court issued its class certification order. Citing Fed. R. App. P. 26(a), which requires inclusion of all calendar days when computing filing periods, the farmers contend that the Department's petition was late.

Although we agree that the Federal Rules of Appellate Procedure govern the filing of Rule 23(f) petitions, the farmers rely on the wrong rule. Rule 5(a), which governs petitions for permission to appeal, does not refer to Rule 26(a), but instead instructs litigants to file their petitions within "the time specified by the statute or rule authorizing the appeal." In this case, the rule "authorizing the appeal" is Rule 23(f) of the Federal Rules of Civil Procedure. The civil rules have their own time-computation rule, which excludes Saturdays, Sundays, and legal holidays when "computing any period of time prescribed or allowed by [the civil] rules."

Fed. R. Civ. P. 6(a). Because Rule 23(f) is a rule of civil procedure, Rule 6(a) governs the timing of 23(f) petitions, as every one of our sister circuits to have considered the matter has held. See Shin v. Cobb County Bd. of Educ., 248 F.3d 1061, 1065 (11th Cir. 2001); see also In re Sumitomo Copper Litig., 262 F.3d 134, 137 n.1 (2d Cir. 2001); Lienhart v. Dryvit Sys., Inc., 255 F.3d 138, 142 n.1 (4th Cir. 2001); Blair v. Equifax Check Servs., Inc., 181 F.3d 832, 837 (7th Cir. 1999).

Under Rule 6(a), the petition was timely. Although the Department filed it fourteen calendar days after the district court issued its class certification order, those fourteen days included four weekend days, and 14 - 4 = 10.

III.

This brings us to the question of whether to exercise our discretion under Rule 23(f) to entertain the Department's challenges to the district court's class certification order. In this circuit, interlocutory review of class certification decisions pursuant to Rule 23(f) is ordinarily appropriate in three circumstances: (1) when a "questionable" class certification decision creates a "death-knell situation" for either party; (2) when the certification decision presents "an unsettled and fundamental issue of law relating to class actions ... that is likely to evade end-of-the-case review"; and (3) when the certification decision is manifestly erroneous. In re Lorazepam & Clorazepate Antitrust Litig., 289 F.3d 98, 105 (D.C. Cir. 2002). Even if a case falls into none of these categories, we will grant 23(f) interlocutory review in "special circumstances," though we have cautioned that such review should be "granted rarely." Id. at 105-06.

If the Department had challenged only the district court's application of Rule 23(a), we would have no trouble rejecting the petition, for it falls into none of the Lorazepam categories. Beginning with the first category, we do not see how the certification of a class limited to injunctive and declaratory relief can create the sort of high-stakes situation that puts "substantial pressure on the defendant to settle independent of the merits of the plaintiffs' claims." Id. at 102 (citing

Blair, 181 F.3d 832 at 834). The Department insists that the district court's limitation of the class to equitable relief is "irrelevant" because "this case is, at bottom, about compensatory relief for past wrongs," creating a "threat of 'hydraulic' pressure to settle." Petitioner's Reply Br. at 12. As this case now stands, however, the farmers may not seek compensatory relief, so the Department faces no possibility of a massive damage judgment. A "death knell" will come, if at all, when and if the district court authorizes the class to proceed with its monetary claims.

Nor do we see anything either novel or manifestly erroneous (the second and third Lorazepam categories) about the district court's conclusion that the farmers' allegations concerning the Department's "failure to properly process, account for, and/or investigate discrimination complaints," which "affected each class member," satisfy Rule 23(a)'s commonality and typicality requirements. Keepseagle, mem. op. at 19-20. According to the Department, the farmers' complaint-processing allegations are a sham: the farmers, it says, designed those allegations "solely to manufacture the illusion of commonality" for class-certification purposes and "have no intention of actually litigating this claim." Petitioner's Opening Br. at 29-30. As the district court observed, however, nothing so far bears out the Department's dire predictions, Keepseagle, mem. op. at 22 n.8, and we think that the district court is in a far better position than we to evaluate claims of this sort. The Department's concern that the farmers will one day abandon their complaint-processing claim is too speculative to justify Rule 23(f) review.

In support of its challenge to the district court's 23(a) findings, the Department also argues that the farmers' complaint-processing claim is actionable under neither the ECOA nor the APA. But this argument, which the Department also made in its unsuccessful motion for judgment on the pleadings, has no bearing on the question of class certification. As the Supreme Court has long held, courts may not examine whether "plaintiffs have stated a cause of action or will prevail on the merits" in order to determine whether class certification is appropriate. Eisen v. Carlisle & Jacquelin,

417 U.S. 156, 178 (1974) (internal quotation marks and citation omitted). To entertain the Department's claims concerning ECOA and APA coverage, now dressed up as challenges to class certification, would "inappropriately mix the issue of class certification with the merits." Lorazepam, 289 F.3d at 107.

The Department's challenge to the district court's application of Rule 23(b) presents a closer question. According to the Department, the district court lacked authority to certify only some of the plaintiffs' claims while leaving the rest "in limbo--not dismissed, but merely deferred." Petitioner's Reply Br. at 27. Unlike the other questions the Department raises in its petition, the question of whether district courts may certify a (b)(2) class solely for purposes of equitable relief without first determining if plaintiffs' claims for monetary relief predominate over their equitable claims is both unsettled--we know of no circuit that has addressed that issue--and fundamental. It is not, however, likely to evade end-of-the-case review. And while we might nonetheless regard the case as presenting "special circumstances," Lorazepam, 289 F.3d at 106, we think the question inappropriate for 23(f) review because the parties have failed to raise the issues critical to its resolution.

Rule 23(c)(4)(A), which authorizes certification of class actions "with respect to particular issues," would at first glance seem to provide authority for the district court's order in this case. The issue, however, is not so clear. To begin with, Department counsel pointed out at oral argument that the Advisory Committee Notes to Rule 23(b)(2) provide that certification "does not extend to cases in which the appropriate final relief relates exclusively or predominantly to money damages." Fed. R. Civ. P. 23(b)(2) advisory committee notes (emphasis added). If by using the word "cases," the Advisory Committee meant to refer to the entire set of issues that a complaint raises, then partial certification under 23(c)(4)(A) could occur only after the district court makes the (b)(2) predominance determination. But if, as counsel for the farmers contended at oral argument, the phrase "appropriate final relief," not the word "cases," functions as the operative portion of the Advisory Committee Notes, then where the district court limits the class to seeking injunctive and declar-

atory relief (as the district court did here), the appropriate final relief in the "case" is equitable, not monetary.

More important, the introduction to subsection (c)(4) provides that certification "with respect to particular issues" may be ordered only "where appropriate." As the court observed at oral argument, whether partial certification is "appropriate" turns at least in part on its effect on two concerns surrounding Rule 23 class actions: first, how class certification affects the due process rights of absent class members to have their own day in court, and second, whether parties are bound to the judgment. As to the first point, the Supreme Court established in Phillips Petroleum Co. v. Shutts, 472 U.S. 797 (1985), that (1) before a court can bind absent class members "concerning claims wholly or predominantly for money damages," due process requires that they receive adequate notice and an opportunity to opt out of the action, id. at 811-13, and (2) the defendant in such an action has a right ("standing") to demand that adequate notice be given to class members, so as to avoid a situation where the defendant would be bound by a loss yet class members would not be bound by its win, id. at 804-06. To complicate matters further, the Supreme Court has expressly left open the question of whether a judgment in a no-opt-out class action (like the one the district court certified here) can ever preclude absent class members from bringing their own individual lawsuits for monetary damages. Ticor Title Ins. Co. v. Brown, 511 U.S. 117 (1994) (per curiam) (raising, without deciding, the question of whether due process forbids enforcing a class-action judgment against an absent plaintiff who wishes to bring her own individual lawsuit for money damages, where the class was properly certified as a no-opt-out class action). Second, the constitutional concerns raised in Shutts and Ticor may also implicate the concerns underlying Rule 23. The drafters of the 1966 amendments, which gave rise to the rule as we know it today, were concerned with the binding effect of class actions and the due process protections required for parties to be bound. Fed. R. Civ. P. 23 advisory committee notes (noting the need to "assure procedural fairness, particularly giving notice to members of the class, which

may in turn be related in some instances to the extension of the judgment to the class"). They drafted the rule to clarify that "all class actions maintained to the end as such will result in judgments including those whom the court finds to be members of the class, whether or not the judgment is favorable to the class." Id.

Because of the importance of these issues to the interpretation of Rule 23 and because their implications for this case are entirely unbriefed, we think it best to decline to exercise our Rule 23(f) discretion to consider the Department's arguments at this time. Following full briefing in the district court and any revised order issued by that court, the Department remains free to seek appellate review, either in another 23(f) petition or otherwise.

The Department's petition is denied.

So ordered.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

GEORGE P. KEEPSEAGLE, et al.,	:	
Plaintiffs,	:	Case No.: 1:99CV03119 (EGS)
v.	:	Judge Emmet G. Sullivan
MIKE JOHANNS, Secretary, United States Department of Agriculture	:	
Defendant.	:	

PLAINTIFFS' SECOND NOTIFICATION THAT THEY SEEK CLASS-WIDE MONETARY RELIEF AND MEMORANDUM IN SUPPORT OF SUCH REQUEST

I. INTRODUCTION

On December 12, 2001, this Court certified a class pursuant to Rule 23(b)(2), Fed. R. Civ. P., and permitted the class to seek injunctive and declaratory relief. *See* Mem. Op. and Order, dkt. no. 134. At that time, the Court deferred ruling on whether monetary relief could be sought on a class-wide basis because the absence of a developed record made it "impossible for the Court to make a finding that claims for individual compensatory relief will not destroy the class cohesion." *Id.* at 34-35. Subsequently, the Court directed Plaintiffs to indicate whether they intend to request monetary relief. In response to this Court's instructions, Plaintiffs filed a brief notifying the Court of their intention to seek monetary relief for United States Department of Agriculture's

("USDA") failure to grant Native American farmers[1] credit comparable to that granted White farmers. *See* Plaintiffs' Notification That They Seek Class-Wide Monetary Relief and Memorandum In Support of Such Request, dkt. no. 261 (hereinafter "Plaintiffs' Initial Monetary Relief Memo"). Now that additional discovery has been conducted, it is apparent that pursuit of monetary relief on a class-wide basis to recover the economic losses caused by USDA's failure to provide Native American farmers the same level of loan servicing that it provided to White farmers is compatible with certification pursuant to Rule 23(b)(2).[2] Loan servicing, of course, consists of benefits USDA extends to delinquent or distressed federal loan program borrowers that restructures the terms of their loans such that the borrowers avoid foreclosure or liquidation.

In support of this notice, Plaintiffs herein submit an expert report that presents the methodology by which economic losses that are attributable to the USDA's failure to provide equal opportunity to Native American farmers to obtain loan servicing can be computed on a class-wide basis.

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1 The term "farmers" as used herein includes both farmers and ranchers.

2 Initially, Plaintiffs anticipated that they might seek class-wide monetary relief for three categories of harm: (1) USDA's failure to provide Native American farmers the federally mandated technical assistance and access to loan applications offered to White farmers, thereby depriving Native American farmers of equal opportunities to apply for credit; (2) USDA's failure to grant Native American farmers credit comparable to that granted White farmers; and (3) USDA's failure to provide Native Americans loan servicing comparable to that provided White farmers. Plaintiffs do not intend to seek separate recompense for USDA's discriminatory denial of the technical assistance that is ordinarily needed to enable loan applicants to present a successful application. The USDA's denial of technical assistance to class members is one factor that contributed to their equal access to loans; as such, this claim will be treated as part of Plaintiffs' claim that USDA failed to grant Native American farmers credit comparable to that granted White farmers.

II. STATEMENT OF FACTS

A. USDA's Farm Loan Program

Farmers and the USDA do not have the typical debtor-creditor relationship. The USDA is not a commercial lender. *See Coleman v. Block*, 562 F. Supp. 1353, 1364 (D.N.D. 1983).[3] Congress mandated that federal farm programs foster and encourage the family farm system of agriculture in this country. 7 U.S.C.A. § 2266(a) (1988). The USDA's Farmers Home Administration (FmHA), succeeded by the Farm Service Agency (FSA), is the lender of last resort for most farmers who cannot obtain credit elsewhere. *Moseanko v. Yeutter*, 944 F.2d 418, 421 (8th Cir. 1991); *see* Consolidated Farm and Rural Development Act, 7 U.S.C.A. §§ 1992, 1941. The FmHA (now FSA) lending program is "primarily designed to assist farmers . . . that cannot obtain funds from private lenders on reasonable terms." *United States v. Kimbell Foods, Inc.*, 440 U.S. 715, 735 (1979).

The farm loan program, however, extends well-beyond the initial grant of a loan. The farm loan program legislation is "a form of social welfare legislation,"[4] that creates a long-term relationship between the farmer and the USDA with the goal of graduating the farmer to commercial credit. *See* 7 C.F.R. § 1951.902. To this end, loan servicing, which comprises an array of means offered to farmers to renegotiate the terms of their loans, is a "primary objective" of the FSA and "[s]upervision and servicing are continuing processes that begin the day a farmer comes into the office." 7 C.F.R. §

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[3] *See also Allison v. Block*, 723 F.2d 631, 638 (8th Cir. 1983) (describing the USDA as a "public broker" not a private lender).

[4] *Curry v. Block*, 541 F. Supp. 506, 511 (S.D. Ga. 1982), *aff'd*, 738 F.2d 1556 (11th Cir. 1984); *see also Coleman*, 562 F. Supp. at 1364-65("participation in FmHA programs is in large part a form of social welfare").

1951.902. A farmer who receives a farm loan acquires not only the actual capital, but the right to apply for loan servicing if he or she has difficulty repaying debt in a given time period because of the vagaries and unexpected hardships of farming, such as animal disease or poor weather conditions.[5] *See* 7 C.F.R. § 1951.901 *et. seq.* Moreover, federal regulations *require* the FSA to send notice of loan servicing programs to all borrowers: (1) who are more than 90 days delinquent; (2) who submit written requests for loan servicing information; or (3) who apply for loan servicing. 7 U.S.C. § 1981d; 7 C.F.R. § 1951.907(c). The FSA must also send loan servicing notices before taking collection action against a borrower. 7 C.F.R. § 1951.907(c).

As a benefit that farmers eligible for loans may receive, loan servicing offers several different ways to assist farmers in managing the terms of their loans. Loan servicing includes consolidation of multiple loans into a single loan with more favorable terms, reduction of rates at which the monies are loaned, forgiving or settling some or all of the outstanding debt, and writing down the outstanding debt to levels that are more affordable. 7 C.F.R. § 1951.906. *See also*, Report at 7-8. Although it may appear in several different forms, loan servicing, with the exception of write-downs, is tracked by the USDA as a single benefit offered to farmers eligible for loans and the data produced

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[5] The right to seek and obtain loan servicing is so fundamental that courts have repeatedly recognized the borrower's right to be notified of and apply for loan servicing. *See Curry*, 541 F. Supp. at 515-525 (finding that 7 U.S.C. § 1981a – creating a right of deferral – imposed a mandatory duty on the USDA to promulgate and enforce regulations providing for notice, opportunity to be heard, and criteria for servicing); *Matzke v. Block*, 542 F. Supp. 1107, 1114-15 (D. Kan. 1982) (same); *Allison*, 723 F.2d at 636-638 (finding that the FmHA was required to provide borrowers with notice of § 1981a relief, including deferrals and other alternatives to acceleration).

by the USDA does not distinguish between different forms of loan servicing. Report at 5 n.2.

Once a borrower has requested loan servicing, the agency must consider all available loan servicing options and make every effort to structure a plan that will prevent collection of the loan. 7 C.F.R. § 1951.909(a)(1) ("the servicing official will consider all primary service programs options . . . to attempt to find the combination of loan servicing programs that will result in a feasible plan."). Nor are the forms of loan servicing mutually exclusive from each other. The FSA may, and often does, offer multiple forms of loan servicing to borrowers at the same time. Report at 8. The FSA, for example, could consolidate and write down a borrower's loan and then extend a new loan to assist the borrower in restoring his or her farm to a financially stable position.

When a farmer applies for an FSA loan, therefore, the USDA also creates the expectation that he or she will be eligible to request one or more forms of loan servicing that will assist the farmer in operating the farm in a financially-successful manner. Indeed, upon receipt of an FSA loan, the borrower automatically acquires the right to be considered for loan servicing.[6] Unlike loans issued by private lenders, therefore, FSA loans are accompanied by the right to obtain services to assist farmers in postponing or avoiding altogether the termination of a delinquent loan.

B. The Monetary Relief That Plaintiffs Seek to Redress the Discriminatory Denial of Loan Servicing is Susceptible to Computation Through Use of a Formula.

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[6] FSA loan holders' right to have the USDA consider their loan servicing options is so fundamental that it cannot be terminated without a hearing. *See, e.g., Coleman*, 562 F. Supp. at 1364-65 (an FmHA loan program is a form of social welfare, the benefits of which cannot be terminated without due process.).

The Court can assess the economic losses associated with USDA's failure to provide Native American farmers loan servicing in much the same way that Plaintiffs have proposed the calculation of economic losses associated with USDA's discriminatory denial of loans. *See* Plaintiffs' Initial Monetary Relief Memo.

In order to determine whether class-wide pursuit of monetary relief for the denial of loan servicing was feasible, Plaintiffs retained Mr. Patrick O' Brien, an agricultural economist with over 27 years of experience working at the USDA's Economic Research Service. *See* Report of Patrick O' Brien ("Report"), attached as Ex. 1, at 2; *see also* Report at 2-3 (setting forth Mr. O'Brien's experience and education in full). Mr. O'Brien reviewed publicly available documents, materials obtained through Freedom of Information Act Requests, and materials obtained during discovery. As the attached report from Mr. O'Brien concludes, the economic loss suffered by members of the class because of the USDA's denial of loan servicing can be computed by use of an economic model which draws upon the USDA's own data of who received loan servicing and publicly available data, collected by the Census Bureau, depicting the proportions of people living in rural areas who are Native American and Caucasian. *Id.* at 10-18 Mr. O'Brien also concluded that any monetary relief associated with economic loss that is detected can be distributed based on simple claims process or distribution on a per capita basis. *Id.* at 18-19.

As his report indicates, the methods that Mr. O'Brien proposes to employ in the measurement of economic losses, if any, attributable to disproportionate loan servicing denials, draw upon well-established methods widely used in his field. *Id.* at 15 n.6.

Furthermore, the distribution of any monetary relief among class members that flows from those calculations is based on the USDA's *Census of Agriculture*. *Id.* at 18-19.

Mr. O'Brien developed a model that permits calculation of a reasonably accurate estimate of the losses suffered by Native American farmers. *Id.* at10-19. The model proceeds in four steps. First, the proportional share of Native American farmers' debt servicing dollars is identified by determining the service standard afforded FSA's non-Native American clients, and assuming that, in the absence of the alleged discrimination, Native Americans would have been provided the same level of servicing. *See id.* at 10-12.[7]

Second, the proportional share of Native Americans' loans that received servicing is compared the actual amount of Native Americans' loans that received servicing. This calculation will identify any shortfall in loan dollars received by Native Americans. *Id.* at 13.[8] Third, the revenue lost as a result of a shortfall in loan servicing can be calculated using USDA's formulas that set forth, on an annual basis, the expected returns that Native American farmers would have generated on their proportional share of loan servicing dollars had the USDA provided the servicing to Native Americans. *See id.* at 13-18.

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[7] Reliance on USDA's expected loans to Native Americans as a benchmark against which to compare actual loans to Native Americans is appropriate because USDA has failed to retain the applicant data that would permit comparison of the actual applicants for loans to determine to what extent Native Americans were denied their fair share of loan funds. Courts routinely rely on general population statistics in such circumstances. *See Hemmings v. Tidyman's Inc.*, 285 F.3d 1174, 1187 n.17 (9th Cir. 2004); *Paige v. California*, 291 F.2d 1141, 1147 (9th Cir. 2002), *cert denied*, 537 U.S. 1189 (2003); *Catlett v. Missouri Highway & Transp. Comm'n*, 828 F.2d 1260 (8th Cir. 1987); *Forehand v. Florida State Hosp. at Chattahoochee*, 89 F.3d 1562, 1564 (11th Cir. 1996).

[8] Monetary relief can be calculated on either a national or a state-by-state basis. For the purposes of this notice and memorandum, Mr. O'Brien has calculated relief on a state-by-state basis. *See* Report at 10.

Fourth, the total amount of monetary relief – that is, the total amount of revenue class members would have earned had they been granted their proportional share of loan servicing would be distributed among the class members either per capita or based on information obtained through a claims process. *Id.* at 18-19.

This methodology, which is set forth in detail in Mr. O'Brien's report, permits class-wide adjudication of Plaintiffs' claims for monetary relief for USDA's denial of loans and loan servicing to Native American farmers.

III. ARGUMENT

A. Plaintiffs' Proposed Methodology For Calculating Classwide Monetary Relief Is Compatible With Class Certification Pursuant To Rule 23(b)(2).

Plaintiffs' use of a formulaic approach, like the one proposed here, to calculate and allocate class-wide monetary relief has been authorized by this Circuit. See *Segar v. Smith*, 738 F.2d 1249, 1258 (D.C. Cir. 1984).[9] Use of a formula is appropriate where, as here, the information needed to adjudicate individually each class member's right to monetary relief does not exist or is so tainted as to make it impossible to reconstruct the circumstances that would have obtained absent the discrimination.[10]

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[9] Several other Courts have endorsed the use of a formula to compute back pay for individual class members. *See, e.g., Pettway v. Am. Cast Iron Pipe Co.*, 494 F.2d 211, 261 (5th Cir. 1974); *EEOC v. Chicago Miniature Lamp Works*, 668 F. Supp. 1150, 1152 (N.D. Ill. 1987); *Pitre v. W. Elec. Co.*, 843 F.2d 1262, 1274 (10th Cir. 1988) (endorsed use of formula to determine monetary remedies for class members where length of discrimination and subjectivity of selection criteria made predicting "where any individual [] would be in the employment process absent discrimination [] mere guesswork.").

[10] Of course, the use of a formula rather than individual remedy proceedings is the exception, not the rule. But the Supreme Court's discussion of the issue in *Int'l Bhd. of Teamsters v. United States* – which stated that, in class actions alleging discrimination, "a

In *Segar*, the Drug Enforcement Agency (DEA) was charged with engaging in a pattern or practice of discrimination against Black agents in a number of personnel practices.[11] *Id.* The Court affirmed both the lower court's determination that the DEA had discriminated against the black agents *and* its decision to forego individualized monetary relief hearings, in favor of a formulaic approach to computing and awarding back pay. *Id.* at 1290-92. The Court concluded that individualized hearings to determine back pay were infeasible because the "decisive criteria for promotions decisions – supervisory evaluations, breadth of experience, and disciplinary history . . . were themselves found to be tainted with illegal discrimination." *Id.* at 1290. An inquiry into each class members' circumstances would therefore "drag the Court into a 'quagmire of hypothetical judgments.'" *Id.* (*quoting Pettway v. Am. Cast Iron Pipe Co.*, 494 F.2d 211, 260 (5th Cir. 1974)).

These are precisely the circumstances here. Discovery has now demonstrated that the USDA failed to maintain a record of farmers whose applications for loan servicing were denied. Nor did USDA retain any record of the reasons for its denials of loan servicing. In the absence of these records, there is no way to reconstruct the identities of farmers who were denied loan servicing, the particular year in which the loan servicing

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district court must *usually* conduct additional proceedings after the liability phase of the trial to determine the scope of individual relief" – makes it clear that individual proceedings to determine the remedies to which victims of discrimination may be entitled are not required, or even warranted, in all circumstances. *Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 361 (1977).

[11] Courts have routinely applied to ECOA cases the Title VII model for adjudicating pattern or practice discrimination. *See, e.g., Hargraves v. Capital City Mortgage Corp.*, 140 F. Supp. 2d 7, 14 (D.D.C. 2000); *Sallion v. SunTrust Bank, Atlanta*, 87 F. Supp. 2d 1323, 1327 (N.D. Ga. 2000).

was denied or the grounds on which the servicing was purportedly denied. USDA's wholly inadequate recordkeeping makes this situation identical to that in *Segar*.

Simply put, there is no way for the Court or the parties to recreate in this litigation, for each individual class member, the circumstances behind each loan servicing decision. Such an effort would embroil the Court and the parties in precisely the kind of "quagmire of hypothetical judgments" that the Court in *Segar* held should be avoided. Use of a formulaic approach, which draws upon the USDA's own data and data compiled by the Bureau of the Census, therefore, offers an alternative way to assess whether the agency denied Native Americans their proportionate share of loan servicing and, if not, to measure the economic loss to the class associated with this conduct.

B. Plaintiffs' Monetary Claims Are Consistent With Rule 23(b)(2).

Plaintiffs' claim for monetary relief is consistent with certification pursuant to Federal Rule 23(b)(2). Plaintiffs' claim for monetary relief is an attempt to recover revenues lost as a result of USDA's discriminatory acts. As such, this claim seeks make-whole relief that, as set forth above, can be readily computed using a formula. This type of relief is thus akin to back pay awardable under Title VII, which courts have long recognized as an equitable remedy compatible with Rule 23(b)(2) class certification. *See Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204, 218 n.4 (2002); *Eubanks v. Billington*, 110 F.3d 87, 95 (D.C. Cir. 1997); *In re Monumental Life Ins. Co.*, 365 F.3d 408, 418 (5th Cir. 2004), *cert. denied*, 125 S. Ct. 277 (Oct. 4, 2004) (No. 04-27).

Notwithstanding this characterization, Plaintiffs recognize there may be variation in the amounts of lost revenues due to members of the class. Accordingly, Plaintiffs intend to ask the Court to afford class members the added procedural protection of notice

and an opportunity to opt-out. *See Eubanks*, 110 F.3d at 96 (finding Rule 23(d)(5) "broad enough to permit the court to allow individual class members to opt-out of a (b)(2) class when necessary to facilitate the fair and efficient conduct of litigation.") (citation omitted)). This will address any concerns regarding reliance on Rule 23(b)(2) as the vehicle for certification of the class.

C. Plaintiffs' Claim For Monetary Relief Can Be Manageably Tried.

Although Federal Rule 23(b)(2) does not require the showing of manageability that is required by Federal Rule 23(b)(3), in the interest of providing the court with a clear blueprint for the adjudication of this case, Plaintiffs set forth a tentative trial plan that the Court could employ. While discovery may eventually indicate that some modifications to this plan are appropriate, the plan demonstrates that trial of the monetary remedies that the Plaintiffs seek would be manageable.

The adjudication of this action can be completed in three distinct stages. First, the Court can determine whether the Defendant is liable to the class, and, if liability is found, the amount of class-wide relief. At this stage, Plaintiffs would present evidence of USDA's discrimination in the form of statistical evidence demonstrating significant shortfalls in loans and loan servicing made to Native Americans;[12] anecdotal evidence of discrimination by USDA in its lending and servicing practices; and evidence of

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[12] Courts have consistently authorized the use of statistical evidence to determine liability. Indeed, the Supreme Court laid to rest any doubt concerning the use of statistics in *Teamsters*, stating that "'[s]tatistical analyses have served and will continue to serve an important role' in cases in which the existence of discrimination is a disputed issue." 431 U.S. at 339. Indeed, statistical disparities alone, if sufficiently pronounced, can establish a prima facie case of discrimination. *Id.* at 340.

discriminatory animus unearthed during discovery. The amount of total class-wide monetary relief will be proven by expert testimony.

If liability is found, then, in a second stage, the Court can determine the precise nature and extent of any class-wide injunctive relief that is warranted.

The third stage would constitute the distribution of the monetary relief to individual class members. Because USDA's financial exposure will already have been determined at this point, distribution of monetary relief to individual class members can be accomplished without adversarial proceedings. *Hilao v. Estate of Marcos*, 103 F.3d 767, 786 (9th Cir. 1996) (finding the defendant's interest is only in the total amount for which it was liable); *Pettway v. Am. Cast Iron Pipe Co.*, 681 F.2d 1259, 1266 (11th Cir. 1982); *Hameed v. Int'l Assoc. of Bridge, Structural, & Ornamental Iron Workers, Local Union No. 396*, 637 F.2d 506, 520-522 (8th Cir. 1980). At this stage, the Court can oversee distribution of the lost revenues to class members, either on a per capita basis or based on self-supplied information returned on a claim form. The details of this process can await full briefing. The distribution process, in any event, should not affect the compatibility of the monetary relief to certification of this action pursuant to Rule 23(b)(2).

IV. CONCLUSION

For the reasons set forth above, Plaintiffs should be permitted to seek the monetary relief described herein on a class-wide basis.

May 23, 2005

Respectfully submitted,

/s/
Joseph M. Sellers, #318410
Charles E. Tompkins, #459854
Llezlie L. Green, #484051

COHEN, MILSTEIN, HAUSFELD &
TOLL, P.L.L.C.
1100 New York Avenue, N.W.
West Tower, Suite 500
Washington, D.C. 20005-3964
(202) 408-4600

Alexander J. Pires, Jr. #185009
David. J. Frantz, #202853
CONLON, FRANTZ, PHELAN & PIRES,
L.L.P.
1818 N Street, N.W.
Suite 700
Washington, D.C. 20036-2477
(202)331-7050

Phillip L. Fraas
3050 K. Street, NW, Ste 400
Washington, DC 20007-5108
(202)342-8864

Lead Counsel

Of Counsel:

Sarah Vogel
Wheeler Wolf Attorneys
220 North Fourth Street
Bismarck, ND 58502

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

MARILYN KEEPSEAGLE, et al., Plaintiffs, v. TOM VILSACK, Secretary, United States Department of Agriculture, Defendant.	Civil Action No. 1:99CV03119 (EGS) Judge: Emmet G. Sullivan Magistrate Judge: Alan Kay

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR CERTIFICATION OF DAMAGES CLAIMS UNDER FEDERAL RULE OF CIVIL PROCEDURE 23(b)(3)

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INTRODUCTION

In December 2001, this Court certified the Plaintiff class under Federal Rule of Civil Procedure 23(a) ("Rule 23") and permitted the class to pursue injunctive and declaratory relief under Rule 23(b)(2). At that time, however, the Court deferred until the completion of discovery the question of whether it would certify a hybrid class that would permit Plaintiffs to pursue their claims for economic damages under Rule 23(b)(3). *See Keepseagle v. Veneman*, 2001 WL 34676944, at *6 (D.D.C. Dec. 12, 2001); *see also Keepseagle v. Johanns*, 236 F.R.D. 1, 1-2 (D.D.C. 2006). Now that factual and expert discovery in this case are complete, Plaintiffs hereby renew their request that the Court certify their claims for damages pursuant to Rule 23(b)(3). The developed record clearly demonstrates that the Court should allow the class to pursue economic remedies, as well as injunctive and declaratory relief.

Plaintiffs satisfy all the criteria for certification of their claims for damages under Rule 23(b)(3). Discovery has confirmed the Court's earlier decision that the common questions of fact and law predominate over any questions affecting only individual members. The documents and deposition testimony amassed during discovery demonstrate that a pattern or practice of discrimination against Native American farmers and ranchers ("farmers") pervaded all aspects of the United States Department of Agriculture's ("USDA") system for farm loan making and loan servicing. Throughout the class period, USDA used highly discretionary criteria to make loan and loan servicing decisions, and left the responsibility for such decisions in the hands of local USDA officials who were almost exclusively non-minority. Numerous examples of the resulting discrimination and bias against Native American farmers are well-documented in deposition testimony in this case.

Common issues also predominate in the adjudication of Plaintiffs' claims for damages. Accordingly, this action should be treated as a hybrid class under *Eubanks v. Billington,* 110 F.3d 87 (D.C. Cir. 1997), which permits a Plaintiff class to pursue claims for declaratory and injunctive relief pursuant to Rule 23(b)(2) and claims for damages pursuant to Rule 23(b)(3). *Id.* at 96. This hybrid approach is appropriate where, as here, common issues of law and fact predominate in the adjudication of the damage claims, even if amounts of damages may vary considerably among members of the class. Common features of the damage determinations that warrant their collective adjudication arise because each class member seeks the same kind of relief and relies upon a single economic formula as the common means for adjudicating their damage claims. Developed by Patrick O'Brien, an economist with 27 years of experience at USDA's Economic Research Service, Plaintiffs' proposed formula permits computation of damages for individual farmers, drawing upon publicly available objective data and allocates the awarded damages among class members commensurate with the magnitude of the harm they suffered.

Absent Plaintiffs' proposed formulaic approach to calculating damages, the individual adjudication of class members' damages claims would require thousands of hearings and consume enormous resources and time. Moreover, individual adjudications would depend largely upon recollections of loan decisions made decades earlier, without the benefit of loan applications or records of the decisions, as USDA failed to retain most of those materials. The computation of monetary relief by formula, therefore, is decidedly more reliable than efforts to reconstruct individual loan decisions in the absence of discrimination. Accordingly, adjudication of the class members' claims for damages by formula is an appropriate and reliable means of

computing and allocating monetary relief among members of the class that is superior to individual adjudications, and is fully compatible with Rule 23(b)(3).

BACKGROUND

I. Nature of Plaintiffs' Claims and Procedural Background.

In this case, Plaintiffs allege that USDA's pattern or practice of denying Native Americans equal access to opportunities to obtain credit has deprived Native American farmers of privileges afforded to other farmers, in violation of the Equal Credit Opportunity Act ("ECOA"), and has caused them substantial economic losses. *See* Eighth Amended Complaint ¶¶ 134-36, Dkt. No. 457. Plaintiffs allege discrimination under both a disparate treatment and a disparate impact theory of liability under ECOA. *Id.* ¶ 135. In particular, Plaintiffs allege that USDA has discriminated against Native American farmers by failing to provide them equal credit opportunities in its farm loan programs. Typically, this discrimination took the form of both outright denials of farm loans and loan servicing, and a widespread failure to provide Native Americans the technical and other forms of assistance that USDA itself has recognized are necessary for farmers to prepare farm loan program applications.

To put this case in the proper context, the relationship between USDA and the farmers to whom it provides loans is not a typical debtor/creditor relationship. Rather, Congress established a special mission for USDA "to foster and encourage the family farm system of agriculture in this country." 7 U.S.C. § 2266(a). Pursuant to that mission, the Farmers Home Administration ("FmHA"), succeeded by the Farm Service Agency ("FSA"), is the lender of last resort for farmers who cannot obtain credit elsewhere.[1] To fulfill this role, FSA is authorized to make at least three types of loans to farmers: (1) farm ownership loans to enable farmers to acquire,

[1] *See, e.g.*, *Moseanko v. Yeutter*, 944 F.2d 418, 421 (8th Cir. 1991); *United States v. Kimbell Foods, Inc.*, 440 U.S. 715, 735 (1979).

enlarge or improve farms; (2) operating loans for annual crop production expenses and the purchase of equipment; and (3) emergency loans to alleviate the effects of losses suffered in disasters and emergencies. *See* 7 C.F.R. § 1941.2 (2007); *id.* § 1943.2; *id.* § 1945.2.[2]

The farm loan program, however, extends well beyond the initial grant of a loan. The farm loan program is "a form of social welfare legislation"[3] that is supposed to create a long-term relationship between the farmer and USDA with the goal of graduating the farmer to commercial credit. *See id.* § 1951.902. To this end, loan servicing, which comprises an array of means offered to farmers to renegotiate the terms of their loans, is a "primary objective" of FSA and "[s]upervision and servicing are continuing processes that begin the day a farmer comes into the office." *Id.*[4] A farmer who receives a farm loan acquires not only the actual capital, but the right to apply for loan servicing if he or she has difficulty repaying debt in a given time period because of the vagaries and unexpected hardships of farming, such as animal disease or poor weather conditions.[5] *See id.* § 1951.901 *et. seq.* Moreover, federal regulations *require* FSA to send

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[2] Hereinafter, all references to USDA's regulations in Title 7 of the Code of Federal Regulations are to the 2007 version.

[3] *Curry v. Block*, 541 F. Supp. 506, 511 (S.D. Ga. 1982), *aff'd*, 738 F.2d 1556 (11th Cir. 1984); *see also Coleman v. Block*, 562 F. Supp. 1353, 1364-65 (D. N.D. 1983) ("participation in FmHA programs is in large part a form of social welfare").

[4] Loan servicing, also referred to as primary loan servicing or 1951-S loan servicing, offers several different ways to assist farmers in managing the terms of their loans. Loan servicing includes consolidation of multiple loans into a single loan with more favorable terms, reduction of rates at which the monies are loaned, forgiving or settling some or all of the outstanding debt, and writing down the outstanding debt to levels that are more affordable. 7 C.F.R. § 1951.906.

[5] The right to seek and obtain loan servicing is so fundamental that courts have repeatedly recognized the borrower's right to be notified of and to apply for loan servicing. *See Curry*, 541 F. Supp. at 515-525 (finding that 7 U.S.C. § 1981a—creating a right of deferral—imposed a mandatory duty on USDA to promulgate and enforce regulations providing for notice, an opportunity to be heard, and criteria for servicing); *Matzke v. Block*, 542 F. Supp. 1107, 1114-15 (D. Kan. 1982) (same); *Allison v. Block*, 723 F.2d 631, 636-38 (8th Cir. 1983) (finding that the

notice of loan servicing programs to all borrowers: (1) who are more than 90 days delinquent; (2) who submit written requests for loan servicing information; or (3) who apply for loan servicing. *Id.* §§ 1981d, 1951.907(c). FSA also must send loan servicing notices before taking collection action against a borrower. *Id.* § 1951.907(c).

II. The Court's Previous Class Certification Decision.

On December 12, 2001, this Court issued an order certifying a class under Rule 23, which defined the class to include:

> All Native American farmers and ranchers, who (1) farmed or ranched between January 1, 1981 and November 24, 1999; (2) applied to the USDA for participation in a farm program during that time period; and (3) filed a discrimination complaint with the USDA individually or through a representative during the time period.

Keepseagle, 2001 WL 34676944, at *6. After careful analysis, the Court held that Plaintiffs had satisfied the four prerequisites for a class action under Rule 23(a), and that the class could proceed under Rule 23(b)(2) for the pursuit of declaratory and injunctive relief. *Id.* at *7-*13. At that time, however, the Court declined to determine whether the monetary relief sought was compatible with class treatment because it lacked a "developed factual record," and deferred consideration whether Plaintiffs' claims for monetary relief warranted class treatment until discovery was complete. *Id.* at *14.

USDA sought interlocutory review of this Court's class certification decision. In October 2002, after plenary briefing and oral argument, the D.C. Circuit denied USDA's Rule 23(f) petition for review. *In re Veneman*, 309 F.3d 789 (D.C. Cir. 2002). USDA then petitioned for a writ of mandamus and sought to stay all proceedings in this action. Again, the D.C. Circuit

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FmHA was required to provide borrowers with notice of § 1981a relief, including deferrals and other alternatives to acceleration).

denied USDA's request. *See* Order Denying Writ of Mandamus, No. 04-5031 (D.C. Cir. Mar. 3, 2004) (attached as Ex. 1).

In 2005, after this Court instructed Plaintiffs to indicate whether they would request monetary damages, Plaintiffs filed a motion to certify their claim for monetary damages. *See* Dkt. No. 329; Minute Entry for Proceedings Held Before Judge Emmet G. Sullivan (Oct. 7, 2004). After a hearing at which Plaintiffs' motion was discussed briefly, the Court concluded it would benefit from a more complete record before ruling on the motion. *See* Transcript of Nov. 10, 2005 Hearing Before the Honorable Emmet G. Sullivan at 87-88, Dkt. No. 359. Accordingly, the Court denied the motion without prejudice and advised the parties that it would entertain such a request upon conclusion of discovery in this action. *Keepseagle*, 236 F.R.D. at 1-2. While postponing any action on the request to certify Plaintiffs' claims for damages, the Court soundly rejected USDA's argument that it should reconsider the class certification decision in its entirety by revisiting whether Plaintiffs "satisfy the requirements of Rule 23(a) or 23(b)," explaining that USDA "failed to present any compelling reason why the Court should reconsider its 2001 certification order[.]" *Id.* at 3-4 n.1.

ARGUMENT

A determination whether to certify a class authorized to pursue economic relief collectively under Rule 23(b)(3) requires a review of (1) evidence of common features in the discriminatory system to which members of the plaintiff class were subject, (2) the extent to which the nature of the monetary relief sought by members of the class and the means of adjudicating the claims for such relief can be adjudicated collectively, and (3) the extent to which alternative means exist for adjudicating class members' damage claims individually that would permit resolution of these claims in a more efficient and reliable manner than the means

proposed for adjudicating the claims collectively. As demonstrated below, each of these factors weighs heavily in favor of certifying Plaintiffs' claims for damages.

I. Discovery in this Case Demonstrates a Pattern or Practice of Discrimination that Fully Justifies Class Treatment for Injunctive, Declaratory, and Economic Relief.

Since the Court last considered the issue of class certification, Plaintiffs have engaged in significant discovery, which demonstrates the propriety of the Court's initial class certification decision and shows the compelling need for economic relief. The parties have taken more than 80 depositions, and each side has produced tens of thousands of pages of documents and has prepared comprehensive expert reports. This discovery process has confirmed that USDA's discriminatory system of loan making and loan servicing caused extensive economic damage to Plaintiffs. In the farm loan system, virtually all control was in the hands of non-minority local decisionmakers who were instructed by USDA to use subjective and highly discretionary criteria to make loan and loan servicing decisions. These decisions often were made based on cultural stereotypes and bias against Native Americans, and resulted in large lending disparities against Native Americans that caused net economic losses of at least $608 million from 1981 to 2007. *See* Final Expert Rebuttal Report of Patrick M. O'Brien (Nov. 2009) ("O'Brien Final"), at 2-7 (attached as Ex. 2).

In addition, discovery has shown that USDA failed to retain accurate records – or any records at all – for most farmers and ranchers who were subject to USDA's discriminatory treatment. Together this evidence demonstrates the impracticability of reconstructing the tens of thousands of decisions that local UDSA officials made throughout the country for nearly 30 years, and consequently why collective adjudication of these damage claims and allocating relief through an objective formula is plainly the superior means of resolving the class claims to

monetary relief. The record readily demonstrates that common questions of law and fact exist which justify certifying Plaintiffs' claims for damages under Rule 23(b)(3).

A. USDA's Pattern or Practice of Discrimination Was Achieved Through Use of Subjective Loan Making and Servicing Criteria.

Under the procedures employed by USDA's direct Farm Loan Programs since 1981, applicants seeking to obtain a loan must satisfy two sets of criteria: (1) "eligibility" criteria, which include citizenship, adequate training and experience, character, the operation of a family farm, and the inability to obtain sufficient credit elsewhere; and (2) "feasibility" or loan approval criteria, which address whether a loan is based on a feasible plan and whether there is adequate security for the loan. *See* Expert Report of Lynn Hayes (Feb. 20, 2009) ("Hayes"), at 4-27 (attached as Ex. 3); 7 C.F.R. §§ 1941.12, 1943.12, 1910.4(i)(1). Under USDA's procedures, an applicant's eligibility is reviewed by the local County Committee members, who are largely elected by local farmers, while the applicant's feasibility or loan approval is determined by local County Office staff. Hayes at 4-5.[6]

Myriad sources obtained in discovery—including statements by USDA officials, USDA reports, and other documents—establish that USDA's process for determining whether to grant loans and loan servicing was largely subjective, as it was predicated upon highly discretionary standards and criteria. For example, in 1998, in reaction to the "striking" fact that "95% of the complaints that were filed against FSA came out of the Farm Loan side," 05/22/09 Winningham Dep. at 23-24 (attached as Ex. 4), USDA published an extensive study intended to determine the cause of the high number of complaints against USDA's Farm Loan Programs. *See* U.S. Dept.

[6] Initially, County Committee members were appointed, but starting in 1986, USDA's regulations were modified so that two of three members are elected by local farmers and the third is appointed by the agency's state director. Hayes at 4 & n.10 (Ex. 3) (citing 51 Fed. Reg. 18,763 (1986)). In March 1999, FSA County Office staff began making eligibility decisions. *Id.* at 4 & n.11 (citing FSA Notice FLP-37, COC Decisions on Direct Loans (Mar. 11, 1999)).

of Agriculture, A Qualitative Study of Civil Rights Implications in Farm Loan Program Administration: Perceptions and Vulnerabilities (1998) ("Qualitative Study"), at 4 (attached as Ex. 5). In that report, USDA "identified nine avenues by which willful discrimination could occur by FSA personnel[,]" including "Subjectivity and Personal Judgment" and "Subjectivity in Data Usage for Loan Making." *Id.* at 21. Noting that earlier in FSA's history "the County Committee had relatively unchallenged authority," USDA concluded that "there still exist areas in [the Farm Loan Program] in which personal judgment is required" and there are "some steps in the loan making/servicing process that . . . could be tools of disparate treatment." *Id.* at 22. Those "subjective" steps that "could be manipulated to adversely affect the outcome of a request" and result in "discrimination" include: "Determinations of family sized-farm, Calculations used for the Farm and Home Plan, Interpretation of what constitutes an acceptable credit history, Valuation of security, [and] Corruption of data used for appraisals."[7] *Id.*

Based on this study, USDA found that its "regulations permit and in some situations indirectly require subjective interpretation of data," and that "the loan officer could manipulate several items on [the farm plan] to effectuate discriminatory actions." *Id.* at 24.[8] Yet according to David Winningham—the primary official responsible for the Qualitative Study and a former Director of Civil Rights for FSA—rather than using the Qualitative Study "to see whether .

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[7] The "list of identified avenues which present an opportunity to discriminate" also included a number of other factors that Plaintiffs allege were responsible for discrimination against Native Americans: Stereotyping, Selectivity in Outreach Efforts, Discouraging Applicants, and Interceding in Loan Process to Delay or Deny a Loan. Qualitative Study at 21 (Ex. 5).

[8] In 2001, another USDA report that documented Native Americans' experiences also identified how subjective factors, such as the criteria for evaluating an applicant's farm management experience, can have a "disparate impact on American Indian farmers." American Indian Outreach Project: Reorientation Meeting Report (Aug. 2001), at 12 (attached as Ex. 6) (stating that an "issue of concern" is that "subjectivity in use of discretionary authority is sometimes being inappropriately or inconsistently applied by program managers in a manner than has a disparate impact on American Indian farmers").

. . there could be opportunities to mitigate or eliminate . . . the ability to discriminate" and "make improvements," USDA failed to make any changes to its system. Winningham Dep. at 30-31 (Ex. 4).

The Qualitative Study was not the first time that USDA recognized the subjective nature of its loan making and loan servicing processes. Indeed, in the late 1980s, USDA similarly acknowledged that decisions on loans and loan servicing were in fact dominated by subjective criteria. For instance, when defending its denial of a farm loan in 1987, USDA told the U.S. District Court that its "decisions on eligibility, feasibility, creditworthiness, etc. are unreviewable because they are subjective criteria, there is no law to apply, and they are wholly within FmHA discretion." Motion and Brief of the United States for Summary Judgment Affirming Agency Action, *Verlarde v. United States*, No. 85-K-2103, at 7 (D. Colo. July 8, 1987) (attached as Ex. 7). That same year, in response to a Congressional inquiry, USDA conceded that its loan approval process had suffered from high levels of subjectivity, stating that "loan approval decisions were made using a variety of *very subjective . . . techniques*, including the completion of a Farm and Home Plan." Attachment to Letter From Vance L. Clark, FmHA Administrator, to U.S. Senate Agriculture Committee Chairman Quentin N. Burdick, Sept. 17, 1987, USDA-FMHA-FRC-000324 (attached as Ex. 8) (emphasis added). Notably, the sole "very subjective technique" identified by USDA—the use of farm plans—remains in place today.

The deposition testimony of USDA officials obtained in this litigation likewise confirms that there are many areas in which subjective and highly discretionary factors play a critical role in loan making and loan servicing decisions. For example, Carolyn B. Cooksie, USDA's Deputy Administrator for Farm Loan Programs, admitted that with respect to loan making, "some of [the eligibility criteria] are clear, some of them are not," "making loans is not an exact science," and

"there are many times [the loan officer] has to use his judgment" and "can exercise [their] judgment," because "[t]here is [sic] a lot of times when there is no fast and hard rule." 02/28/06 Cooksie Dep. at 89-91 (attached as Ex. 9). In particular, the loan making areas acknowledged by Ms. Cooksie and other longtime USDA officials to be discretionary include: the training or farm experience needed to have a reasonable prospect of success,[9] an applicant's character,[10] the

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[9] With respect to the requirement that an applicant have sufficient "training or farm experience . . . to assure reasonable prospects of success in the proposed farming operations," 7 U.S.C. § 1922(a)(2), James Radintz, Director of the Loan Making Division for Farm Loan Programs and USDA's designated witness on loan eligibility standards, testified that the purpose of this rule is to ensure "that someone who gets a farm loan has the knowledge, experience, training such that they would have a *reasonable* chance of succeeding." 03/08/06 Radintz Topic 6 Dep. at 55-56 (emphasis added) (attached as Ex. 10). But USDA did not adopt any procedures or regulations to interpret the term "reasonable." *Id.* at 57-58. Nor did USDA provide a "standard or set guideline" on how quickly applicants would be expected to achieve success. *Id.* at 64-65. Similarly, while applicants were required to have "some experience in making management decisions on the farm," Mr. Radintz knew of no written USDA guidance issued on *how much* experience was needed, and he explained that the amount of experience is "a matter of judgment" and "within the judgment and purview of the loan approval official making the eligibility decision based on their knowledge of the enterprises in the local area and things such as that." *Id.* at 61-63. Moreover, although USDA required consideration of "'hands on' supervision" that an individual might receive, Mr. Radintz did not know what this term meant. *Id.* at 128. Not surprisingly, there was "some concern" within USDA over the "potential lack of uniformity in the interpretation of the training and experience requirement." *Id.* at 113. Finally, Mr. Radintz conceded that County Committee members would judge the experience of applicants – and other eligibility factors – in light of their own experiences and personal knowledge of the applicants and their operations. *Id.* at 130-31.

[10] Rosalind Gray, former Director of USDA's Office of Civil Rights, explained that USDA's good character requirement "was entirely subjective," and "all depended on where you were," noting that "[b]ad character could mean whatever information [local FSA decisionmakers] wanted to consider, and the applicant need not have access to the information, or it might have just been community information, might have been reputation stuff, it might have been gossip stuff." 10/23/08 Gray Dep. at 180 (attached as Ex. 11). Ms. Gray concluded that USDA "should have [had] very clear objective standards" so that the "farmer could understand what it meant and what they had to do . . . before they actually filled out their application" and that the farmer should have received notice if their character was challenged. *Id.* at 180-81. According to Mr. Radintz, USDA linked the "character" requirement to an applicant's creditworthiness or "reputation for repaying their debts," Radintz Topic 6 Dep. at 133-34 (Ex. 10), and County Committee members would apply their personal experience as farmers in evaluating applicants' character. *Id.* at 153-54. While decisionmakers had discretion to disregard an adverse credit report "if they were aware of extenuating circumstances," there was no requirement to interview

inability to obtain credit elsewhere,[11] the operation of a family farm,[12] and the loan officer's role in preparing applications and in developing Farm and Home Plans.[13] Given that USDA has

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the applicant to ascertain such circumstances. *Id.* at 154-55. Moreover, although USDA regulations allowed a borrower to satisfy the "character" requirement if he made an "honest attempt" to meet his prior debt repayments, there was no clear guidance or communication to the field regarding the term's meaning or how it should be applied. *Id.* at 144-47. Similarly, USDA offered no examples of what type of "isolated incidents" should not be permitted to lead to an adverse credit report finding. *Id.* at 165-66. And even if "circumstances beyond [the applicant's] control" could excuse an adverse credit report, the decisionmaker still "has to make the judgment about whether he agrees with that or not." Cooksie Dep. at 89-90 (Ex. 9); *see also, e.g.*, *id.* at 90 (explaining that it would "certainly [be] a judgment call" to decide whether a person acted in "good faith in trying to repay" a bill when the person "didn't have [health] insurance" and "had a catastrophic illness in the family").

[11] Although an applicant must show that he cannot "obtain sufficient credit elsewhere to finance [his] actual needs at reasonable rates and terms, taking into consideration prevailing private and cooperative rates and terms in the community in or near which the applicant resides for loans for similar purposes and periods of time," 7 U.S.C. § 1922(a)(4); Radintz Topic 6 Dep. at 69-70 (Ex. 10), Mr. Radintz acknowledged that USDA offered no guidance on how to define the "community" whose prevailing rates and terms should be considered. Radintz Topic 6 Dep. at 73. Moreover, in the absence of a letter from a bank denying credit to an applicant, local officials exercised discretion in determining whether an applicant could obtain sufficient credit elsewhere. *Id.* at 80-83; *see also* Cooksie Dep. at 90 (Ex. 9).

[12] Local officials had to compare the applicant's farm to similar operations locally to determine whether it qualified as a family farm, but UDSA did not offer quantitative guidance on this subject, leaving the loan officer "some leeway to figure out what is applicable for his area" and to exercise his judgment and knowledge. Cooksie Dep. at 72-74 (Ex. 9). Similarly, although a family farm had to use a "substantial" amount of the family's labor, USDA did not offer clear guidance about how much labor would be "substantial," and what is "substantial" "depends on the farming operation[.]" *Id.* at 74-78. Ultimately, the loan official would simply "have to use his judgment" based on what he knows about the farm. *Id.* at 78.

[13] Loan officers could influence the outcome of loan applications by exercising their discretion to make decisions or recommendations about a range of inputs in the Farm and Home Plans used to determine loan feasibility. *See, e.g.*, 04/20/06 Radintz Topic 7 Dep. at 61-62 (attached as Ex. 12) (discussing a loan officer's discretion to determine an applicant's operating expenses); *id.* at 59-60 (noting that in estimating family living expenses, "the loan officer would be expected to use judgment and to help the applicant develop a realistic plan"); *id.* at 44-45, 50-52 (discussing the estimation of the value of farm assets such as livestock and machinery); *id.* at 92 (agreeing that the loan officer's role in developing a Farm and Home Plan typically involves the exercise of judgment). In addition, because of the loan officer's critical role in working with applicants to develop Farm and Home Plans, an applicant's ability to obtain a loan is highly dependent on his relationship with the loan officer. *See id.* at 25, 30, 74-76 ("very few" loan applicants complete

generally applied the same standards and processes for determining the feasibility of both loan servicing and loan making, these key discretionary features in loan making also pervaded USDA's loan servicing decisions. *See* 04/20/06 Rowe Dep. at 14-16 (attached as Ex. 13).

In addition to the testimony of USDA's national officials, current and former USDA local officials likewise confirmed the high degree of discretion and the potential for manipulation in the loan making and loan servicing processes. For example, one former USDA loan officer testified that when determining the feasibility of a loan application, he was instructed by his superior that he should not use the county average yield rates for Native American applicants because "you know that Indians don't get as good yields as other people do." 03/06/09 Anderson Dep. at 10 (attached as Ex. 14); *see also id.* at 32 (stating that "the District Supervisor had me come into the office and told me that I was not supposed to use average crop yields and average weaning weights on Indian applications").[14] Current USDA local officials testified that the eligibility criteria used by the County Committee were also subjective, and that applications

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their own Farm and Home Plans, and the loan officer and applicant would meet in-person to a develop a plan in a collaborative process); *id.* at 60-61 (developing the Farm and Home Plan is a "joint process," "an interactive process" and a "joint venture" "between the loan officer and the loan applicant or borrower"); *id.* at 77-79 (if a Farm and Home Plan was not feasible, loan officers were expected to consider a wide range of alternative inputs to make it feasible, and "were expected to exercise their judgment in determining how reasonable and realistic the alternatives were"); Cooksie Dep. at 22-23 (Ex. 9) (describing how loan officers would "see if they could come up with a feasible plan of operation for the customer" and that "it required the customer and the officer to sit down and agree on the plan because they both had to sign the plan"); *cf.* Radintz Topic 7 Dep. at 48-50 (Ex. 12) (loan officers were required to provide technical assistance to applicants in completing a Farm and Home Plan, but he was unaware of any mechanism within USDA to monitor the extent of help provided locally to applicants).

[14] *See also, e.g.*, 04/30/09 Cumpton Dep. at 71 (attached as Ex. 15) (confirming that "project[ing] yields and expenses and income" involved loan officer's discretion); 05/14/09 Meredith Dep. at 117 (attached as Ex. 16) (agreeing that "a loan officer ha[s] the discretion to adjust or deviate from the state or county averages"); 05/15/09 Petty Dep. at 75-76, 81-82 (attached as Ex. 17) (describing degree of loan officer's discretion); 05/20/09 Larrick Dep. at 118-19 (attached as Ex. 18) (confirming that there is "discretion in the appraisal process in terms of valuing different equipment and land and crops and the like").

were often denied based on subjective determinations. *See* 04/29/09 Knuth Dep. at 129-30 (attached as Ex. 19).[15] And the witness USDA designated to provide testimony concerning farm loan officer training stated that there was no training to "teach the employees about how to exercise discretion or judgment." 05/19/09 Ropp Dep. at 67 (attached as Ex. 20).

Based on this and other evidence, Plaintiffs' expert Lynn Hayes, an expert in agricultural law who has counseled farm organizations and hundreds of individual farmers throughout the nation, developed an extensive report documenting the various ways USDA's standards for loan making eligibility criteria are subjective or highly discretionary, either because of the decision criteria themselves or because USDA failed to provide sufficient guidance on how to apply them and oversight to review how the criteria were applied. Hayes at 5-18 (Ex. 3). For example, USDA implemented subjective or highly discretionary standards for the eligibility criteria, requiring a determination of whether an applicant: (1) has "sufficient training or experience to assure a reasonable prospect of success in the proposed operation"; (2) has "the character" needed to receive a loan; (3) has "managerial ability"; (4) will "honestly" carry out the conditions of the loan; (5) operates a "family farm"; and (6) has creditworthiness. *Id.* In addition, Ms. Hayes concluded that the criteria for measuring the "feasibility" of a loan application were also "fraught with discretionary, subjective determinations by agency personnel." *Id.* at 19. For example, because USDA staff assisted farmers in developing, reviewing, or revising their "farm plans" before determining the plans' feasibility, USDA staff "exercised broad discretion and made subjective judgments on each of the major aspects of the plan: the amount and types of farm operating expenses, the amount and types of family living expenses, the yields and prices (to calculate the projected income) for each crop or livestock

[15] *See also, e.g.*, Cumpton Dep. at 81-82 (Ex. 15) (confirming that County Committee members could use personal knowledge of applicant in making loan eligibility determinations).

enterprise planned, and in some cases the agency debt installment amounts due during the period of the plan." *Id.* at 20.

These same discretionary standards also governed the process for loan servicing determinations, which involve assessing whether a farm plan would be feasible after application of the loan servicing options. *Id.* at 27-28. Furthermore, USDA's loan servicing process suffered from subjectivity because of how the agency implemented the requirement that such servicing only be authorized if the borrower had "acted in good faith with the Secretary in connection with the loan[.]" *Id.* at 28 (quoting 7 U.S.C. § 2001(b)(2)).

In sum, discovery in this case has amply demonstrated that USDA's process for loan making and loan servicing amounts to nothing more than an "undisciplined system of subjective decisionmaking . . . ." *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 990-91 (1988).

B. USDA Staff Who Made Loan Decisions Were Nearly All Non-Minority, Contributing to Disparities in Credit Opportunities for Native Americans.

Exacerbating the problems caused by USDA's highly subjective and discretionary criteria and processes for loan making and servicing, the staff who evaluated applicants' compliance with such criteria lacked diversity and often made biased decisions based on stereotypes of Native Americans. From 1981 to the present, USDA's local decisionmakers, including County Committee members and County office staff, have been disproportionately white and have rarely included Native American (or other minority) farmers. *See, e.g.*, USDA Office of the Inspector General, Minority Participation in Farm Service Agency's Farm Loan Programs – Phase II (1997), at 20 (attached as Ex. 21) (finding that in 1996, 98.2% of County Office Committee members were white). USDA has conceded that its local decisionmakers came nowhere close to reflecting the diversity of its customers, principally because County

Committee members were elected by local farmers and, in turn, County Committee members selected the local county executive director, who hired local staff. *See* Civil Rights Action Team, U.S. Department of Agriculture, Civil Rights at the United States Department of Agriculture (1997) ("CRAT Report"), at 18-20 (attached as Ex. 22) ("Because of the ways in which State and county committees are chosen and county offices are staffed, FSA lacks diversity in its program delivery structure. . . . Proportionate under-representation . . . is a problem throughout the Nation."); Statement of Deputy Secretary of Agriculture Rominger at a USDA Civil Rights Forum, May 14, 1996, KVL014-0296 (attached as Ex. 23) ("There's no excuse for a workforce that doesn't better reflect the people that we work for, up and down the ranks.").

USDA's process for selecting the people who made credit decisions ensured they were not representative of the general population they were charged to serve. It also suffered from another defect. As former Secretary of Agriculture Dan Glickman lamented, this system for selecting credit officers meant that local employees were often "influenced by the values of their local communities and county committees rather than by standard policies promulgated at the national level," and that adherence to such values sometimes led to "abuse of program authority and insider information to the benefit, or detriment, of certain groups." Letter From Dan Glickman, Secretary of Agriculture, to Kenneth Harden (Apr. 29, 1997), at 1 (attached as Ex. 24); *accord* CRAT Report at 18 (Ex. 22) (finding that local staff "tend to be influenced by values of their local communities and county committees rather than by standard policies promulgated a national level," making it "more difficult to hold [them] accountable").

Indeed, Rosalind Gray, a former Director of USDA's Office of Civil Rights, explained that "since the process seemed to be so subjective" and "there were White persons on the County

committee who knew White farmers," having "a minority person on the County committees who knew some minority farmers" "certainly would [have] enhance[d] their ability to deal with the subjectivity and certainly the character, moral turpitude types of interpretation that happened with the element of creditworthiness." Gray Dep. at 205 (Ex. 11). She added that as Director of Civil Rights, she had been unaware of *any* Native Americans who had served as County Committee members. *Id.* at 206; *see also* 10/01/09 Lopez Dep. at 30-36 (attached as Ex. 25) (Texas FSA State Outreach Coordinator and former County Executive Director of 28 years knew of only a single Native American farmer elected to a County Committee in Texas, occurring just two years ago).

As two well-respected experts in sociology and psychology have determined, the combination of a highly subjective process and non-diverse decisionmakers owing loyalty to white local farmers was a recipe for bias and discrimination against Native American farmers. William T. Bielby, a University of Illinois sociology professor, "determined that there are highly subjective discretionary aspects to the process and criteria used for decisions about direct loans and loan servicing," and that "social science research on stereotyping and outgroup bias provides a basis for concluding that subjectivity and discretion in the process for making direct loans and loan servicing and the lack of effective monitoring and oversight [by USDA] introduces a substantial degree of vulnerability to bias against Native Americans." Expert Report of William T. Bielby (Feb. 20, 2009), at 22, 35-36 (attached as Ex. 26). And Stephanie A. Fryberg, a University of Arizona psychology professor with expertise in stereotyping phenomena, concluded that "USDA fostered an environment that allows both cultural biases and stereotypes of Native Americans within the USDA to influence the opportunities of individual Native American farmers," and that training of and guidance for local loan officers was needed "to

overcome these stereotypes and cultural biases." Expert Report of Stephanie A. Fryberg (Feb. 20, 2009), at 21-22 (attached as Ex. 27). Moreover, since USDA's County Committees have lacked diversity, "Native American farmers are less likely to hear about programs and to receive the help and attention needed to participate in these programs." *Id.* at 22.

Drs. Bielby and Fryberg's carefully formulated opinions about how cultural stereotypes and bias infected USDA's policies and practices are consistent with the experiences of Native American farmers, ranchers, and advocates throughout the nation. For example, class member Steven Defender testified that he witnessed outright hostility by white County Committee members to Native Americans' applications, and was personally told that he "had no business being on [the County Committee]" in McLaughlin, South Dakota.[16] Named Plaintiff Luther Crasco testified that he repeatedly observed local staff in Montana demonstrate bias against and express stereotypes about Native Americans.[17] Nancy Carnley, Vice-Chief of the MaChis Lower Creek Indian tribe in New Brockton, Alabama, testified that she heard local staff state that they would not make loans to Native Americans and heard them make offensive, derogatory comments.[18] Similarly, Phil Givens, a Native American farmer and USDA consultant from

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[16] While serving on a County Committee, Mr. Defender witnessed "blatant name-calling," including being called a "damn Indian" by a committee member; when Native Americans' applications were considered, a committee member would say, "not another Prairie Nigger"; and the committee often delayed decisions on such loan applications. 02/05/09 Defender Dep. at 84, 140 (attached as Ex. 28).

[17] Mr. Crasco recounted several such instances: first, a local county employee told Mr. Crasco, "You Indians are always getting free money and you don't . . . pay taxes"; second, an employee told him, "why don't you Indians just go back to [the] Fort Belknap [Reservation] and borrow money there? That's where you belong"; and third, an employee informed him that he had "only been sent here for two reasons, to protect the government's money and to sell you people out." 03/10/06 Crasco Dep. at 94-96 (attached as Ex. 29).

[18] Carnley stated that she went with her father and children to the county loan office, and they were told that no applications were available for "injuns" and were repeatedly called "injuns." At the county office, an employee made "war [w]hoop" noises with her hand in front of her

Tahlequah, Oklahoma, testified that, in his experience, "the documentation that's required to fill out [a loan] application is totally different when it comes to the white farmer versus a Native American male" and it is "a lot worse when [Native Americans] go and ask for [loan] servicing." 04/23/09 Givens Dep. at 238-39 (attached as Ex. 31).

These anecdotes are only a few examples of bias exhibited repeatedly by local USDA officials against Native American farmers and ranchers, the cumulative effects of which are evidenced by the consistent, widespread and statistically-significant disparities in loans and servicing awarded to Native Americans and other farmers and ranchers throughout the period covered by this action. O'Brien Final at 2 (Ex. 2) (finding that Native Americans "faced large, consistent, statistically significant shortfalls in loans and servicing in the overwhelming majority of the states"); CRAT Report at 21, 30 (Ex. 22) (finding that disparities exist between "nonminority loan processing and American Indian loan processing" and "[m]inority farmers have lost significant amounts of land and potential farm income as a result of discrimination by FSA programs").

In sum, discovery in this case has amply demonstrated that the "problem of subconscious stereotypes and prejudices" pervaded the USDA's system for providing loans and loan servicing to farmers and ranchers. *Watson*, 487 U.S. at 990-91.

II. USDA Failed to Retain Information on Loan and Loan Servicing Applications From Which Individual Damages Calculations Could Be Made.

Discovery in this case also has revealed USDA's failure to retain adequate documentation regarding its loan making and loan servicing decisions, which bolters the need for the collective adjudication of class members' damage claims. As demonstrated below, USDA's recordkeeping

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mouth, and another employee said "I don't have anything for you Injuns, I never will, and as long as I am in this office there is not going to be anything for you Injuns." 04/08/09 Carnley Dep. at 39-40, 45-46, 51, 62, 69 (attached as Ex. 30).

failures make it utterly impractical to litigate this case using anything but an objective formula as a basis for calculating individual damages.

First, USDA has retained virtually no data on the basis for decisions on loan applications that were denied prior to 1998, let alone the actual loan application files.[19] Thus, for nearly the entire class period, there is no reliable way to reconstruct the loan-denial decisions that were made by local USDA officials. Other than the testimony of the individuals involved, there is no evidentiary record that would show why an application was denied, whether or how the original size of the loan sought by the applicants was reduced by the loan officer, or why this occurred. And even after 1998, when USDA first began keeping data on rejected or withdrawn applications, its record retention policies required that loan files be destroyed after three years. *See* Hawkinson Decl. Attachment D (25-AS) at ¶ 84 ("Hawkinson Attachment D") (attached as Ex. 35). Thus, most of the files and other materials documenting loan denials no longer exist.

Second, USDA's recordkeeping systems have been abysmal, as Plaintiffs documented in detail in their August 18, 2009 motion to address the consequences of the USDA's failure to institute a proper litigation hold in this action and to create or retain Native Americans' civil rights complaints. *See* Dkt. No. 529 at 2-18. Even for those Plaintiffs who eventually received loans from USDA, many of their records are either missing or incomplete. For example, in

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[19] *See* Def.'s 10/03/08 Stat. Rep. at 25-26, Dkt. No. 484; Expert Rebuttal Report of Patrick O'Brien (July 2009) ("O'Brien July"), at 53 (attached as Ex. 32) (stating that USDA's MAC database that provides summary statistics on the denial of loan applications "includes virtually no data for the first 16 years [1981-97] of the relevant period when . . . Native Americans faced the greatest differences in treatment by USDA" and noting that "USDA has conceded [that the available MAC data [from 1981 to 1997] is substantially incomplete, and even corrupted"); Expert Report of Gordon C. Rausser (Oct. 19, 2009), at 58-59 (attached as Ex. 33) (stating that USDA's MAC database "was not implemented until 1997, and then only partially so," and that the MAC data "pertaining to 1981-1997 is a miniscule sample of the actual number of loan applications filed with FSA during that period and cannot be relied upon to arrive at any valid conclusions."); 12/02/08 K. Miller Dep. at 12-15 (attached as Ex. 34).

discovery Plaintiffs sought a sample of so-called "borrower" files from USDA. These files are supposed to include all relevant loan application documents for borrowers. USDA was unable to find nearly one-third of the files for even the small sample requested by Plaintiffs. *Id.* at 35 (stating that when Plaintiffs requested that USDA produce borrower files for 151 members of the class, USDA could not locate almost one-third of those files). It is quite likely, therefore, that USDA may not have any documentation about the borrowing activity and/or loan servicing applications of a large portion of the class, making it extraordinarily difficult to reconstruct many of the loan decisions made during the class period, which extends back to 1981.

Third, the documentation that is kept in even the small number of "borrower files" produced by USDA is often incomplete. Many Plaintiffs who were repeatedly denied a loan before being granted one have nothing in their "borrower files" until they actually become borrowers. *See* Hawkinson Attachment D ¶ 84 (Ex. 35) (discussing the process for handling denied loan applications). And discovery revealed that there are often important items missing from a borrower's file, such as evidence that the borrower had complained of discrimination. *See, e.g.*, Dkt. No. 529 at 10 (documenting USDA's failure to record numerous civil rights complaints filed by individual class members). Moreover, these "borrower files" fail to show the informal back-and-forth interaction between borrowers and county staff, which is directly relevant to Plaintiffs' claims of discrimination.

Fourth, given USDA's complete (and conceded) failure to take its recordkeeping responsibilities seriously and implement a litigation hold in this matter for all documents relevant to this litigation until just last year, it is likely that many other documents relevant to loan making and loan servicing decisions for class members have been destroyed. USDA concedes that it did not implement any litigation hold at all for the *Keepseagle* litigation until 2002, *see*

Dkt. No. 542 at 9, and concedes that there was significant "cause for concern with respect to the scope" of that hold that was not rectified until a new litigation hold order was issued in October 2008. *Id.* With no proper litigation hold in place until 2008, relevant USDA retention policies *required* the USDA to dispose of many, if not most, of its borrower files. *See* Def.'s 10/03/08 Stat. Rep. at 18, Dkt. No. 484 (retention policies are mandatory); *see also* Snyder Decl. ¶ 5 (attached as Ex. 36) (records schedules provide "mandatory instructions for the disposition of the records . . . when they are no longer needed by the agency"); 11/20/08 Snyder Dep. at 7 (attached as Ex. 37) ("[o]nce a disposition is up, you need to destroy it"); Hawkinson Decl. Attachment B ¶ 77 (attached as Ex. 38) ("retention periods specified in the Agency records schedules . . . are: mandatory [and] not to be exceeded").[20] Had USDA implemented a proper hold when litigation was reasonably anticipated, it should have retained all borrower files that remained open as early as 1990.[21] It utterly failed to preserve these materials.

III. Plaintiffs' Expert Has Developed an Economic Model that Provides a Basis for Accurately Calculating and Distributing Class Members' Economic Losses.

Plaintiffs seek to pursue as a class the recovery of economic losses associated with USDA's discriminatory denial of credit opportunities under its farm loan programs. Accordingly, Plaintiffs seek to recover the revenues they would have received in the absence of USDA's discriminatory lending policies and practices.

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[20] The only exception would be for files stored at the Federal Records Center ("FRC") from 1999 on, but as explained in detail in Plaintiffs' August 18, 2009 motion, state and county offices, which typically maintained borrower files, did not use the FRC until very recently. Dkt. No. 529 at 19-20 & n.10.

[21] As explained in Plaintiffs' motion for an evidentiary presumption, litigation was reasonably foreseeable in 1993, when USDA's general counsel stated that USDA should expect class action litigation for civil rights violations in the farm loan programs. Dkt. No. 529 at 30-33. Under governing regulations, USDA is required to retain borrower files for three years after closure. *See* Hawkinson Decl. ¶ 8 (attached as Ex. 39); Hawkinson Attachment D ¶ 84 (Ex. 35). Accordingly, USDA and FSA should have preserved *all* open borrower files dating back to 1990.

Plaintiffs have developed an objective formula for calculating the losses that class members suffered as a result of USDA's pattern or practice of discrimination. Plaintiffs' expert, Mr. O'Brien, an agricultural economist with over 27 years of experience at USDA's Economic Research Service, has developed and applied an economic model for calculating the amount of economic losses Native Americans suffered *in each state and year* due to shortfalls in loans and loan servicing they received compared to other farmers and ranchers. *See* O'Brien Final Report at 1-7 (Ex. 2); O'Brien July at 1-14 (Ex. 32); Expert Report of Patrick O'Brien (Feb. 2009) ("O'Brien Feb."), at 1-7 (attached as Ex. 40).

Mr. O'Brien's analysis reveals that Native American farmers and ranchers "faced large, consistent, statistically significant shortfalls in loans and servicing in the overwhelming majority of the states," and that nationally from 1981 to 1999 Native Americans: (1) received only half of the loans and 43% of the loan dollars they would be expected to receive in the absence of discrimination; (2) received only half to two-thirds the loan servicing they would be expected to receive in the absence of discrimination; and (3) suffered at least $584 million in aggregate net economic losses. *See* O'Brien Final 2-3, 5-7, & Appx. 1 Figures II-5 & III-1 (Ex. 2). Mr. O'Brien determined that these disparities in loans and loan servicing received by Native Americans cannot be attributable to chance, as they are "statistically significant at the 99% level." *Id.* at 2. Furthermore, while Native Americans experienced the largest disparities from 1981 to 1999, statistically significant disparities persisted in many states after the filing of this action, thereby increasing aggregate net economic losses to at least $608 million from 1981 to 2007. *Id.* at 3-4, 6-7.

This model, which draws primarily on USDA's own data to compute disparities in lending and the resulting economic losses, provides a sound basis for distributing damages among class members who were denied credit opportunities in particular years and states.

A. The Methodology for Evaluating Loan Making and Servicing.

The methodology Mr. O'Brien developed for analyzing loan making—which the Court may employ—involves four steps: (1) ascertaining how many USDA loans Native Americans reasonably would be expected to receive in the absence of discrimination for each year and state; (2) computing shortfalls in the amounts of loans and funds awarded to Native Americans compared to other farmers and ranchers for each year and state; (3) converting loan shortfalls into the amounts of working capital Native Americans were denied; and (4) computing the amounts of revenue lost by Native Americans because they received less loan funds than they should have received in the absence of discrimination. *See* O'Brien Feb. 6-21, 26-31 (Ex. 40).

First, the formula developed computes the amount and number of loans Native American farmers would have been expected to receive in the absence of discrimination by allocating to them a share of total loans and funds awarded that is proportionate to the percentage of Native Americans counted among the overall population of farm operators eligible for USDA loans. O'Brien Feb. at 7 (Ex. 40).[22] The formula derives the percentage of Native Americans eligible

[22] Reference to the population of Native American farmers and ranchers who were eligible to receive loans, rather than to the population of actual loan applicants, as a basis for determining whether Native Americans received a proportionate share of loans and funds draws upon an approach long endorsed by the courts when evidence from actual applicants is missing or unreliable. Here, USDA's failure to retain records for applicants denied loans and to maintain complete and accurate records for those to whom it awarded loans makes it impossible to statistically compare the circumstances of the actual loan applicants or reconstruct loan decisions made many years earlier. *See supra* Section II; O'Brien July at 53-54 (Ex. 32). In the absence of evidence about actual applicants and the decisions to deny their applications, courts routinely refer to general population statistics or other proxies as an appropriate substitute for that information. *See Hemmings v. Tidyman's Inc.*, 285 F.3d 1174, 1187 n.17 (9th Cir. 2004), *cert*

for USDA farm loans using the percentage of Native American farm operators counted by USDA's 2007 Census of Agriculture for each state, and controlling for a variety of factors to ensure that only operators who could qualify for USDA loans are counted. O'Brien July at 2, 14-16 (Ex. 32).[23]

Second, the formula computes loan shortfalls by comparing for each of the three categories of loans at issue in this case the number and amount of loans Native Americans would be *expected* to receive to the number and amount of loans they *actually* received in each year and state. O'Brien Feb. at 13-14 (Ex. 40). This computation is undertaken by using USDA's own data on the number and amount of loans that were awarded to Native Americans and to other farmers and ranchers in each state and year. *Id.* at 13-16.

Third, the formula converts the amounts of loan shortfalls into credit shortfalls, which represent the amount of working capital to which Native Americans were effectively denied access over the life of the loans. *Id.* at 27-28. The credit shortfalls are obtained by "using amortization schedules based on the interest rate, the negotiated term, and the actual term for the

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denied, 537 U.S. 1110 (2003); *Paige v. California*, 291 F.3d 1141, 1147 (9th Cir. 2002), *cert denied*, 537 U.S. 1189 (2003); *Forehand v. Florida State Hosp. at Chattahoochee*, 89 F.3d 1562, 1564 (11th Cir. 1996); *Berger v. Iron Workers Reinforced Rodmen Local 201*, 843 F.2d 1395, 1414-15 (D.C. Cir. 1988) (per curiam); *Catlett v. Missouri Highway & Transp. Comm'n*, 828 F.2d 1260, 1266-67 (8th Cir. 1987). Not surprisingly, then, both Plaintiffs' and USDA's experts "agree that any measure of reasonable expectations has to start by establishing Native Americans' share of the farm operator population served by the USDA program and using that share to arrive at a measure of the number of loans and loan servicing agreements that Native Americans could reasonably have expected[,]" and that the "most reliable data for establishing Native Americans' share of the farm operator pool is the 2007 Census of Agriculture." O'Brien Final at 9 (Ex. 2); *see also* Report of Gordon C. Rausser (April 9, 2009), at 11, 16-17 (attached as Ex. 41).

[23] Those factors, *inter alia*, include: (1) the targeting of ownership and operating loans to small- and medium-sized operators; (2) the targeting of emergency loans to operators who faced natural disasters; and (3) the program's emphasis on beginning and limited resource farmers. O'Brien July at 16-17; O'Brien Feb. at 8-9, 11-12.

individual ownership, operating, and emergency term[.]" *Id.* at 28; *see also* O'Brien July at 135-37 (Ex. 32).

Fourth, the formula computes for each state and year the amount of economic loss Native Americans suffered as a result of being awarded less loan funds – and a corresponding smaller amount of working capital – than would be expected in the absence of discrimination. O'Brien Feb. at 28-31 (Ex. 40). These calculations use "ratios" developed and employed by USDA's Economic Research Service to assess for each state and year how much income and asset appreciation is generated by additional capital investments. *Id.*; O'Brien July 4-5, 43-45 (Ex. 32).[24] Accordingly, the formula accounts for varying economic conditions over the period covered by this action, and aggregates the positive and negative effects of loan awards for all states and years studied. O'Brien Final at 6-7. In addition, because the formula identifies the years and states in which USDA's ratios were negative—when the award of an additional dollar of credit would have resulted in a *loss* of revenue—the formula ensures that class members denied credit in years where credit would not have resulted in additional revenue will not receive damages for those years, and that the amount and allocation of damages awarded will redress the harm actually suffered by class members to the greatest extent possible. *Id.*; O'Brien July at 4-5 (Ex. 32).

[24] The formula also determines the amount of interest rate subsidies Native Americans were denied to reflect the lower interest rates that Native American borrowers would have been charged if they had received their fair share of USDA loans. Mr. O'Brien calculates these lost subsidies by multiplying the difference between commercial interest rates and the state-weighted USDA interest rates by the credit shortfall for each state and year. O'Brien Feb. at 30 (Ex. 40); July at 44-45 (Ex. 32).

A very similar formula can be used to compute and allocate economic losses attributable to shortfalls in loan servicing.[25] First, the formula compares the amount of loan servicing Native Americans would have received had they been awarded loan servicing in amounts proportionate to their representation among the total population of USDA borrowers. O'Brien Feb. at 21-22 (Ex. 40). The formula makes this comparison for three types of loan servicing: (1) loan restructuring; (2) shared appreciation and net recovery buy-out agreements; and (3) write-off agreements. *See id.* at 21-25; O'Brien July 38-42 (Ex. 32).[26] Second, the formula converts shortfalls for each of the three types of loan servicing studied into economic losses based on the same USDA ratios used to compute economic losses for loan shortfalls, as well as other statistical techniques. O'Brien Feb. 32-36 (Ex. 40).

B. The Formula's Allocation of Damages Among Class Members.

The same formula developed by Mr. O'Brien to detect and compute shortfalls in loans and loan servicing awarded to Native Americans can also be deployed to allocate any damages awarded among members of the class. In essence, the formula would allocate damages among class members based on where and when they were denied credit opportunities. By relying upon these temporal and geographic characteristics, the formula will ensure that damages are allocated

[25] The formula developed by Mr. O'Brien relies upon USDA's own "PLAS database," which contains a range of information about individuals who successfully obtained loans from USDA—including racial demographics—and, thus, were potential applicants for loan servicing. O'Brien Feb. at 21 & Appx. A2-1 (Ex. 40).

[26] The formula captures not only the economic losses associated with lower levels of loan servicing received by Native Americans who actually obtained USDA loans and were, therefore, eligible for loan servicing, but also "the amount of loan servicing that should have been received had Native Americans received their expected level of lending." O'Brien Final at 5 (Ex. 2); *see also id.* ("Of course, Native Americans who were wrongly denied USDA loans received no servicing, but the economic value of the loans they were denied should incorporate the potential for receiving loan servicing.").

proportionate to the magnitude of harm actually suffered by farmers and ranchers in each state and time period. Damages would be distributed to Native American farmers and ranchers who submit a claim form in response to appropriate notice. Each would be expected to provide information to demonstrate membership in the class and specify the state and time period during which he or she unsuccessfully sought a loan or loan servicing. The damages allocated to each state and time period by the formula then would be distributed among these class members within each state and time period.

This method for allocating damages will help ensure they are distributed to members of the class who were harmed by the practices challenged in this action and in proportion to the magnitude of the harm each individual suffered. Accordingly, class members who sought loans and loan servicing opportunities earlier in the class period or for a longer period of time would receive larger individual awards. In addition, this process will ensure that individual awards of damages reflect the economic realities of the time and state where the farming or ranching occurred. As most of the economic loss calculations are based on USDA's ratios for farm financial performance and historical changes in asset value, which vary yearly, awards to individuals will reflect how much—and even whether—the denial of a credit opportunity impacted individual farmers in a particular state and year.

IV. The Court Should Certify That the Class May Pursue Damages.

Given the nature and extent of the violations at issue here and the available options for adjudicating Plaintiffs' claims for monetary relief, certification of the class members' damage claims under Rule 23(b)(3) and utilizing an objective formula to compute and allocate any damages awarded is clearly justified. Commenting on the kind of subjective decisionmaking challenged in this action, the Supreme Court explained that the "problem of subconscious

stereotypes and prejudices" when combined with an "undisciplined system of subjective decisionmaking has precisely the same effects as a system pervaded by impermissible intentional discrimination." *Watson*, 487 U.S. at 990-91. The pervasiveness of undisciplined and subjective decisionmaking throughout USDA's processes for loan making and loan servicing presents common questions of law and fact that warranted certification of the Plaintiff class pursuant to Rules 23(a) and 23(b)(2) to pursue declaratory and injunctive relief. *Keepseagle*, 2001 WL 34676944, at *8. This same system of undisciplined and subjective decisionmaking likewise caused significant economic damages to Plaintiffs, the redress of which should be undertaken pursuant to Rule 23(b)(3).

Discovery undertaken since the class was certified amply demonstrates that Plaintiffs were subject to a common set of challenged practices, confirming the propriety of the original class certification decision and providing the foundation for certification of Plaintiffs' claims for monetary relief. Testimony elicited from USDA's own witnesses, as well as expert analyses, demonstrates that USDA engaged in a pattern or practice of discrimination, predicated on a system of highly subjective local decisionmaking that permitted the use of stereotypes and bias against Native Americans and produced large disparities in loan making and servicing that were adverse to Native Americans. The evidence also demonstrates that Plaintiffs' claims for damages are susceptible of class treatment, as any damages that are awarded may be computed and allocated by application of a straightforward formula that draws upon objective data produced by the USDA, and thus avoids the "quagmire of hypothetical judgments" in which the parties and the Court would be embroiled were they to attempt to individually adjudicate each class member's claim. *See Segar v. Smith*, 738 F.2d 1249, 1290 (D.C. Cir. 1984) (quotation marks and citations omitted). Accordingly, common questions predominate in adjudicating

Plaintiffs' damages claims and pursuit of those claims collectively is decidedly superior to individual adjudication, making certification pursuant to Rule 23(b)(3) appropriate.

A. The D.C. Circuit Has Expressly Endorsed the Use of Hybrid Certification in Cases Involving Claims for Both Injunctive Relief and Monetary Damages.

The hybrid certification that Plaintiffs seek herein is neither novel nor unprecedented. It has been expressly adopted in this Circuit in similar circumstances. In *Eubanks v. Billington*, 110 F.3d 87 (D.C. Cir. 1997), the D.C. Circuit faced the question of what to do when a class seeks injunctive or declaratory relief along with economic damages. The Court concluded that where

> the assumption of cohesiveness for purposes of injunctive relief that justifies certification as a (b)(2) class is unjustified as to claims that individual class members may have for monetary damages . . . the court may adopt a 'hybrid' approach, certifying a (b)(2) class as to the claims for declaratory or injunctive relief, and a (b)(3) class as to the claims for monetary relief, effectively granting (b)(3) protections including the right to opt out to class members at the monetary relief stage.

Id. at 96. In other words, where all members of the class are clearly interested in obtaining the same injunctive and declaratory relief, but some individual members of the class may take issue with the means of calculating their individual share of damages once liability has been established, due process demands that these individuals be given notice and the right to opt out of the class at that stage of the proceedings. *See, e.g.*, *In re Veneman*, 309 F.3d 789, 792 (D.C. Cir. 2002) ("Because members of a class seeking substantial monetary damages may have divergent interests, due process requires that putative class members receive notice and an opportunity to opt out.").

Numerous courts in this Circuit and others have also followed the *Eubanks* hybrid certification approach. As one district court recently explained, hybrid certification "allows for the best of both worlds." *Wilson v. County of Gloucester*, 256 F.R.D. 479, 491 (D.N.J. 2009).

"Certifying the injunctive relief portion of [a] suit pursuant to (b)(2) best ensures the efficient litigation of the issue central to the parties' dispute. . . . Yet certifying the damages portion of the suit, pursuant to (b)(3), ensures notice to all class members in the event a [] violation is held to have occurred." *Id.* at 491-92. The court further stated that if liability is not found,

> the time and cost involved with the notice and opt-out requirements of (b)(3) will be avoided because no damage determinations will be required. On the other hand, if the Court does find liability, the parties will still benefit from the streamlined litigation of the damages issues, and the procedural protections of (b)(3) will be afforded to class members.

Id. at 491-92; *see also Robinson v. Metro-North Commuter R.R. Co.*, 267 F.3d 147, 167 (2d Cir. 2001) (suggesting separate certification of liability and damages issues); *Lemon v. Int'l Union of Operating Eng'rs, Local No. 139*, 216 F.3d 577, 581 (7th Cir. 2000) ("The district court could certify a Rule 23(b)(2) class for the portion of the case addressing equitable relief and a Rule 23(b)(3) class for the portion of the case addressing damages. This avoids the due process problems of certifying the entire case under Rule 23(b)(2) by introducing the Rule 23(b)(3) protections of personal notice and opportunity to opt out for the damages claims.").

Hybrid certification is appropriate whenever there is "some reason to believe that the assumption of cohesiveness underlying a subsection (b)(2) class action does not apply to the individual claims for monetary damages; for example, [where] the amounts claimed by various class members may be so disparate as to create a conflict of interest within the class." *Thomas v. Albright*, 139 F.3d 227, 235-36 (D.C. Cir. 1998); *cf. Holmes v. Continental Can Co.*, 706 F.2d 1144, 1156 (11th Cir. 1983) (noting that "in general terms, the rights and interests of class members were visualized as more likely to be homogeneous in a (b)(2) than in a (b)(3) class"). Thus, in *Bynum v. District of Columbia*, 214 F.R.D. 27 (D.D.C. 2003), the court certified a hybrid class where, if liability were proven, "the award that each individual class member is entitled to may vary significantly." *Id.* at 39. While concluding that this justified a finding that

the "assumption of cohesiveness" in the (b)(2) claims broke down as to the (b)(3) claims, the court found that this potential disparity in damages "would not preclude a finding that common questions of law and fact predominate over individual questions" for purposes of (b)(3) certification. *Id.*; *see also Barnes v. District of Columbia*, 242 F.R.D. 113, 124 (D.D.C. 2007) (certifying injunctive relief under (b)(2) and damages under (b)(3)); *Taylor v. District of Columbia Water & Sewer Authority*, 205 F.R.D. 43, 50 (D.D.C. 2002) (noting that "district courts have ample discretion to implement hybrid certification under Rule 23(d)(5), which allows them to 'make appropriate orders . . . requiring for the protection of the members of the class or otherwise for the fair conduct of the action'").[27]

In this action, the Court should certify a hybrid class, because the economic damages owed to individual Plaintiffs may "vary significantly," *Bynum*, 214 F.R.D. at 39, depending on the state and year in which they were denied credit opportunities, how frequently they sought credit opportunities, and whether they applied for loan servicing in addition to loans. *See supra* Section III.B. As in *Bynum*, these variations do "not preclude a finding that common questions of law and fact predominate over individual questions" for purposes of Rule 23(b)(3) certification. 214 F.R.D. at 39. Moreover, because this Court may allocate and distribute damages among Plaintiffs based on an objective formula that takes into account the very factors that cause damages to vary, collective adjudication of Plaintiffs' damages claims will undoubtedly be superior to

[27] In contrast, the court denied certification of a hybrid class where the "computation of damages [would] require separate mini-trials," finding that in such a case the "individualized damages determinations predominate over common issues." *Does I Through III v. District of Columbia*, 2006 WL 2864483, at *3 (D.D.C. Oct. 5, 2006). The *Does* court noted, however, that "[i]f the calculation of the damage claims were a mechanical task, the presence of individualized claims would not be a barrier to class certification." *Id.* As demonstrated herein, the calculation of Plaintiffs' damages claims will be a mechanical task; however, because there is still a potential for variance among awards of damages, the hybrid certification approach is warranted here.

individual adjudication and will be easily manageable. In the following sections, we explain why Plaintiffs satisfy the criteria for certifying their damages claims under Rule 23(b)(3).

B. Plaintiffs Amply Satisfy the Requirements of Rule 23(b)(3) to Pursue Their Damages Claims Through Collective Adjudication.

The record readily demonstrates that pursuit of Plaintiffs' damages claims collectively is fully consistent with and plainly contemplated by Rule 23(b)(3).[28] While variations exist in the amounts of damages awardable to individual class members, questions of fact and law common to the class clearly predominate, and the amount and allocation of damages may be calculated by application of a formula relying upon objective evidence produced by USDA. Moreover, pursuit of the damage claims collectively, rather than individually for each class member, is decidedly the superior method for adjudicating these claims. Indeed, Congress plainly contemplated that ECOA claims for damages advanced by multiple victims be resolved by means of class adjudication. *See* 15 U.S.C. § 1691e(a) (stating that defendants shall be liable for "damages sustained" by plaintiffs "acting either in an individual capacity or as a member of a class").

1. Common Issues of Law and Fact Predominate.

[28] The decisions in *Love v. Johanns*, 439 F.3d 723 (D.C. Cir. 2006) and *Garcia v. Johanns*, 444 F.3d 625 (D.C. Cir. 2006), in which the D.C. Circuit affirmed the denial of class certification for female and Hispanic farmers, do not affect or preclude certification of Plaintiffs' claims for damages here. Neither decision addressed whether the claims presented in those cases could satisfy the requirement of Rule 23(b), as the sole focus of those decisions was whether the plaintiffs had satisfied Rule 23(a). *See Love*, 439 F.3d at 727-28 ("we affirm without considering whether certification would also be improper under Rule 23(b)"); *Garcia*, 444 F.3d at 631 n.6 (same). Moreover, in those cases, the courts did not have the benefit of a developed record prior to addressing class certification, whereas merits discovery has largely concluded in this action. In any event, the D.C. Circuit made clear that the District Court's discretion to certify a class is sufficiently broad to permit certification of claims that may resemble other claims for which certification was denied by a different District Judge in the same District Court. *See Love*, 439 F.3d at 730 (citing *Chiang v. Veneman*, 385 F.3d 256, 265-66 (3rd Cir. 2004)). Accordingly, neither *Love* nor *Garcia* poses an obstacle to the certification of Plaintiffs' claims for damages.

Issues of law and fact common to the class clearly predominate over any issues that may vary among individual class members.

First, members of the class challenge a common set of discriminatory practices: the highly discretionary and undisciplined process by which loan and loan servicing decisions were made by USDA, the lack of oversight over officials who made loan decisions on the basis of stereotypes of Native Americans, and other forms of bias often encountered at USDA county offices. In the event members of the Plaintiff class are permitted to adjudicate their damages claims, they already will have established USDA's liability for some or all of the common practices they challenge. As such, they will have demonstrated they were subject to a common set of discriminatory practices, leaving only the questions of whether and, if so, to what extent they were harmed economically by the discriminatory practices proven at that point. *See Int'l Brotherhood of Teamsters v. United States*, 431 U.S. 324, 362-63 (1977).

This exposure to a common set of unlawful practices constitutes a set of issues of fact or law common to the class which, having been sufficient to establish liability to the class, necessarily predominates over the circumstances of individual class members. *See Brown v. Pro Football, Inc.*, 146 F.R.D. 1, 3 (D.D.C. 1992) (noting that "the common question of liability" is "still relevant to the … determination of damages"); *Barnes*, 242 F.R.D. at 123 (certifying hybrid (b)(2) and (b)(3) class on basis that common issues of liability predominated over individual issues).

Second, the nature of the monetary relief sought and the evidence needed to warrant its award constitute issues of fact or law common to the class that predominate over any individual issues. All members of the class seek awards of damages reflecting the economic harm they suffered because of discrimination in USDA's farm loan program. As such, each class member

seeks to recover some measure of the revenues they would have received had they not been subject to discrimination in the farm loan program. None seek damages to compensate for emotional harm or consequential damages they may have suffered as a result of the discriminatory treatment they received,[29] and each will rely on objective information that is publicly available. *Cf. In re Monumental Life Ins. Co.*, 365 F.3d 408, 419-420 (5th Cir. 2004). The damages that Plaintiffs seek herein are thus akin to back pay awarded to victims of employment discrimination under Title VII, since the award under ECOA would represent a measure of income lost because of discrimination, and courts have long held such that claims for income lost because of discrimination are compatible with class treatment. *See id.* (citing *Pettway v. Am. Cast Iron Pipe Co.*, 494 F.2d 211, 256-58 (5th Cir. 1974)); *Eubanks*, 110 F.3d at 92.[30] The nature of the monetary relief sought by members of the class, therefore, presents questions of fact or law common to the class.[31]

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[29] Plaintiffs who wish to seek claims for *non-economic* damages will have the opportunity to opt out for the limited purpose of pursuing any such permissible damages under the hybrid approach to class certification urged herein.

[30] Indeed, courts consistently rely on Title VII jurisprudence to interpret ECOA. *Garcia*, 444 F.3d at 632 n.7 (holding that Title VII precedents may be followed "in cases involving ECOA," including in the class action context) (citing *Mays v. Buckeye Rural Elec. Co-op., Inc.*, 277 F.3d 873, 876 (6th Cir. 2002) ("Given the similar purposes of the ECOA and Title VII, the burden-allocation system of federal employment discrimination law provides an analytical framework for claims of credit discrimination."); *Rosa v. Park W. Bank & Trust Co.*, 214 F.3d 213, 215 (1st Cir. 2000) ("In interpreting the ECOA, this court looks to Title VII case law . . . ."); *Bhandari v. First Nat'l Bank of Commerce*, 808 F.2d 1082, 1100 (5th Cir. 1987) ("The language [of ECOA] is closely related to that of Title VII of the Equal Employment Opportunity Act ("EEOA"), 42 U.S.C. § 2000e-2, and was intended to be interpreted similarly.")).

[31] The fact that there will be variation in the amounts awardable to class members does not lessen the susceptibility of these claims to class treatment. Courts have long held that "[w]hile the quantum of damages for each plaintiff may be different, that fact alone is insufficient to introduce a predominant noncommon question." *Jack Faucett Assoc. v. American Tel. & Tel.*, 1983 WL 4601, *3 (D.D.C. Mar. 18, 1983).

Third, the method for computing and allocating the monetary relief is common to all members of the class. The use of a formula to determine the amount of damages awardable to each class member presents a powerful factor favoring certification of the damages claims, as damages can be ascertained through application of the same economic model for each member of the class. *See supra* Section III (discussing the formula developed by Mr. O'Brien). Indeed, the economic model developed by Mr. O'Brien to determine the amounts of damages awardable to individual class members more than satisfies the showing needed to warrant certification of such damages claims. It is well established in this Circuit that "[a]s to whether common issues of damages predominate, the Court need only assess whether methods are *available* to prove damages on a class-wide basis." *In re Nifedipine Antitrust Litigation*, 246 F.R.D. 365, 371 (D.D.C. 2007) (internal quotation and citation omitted; emphasis added). "As a result, plaintiffs do not need to provide a precise damage formula, nor do they need to take into account or eliminate individual variations in damages." *Id.* "Instead, plaintiffs need only show that the proposed methods are not so insubstantial as to amount to no method at all." *Id.* (internal quotation and alteration omitted); *see also In re Vitamins Antitrust Litig.*, 209 F.R.D. 251, 268 (D.D.C. 2002) ("At the certification stage, the preliminary inquiry in assessing the proposed methods of proving damages is limited: The inquiry is not whether the methods are valid, but is only to assess whether the methods are available to prove damages on a class-wide basis.").

The economic model developed here is no mere concept; it is a professionally developed formula, which draws upon objective data provided by USDA, and it will enable the computation and allocation of damages among class members in a manner commensurate with the magnitude of the harm they suffered. As such, it offers a viable, concrete method for adjudicating damages for all members of the class, clearly presenting issues of fact and law common to the class.

2. Adjudication of Class Members' Damages Claims Collectively Is the Superior Method for Resolving Plaintiffs' Claims to Monetary Relief.

Certification of Plaintiffs' damages claims provides a means of resolving these claims that is clearly superior to other means of resolution.

It is well settled in this Circuit that a court need not engage in individualized inquiries where the challenged system was so widely affected by discretionary criteria that it would be nearly impossible to determine the decisions that might have been made absent the discrimination. *See Segar v. Smith*, 738 F.2d 1249, 1290-91 (D.C. Cir. 1984). Rather, a court may use a formula to calculate plaintiffs' damages. Here, given the unique features of this case and the dismal state of USDA's recordkeeping, the computation and allocation of monetary relief by formula might possibly be the *only* way that class members could recover a measure of relief to redress the pervasive discrimination to which USDA subjected them. Absent use of a formula to compute and allocate monetary relief, the Court would be forced to conduct hearings for each of the many thousands of class members in an effort to reconstruct the loan decisions that would have been made decades earlier had the USDA not engaged in a pattern or practice of discrimination in the delivery of farm loans and servicing. While the superiority of this formulaic approach should be readily evident, several reasons commending its use in this case are worth noting.

First, there can be no serious dispute that any attempt to reconstruct thousands of loan transactions with USDA over the course of three decades—including hypothetical histories about what those transactions would have been in the absence of discrimination, what farm earnings any given individual would have received had a loan been granted, and the additional amount that could have been earned in future years based on growth in farm opportunity enabled by the

loans—would, as the D.C. Circuit has long cautioned against, "drag the court into a quagmire of hypothetical judgments." *Segar*, 738 F.2d at 1290 (quotation marks and citations omitted).

In *Segar*, a federal agency was charged with engaging in a pattern or practice of discrimination involving personnel practices analogous to the lending practices challenged here. *Id.* at 1260-61. After affirming the lower court's liability determination, the D.C. Circuit strongly endorsed the approach employed by the trial court to forego individual monetary relief hearings, in favor of a formulaic approach to compute and award back pay. *Id.* at 1290-92. The court concluded that individualized hearings would require determinations based largely upon speculation about the course of class member careers in the absence of discrimination that would "drag the Court into 'a quagmire of hypothetical judgments.'" *Id.* (quoting *Thompson v. Boyle*, 499 F. Supp. 1147, 1170 (D.D.C. 1979) (quoting *Pettway*, 494 F.2d at 260))).[32] Rather than reviewing "a small number of discernible decisions," the Court explained, individualized hearings would involve "mere guesswork" to "recreate the employment histories of individual employees" that were affected by an evaluation process tainted by discrimination and "increased

[32] Other courts likewise have endorsed the use of a formula to compute back pay for individual class members where it would be difficult or impossible to determine, in the absence of discrimination, which class members would have received benefits and the amount of such benefits; where the challenged practices were highly discretionary; where there is a dearth of information to document the basis for past decisions; or where the process was so broadly tainted by discrimination that it would be very hard to reconstruct its operation in a neutral manner. *See, e.g.*, *McClain v. Lufkin Indus.*, 519 F.3d 264, 280-81 (5th Cir. 2008); *Pettway*, 494 F.2d at 261; *Pettway v. Am. Cast Iron Pipe Co.*, 681 F.2d 1259, 1266 (11th Cir. 1982); *EEOC v. O&G Spring & Wire Forms Specialty Co.*, 38 F.3d 872, 880 n.9 (7th Cir. 1994); *Liberles v. Cook County*, 709 F.2d 1122, 1136 (7th Cir. 1983); *Pitre v. W. Elec. Co.*,843 F.2d 1262, 1274 (10th Cir. 1988); *Domingo v. New England Fish Co.*, 727 F.2d 1429, 1444-45 (9th Cir. 1984); *Hameed v. Int'l Ass'n of Bridge, Structural, and Ornamental Iron Workers, Local Union No. 396*, 637 F.2d 506, 520 (8th Cir. 1980); *Stewart v. Gen. Motors Corp.*, 542 F.2d 445, 452-53 (7th Cir. 1976); *EEOC v. Chicago Miniature Lamp Works*, 668 F. Supp. 1150, 1152 (N.D. Ill. 1987).

subjectivity in evaluations [that] gave discrimination more room to work its effects." *Id.* at 1290-92.[33]

Reconstruction of individual loan and loan servicing decisions here would be even more speculative than the employment decisions at issue in *Segar*. As the USDA failed to retain almost any documentation about the loan applications it denied prior to 1998 and thereafter only retained denied applications for three years, it would be virtually impossible to reconstruct the loan denial decisions made by local USDA officials for nearly all class members. *See supra* at Section II. Without such information, the Court would be compelled to rely entirely upon testimony from USDA officials about the details of individual credit decisions from among thousands of such decisions, made many years ago without the benefit of any records to refresh their recollections. And the broad discretion USDA afforded its officials in making loan and loan servicing decisions has, as the *Segar* court explained, permitted "discrimination more room to work its effects," making it "'not only imprecise but impractical" to reconstruct each credit decision made by USDA loan officials. *Segar*, 783 F.2d at 1290-92 (quoting *Pettway*, 494 F.2d at 262); *see also Watson*, 487 U.S. at 990-91 (unchecked subjectivity in employment decisions provides a ready mechanism for intentional discrimination to be perpetrated).

Of course, even if the Court could scrutinize individual loan decisions—which would be very difficult without contemporaneous documentary evidence—it would "have [] no way of knowing how much more favorable a particular [farmer's loan] evaluation should have been, or how a fair evaluation might have affected [the farmer's] chances for obtaining" a loan or loan servicing. *Segar*, 783 F.2d at 1290-91. Nor could the Court assess in this case the effects on

[33] Although *Segar* dealt with back pay in a Title VII employment discrimination class action, its principles apply to other types of discrimination cases, *Dougherty v. Barry*, 869 F.2d 605, 614 n.8 (D.C. Cir. 1989) (R.B. Ginsburg, J.), and can easily be applied to the instant action under ECOA. *See supra* n.30.

farm size, productivity and long-term profitability in later years of a discriminatory loan denial in earlier years any more effectively than the *Segar* Court could determine the effects on career progression in later years from an earlier promotion denial. *See id.*

Simply put, it would be extremely difficult for the Court or the parties to recreate in this litigation, for any individual class member, the circumstances behind each loan and loan servicing decision. When decisionmaking is highly discretionary and few, if any, records exist that document the bases for the challenged decisions, courts have readily concluded that computing and allocating monetary relief through use of a formula "has more basis in reality . . . than an individual-by-individual approach." *Pettway*, 494 F.2d at 263; *see also McClain v. Lufkin Indus.*, 519 F.3d 264, 280-81 (5th Cir. 2008) (holding that if "the class is large, the promotion or hiring practices are ambiguous, or the illegal practices continued over an extended period of time, a class-wide approach to the measure of back pay may be necessary" and rejecting an "individualized process of determining actual damages for each plaintiff . . . [that] would result in the 'quagmire of hypothetical judgments' that courts should avoid") (quoting *Pettway*, 494 F.2d at 260). Accordingly, the use of a formula that draws in large part upon USDA's own statistical data offers both the most appropriate and accurate way of measuring the economic losses to class members attributed to USDA's unlawful conduct.[34]

[34] The D.C. Circuit likewise has endorsed the use of a formula for allocating relief where, as here, various factors preclude a reasoned determination as to which class members should recover monetary relief. *See Dougherty*, 869 F.2d at 614 n.8. In *Dougherty,* then-Judge Ruth Bader Ginsburg wrote for the panel that a "court may impose class-wide relief for a group of individuals subjected to discrimination where it is impossible to determine *which particular individual* would have received the benefit but for the discrimination." *Id.* (emphasis added). Here, even if it were possible to determine which individual farmers and ranchers would have *qualified* for credit opportunities in the absence of discrimination, it may be impossible to determine which individuals would have actually received the credit opportunities, as the number of qualified claimants may exceed the number of loans that Native Americans were improperly denied. Having failed to retain records of dates on which individuals applied unsuccessfully for

Second, given USDA's utter failure to maintain relevant records in this case—including its failure to implement a proper litigation hold until just last year—Plaintiffs could face insurmountable obstacles if they are forced to bring their claims individually. Courts have repeatedly held that, in assessing the suitability of claims for class treatment, a putative plaintiff class should not be penalized for a defendant's failures to retain records. *See, e.g., Brown v. Nucor Corp.,* 576 F.3d 149, 155 (4th Cir. 2009) (holding that potential class members "should not be penalized because [the defendant] destroyed . . . data" and therefore allowing potential class members an "alternative" method to show the commonality requirement); *Dixon v. Shalala*, 54 F.3d 1019, 1034 (2d Cir. 1995) (holding that "[i]f records cannot be located for any class member, either because [the agency] has destroyed them pursuant to its published file retention schedules . . . or [the agency] is unable to locate them, certain rebuttable presumptions apply"). Were class members denied the opportunity to present their damages claims with appropriate evidentiary support because USDA failed to retain records of decisions denying loan applications, USDA would be rewarded for its failure to implement a timely litigation hold that could have prevented destruction of materials central to this litigation that were solely within its control.

Finally, certifying the damages claims in this manner will be far more efficient and manageable than individual adjudications. *See Barnes*, 242 F.R.D. at 123-24 ("In cases such as this, involving many extremely similar claims against the same defendant, class certification promises greater efficiency and consistency than serial litigation of nearly identical individual cases."). Here, as it is nearly impossible to reconstruct the loan decisions that might have been

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loans, the USDA has no reasoned basis to determine how to allocate among Native American farmers and ranchers those loan funds that should have been, but were not, awarded to Native Americans.

made absent discrimination—a difficulty exacerbated by USDA's failure to preserve its own records—the formula Plaintiffs have proposed for calculating and distributing monetary relief without the need for individual hearings plainly offers the most reliable and manageable means to measure the economic harm caused by the USDA's conduct. Computing monetary relief by pursuing thousands of individual hearings would constitute an enormous and unnecessary consumption of resources, would delay by years the conclusion of this action, and would rest remedial decisions on conjecture and dim memories from witnesses largely immune from cross-examination, as the USDA failed to retain the materials needed to refresh and test their recollections.

In sum, certification of the damages claims advanced by members of the Plaintiff class is decidedly superior to the adjudication of these claims individually.

Thus, Plaintiffs have met the required elements for certification of a hybrid class.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that this Court certify the Plaintiff class to pursue its claims for economic relief under Rule 23(b)(3).

December 4, 2009

Respectfully submitted,

/s/ Joseph M. Sellers

Joseph M. Sellers, Bar No. 318410
Christine E. Webber, Bar No. 439368
Llezlie Green Coleman, Bar No. 484051
COHEN MILSTEIN SELLERS & TOLL PLLC
1100 New York Avenue, N.W.
Suite 500, West Tower
Washington, DC 20005

Paul M. Smith, Bar No. 358870
Katherine A. Fallow, Bar No. 462002
Jessica Ring Amunson, Bar No. 497223
Carrie F. Apfel, Bar No.
JENNER & BLOCK LLP
1099 New York Ave., N.W.
Suite 900
Washington, DC 20001-4412

Telephone: (202) 408-4600
Facsimile: (202) 408-4699

David J. Frantz, Bar No. 202853
CONLON, FRANTZ & PHELAN
1818 N Street, N.W.
Suite 400
Washington, DC 20036-2477
Telephone: (202) 331-7050
Facsimile: (202) 331-9306

Telephone: (202) 639-6000
Facsimile: (202) 639-6066

Anurag Varma, Bar No. 471615
PATTON BOGGS LLP
2550 M Street, N.W.
Washington, DC 20037
Telephone: (202) 457-6000
Facsimile: (202) 457-6315

Phillip L. Fraas
STINSON MORRISON HECKER
1150 18th St. NW, Suite 800
Washington, DC 20036
Telephone: (202) 785-9100
Facsimile: (202) 785-9163

Attorneys for Plaintiffs

Sarah Vogel
SARAH VOGEL LAW FIRM, P.C.
222 N. 4th St.
Bismarck, ND 58501

Of Counsel

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

MARILYN KEEPSEAGLE, et al., Plaintiffs, v. TOM VILSACK, Secretary, United States Department of Agriculture, Defendant.	Civil Action No. 1:99CV03119 (EGS) Judge: Emmet G. Sullivan Magistrate Judge: Alan Kay

SETTLEMENT AGREEMENT

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SETTLEMENT AGREEMENT

I. INTRODUCTION

This is a class action, *Keepseagle v. Vilsack*, No. 1:99CV03119 (D.D.C.) ("the Case"), brought by Plaintiffs against the Secretary of the U.S. Department of Agriculture ("the Secretary" or "USDA") under the Equal Credit Opportunity Act, 15 U.S.C. §§ 1691-1691f, alleging that USDA discriminated against Native Americans in its farm loan and farm loan servicing programs. In the interest of resolving the dispute between the parties without the expense, delay, and inconvenience of further litigation of the issues raised in this action, and in reliance upon the representations, mutual promises, covenants, and obligations set out in this Settlement Agreement, and for good and valuable consideration also set out in this Settlement Agreement, and subject to Rule 60(b), Fed.R.Civ.P., the parties, through their undersigned counsel of record, hereby stipulate and agree as follows:

II. DEFINITIONS

Unless otherwise noted, as used in this Settlement Agreement:

A. A "Claimant" is any individual who submits a claim and/or seeks an award under this Settlement Agreement. A "co-claimant" is any individual who submits a claim or seeks an award with a claimant, or whom the Neutral determines should have submitted his or her claim jointly with another claimant. Claimants shall be deemed co-claimants, eligible for consideration for one, shared award, where the individuals were, or would have been, co-applicants to the loan application which is the subject of the claim. For example, co-operators, spouses, or business partners who farmed or ranched together in one farm operation, would be co-claimants.

B. The "Claim Deadline" is 180 calendar days from the Effective Date.

C. A "Claim Determination" is the binding and final result of a Track A or a Track B adjudication and represents whether a Class Member is eligible to receive an award as a result of the Non-Judicial Claims Process, and if so, the amount of the award. A Claim Determination is shown on a Track A Claim Determination Form (Ex. A) or a Track B Claim Determination Form (Ex. B).

D. The "Claims Administrator" is a class action claims administration company suggested by Class Counsel and approved by the Court. Class Counsel propose Epiq Systems, 10300 SW Allen Blvd., Beaverton, OR 97005.

E. The "Class" is all persons who are Native American farmers and ranchers who (1) farmed or ranched or attempted to farm or ranch between January 1, 1981 and November 24, 1999; (2) applied to the USDA for participation in a farm loan program during that same time period; and (3) during the same time period filed a discrimination complaint with USDA either individually or through a representative

with regard to alleged discrimination that occurred during the same time period.

The phrase "filed a discrimination complaint with the USDA" in subsection (3) of Section II.E above shall include discrimination complaints filed with the Federal Trade Commission ("FTC") after November 3, 1992, and complaints made orally or in writing with other persons if evidence meeting the standard set out in Section IX. C or Section IX.D, as appropriate, establishes that the recipient of the complaint forwarded it to the USDA. In determining whether the evidence establishes a complaint was forwarded to the USDA, the Track A and Track B Neutrals shall consider all of the available evidence including representations made to the putative claimant and presumptions of regularity that attach to the conduct of government officials (including tribal government officials). To be cognizable, the complaint forwarded to the USDA must have identified the claimant and claim with sufficient specificity to put the USDA on notice of the identity of the claimant and the nature of his/her claim.

The phrase "applied to the USDA" may include, for purposes of "Track A" a *bona fide* effort to apply for a loan, as discussed in IX.C.2.a-3(1)-(5)

Where used in this Settlement Agreement, the Class refers, individually and collectively, to the Class Representatives, the Class, and each Member of the Class as well as their heirs, administrators, personal representatives, successors, and/or assigns.

F. "Class Counsel" are the following attorneys: Joseph M. Sellers, Christine E. Webber, Peter Romer-Friedman of Cohen Milstein Sellers & Toll PLLC; David J. Frantz of Conlon, Frantz & Phelan, LLP; Paul M. Smith, Katherine A. Fallow, Michael Brody, Jessica Ring Amunson, and Carrie Apfel of Jenner & Block, LLP; Anurag Varma of Patton Boggs LLP; Phillip L. Fraas of Stinson, Morrisson and Hecker; and Sarah Vogel of Sarah Vogel Law Partners..

G. "Class Representatives" are, or have been, Luke Crasco, Gene Cadotte, Keith Mandan, Porter Holder, George Keepseagle, Marilyn Keepseagle, Claryca Mandan, John Fredericks, Jr., and Basil Alkire.

H. "Cost Cap" is $20,000,000, and represents the maximum amount of Implementation Costs that the Secretary will pay under this Settlement Agreement.

I. "Cy Pres Beneficiary" is any non-profit organization, other than a law firm, legal services entity, or educational institution, that has provided agricultural, business assistance, or advocacy services to Native American farmers between 1981 and the Execution Date that will be proposed by Class Counsel and approved by the Court.

J. "Cy Pres Fund" is a fund administered by Class Counsel designated to hold any leftover funds under paragraph 7 in Section IX.F of this Settlement Agreement.

K. "Debt Relief Award" means elimination by USDA of all of a Debt Relief Award Recipient's outstanding Farm Loan Obligations, held as of the date of a Track A Award or a Track B Award, subject to an $80,000,000 cap and, therefore, a potential reduction pursuant to Section IX.E of this Settlement Agreement. Elimination of such obligations would not make the Class Member ineligible to be considered for new loans from USDA.

L. "Debt Relief Award Recipient" is a class member, who prevails under either Track A or Track B, who had any outstanding Farm Loan Obligations during the class period.

M. "Debt Relief Tax Award" is an award made in recognition of a Class Member's expected tax liability for his or her Debt Relief Award in an amount equal to 25% of the principal of the Class Member's Debt Relief Award.

N. "Designated Account" means any bank account, set up by Class Counsel and held for the benefit of the Class, at a Designated Bank that is (1) insured by the Federal Deposit Insurance Corporation up to the applicable limits, (2) a segregated trust account that is not subject to claims of a bank's creditors, or (3) invested in U.S. Treasury securities.

O. "Designated Bank" means a bank that has a Veribanc (www.veribanc.com) rating of Green with three stars and one for which neither the bank nor any of its senior officers appear in the Excluded Parties List System (www.epls.gov), which is a list of entities and individuals suspended or debarred from doing business with the federal government.

P. "District Court" and "Court" mean the U.S. District Court for the District of Columbia, unless the context reveals otherwise.

Q. "Effective Date" – is the date upon which, if the Agreement is not voided under Section X, an order providing final approval of this Agreement under Federal Rule of Civil Procedure 23(e) becomes non-appealable, or, in the event of any appeals, upon the date of final resolution of said appeals. When this Agreement refers to the date on which the Agreement became "Effective," such date is the Effective Date.

R. "Execution Date" is the date on which this Settlement Agreement has been signed by or on behalf of all of the Parties.

S. "Farm Loan Obligation" encompasses only direct operating loans, direct farm ownership loans, emergency loans, economic emergency loans, and all amounts due thereunder, including principal, interest, penalties and charges, and debts restructured through any Part 766 (formerly Part 1951-S) loan or other farm loan program servicing options.

T. "Farm Loan Programs" are USDA programs to make and service loans to owners and/or operators, as authorized by statute or pursuant to USDA regulations.

U. "Fee Award" is the total amount approved by the Court for the payment of Attorney's Fees.

V. "FSA" refers to the Farm Service Agency, an agency of USDA, and FSA predecessor agencies including the Farmers Home Administration.

W. "Final Accounting" is an accounting prepared and signed by the Claims Administrator after all funds in the Designated Account have been disbursed. The Final Accounting shall identify: (1) the number and amount of all awards the Claims Administrator has caused to be paid to Class Members; (2) the Implementation Costs incurred under the Settlement Agreement; and (3) the amount of any leftover funds paid into the Cy Pres Fund. The Final Accounting shall also identify the total amount of implementation funds the Secretary has provided to Class Counsel, for the benefit of the Class, under this Settlement Agreement and the status of these funds.

X. "Final Approval Date" is the date on which the District Court enters an order providing final approval of this Settlement Agreement under Rule 23(e), Fed.R.Civ.P.

Y. "Implementation Costs" are the administrative costs associated with implementing this Settlement Agreement, including the fees and costs of the Track A and Track B Neutrals, the Track B Expert, the Claims Administrator, costs incurred under Section IX, and the costs necessary to provide notice of this Settlement Agreement to the Class. With the exception of those specified above, Implementation Costs do not include attorney's fees, costs, and expenses.

Z. "Individual Counsel" are counsel, other than Class Counsel, retained by Claimants to represent them in the Non-Judicial Claims Process.

AA. "IRS" is the Internal Revenue Service.

BB. "Native American" means:

> 1) any citizen of the United States, United States non-citizen national, or a qualified alien who is enrolled in any Indian tribe, band, nation, or other organized group or community, including any Alaska Native village or regional or village corporation as defined in or established pursuant to the Alaska Native Claims Settlement Act (85 Stat. 688) (43 U.S.C. 1601 *et seq.*), which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as

Indians; or

2) any citizen of the United States, United States non-citizen national, or a qualified alien who is enrolled in any Indian group that has been formally recognized as an Indian tribe by a State legislature or by a State commission or similar organization legislatively vested with State tribal recognition authority; or

3) any citizen of the United States who is enrolled in any Indian tribe or "Native group" according to 43 U.S.C. § 1602.(c) and (d) that had an open letter of intent to petition the United States for Federal recognition; or

4) any citizen of the United States, United States non-citizen national, or a qualified alien who can show that, prior to November 24, 1999, he/she identified himself/herself as Native American. Such self-identification may be established (a) by documentation, such as an application for loan or loan servicing assistance submitted to USDA prior to or within the Class Period, or (b) through a credible written narrative, submitted under penalty of perjury, in which the individual describes in detail the circumstances establishing his/her Native American ancestry sufficient to persuade the Track A or Track B Neutral of its genuineness and authenticity. Such a narrative can include recounting a prior instance in which the claimant identified himself/herself as Native American to a governmental entity, such as the U.S. Census Bureau.

Membership in an Indian tribe for purposes of paragraphs (1) – (3), above, shall be defined by the law or rules of the Indian tribe in which the individual claims to be a member. Such membership can be demonstrated by providing a copy of an official tribal document that states that the individual is a member of an Indian tribe, such as (a) an identification card that states that the person is currently an enrolled member of the Indian tribe, or (b) a letter or statement from the tribal government that states that the person is regarded as a member of the Indian tribe.

CC. "Non-Judicial Claims Process" means the claim processes set forth in Section IX of this Settlement Agreement.

DD. "Parties" means the Plaintiffs and the Secretary.

EE. "Plaintiffs" are the individual plaintiffs named in *Keepseagle v. Vilsack*, No. 1:99CV03119 (D.D.C.), the members of the Class, and the Class Representatives.

FF. "Preliminary Approval Date" is the date on which the District Court enters a Preliminary Approval Order under Rule 23(e), Fed.R.Civ.P.

GG. "Preliminary Accounting" is an accounting prepared and signed by the Claims Administrator after receipt of all completed Claim Determination Forms. The Preliminary Accounting shall identify: (1) the number and amount of all Final Track A Liquidated Awards, Final Track A Liquidated Tax Awards, Final Track B Awards, and Debt Relief Tax awards (shown in Part II of the completed Track A and Track B Determination Forms); (2) the Implementation Costs incurred to date; (3) a good faith estimate of Implementation Costs necessary for the Claims Administrator to perform its final duties under this Settlement Agreement; and (4) the amount of the Fee Award.

HH. "Preliminary Accounting Date" is the date that the Secretary receives the Preliminary Accounting.

II. "Preponderance of the evidence" is such relevant evidence as is necessary to prove something is more likely true than not true.

JJ. "Prevailing Claimant" is any individual whose Track A or Track B claim is approved under the Non-Judicial Claims Process set forth in Section IX, together with any co-claimants.

KK. "Secretary" is, individually and collectively, Thomas Vilsack, in his official capacity as Secretary of USDA, his predecessors and successors as Secretary of USDA, USDA, its agencies, instrumentalities, agents, officers, and employees.

LL. "Secretary's Counsel" is the U.S. Department of Justice.

MM. "Substantial evidence" is such evidence 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 a preponderance of the evidence.

NN. "Track A" is a non-judicial claims process by which a submitted claim is reviewed by a Track A Neutral based on the criteria delineated in Section IX.C.

OO. "Track A Neutral" is a third party claims adjudication company suggested by Class Counsel and approved by the Court to determine the merits of the claims submitted under Track A. Class Counsel propose JAMS, 2 Embarcadero Center, Suite 1100, San Francisco, California, to serve as the Track A Neutral.

PP. "Track A Award" is a combination of a Track A Liquidated Award and a Track A Liquidated Tax Award. Track A Awards are subject to reduction under paragraph 2, subsection b of Section IX.F. A "Final" Track A Award refers to the amount

specified in Part II of a Track A Claim Determination Form. A Final Track A Award is the Award calculated by the Claims Administrator under paragraph 2, subsection b of Section IX.F.

QQ. "Track A Individual Counsel Fee" is a fee negotiated between Claimant and his or her Individual Counsel, subject to the Track A Individual Counsel Fee Cap, which the Claimant agrees to pay to Individual Counsel if he or she obtains a Track A Award and which Individual Counsel agrees to accept in full satisfaction for the fees, expenses, or costs associated with work performed on behalf of the Claimants in obtaining that Award. The Track A Individual Counsel Fee will be paid only from the Final Track A Award, if any, and not from any other funds in the settlement.

RR. "Track A Individual Counsel Fee Cap" is the maximum Track A Individual Counsel Fee set by the Court, not to exceed 2% of a Track A Claimant's Final Track A Award.

SS. "Track A Liquidated Award" is $50,000 per Track A Prevailing Claimant, regardless of the number of the Prevailing Claimant's prevailing claims. Track A Liquidated Awards are subject to reduction under paragraph 2, subsection b of Section IX.F. A "Final" Track A Liquidated Award refers to the amount specified in Part II of a Track A Claim Determination Form. A Final Track A Liquidated Award is the Award calculated by the Claims Administrator under paragraph 2, subsection b of Section IX.F.

TT. "Track A Liquidated Tax Award" is an award made in recognition of a Prevailing Claimant's expected tax liability for his or her Track A Liquidated Award in an amount equal to 25% of the Prevailing Claimant's Track A Liquidated Award. Track A Liquidated Tax Awards are subject to reduction under paragraph 2, subsection b of Section IX.F. A "Final" Track A Liquidated Tax Award refers to the amount specified in Part II of a Track A Claim Determination Form. A Final Track A Liquidated Tax Award is the Award calculated by the Claims Administrator under paragraph 2, subsection b of Section IX.F.

UU. "Track B" is a non-judicial claims process by which a claim is reviewed by a Track B Neutral based on the criteria delineated in Section IX.D.

VV. "Track B Award" is the amount of actual damages, up to $250,000, for which the Track B Neutral determines that a Prevailing Claimant is eligible under the applicable standards for Track B, subject to reduction under paragraph 2 subsection a of Section IX.F. A "Provisional" Track B Award refers to the amount specified by the Track B Neutral in Part II of a Track B Determination Form (Ex. B). A "Final" Track B Award refers to the amount specified in Part II of a Track B Claim Determination Form after the Claims Administrator performs any calculation required under paragraph 2, subsection a of Section IX.F, after receipt of all

Provisional Track B awards.

WW. "Track B Cap" is $50,000,000.

XX. "Track B Expert" is an experienced agricultural economist hired by the Track B Neutral to assist the Track B Neutral in assessing economic damage claims made by Class Members.

YY. "Track B Fee" is a fee negotiated between a Claimant and his or her Counsel, whether Class Counsel or Individual Counsel, subject to the Track B Fee Cap, which the Claimant agrees to pay if he or she obtains a Track B Award and which Counsel agrees to accept in full satisfaction for the fees, expenses, or costs associated with work performed on behalf of the individual Claimant in obtaining that Award. The Track B Fee will be paid only from the Final Track B Award, if any, and not from any other funds in the settlement

ZZ. "Track B Fee Cap" is the maximum Track B Fee set by the Court, not to exceed 8% of a Track B Claimant's Final Track B Award.

AAA. "Track B Neutral" is a third-party claims adjudication company suggested by Class Counsel and approved by the Court to determine the merits of the claims submitted under Track B. Class Counsel propose JAMS, 2 Embarcadero Center, Suite 1100, San Francisco, California, to serve as the Track B Neutral.

BBB. "United States" is, individually and collectively, the Executive Branch of the United States, its agencies, instrumentalities, agents, officers, and employees.

CCC. "USDA" is the United States Department of Agriculture.

III. RECITALS

A. On November 24, 1999, Plaintiffs filed suit against USDA under, *inter alia*, the Equal Credit Opportunity Act, 15 U.S.C. §§ 1691-1691f, alleging that USDA discriminated against Native Americans in its farm loan and farm loan servicing programs.

B. On September 28, 2001, the Court issued an order certifying a class for purposes of declaratory and injunctive relief under Rule 23 and defining the class as:

> All Native American farmers and ranchers, who (1) farmed or ranched between January 1, 1981 and November 24, 1999; (2) applied to the USDA for participation in a farm program during that period; and (3) filed a discrimination complaint with the USDA either individually or through a representative during the time period.

C. Between 2004 and 2009, the parties engaged in significant discovery in the Action. This discovery included the exchange and review of millions of pages of hard copy and electronic documents, more than 40 depositions of Plaintiffs' non-expert witnesses, more than 50 depositions of the Secretary's non-expert and 30(b)(6) witnesses, the exchange of numerous reports from several experts on both sides, and 8 expert depositions. As of November 2009, discovery in the case was essentially completed.

D. In order to bring the Case to a close FOREVER and FINALLY, the Parties have determined to settle the Case, including all claims that the proposed Class and Class Members have brought or could have brought in the Case.

E. The Plaintiffs believe that the terms of this Settlement Agreement are fair, reasonable, and adequate; that this Settlement Agreement provides substantial benefits to the proposed Class and the Class Members; and that settlement of the Case on the terms set forth in this Settlement Agreement is in the best interests of the proposed Class and the Class Members.

F. The Secretary expressly denies any wrongdoing, as alleged in the Case or otherwise, and does not admit or concede any actual or potential fault, wrongdoing or liability in connection with any facts or claims that have been or could have been alleged in the Case. Nonetheless, the Secretary considers it desirable to settle the Case on the terms set forth in this Settlement Agreement because it will avoid disruption to USDA due to the pendency and defense of the Case, and it will avoid the substantial expense, burdens, and uncertainties associated with litigation of the Case.

G. Accordingly, the purpose of this Settlement Agreement is to make a full, complete, and final resolution of all claims and causes of action that have been or could have been asserted against the Secretary by the proposed Class and the Class Members in the Case arising out of the conduct alleged therein.

H. NOW, THEREFORE, in reliance on the mutual promises, covenants, releases, and obligations as set out in this Settlement Agreement, and for good and valuable consideration, the Parties hereby stipulate and agree to resolve all claims that were or could have been at issue in this matter.

IV. THE SETTLEMENT CLASS

A. The Parties agree, for purposes of this Settlement Agreement only, to a Federal Rule 23(b)(3), Fed.R.Civ.P., opt-out class, as defined *supra*.

B. If this Settlement Agreement is approved by the Court, all persons within the Class are bound by its terms, except those Class Members who effectively exercise a right to opt out of the Class and the settlement. Class Members who elect to opt out must

do so in writing, in the manner and by the date specified in the Notice of Proposed Class Action Settlement and Fairness Hearing (Ex. I).

V. NOTICE

A. Attached to this Settlement Agreement is a Notice of Proposed Class Action Settlement and Fairness Hearing ("Notice") in long form (Ex. I) and short form (Ex. J). The Notice contains a brief description of the claims advanced by the plaintiff class and the Secretary's denial of liability for such claims, a summary of the terms of the proposed settlement, and a notice of a fairness hearing to be held pursuant to Rule 23(e), Fed. R. Civ. P. Should the Court give preliminary approval to the Settlement Agreement, the Plaintiffs will issue the Notice to members of the class by the best means practicable, as set forth in Section V.B, below.

B. Plaintiffs intend to contract with Kinsella Media, LLC ("KM") to provide notice to the Class Members. For this settlement, Plaintiffs have advised USDA and the Court that KM has developed a four-part notice program that includes (1) direct notice to potential class members for whom address information is available pursuant to Section V.C below, (2) paid media (including broadcast, print and Internet advertising), (3) earned media through press releases sent to national print outlets and tribal newsletters, and (4) third party outreach to over 1,100 entities affiliated with the agricultural and/or Native American community to request their participation in the Notice Program. In addition, KM will develop an Informational Web Site to provide a constant source of information and assistance for Class Members.

C. Within 5 days after the Preliminary Approval Date and authorization by the Court for the Secretary to provide the Claims Administrator the information identified in this paragraph, USDA shall prepare and deliver to the Notice Administrator a computer disk (or other electronic format) containing the information needed to facilitate Notice to Class Members. Such information shall include for each loan or loan application included in USDA's electronic, active PLAS or DLS databases where a borrower or applicant is identified as Native American, the name; social security number; and last-known address of the borrower(s).

D. The Notice and the Informational Web Site will include information on how to obtain a claim form.

VI. DISMISSAL AND SETTLEMENT AGREEMENT

A. The Class agrees to the dismissal of the Case with prejudice under Rules 41(a)(1) and 23(e), Fed.R.Civ.P., subject to the terms of the Settlement Agreement and to the Court's continuing jurisdiction as set forth in Section XIII. In accordance with the terms of this Settlement Agreement, the Plaintiffs will move for dismissal of the

Case with prejudice to be effective on the Final Approval Date.

B. The Parties agree to the entry of this Settlement Agreement and will move for entry of the Settlement Agreement to be effective on the Final Approval Date.

VII. FUNDING

A. Class Counsel shall, within seven (7) calendar days of the Preliminary Approval Date, notify the Secretary and the Secretary's Counsel in writing of the identity of the Designated Account and Designated Bank and provide any and all information necessary and appropriate to direct any and all deposits provided for in this Settlement Agreement.

B. Implementation Costs. Within fifteen (15) calendar days of the Preliminary Approval Date, the Secretary shall provide the U.S. Department of the Treasury with all necessary forms and documentation to direct a payment of $5,000,000 to Class Counsel for Implementation Costs, for the benefit of the Class, in accordance with and subject to the following conditions:

1. The Secretary shall direct the deposit of these funds into the Designated Account. Class Counsel shall provide the Secretary in writing with the information necessary to direct the deposit;

2. Class Counsel shall use these funds solely for Implementation Costs provided for in this Settlement Agreement; and

3. Class Counsel shall provide the Secretary with monthly written reports related to the expenditure of the funds provided in this Section. The monthly reports, which may be submitted on the Monthly Disbursement Reporting Form (Ex. E), shall identify (a) to whom Class Counsel has paid the funds, (b) the amount of such payment, (c) when the funds were paid, and (d) for what purpose the payment has been made, with reference to this Settlement Agreement.

C. If Class Counsel determines that the $5,000,000 is insufficient to cover the Implementation Costs, Class Counsel may submit additional written requests to the Secretary for up to three additional payments of $5,000,000 each, to be used for Implementation Costs, subject to the conditions in Section VII.B. Class Counsel must submit a separate request for each of the additional payments, and for the final request must explain why the additional funding is warranted.

D. The Secretary shall, within thirty (30) calendar days of an additional written request specified in Section VII.C, provide the U.S. Department of the Treasury with all necessary forms and documentation to direct the payment of the requested funds to Class Counsel, for the benefit of the Class, in accordance with and subject to the

conditions in Section VII.B.

E. Attorneys' Fee Award and Class Representative Service Awards. The Secretary's Counsel shall, within fifteen (15) calendar days of the Effective Date, and subject to the approval of the Court, provide the U.S. Department of the Treasury with all necessary forms and documentation to direct a payment to Class Counsel, for the benefit of the Class, the Fee Award, and to direct payment to the Class Representatives for the Class Representative Service Awards subject to the following conditions:

1. The United States shall direct the deposit of the Fee Award funds into a Designated Account. The United States shall direct the deposit of the Class Representative Service Awards into a separate Designated Account. Class Counsel shall provide the Secretary in writing with the information necessary to direct the deposits; and

2. Class Counsel shall use these funds solely to pay (a) the Fee Award and (b) the Class Representative Service Awards.

F. Compensation Fund Payment. The Secretary's Counsel shall, within sixty (60) calendar days of the Effective Date, provide the U.S. Department of the Treasury with all necessary forms and documentation to direct a payment to Class Counsel, for the benefit of the Class, the Total Compensation Fund, which is $680,000,000 minus the Fee Award and the Class Representative Service Awards, subject to the following conditions:

1. The United States shall direct the deposit of these funds into a Designated Account. Class Counsel shall provide the Secretary's Counsel in writing with the information necessary to direct the deposit;

2. Class Counsel shall use these funds solely to pay Final Track A Liquidated Awards, Final Track A Liquidated Tax Awards, Final Track B Awards, and Debt Relief Tax Awards to, or on behalf of, Class Members pursuant to the Non-Judicial Claims Process; and

3. Class Counsel shall provide the Secretary with written quarterly reports related to the expenditure of the funds provided in this Section. The quarterly reports, which may be submitted on the Quarterly Disbursement Reporting Form (Ex. E), shall identify (a) to whom Class Counsel has paid the funds, (b) the amount of such payment, (c) when the funds were paid, and (d) for what purpose the payment has been made, with reference to this Settlement Agreement. If Class Counsel has expended funds to pay Final Track A Liquidated Awards, Final Track A Liquidated Tax Awards, Final Track B Awards and Debt Relief Tax Awards during the reporting period, Class Counsel shall also identify the number of such awards.

G. Once the funds paid by the Secretary's Counsel under this Settlement Agreement are deposited into the Designated Accounts, the United States has no liability whatsoever for the protection or safeguard of the deposited funds, regardless of bank failure, fraudulent transfers, or any other fraud or misuse of the funds.

H. Nothing in this Settlement Agreement shall limit in any way the duties owed by Class Counsel to the Class under any applicable law, including any law governing counsel's management or handling of client funds.

I. The funds that the United States pays, and the Debt Relief that the Secretary makes, pursuant to this Settlement Agreement are inclusive of damages and other monetary relief, attorney's fees, expenses, costs, tax payments, interest, and costs, and are the only funds to be paid by the Secretary and/or the United States under this Settlement Agreement.

J. The limitations on funding in this Settlement Agreement apply notwithstanding a determination by the Class Representatives, the Class, or Class Counsel that the funds made available under this Settlement Agreement are inadequate to pay claims submitted pursuant to the Non-Judicial Claims Process, attorney's fees, expenses, and costs incurred under this Settlement Agreement, and/or Implementation Costs incurred under this Settlement Agreement.

K. The Class Representatives, the Class, and/or Class Counsel may not terminate this Settlement Agreement because the Class Representatives, the Class, and/or Class Counsel assert that the Cost Cap is inadequate, and neither the Class Representatives nor Class Counsel shall be permitted to amend, alter, or reduce their obligations and duties under this Settlement Agreement in any manner. The Class Representatives and Class Counsel agree to continue with implementation of this Settlement Agreement notwithstanding the amount of Implementation Costs incurred under this Settlement Agreement. The Secretary shall have no responsibility for Implementation Costs above the Cost Cap.

L. The Class will have sole responsibility to comply with their own applicable federal, state, and local tax requirements that arise as a result of this Settlement Agreement. Class Counsel will have sole responsibility to comply with their own applicable federal, state, and local tax requirements that arise as a result of this Settlement Agreement.

VIII. MORATORIUM ON ACCELERATIONS, FORECLOSURES, AND OFFSETS

A. Upon preliminary approval of the Settlement Agreement, FSA farm loan program debts held by borrowers who are identified as Native Americans in the Service Center Information Management System or its successor database, or who file claims pursuant to this agreement, will be considered under review, and USDA shall suspend all collection efforts by FSA as to such debts, including all efforts to

seize personal property, requests or renewal of requests for internal administrative offsets of other farm program payments, referrals, or renewal of referrals, to the Department of the Treasury for the Treasury Offset Program or cross-servicing, actions to accelerate loan accounts, and actions to foreclose on real or personal property. Any debt that was referred to the Department of the Treasury prior to the date of the preliminary approval of the Settlement Agreement remains valid and legally enforceable, and will be collected in accordance with applicable laws. For debts held by those identified persons in the Service Center Information Management System who do not participate in the claims process, this moratorium on collection action will end at the end date of the claims application period.

B. USDA and/or Secretary's Counsel will within ten (10) days of Preliminary Approval Date, issue written and electronic notice to its Finance Office, all Farm Service Agency state and district offices and FSA Service Centers and to United States Attorney's Offices and/or the Executive Office of United States Attorneys of the terms of this moratorium on foreclosures, accelerations and offsets. USDA will instruct the Finance Office and FSA offices to immediately implement these provisions.

C. For Claimants, the Secretary agrees to refrain from (1) accelerating, (2) foreclosing, or (3) using administrative offsets, of any FSA Farm Loan Program loan held by each and every Claimant from the date on which the Settlement Administrator informs USDA of that Claimant's claim until 30 calendar days after the Preliminary Accounting Date or until the claim is denied, whichever is earlier.

D. This Section does not:

1. Prohibit the Secretary from taking any action up to, but not including, acceleration, foreclosure or offset that is necessary to protect his interests or service a loan under applicable law;

2. Prohibit a United States Attorney from proceeding with a foreclosure already referred to him/her by USDA if the United States Attorney determines in his/her sole discretion not to suspend the foreclosure pursuant to this moratorium.

IX. NON-JUDICIAL CLAIMS PROCESS

A. GENERAL REQUIREMENTS

1. To obtain a Claim Determination under this Settlement Agreement, a Claimant must submit a Complete Claim Package to the Claims

Administrator by the Claim Deadline, or, for those Claimants who are asked for supplemental information, within 60 days of the date of such notice of an incomplete claim package, or the Claim Deadline, whichever is later. The submission date shall be the date of postmark if the Claim Package is sent via first-class mail, the date of deposit if sent by courier or overnight delivery, and the date of transmission if sent electronically.

2. Election of Remedies: In addition to this case, there are other cases pending in which discrimination in the USDA Farm Loan Program was alleged. Those cases include: *Pigford v. Vilsack*, No. 97-1978 (PLF) (D.D.C.) (alleging discrimination against African American farmers) , *In Re Black Farmers Discrimination Litigation*, No. 08-0511 (MC) (D.D.C) (also known as "*Pigford II*")(alleging discrimination against African American farmers who filed untimely claims), *Love v. Vilsack*, No. 00-2502 (RBW) (D.D.C.) (alleging discrimination against women farmers), and *Garcia v. Vilsack*, No. 00-2445 (RBW) (D.D.C.)(alleging discrimination against Hispanic farmers).

Individuals who filed claims in the *Pigford v. Vilsack* case are deemed to have elected to pursue their claims in that action and have waived any right to obtain relief through this Settlement. Individuals who filed claims or requests to file late claims in *Pigford* and were then encompassed *by Pigford II*, will waive their right to pursue a claim through this Settlement unless they withdraw their claim or their request to file a late claim before the deadline has passed by which claims must be filed through this Settlement. Individuals who file claims in connection with the *Love v. Vilsack* or the *Garcia v. Vilsack* cases will waive their right to pursue a claim through this Settlement unless they withdraw their claim before the deadline has passed by which claims must be filed through this Settlement. Individuals who opt out of any of the above-identified cases and have pursued judicial or administrative remedies are deemed to have hereby waived their right to pursue a claim for relief under this Settlement. The United States hereby agrees to settle with members of this case on the premise that only one award will be made to an individual for alleged discrimination under ECOA during the time period of January 1, 1981 and November 24, 1999, and that this Settlement is a compromise of all claims. Such individuals will be identified by the Claims Administrator as follows:

a. Once the Court enters an order permitting the United States to disclose the information described in this paragraph, for purposes of identifying persons who have submitted claims in *Pigford II, Love* or *Garcia*, the Secretary and/or the Secretary's Counsel shall provide to the Claims Administrator on a monthly basis a list of

persons who have submitted or do submit claims in those cases, including names, addresses, social security numbers, and the date on which the claim was deemed to be submitted, and will update this list on a monthly basis through the conclusion of the *Keepseagle* claims process to reflect any withdrawals of claims as well as any additional claims made in those cases.

b. For purposes of identifying persons who submitted claims in *Pigford*, Class Counsel will provide to the Claims Administrator a list of persons who have submitted claims, including names, addresses, social security numbers, and the date on which the claim was deemed to be submitted.

c. The claim form (Ex. C) will require each Claimant to acknowledge whether they are participants in any of the above-identified cases.

3. "Complete Claim Package" is:

a. A completed Claim Form (Ex. C), and the Claimant's declaration, under penalty of perjury, that each of the statements provided by the Claimant is true and correct;

b. For a Claimant who seeks Debt Relief, a statement that the Claimant seeks such an award and an executed Authorization to Disclose Debt Information Form (Ex. D);

c. For a Claimant who is deceased, (i) a death certificate, and (ii) either (A) proof of current legal representation, or (B) in a situation in which a legal representative has not yet been appointed, a sworn statement describing why the submitting individual believes he or she will be appointed the legal representative of the Claimant's estate; and

d. For a Claimant unable to submit a claim on his or her own behalf due to a physical or mental limitation, (i) proof of legal representation or (ii) a sworn statement describing why the Claimant is unable to submit a claim on his or her own behalf and why the submitting individual asserts a right to do so on the Claimant's behalf.

4. A Claimant may be represented in this Claims Process by Class Counsel or Individual Counsel, or the Claimant may submit a claim without counsel. Class Counsel shall provide Track A Claimants with assistance in preparing and submitting the forms (done by paralegals and/or contract attorneys under the supervision of Class Counsel), unless that Claimant

elects to be represented by Individual Counsel or elects to submit a claim without counsel. For Track A, if a Claimant elects to be represented by Individual Counsel, the Claimant must make separate arrangements to pay Individual Counsel. Such payment shall be subject to the terms of this Settlement Agreement and the Track A Individual Counsel Fee Cap. For Track B, if a Claimant elects to be represented by either Class Counsel or Individual Counsel, the Claimant must make separate arrangements to pay Class Counsel or Individual Counsel. Such payment shall be subject to the terms of this Settlement Agreement and the Track B Fee Cap. An attorney who serves as Individual Counsel consents to the terms of this Settlement Agreement and agrees to abide by all orders of the Court in this Case.

5. In the case of a Claimant who is deceased, the legal representative of the Claimant's estate may submit a claim on the Claimant's behalf. If there is no legal representative, any other individual who asserts a right to be the legal representative of the Claimant's estate may submit a claim on the Claimant's behalf. If there is no legal representative and more than one individual submits a claim on behalf of the Claimant, the Track A Neutral handling the Claimant's Claim shall decide which of the individuals is entitled to pursue the claim on the Claimant's behalf, and this decision shall be final and non-reviewable, subject to paragraph 7 below.

6. In the case of a Claimant who is unable to submit a claim on his or her own behalf due to a physical or mental limitation, the Claimant's legal representative may submit a claim on the Claimant's behalf. If there is no legal representative, any other individual who asserts a right to be the legal representative may submit a claim on the Claimant's behalf. If there is no legal representative and more than one individual submits a claim on behalf of an individual who is unable to submit a claim on his or her own behalf, the Track A Neutral handling the Claimant's Claim shall decide which of the individuals is entitled to pursue the claim on the Claimant's behalf, and this decision shall be final and non-reviewable, subject to paragraph 7 below.

7. If a claim submitted under paragraphs 5 or 6 above prevails, and a legal representative for the Claimant or the Claimant's estate has not yet been appointed, the Claimant's Track A Award or Track B Award shall be held for up to one year in a separate account established by Class Counsel for the benefit of the Claimant or the estate until a legal representative to whom the funds may be disbursed is appointed. The Claims Administrator may extend this period, up to 180 days, upon receipt of proof that a probate petition is pending in the appropriate Court. Regardless of who the Neutral decides would be permitted to submit the

claim under paragraph 5 or 6, payment will be made on behalf of such successful claims only to a duly recognized legal representative as set forth in this paragraph.

8. A Claimant's election of Track A is irrevocable and exclusive. A Claimant's election of Track B is irrevocable and exclusive, except as provided in paragraph 6 of Section IX.B.

9. The Claim Determinations, and any other determinations made under this Non-Judicial Claims Process are final and are not reviewable by the Claims Administrator, the Track A Neutral, the Track B Neutral, the District Court, or any other party or body, judicial or otherwise. The Class Representatives and the Class agree to forever and finally waive any right to seek review of the Claim Determinations, and any other determinations made under this Non-Judicial Claims Process. Nothing in this Settlement Agreement shall preclude the United States from exercising its lawful authority to investigate or otherwise pursue criminal or civil misconduct arising from the claims process.

10. Except as specified in paragraph 5 of Section IX.B and paragraph 2 subsection a of Section IX.A, the Secretary and/or the United States shall have no role in the Non-Judicial Claims Process.

11. All Track A Liquidated Awards, Track A Liquidated Tax Awards, Track B Awards and Debt Relief Tax Awards shall be paid from the Designated Account. Debt Relief Awards shall be written off directly by the Secretary, and shall not be paid from the Designated Account.

12. The Secretary and/or the United States shall not be liable to pay the Claims Administrator, the Track A Neutral, the Track B Neutral, the Track B Expert, or any of their employees and agents. Subject to the Cost Cap, all fees, costs, and expenses incurred by the Claims Administrator, the Neutrals, the Track B Expert, and any of their employees and agents shall be paid from the Designated Account as Implementation Costs.

13. The Secretary and/or the United States shall have no obligation to provide any information, documents, or discovery to the Class, Class Members, or Class Counsel, except as provided in paragraph 5 of Section IX.B and paragraph 2 subsection a of Section IX.A, or as otherwise required by law.

14. The Claims Administrator shall send all correspondence and all payments to Claimants, Class Members, and/or their Counsel by first-class mail, postage prepaid.

15. Class Counsel, the Claims Administrator, and the Neutrals will take

reasonable steps to protect private personal and financial information submitted to them under this Settlement Agreement.

16. The Claims Administrator and the Track A and B Neutrals shall report periodically to Class Counsel any issues of concern that arise in the course of the execution of their duties.

B. REVIEW OF THE CLAIM SUBMISSION AND THE CLASS MEMBERSHIP DETERMINATION

1. Upon receipt of a claim, the Claims Administrator shall first determine whether the Claimant's submission satisfies the Claim Deadline and whether the submission is a Complete Claim Package. The Claims Administrator shall make every reasonable effort to complete this determination within ten (10) days of receipt of the claim.

2. For each Claimant who has submitted an incomplete Claim Package or for each Claim Package that the Claims Administrator is unable to determine whether it is complete, the Claims Administrator shall send to the Claimant and his or her Counsel a completed Your Claim Package is Not Complete Form (Ex. F). A Claimant shall have 60 calendar days from the date of postmark of such a Form, or until the Claim Deadline, whichever is later, to submit, either by first-class mail, postage prepaid, or electronically, a Complete Claim Package. There shall be no exceptions to or extensions of the time frames set forth in this paragraph, and the failure of a Claimant to provide any requested materials within the specified time frames will result in that Claimant's obtaining a final and unreviewable adverse determination.

3. For each Claimant whose claim is untimely submitted, the Claims Administrator shall return the Claim Package to the Claimant and his or her Counsel with a completed You Have Not Submitted Your Claim On Time Form (Ex. G). This determination is final and not reviewable by the Claims Administrator, the Track A Neutral, the Track B Neutral, the District Court, or any other party or body, judicial or otherwise.

4. For each Claimant who the Claims Administrator determines to have submitted a timely Complete Claim Package and who elects Track A, the Claims Administrator shall complete Part I of a Track A Claim Determination Form (Ex. A) and shall send the Track A Claim Determination Form and the Class Member's Complete Claim Package electronically to the Track A Neutral.

5. For Class Members seeking Debt Relief who submit an Authorization to Disclose Debt Information Form (Ex. D), the Claims Administrator shall

complete the Authorization to Disclose Debt Information Form received from the Class Member, shall send it, along with the Class Member's completed Claim Form, to the FSA, and shall request that FSA (i) confirm whether the Class Member has an outstanding Farm Loan Obligation; and (ii) provide a list of all outstanding loans the individual has had and, for all outstanding loans, the applicable loan(s) balances and loan payoff amount(s) for a Debt Relief Award, including the year each loan was issued. Further, FSA shall search PLAS data available through its easily-accessible electronic data sources and, to the extent such information is contained in such easily-accessible electronic data sources, identify any Class Member who received a prior write-down or write-off of a farm loan program loan within the Class Period and the year(s) that each prior write-down or write-off occurred. Within sixty (60) calendar days of receipt of the request or as soon thereafter as is practicable, FSA will return the Authorization to Disclose Debt Information Form to the Claims Administrator with the requested information. The Claims Administrator shall submit the completed Authorization to Disclose Debt Information Form to the Track A or Track B Neutral reviewing the Class Member's Claim, and shall send a copy to the Class Member, and the Class Member's Counsel, if applicable.

6. Within ten (10) days after the Claim Deadline, for each Claimant who elects Track B, the Claims Administrator shall send the Class Member a notice in writing informing the Class Member of the total number of Class Members who submitted Complete Claims Packages under Track B by the Claim Deadline. For Track B claims received after the Claims Deadline but which are considered timely pursuant to paragraph 2 of this subsection, this notice shall be sent within ten (10) days of receipt of the Complete Claims Package. Such notification shall also remind each Class Member of: (a) the definition of Track B Awards; (b) the Track B Cap; (c) the evidentiary requirements for Track B claims; and (d) the possibility that a Class Member's Track B Award will be reduced if the total of all Track B Awards exceeds the Track B Cap. Such notification shall also inform the Class Member that the Class Member may change his or her election to Track A by so notifying the Claims Administrator in writing within thirty (30) days of the postmark of the notification from the Claims Administrator. If a Track B Class Member does not so notify the Claims Administrator, his or her claim shall be treated as a Track B claim.

7. For each Claimant who elects Track B on the Claim Form (Ex. C) and who the Claims Administrator determines to have submitted a timely Complete Claim Package, the Claims Administrator shall complete Part I of a Track B Claim Determination Form (Ex. B) and shall send the Form and the Class Member's claim electronically to the Track B Neutral.

8. For each Claimant who the Claims Administrator determines to have submitted a timely Complete Claims Package and who elects Track A under on the Claim Form (Ex. C), the Claims Administrator shall follow the procedure in Section IX.C., below.

9. The Claims Administrator shall make every reasonable effort to complete his or her other duties under this Section within sixty (60) days of receipt of a Complete Claim Package.

C. TRACK A

1. For each Claimant asserting a claim under Track A, the Track A Neutral shall determine whether the Claimant has established, by substantial evidence, that each of the following elements is satisfied:

   a. The Claimant is a Native American who farmed or ranched, or attempted to farm or ranch between January 1, 1981 and November 24, 1999;

   b. The Claimant (i) owned or leased, or (ii) attempted to buy or lease (using the loan which is the subject of part c. immediately below), or (iii) had grazing rights on, or authorization to use, farm or ranch land;

   c. The Claimant applied, or attempted to apply, for a specific farm credit transaction(s) at a USDA office between January 1, 1981, and November 24, 1999;

   d. The farm loan(s) for which the Claimant applied was denied, provided late, approved for a lesser amount than requested, encumbered by a restrictive condition(s), or USDA failed to provide an appropriate loan service(s);

   e. At least one instance of conduct defined under sub-paragraph d above, or in paragraph 3 below occurred either during the period January 1, 1981, through December 31, 1996, or during the period November 24, 1997, through November 24, 1999;

   f. USDA's treatment of the loan or loan servicing application(s) led to economic damage to the Claimant; and

   g. The Claimant "filed a discrimination complaint with the USDA" as defined in Section II.E of this Agreement, on condition that the complaint was filed during the period January 1, 1981, through June 30, 1997, or during the period November 24, 1997, through

November 24, 1999.

2. For each Claimant, the Track A Neutral must make an additional determination that the Claimant has established, by substantial evidence, that:

   a. The Claimant made a *bona fide* effort to apply for credit or did apply. Such application or *bona fide* effort may be established by evidence of:

      (1) the year in which the Claimant applied or attempted to apply and the general time period within that year (*e.g.*, late fall, early spring, sometime in January, February, or March);

      (2) the type and amount of loan or loan servicing for which the Claimant applied or attempted to apply;

      (3) how the Claimant planned to use the funds (*e.g.*, identification of crops, equipment, acreage, etc.);

      (4) how the Claimant's plans for a farm operation were consistent with farming operations in that county/area in that year; and

      (5) the location where the Claimant made efforts to seek credit assistance.

3. For each Claimant who asserts that he or she attempted to apply for a loan, the Track A Neutral must make an additional determination that the Claimant has established, by substantial evidence, that USDA actively discouraged the application. Examples of evidence of active discouragement include but are not limited to:

   a. statements by a USDA official that, at the time the Claimant wanted to apply, there were no funds available and therefore no application would be provided;

   b. statements by a USDA official that, at the time the Claimant wanted to apply, there were no application forms available;

   c. statements by a USDA official that, at the time the Claimant wanted to apply, USDA was not accepting or processing applications;

d. statements by a USDA official that the Claimant would not qualify for a loan or loan servicing and thus should not bother applying; or

e. statements by a USDA official that a Claimant must seek a loan from the Bureau of Indian Affairs, rather than through FSA.

4. The Track A Neutral's determination shall be based solely on the materials submitted by the Claimant and, if applicable, the information provided by FSA in response to a completed Authorization to Disclose Debt Information Form.

5. The Claims Administrator shall ensure that the Track A Neutral has access to alternate electronic templates for completing Part II of the Track A Claim Determination Form ("Summary of Claim Determination") (Ex. A), for Track A claims which are approved ("Track A Approval Version") and denied ("Track A Denial Version").

6. If the Track A Neutral determines that the Claimant has satisfied the elements listed above for a credit claim, the Neutral shall complete the Track A Approval Version of Part II Summary of Claim Determination on the Class Member's Track A Claim Determination Form (Ex. A). If the Track A Neutral determines that the Claimant has not satisfied the elements listed above, the Neutral shall complete the Track B Denial Version of Part II Summary of Claim Determination on the Track A Claim Determination Form (Ex. A). The Neutral shall make every reasonable effort to complete this determination and send the Track A Claim Determination Form electronically to the Claims Administrator within thirty (30) calendar days of receipt of the claim or within ten (10) calendar days of receipt of the Authorization to Disclose Debt Information Form, whichever is later.

D. TRACK B

1. For each Claimant asserting a claim under Track B, the Track B Neutral shall determine whether the Claimant has established, by a preponderance of the evidence and through documentary evidence admissible under the Federal Rules of Evidence (subject to paragraph 2 of this Section), each of the following elements:

a. The Claimant is a Native American who farmed or ranched, or attempted to farm or ranch, between January 1, 1981, and November 24, 1999;

b. The Claimant owned or leased, attempted to own or lease, or had grazing rights on or authorization to use farm or ranch land;

c. The Claimant applied for a specific farm credit transaction(s) at a USDA office between January 1, 1981, and November 24, 1999. An attempt to apply for a farm credit transaction is insufficient;

d. The farm loan(s) or servicing option for which the Claimant applied was denied, provided late, approved for a lesser amount than requested, encumbered by a restrictive condition(s), or USDA failed to provide an appropriate loan service(s);

e. The treatment of the Claimant's loan or loan servicing application(s) by USDA was less favorable than that accorded a specifically identified, similarly situated white farmer(s) and at least one instance of less favorable treatment occurred either during the period January 1, 1981, through December 31, 1996, or during the period November 24, 1997, through November 24, 1999;

f. USDA's treatment of the loan or loan servicing application(s) led to economic damage to the Claimant; and

g. The Claimant "filed a discrimination complaint with the USDA" as defined in Section II.E of this Agreement, on condition that the complaint was filed during the period January 1, 1981, through June 30, 1997, or during the period November 24, 1997, through November 24, 1999.

2. Notwithstanding the requirement that each element in Track B be established by a preponderance of the evidence and with documentary evidence admissible under the Federal Rules of Evidence,

a. Any of the following elements may be established by a credible sworn statement based on personal knowledge by an individual who is not a member of the Claimant's family:

(1) the identity of a similarly situated white farmer; and

(2) that the Claimant filed a discrimination complaint with the USDA.

This sworn statement need not be admissible under the Federal Rules of Evidence but must establish these facts by a preponderance of the evidence.

b. Proof that Claimant is a Native American shall be consistent with the requirements of Section II.BB, above. If a Claimant is a

member of a federally- or state-recognized tribe, then such membership must be established by documentary evidence as identified in Section II.BB. If a Claimant identified himself/herself as Native American prior to November 24, 1999, such self-identification may be established (a) by documentation, such as an application for loan or loan servicing assistance submitted to USDA prior to or within the Class Period, or (b) through a credible written narrative, submitted under penalty of perjury, in which the individual describes in detail the circumstances establishing his/her Native American ancestry sufficient to persuade the Track B Neutral of its genuineness and authenticity, as described in Section II.BB.

c. The Claimant's loan application and supporting documents forming the basis of the Claimant's claim are deemed admissible upon a sworn statement by the Claimant that the loan application and supporting documents were submitted to FSA contemporaneously with the date of the application. FSA documents that were provided to the Claimant in response to the Claimant's loan application are also deemed admissible upon a sworn statement by the Claimant that the Claimant received the FSA documents in response to the Claimant's loan application; and

d. Nothing in this Section precludes a Claimant from submitting expert testimony to explain the documentary evidence submitted by the Claimant with respect to paragraph 1, subsection f of this Section.

3. Once the Claimant has submitted documentary evidence admissible under the Federal Rules of Evidence or other evidence as provided for above in paragraphs 1 and 2 of this Section on each element, the Track B Neutral may consider the materials submitted by the Claimant, the opinion and analysis by the Track B Expert, and any other information or material deemed appropriate for consideration by the Track B Neutral.

4. The Claims Administrator shall ensure that the Track B Neutral has access to alternate electronic templates for completing Part II of the Track B Claim Determination Form ("Summary of Claim Determination") (Ex. B), for Track B claims which are approved ("Track B Approval Version") and denied ("Track B Denial Version").

5. If the Track B Neutral determines that the Claimant has satisfied the elements listed above, the Neutral shall complete the Track B Approval Version of Part II Summary of Claim Determination on the Claimant's

Track B Claim Determination Form (Ex. B). If the Track B Neutral determines that the Claimant has not satisfied the elements listed above, the Neutral shall complete the Track B Denial Version of Part II, Summary of Claim Determination on the Track B Claim Determination Form (Ex. B). The Neutral shall make every reasonable effort to complete the determination and send the Track B Claim Determination Form electronically to the Claims Administrator within thirty (30) calendar days of receipt of the claim.

E. DEBT RELIEF

1. Each Class Member who receives either a Track A or Track B Award and who has outstanding debt with USDA shall be entitled to a Debt Relief Award as defined in this Settlement Agreement.

2. The Claims Administrator shall determine the amount of the Debt Relief for each Prevailing Claimant entitled to Debt Relief by determining the sum of all outstanding loans identified by USDA pursuant to paragraph 5, Section IX.B.

3. Each Class Member who receives a Debt Relief Award shall be paid a Debt Relief Tax Award in an amount equal to 25% of the amount of the principal extinguished by the Prevailing Claimant's Final Debt Relief Award. The Claims Administrator shall send to the IRS, on behalf of each prevailing Claimant (Track A or Track B) who receives a Debt Relief Award, the amount of the Class Member's Debt Relief Tax Award. The Claims Administrator shall provide the Class Member's counsel, or the Class Member directly if the Class Member has no counsel, notice that such payment(s) has been made. When transmitting payment of Track A Liquidated Tax Awards to the IRS, the Claims Administrator shall provide the IRS with the name, address, and Social Security or Taxpayer Identification Number of the Class Member on whose behalf the payment is being made.

4. The total of all Debt Relief Awards under this Settlement Agreement is subject to an $80,000,000 cap. This amount does not include the separate Debt Relief Tax Awards.

5. If the total amount of Debt Relief which all Prevailing Claimants could receive exceeds the $80,000,000 cap, the Claims Administrator shall proceed as follows:

   a. The Claims Administrator will identify all Prevailing Claimants who obtained a loan from USDA on or before November 24, 1999 based upon the information provided by FSA pursuant to

paragraph 5, Section IX.B. This will be referred to as the "Pre-1999 Group."

b. The Claims Administrator will identify all Prevailing Claimants who first obtained a loan from USDA after November 24, 1999 based upon the information provided by FSA pursuant to paragraph 5, Section IX.B. This will be referred to as the "Post-1999 Group."

c. Ninety percent of the Debt Relief cap, or $72 million, will be initially allocated to the Pre-1999 Group, and 10%, or $8 million, will be initially allocated to the Post-1999 Group.

d. If the total of all debt outstanding for the Pre-1999 Group is more than $72 million, the Claims Administrator will divide each Pre-1999 Group Prevailing Claimant's total outstanding debt by the sum total of all outstanding debt for the Pre-1999 Group to obtain that Pre-1999 Group Prevailing Claimant's "pro rata percentage share of debt relief." Then, the Claims Administrator shall multiply each Prevailing Claimant's pro rata percentage share of debt relief by $72 million to obtain that Prevailing Claimant's Debt Relief Award.

e. If the total of all debt outstanding for the Pre-1999 Group is less than $72 million, then each Pre-1999 Group Prevailing Claimant will receive his or her full Debt Relief Award, and any unused Pre-1999 Group debt relief funds will be transferred to the Post-1999 Group.

f. If the total of all debt outstanding for the Post-1999 Group is more than $8 million, the Claims Administrator will divide each Post-1999 Group Prevailing Claimant's total outstanding debt by the sum total of all outstanding debt for the Post-1999 Group to obtain that Prevailing Claimant's "pro rata percentage share of debt relief." Then, the Claims Administrator shall multiply each Post-1999 Group Prevailing Claimant's pro rata percentage share of debt relief by $8 million to obtain that Prevailing Claimant's Debt Relief Award.

g. If the total of all debt outstanding for the Post-1999 Group is less than $8 million, then each Post-1999 Group Prevailing Claimant will receive his or her full Debt Relief Award, and any unused Post-1999 Group debt relief funds will be transferred to the Pre-1999 Group if the Pre-1999 Group did not receive full Debt Relief Awards.

F. DISTRIBUTION OF CLAIM DETERMINATIONS AND SETTLEMENT FUNDS

1. On a monthly basis, the Claims Administrator shall provide to the Secretary and to Class Counsel a written report, which may be provided on the Monthly Claim Determination Reporting Form (Ex. H), that includes: (a) the name, address, and Social Security or Taxpayer Identification Number of each Class Member who has completed the claims process; (b) the Class Member's FSA Account Number, and (c) whether the Class Member prevailed.

2. Within thirty (30) calendar days of receipt of all Track A and Track B Claim Determination Explanation Forms, the Claims Administrator shall calculate: (a) the sum of all Track A Liquidated Awards and Track A Liquidated Tax Awards; (b) the sum of all Provisional Track B Awards; (c) the sum of all Final Track A Liquidated Awards, Final Track A Liquidated Tax Awards, and Final Track B Awards, as calculated below; (d) the Implementation Costs incurred to date; and (e) a good faith estimate of Implementation Costs necessary for the Claims Administrator to perform its final duties under this Settlement Agreement.

In order to calculate each Class Member's Final Award(s), the Claims Administrator shall do as follows:

a. Determine the Track B Awards:

(1) If the sum total of all Track B Awards is less than the Track B Cap of $50,000,000, then the Class Member's Final Track B Award shall be equal to the Provisional Track B Award.

(2) If the sum total of all Track B Awards exceeds the Track B Cap of $50,000,000,

(a) The Claims Administrator shall divide each Class Member's Track B Award by the sum total of all Track B Awards to obtain that Class Member's "Track B Percentage."

(b) The Claims Administrator shall multiply each Class Member's Track B Provisional Award by the Track B Percentage to obtain the Class Member's Final Track B Award.

(3) The Claims Administrator shall calculate the Total Track B

Awards as either the Track B Cap of $50,000,000 or the sum of all Track B Awards to Class Members if the total of all Track B Awards is less than the Track B Cap of $50,000,000.

b. After determining the Total Track B Awards, the Claims Administrator shall calculate the Track A Awards as follows:

(1) The Claims Administrator shall calculate the Available Track A Funds. The Available Track A Funds is $680,000,000 minus the Fee Award, the Class Representative Service Awards, the Total Track B Awards, and the sum of the Debt Relief Tax Awards.

(2) The Claims Administrator shall calculate the sum of Track A Awards by combining the sum of all Track A Liquidated Awards and Track A Liquidated Tax Awards.

(3) If the Available Track A Funds is equal to or greater than the sum of Track A Awards, each prevailing Track A Class Member's Track A Liquidated Award is deemed to be the Final Track A Liquidated Award and his or her Track A Liquidated Tax Award is deemed to be the Final Track A Liquidated Tax Award.

(4) If the Available Track A Funds is less than the sum of Track A Awards, then the Claims Administrator shall divide the Available Track A Funds by the sum of Track A Awards to obtain a percentage ("the Percentage"). Each prevailing Track A Class Member's Final Track A Liquidated Award shall be equal to the Percentage multiplied by the Track A Liquidated Award. Each prevailing Track A Class Member's Final Track A Liquidated Tax Award shall be equal to the Percentage multiplied by the Track A Liquidated Tax Award.

3. Within thirty (30) calendar days of receipt of all Track A or Track B Claim Determination Forms, the Claims Administrator shall:

a. For prevailing Track A or Track B Claims, record the Final Track A Awards, Final Track B Awards, Debt Relief Award, and Debt Relief Tax Award in Part II of the prevailing Class Members' Track A and Track B Claim Determination Forms. This action shall be limited to the arithmetical computation prescribed under IX.E, if applicable, and paragraph 2 of IX.F, above, and shall not alter the substantive

determination on the merits made by the Track A Neutral or Track B Neutral on any individual Track A or Track B claim;

b. For all Track A or Track B claims, the Claims Administrator shall finalize the formatting of the Track A or Track B Claim Determination Forms;

c. Prepare the Preliminary Accounting and submit it to Class Counsel and the Secretary.

4. Within thirty (30) calendar days of the date that the Preliminary Accounting provided for in Section IX.F.3(c) is submitted, the Claims Administrator shall:

a. Send to each prevailing Track A Class Member who retained Class Counsel or proceeded without counsel the Class Member's Track A Claim Determination Form and a check payable to the Class Member in the amount of the Class Member's Final Track A Liquidated Award. The Claims Administrator shall also send to the Individual Counsel for each Track A Class Member who retained Individual Counsel the Class Member's Track A Claim Determination Form and a check jointly payable to the Class Member and his or her Individual Counsel in the amount of the Final Track A Liquidated Award.

b. Send to each prevailing Track B Class Member the Class Member's Track B Claim Determination Form and a check payable to the Class Member in the amount of the Final Track B Award. The Claims Administrator shall also send to the Individual Counsel for each Track B Class Member who retained Individual Counsel the Class Member's Track B Claim Determination Form and a check jointly payable to the Class Member and his or her Individual Counsel in the amount of the Final Track B Liquidated Award.

c. Send to each Track A or Track B Class Member who did not prevail, who retained Class Counsel or proceeded without counsel the Class Member's Track A or Track B Claim Determination Forms. The Claims Administrator shall also send to the Individual Counsel for each Track A or Track B Class Member who retained Individual Counsel the Class Member's Track A or Track B Claim Determination Form.

d. Send to the IRS, on behalf of each prevailing Track A Class Member, the amount of the Class Member's Final Track A

Liquidated Tax Award. The Claims Administrator shall provide the Class Member's counsel, or the Class Member directly if the Class Member has no counsel, notice that such payment(s) has been made. When transmitting payment of Track A Liquidated Tax Awards to the IRS, the Claims Administrator shall provide the IRS with the name, address, and Social Security or Taxpayer Identification Number of the Class Member on whose behalf the payment is being made.

e. Send to the FSA, on behalf of each prevailing Track A and Track B Class Member, notice of the amount of the Class Member's Debt Relief Award. The Claims Administrator shall inform the Class Member's counsel, or the Class Member directly if the Class Member has no counsel, that such notice to the FSA has been made. When transmitting notice of Track A or Track B Debt Relief to FSA, the Claims Administrator shall provide FSA with the name, address, and Social Security or Taxpayer Identification Number of the Class Member who received the award as well as the FSA Account Number of the loan to which the credit should be made.

5. Within sixty (60) calendar days of the date of the last payment made by the Secretary pursuant to Section VII.C, the Claims Administrator shall cause to be paid from the Designated Account any outstanding Implementation Costs up to the Cost Cap.

6. All checks distributed under this Section, exclusive of those that are directly deposited, will be valid for 180 calendar days from the date of issue. The funds corresponding to any check that remains uncashed 181 calendar days from its date of issue shall be distributed *pro rata* to all prevailing Class Members, unless the total amount of uncashed checks is less than $250,000, in which case the unclaimed funds shall be distributed pursuant to paragraph 7, below. The Claims Administrator shall send a check made payable to the Class Member in the amount of the *pro rata* distribution, if applicable. These checks will be valid for 180 calendar days from the date of issue. Notwithstanding any other provision, no Class Member shall receive a total cash payment of more than his or her Provisional Track A Award or Provisional Track B Award.

7. In the event there is a balance remaining in the Designated Account after the last check has been cashed, the last check has been invalidated due to passage of time, and after the passage of time set forth in paragraph 7 of

Section IX.A, the Claims Administrator shall direct any leftover funds to the Cy Pres Fund. Class Counsel may then designate Cy Pres Beneficiaries to receive equal shares of the Cy Pres Fund. The Claims Administrator shall send to each Beneficiary, via first class mail, postage prepaid, a check in the amount of the Beneficiary's share of the Cy Pres Fund. Designations shall be for the benefit of Native American farmers and ranchers, upon recommendations by Class Counsel and approval by the Court.

8. Within 200 calendar days of making all payments set forth in this Section, the Claims Administrator shall prepare the Final Accounting and submit it to Class Counsel and the Secretary.

X. THE DUTIES OF CLASS COUNSEL

A. Class Counsel shall:

1. Perform all duties set forth in Rule 23, Fed.R.Civ.P., those ordered by the Court, and those provided for in this Settlement Agreement;

2. Provide assistance without additional charge to Claimants who elect to submit claims under Track A;

3. Provide notice of this Settlement Agreement to Class Members pursuant to Section V;

4. Answer Class Member questions;

5. Provide information to Class Members regarding the status of claims processing or the distribution of the funds provided under this Settlement Agreement; and

6. Perform other such duties as may be incidental to proper coordination of this Settlement Agreement. Class Counsel shall have no obligation to perform any legal work for any Class Member related to the probate of a Class Member's estate, including the appointment of executors or legal representatives.

XI. AUDIT OF CLAIMS

A. In addition to other measures within the claims process designed to protect against fraud, USDA or a third-party contractor of the agency may audit the claims submitted pursuant to this Agreement. Such audit would not interfere with the timely completion of

the claims process and disbursement of settlement funds in accordance with the schedule prescribed in this Agreement. As a result of any audit conducted, USDA and/or any other government agency may, to the full extent permitted by law, make referrals for investigation or prosecution or prosecute or take other enforcement action to address any evidence of fraud. Nothing in this Settlement Agreement shall preclude the United States from exercising its lawful authority to investigate or otherwise pursue criminal or civil misconduct arising from the claims process.

XII. PROGRAMMATIC RELIEF

A. THE COUNCIL FOR NATIVE AMERICAN FARMING AND RANCHING

1. **Establishing the Council.** Subject to and contingent upon meeting all requirements of the Federal Advisory Committee Act ("FACA"), USDA will take steps to establish a Council for Native American Farming and Ranching ("Council"), comprised of Native American leaders and senior officials of the Farm Service Agency and USDA.

2. **The Council's Purpose.** The Council is expected to discuss issues related to the participation of Native American farmers and ranchers in USDA farm loan programs and to transmit recommendations concerning any changes to FSA regulations or internal guidance or other measures that would eliminate barriers to program participation for Native American farmers and ranchers.

3. **The Council is Subject to FACA.** USDA reserves to itself all discretion required by FACA, including, but not limited to, the determination as to whether establishment of the Council is in the public interest, consultation with the General Services Administration ("GSA"), final authority to appoint Council members except as otherwise expressly set forth in this Agreement, and discretionary re-authorization of the Council.

4. **Composition and Selection of the Council.** The Council will be composed of fifteen members.

   a. **Selection of Native American representatives:** Of those members, no fewer than eleven will be selected to represent the interests of Native American farmers and ranchers. Class Counsel may nominate up to eleven individuals to fill the slots designated for members who represent the interests of Native American farmers and ranchers. The Secretary will select no fewer than five members of the Council from the individuals nominated by Class Counsel, as long as Class Counsel do not fail to nominate at least

five individuals to serve on the Council and at least five individuals nominated by Class Counsel meet the requirements in FACA and regulations applicable for service on a committee created under FACA. All candidates proposed by Class Counsel will be given due consideration by the Secretary. If any candidate proposed by Class Counsel is disqualified by the Secretary, then Class Counsel shall have the opportunity to nominate a replacement candidate(s).

b. **Members who represent the USDA:** Council membership shall include the following senior officials of USDA: (1) the Director, Office of Tribal Relations or his or her delegate, (2) the FSA Administrator or his or her delegate, (3) the Assistant Secretary for Civil Rights or his or her delegate, and (4) the Deputy Administrator for Farm Loan Programs or his or her delegate. In the event that these job titles change or are eliminated during the Term of this Agreement, these roles will be filled by other senior management officials appointed by the Secretary.

5. **Council Meetings and Procedures.** USDA will schedule Council meetings no fewer than two times each fiscal year and determine the locations of those meetings. If the USDA or Council determines that a meeting cannot be held as scheduled, the USDA will re-schedule the meeting for a date within the fiscal year if such a date is appropriate. The Council shall establish procedures for its operation.

a. **Quorum.** A minimum of 8 members shall be present or participating by telephone or other electronic means such as video conferencing to constitute a quorum.

b. **Reimbursement of costs and other payments to Council members.** In the event that Council meetings require travel, the USDA will reimburse Council members for reasonable travel expenses consistent with federal regulations and agency policy. Council members who represent the interests of Native American farmers and ranchers will be paid an amount not less than $100 per day for time spent away from their employment or farming or ranching operation, subject to the availability of funds. If there is a shortfall of appropriated funds for the Council for the payment of travel expenses or honoraria, USDA will notify Council members as soon as reasonably practicable.

B. USDA OMBUDSPERSON FOR NATIVE AMERICAN AND OTHER SOCIALLY DISADVANTAGED FARMERS AND RANCHERS.

1. **Establishing an Ombudsperson.** USDA will create a USDA Ombudsperson position to address issues relating to Native American farmers and ranchers, as well as other socially disadvantaged farmers or ranchers.

2. **Duties of the Ombudsperson.** The Secretary will assign the Ombudsperson such duties as he decides, in his discretion, are appropriate Such duties may include, but are not limited to, reviewing statistics from farm loan program and USDA program data systems; tracking the frequency, type, and location of civil rights complaints; serving as a point of contact and coordination for Federal Advisory Committees, individual producers, the Office of Tribal Relations, and other senior officials at USDA; referring systemic programmatic issues raised by the Council for Native American Farming and Ranching or the Ombudsperson on his or her own initiative to the USDA Office of the Inspector General for audit or investigation; and referring individual complaints of discrimination to the Office of the Assistant Secretary for Civil Rights (OASCR) for processing.

C. REPORTS & INVESTIGATIONS.

1. In order to aid in its efforts to identify and address areas where its Farm Loan Program might or might not fully and fairly serve Native Americans, the USDA agrees regularly to collect and evaluate data that will permit a comparison between the volume of loans sought by Native Americans and the volume of loans awarded to Native Americans.

   a. Data will be collected and evaluated for each State, on a State-wide basis; and

   b. For the following States, additional data will be collected on a county-wide basis (in alphabetical order): Alabama, Arizona, Arkansas, California, Colorado, Montana, Nevada, New Mexico, North Dakota, Oklahoma, South Dakota, Texas, Utah, Washington, Wyoming.

2. The results of this collection and evaluation of data, by county and state, will be reported at least semi-annually to the USDA Ombudsperson, to the Council and to Class Counsel. If the Council determines, in its sole discretion, that significant and unexplained disparities exist between the volume of loan sought by, and the volume awarded to, Native Americans as compared with Caucasian applicants who receive loans, the Council may request that USDA investigate the circumstances surrounding the disparity and, if USDA considers any action relative thereto to be

warranted, USDA will take whatever action it considers to be appropriate to improve the delivery of service provided to Native Americans. The USDA retains sole discretion whether to investigate and whether to take any actions or actions relative thereto.

3. The USDA may, in its sole discretion, report to the Ombudsperson, to the Council and/or to Class Counsel the results of investigation(s) relative to the matters addressed in paragraph 1 of this subsection, above, and any actions it has taken or proposes to take in response to any such investigation.

4. The Council, or any member, the Ombudsperson and/or Class Counsel may refer to the USDA Inspector General any concerns they may have about any disparity reported relative to the matters addressed in paragraph 1 of this subsection, any investigation by USDA relative to such matters and/or any action taken by USDA in response to any such investigation.

D. ENHANCED SERVICES FOR NATIVE AMERICANS

1. **Enhancing Services.** USDA, through efforts of FSA and the Office of Tribal Relations ("OTR"), will enhance the service for Native American farmers and ranchers by establishing 10 to 15 regional venues that will do the following:

   a. Teach intensive financial, business and marketing planning skills and understanding of basic and advanced farm and ranch business management skills to Native American farmers and ranchers.

   b. Teach leasing requirements for tribal trust and restricted lands to Native American farmers and ranchers in coordination with the Bureau of Indian Affairs; and

   c. Support the deployment of tribal agriculture advocates and technical assistance providers in key locations throughout Indian Country, who will serve alongside consolidated sub-offices at Tribal headquarters, tribal agriculture FSA liaisons, third party regional employees, and others.

2. The USDA will develop and release a plain language customer's guide on how to apply for farm loans and farm loan servicing.

3. Subject to the availability of funds, as determined by USDA, USDA shall fund consolidated sub-offices at Tribal Headquarters on Indian

Reservations, selected by the Secretary after a needs assessment by the Secretary or his delegate. Demonstration of Tribal cultural competency shall be a requirement for employment as a Program Manager or Director in the Tribal sub-offices. Subject to the availability of funds, USDA will employ Program Directors to direct the operations of the sub-offices at Tribal headquarters and, to the extent funds are available, each office will be staffed with a Program Director, Extension Agent, and support staff. USDA will defray the cost of overhead, including the cost of office space. The purpose of the sub-offices shall include, but not be limited to, conducting training, providing technical assistance, and loan outreach and assistance.

4. **Reporting on USDA's Enhanced Services.** USDA shall report on the activities of these regional venues to the Council at each of the Council's meetings.

E. LOAN SERVICING AND RECEIPT OF FUTURE LOANS.

1. For each Prevailing Claimant who is delinquent in payment on a FSA loan, USDA will offer an additional round of loan servicing to each such claimant within 120 days of (a) the Claims Determination, or (b) the distribution of a Debt Relief Award to each such claimant, whichever date is later.

2. If a Prevailing Claimant has a farm program loan discharged as a result of this Agreement, that discharge shall not adversely affect the claimant's eligibility for farm program loans or loan servicing in the future.

3. If a Prevailing Claimant previously received a write-down or write-off of a farm program loan pursuant to a debt settlement of a loan issued within the class period that would have been discharged under this Agreement, then the previous debt settlement will not adversely affect the prevailing claimant's eligibility for farm program loans or loan servicing in the future. The amount of debts settled and/or discharged prior to this Settlement Agreement and referenced in this paragraph do not count against the $80,000,000 cap on debt relief.

F. REVIEWING USDA'S FARM LOAN PROCEDURES AND POLICIES.

1. Within 90 days after Preliminary Approval of this Agreement by the Court, representatives from FSA and the Office of Tribal Relations will meet twice with Class Counsel to engage in consultation on the contents of FLP Handbooks, instructions and administrative notices.

2. The USDA will make whatever revisions or changes to the contents of the FLP Handbooks, instructions and administrative notices, if any, it concludes are warranted.

3. After the Council for Native American Farming and Ranching is appointed, Class Counsel will direct any comments or proposals to revision to FSA handbooks, instructions, or notices to the Council for Native American Farming and Ranching and to the Office of Tribal Relations for further ongoing review and consideration by USDA and the Council.

G. TERM OF PROGRAMMATIC RELIEF

The Programmatic Relief specified in this paragraphs A, B, C, D and F of Section XII, above, shall be provided for a period of five (5) years. Nothing in this Settlement Agreement shall preclude USDA from maintaining the same, or comparable, programmatic structures and functions for such additional time beyond this five (5) year period as USDA determines, in its sole discretion, to be appropriate.

XIII. COURT SUPERVISION OF THE SETTLEMENT AGREEMENT & ENFORCEMENT PROCEDURES

A. Court Supervision. The Court shall retain jurisdiction over this action beyond the date of final approval of this Agreement only as set forth below and, with respect to paragraphs 1 through 5 below, only for a period of five years from the date of final approval of this Agreement.

1. **Non-Judicial Claims Process**. The Court shall retain jurisdiction over this action to supervise the distribution of the Fund and to ensure that Debt Relief Awards issued by the Track A and Track B Neutrals are applied by USDA, subject to both the limitations provided in IX.E of this Agreement and not to exceed the cap of $80 million. This continuing jurisdiction will continue until final payment from the Fund and application of the debt relief. The Court shall have no other role in supervising the provision of debt relief or the methods used to cancel outstanding debt owed to USDA, and shall have no role in resolving any disputes between a Class Member and the United States concerning the provision of debt relief.

2. **Council on Native American Farming and Ranching**. The Court shall retain jurisdiction over this action to ensure that the USDA creates the Council on Native American Farming and Ranching, as set out in Section XII.A of this Agreement, and limited by FACA, and that USDA schedules Council meetings in accordance with the scheduling provisions set out in

paragraph 5 of Section XII.A. The Court shall have no role in supervising the substance of the Council meetings, the composition of the Council, the outcome of the Council meetings, how USDA responds to Council recommendations, or any administrative or budgetary matters involving the Council.

3. **Supplemental Services on Indian Reservations.** The Court shall retain jurisdiction over this action to supervise whether the USDA conducts within the term of the Agreement an internal assessment concerning the subject of whether a consolidated sub-office or sub-office(s) at Tribal headquarters on Indian Reservations are needed and where such sub-office(s) should be placed. The Court shall have no role in supervising the content or quality of the internal assessment, requesting or demanding any actions based upon the recommendations contained in the internal assessment, or in supervising USDA office placement or the delivery of USDA services.

4. **Customer's Guide.** The Court shall retain jurisdiction over this action to supervise whether the USDA releases a customer's guide on how to apply for farm loan programs and farm loan servicing within the term of the Agreement. The Court shall have no role in supervising the content development or quality of the customer's guide.

5. **Moratorium.** The Court shall retain jurisdiction over this action to supervise whether, pursuant to Section VIII of this Settlement Agreement, the Farm Service Agency issued written or electronic notice to its Finance Office and all Farm Service Agency state and district offices and FSA service centers and to the United States Attorneys' Offices and/or the Executive Office of the United States Attorneys specifically within thirty (30) days of preliminary approval. The Court shall have no role in supervising the administrative implementation of the moratorium and shall have no role in resolving any disputes between a Class Member and Defendants concerning this issue.

Other than the provisions expressly described above and subject to the limitations agreed upon by the parties above, the Court will not retain jurisdiction over any aspect of this action, or in connection with the enforcement of any of its provisions, after the date of the final approval of this Agreement.

B. **Enforcement of the Settlement Agreement.** Before seeking any order by the Court concerning any alleged violation of the provisions of this Settlement Agreement that are enforceable by the Court, the parties must comply with the following procedures:

1. The party seeking enforcement of any of the provisions of this Settlement Agreement that are enforceable by the Court shall serve on the opposing party a written notice that describes with particularity the term(s) of the Settlement Agreement 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 party alleging the violation shall not inform the Court of the allegation at that time.

2. The parties shall make their best efforts to resolve the matter in dispute without the Court's involvement. If requested to do so, the party who served the notice shall provide to his opponent any information and materials available to the noticing party that support the violation alleged in the notice. Upon receipt of a notice, the counsel for the parties agree to meet and confer, and otherwise to work with their clients within forty-five (45) days to respond to the allegation (or 60 days to respond to an allegation of non-compliance regarding debt relief). If the opposing party fails to respond to a notice of non-compliance within forty-five (45) days (or 60 days in the case of an allegation of non-compliance regarding debt relief), or the parties otherwise cannot resolve the issue, the party who served the notice of violation pursuant to subparagraph (1), above, may move for enforcement of the provisions of this Settlement Agreement that are enforceable by the Court as early as seventy-five (75) days after the date on which the notice was served (or 90 days after the date on which the notice was served in the case of an allegation of non-compliance regarding debt relief). If, and only if, the plaintiffs prevail in securing enforcement of a contested term of the Agreement over which the Court has retained jurisdiction, the Court may award them reasonable attorneys' fees and costs.

XIV. PROCEDURES GOVERNING APPROVAL OF THIS SETTLEMENT AGREEMENT

A. Within five calendar days of the Execution Date, the Plaintiffs shall submit this Settlement Agreement and its Exhibits to the District Court along with a motion for its preliminary approval. The Motion shall specifically request that the Court set a hearing on the Motion and be accompanied by a proposed Preliminary Approval Order, a proposed Settlement Notice, and a proposed Settlement Notice Plan. The Motion shall specifically request that the Court:

1. Certify the claims for monetary relief, for settlement purposes only, pursuant to Rule 23(b)(3), Fed.R.Civ.P. in addition to maintaining the class already certified pursuant to Rule 23(b)(2), Fed. R. Civ.P., for the purpose of allowing the pursuit of declaratory and injunctive relief. Class Counsel and Class Representatives as defined in Sections II.F and II.G of

this Settlement Agreement, respectively, will be appointed to represent the class in its pursuit of monetary relief under Rule 23(b)(3);

2. Grant preliminary approval to the Settlement Agreement and its attachments and authorize issuance of the notice attached;

3. Approve the Plaintiffs' selection of a Notice Administrator, Claims Administrator and Neutrals to perform the duties set forth in this Settlement Agreement within the cost limitations set out in this Settlement Agreement.

4. Approve the Parties' plan for dissemination of notice of this Settlement Agreement pursuant to Rule 23(e)(1), Fed.R.Civ.P.;

5. Set the Track A Individual Counsel Fee Cap and the Track B Fee Cap;

6. Set a date and procedure by which objections from Class Members must be filed;

7. Set a date for the Fairness Hearing at which time the Court will determine whether the Settlement Agreement should be approved under Rule 23(e), Fed.R.Civ.P.;

8. Authorize the Secretary to disburse to Class Counsel, for the benefit of the Class, the funds specified in Section VII and order that the expenditure of such funds for purposes of this Settlement Agreement are a proper and consistent use of the funds, and that the Secretary shall not be liable in any other context or proceeding for these funds in the event that the Settlement Agreement becomes void or is voided.

B. No later than three (3) business days before the Fairness Hearing, the Notice Administrator shall file with the District Court a declaration confirming compliance with the Notice procedures approved by the Court.

C. At the Fairness Hearing, the Parties will jointly request that the District Court finally approve this Settlement Agreement pursuant to Rule 23(e), Fed.R.Civ.P., and order the items in paragraph A of this Section. The Parties agree to take all actions necessary to obtain approval of this Settlement Agreement.

D. In the event the Court approves the Settlement Agreement as fair and reasonable to the class as a whole pursuant to Rule 23 (e), Fed. R. Civ. P., the parties will ask the Court to enter the Settlement Agreement in order that it may become effective as of the Final Approval Date.

1. Within three business days of the entry of the order approving the

Settlement Agreement, the Plaintiffs will ask the Court to dismiss this action with prejudice pursuant to Rules 41(a)(1) and 23(e), Fed.. R. Civ. P., except to the extent the Court exercises continuing jurisdiction as set forth in Section XIII above.

XV. ATTORNEYS' FEES, CLASS REPRESENTATIVE SERVICE AWARDS, EXPENSES, AND COSTS

A. As part of the Motion for Preliminary Approval of this Settlement Agreement, Plaintiffs will move the Court to approve the Track B Fee Cap and the Track A Individual Counsel Fee Cap and to set the amount of the Track B Fee Cap and the Track A Individual Counsel Fee Cap, except that the amount of the Track A Individual Counsel Fee Cap shall not exceed 2% of a Track A Claimant's Final Award and a Track B Fee Cap shall not exceed 8% of a Track B Claimant's Final Award.

B. Plaintiffs will ask the Court to approve an award of attorneys' fees and costs to Class Counsel, payable as part of the common fund awarded to the Class, with the understanding that the Plaintiffs may seek, and the Court may award, such attorneys' fees and costs the total amount of which shall be at least 4% and not more than 8% of $760,000,000. The Secretary reserves the right to respond to the petition for an award of attorneys' fees and expenses that the plaintiffs will file in connection with the settlement. In the event the Secretary files a response, it will do so no earlier than the last date on which any objections from class members are due to be filed with the Court.

C. Subject to the Court's approval, the parties agree that Class Representative Service Awards, referred to in Section VII, may be awarded. Class Counsel intend to recommend awards in the following amounts:

1. Luke Crasco shall receive $100,000.

2. Gene Cadotte shall receive $100,000.

3. Keith Mandan shall receive $100,000.

4. Porter Holder shall receive $100,000.

5. George Keepseagle shall receive $100,000.

6. Marilyn Keepseagle shall receive $100,000.

7. Claryca Mandan shall receive $200,000.

8. Estate of John Fredericks, Jr. shall receive $75,000.

9. Estate of Basil Alkire shall receive $75,000.

The Secretary reserves the right to comment on the amount of the Service Awards.

The receipt of a Class Representative Service Award shall not affect in any way the Class Member's award or debt relief under Section IX.E.

Any payments awarded to these Class Representatives shall be subject to approval by the Court, and any modification or reduction of any award sought by such a Class Member shall not affect the validity of the other terms of this Decree.

D. The Court's determination of the Fee Award, the Track A Fee Cap, and the Track B Fee Cap shall be conclusive, and neither the Class, nor Class Counsel, nor the Secretary shall appeal the decision.

E. The Class Representatives, the Class, and/or Class Counsel may not terminate this Settlement agreement because the Class Representatives, the Class, and/or Class Counsel assert that the amount of the Fee Award, the Track A Individual Counsel Fee Cap, or the Track B Fee Cap is inadequate.

F. The Class Representatives, the Class, and Class Counsel release, acquit, and forever discharge any claim that they may have against the United States for attorney's fees, expenses, or costs associated with their representation of the Plaintiffs, the Class, or any member of the Class in the Case or under this Settlement Agreement. Furthermore, by accepting any payment in connection with services provided in connection with this Agreement, Individual Counsel release(s), acquit(s), and forever discharge(s) any claims that they may have against the United States for attorney's fees, expenses or costs associated with their representation of the Plaintiffs, the Class, or any Member of the Class in the Case or under this Settlement Agreement.

G. If a person preparing a claim on a Claimant's behalf seeks the Claimant's award as a representative of the Claimant's estate, Class Counsel and Individual Counsel may, but are not required to, represent that Claimant in any probate proceedings. The fee for such probate work is outside the scope of this Settlement Agreement and is not subject to any limitation on attorney's fees, expenses, or costs contained within this Settlement Agreement.

XVI. CONDITIONS THAT RENDER SETTLEMENT AGREEMENT VOID OR VOIDABLE

This Settlement Agreement shall be void if it is disapproved by a final Court order not subject to any further review.

XVII. EFFECT OF SETTLEMENT AGREEMENT IF VOIDED

A. Should this Settlement Agreement become void,

1. The Secretary will not object to reinstatement of this action in the same posture and form as it was pending immediately before the Court granted preliminary approval of the Settlement Agreement.

2. All negotiations in connection herewith, and all statements made by the Parties at or submitted to the District Court during the Fairness Hearing shall be without prejudice to the Parties to this Settlement Agreement and shall not be deemed or construed to be an admission by a Party of any fact, matter, or proposition.

3. The Secretary retains all defenses, arguments, and motions as to all claims that have been or might later be asserted in the Case, and nothing in this Settlement Agreement shall be raised or construed by any Plaintiffs, Claimants, the Class Representatives, the Class, or Class Counsel, to defeat or limit any defenses, arguments, or motions asserted by the Secretary. Neither this Settlement Agreement, nor the fact of its having been made, nor any exhibit or other document prepared in connection with this Settlement Agreement, shall be admissible, entered into evidence, or used in any form or manner in discovery in the Case or in any other action or proceeding for any purpose whatsoever if they are objected to by the Secretary.

4. With the exception of the Release provided in subsection 5, below, Plaintiffs, Claimants, and Class Members shall retain all rights, claims, causes of action, arguments, and motions as to all claims that have been or might later be asserted in the Case, and nothing in this Settlement Agreement shall be raised by the Secretary or the Secretary's Counsel to defeat or limit any rights, claims, causes of action, arguments, or motions asserted by any Claimants and/or the Class. With the exception of the Release provided in subsection 5, below, neither this Settlement Agreement, nor the fact of its having been made, nor any exhibit or other document prepared in connection with this Settlement Agreement, shall be admissible, entered into evidence, or used in any form or manner in discovery, over the objection of any Plaintiffs, Claimants, and/or the Class in the Case or in any other action or proceeding for any purpose

whatsoever.

5. The Plaintiffs hereby RELEASE, WAIVE, ACQUIT, and FOREVER DISCHARGE the United States and the Secretary from, and are hereby FOREVER BARRED and PRECLUDED from prosecuting, any and all claims, causes of action, or requests for any monetary relief, including, but not limited to, damages, tax payments, debt relief, costs, attorney's fees, expenses, and/or interest that, whether presently known or unknown, related to the funds that the Secretary has paid pursuant to Section VII. Neither the Plaintiffs nor Class Counsel shall be obligated to repay any Implementation Costs paid to them by the Secretary under Sections VII.B, VII.C and/or VII.E.

XVIII. RELEASES

The Class Representatives, the Class, and its Members and their heirs, administrators, successors, and assigns (the "Class Releasors") hereby RELEASE, WAIVE, ACQUIT, and FOREVER DISCHARGE the United States and the Secretary (the "Government Releasees") from, and are hereby FOREVER BARRED and PRECLUDED from prosecuting, any and all claims, causes of action, or requests for any injunctive and/or monetary relief, including, but not limited to, damages, tax payments, debt relief, costs, attorney's fees, expenses, and/or interest, whether presently known or unknown, that have been or could have been asserted in the Case by reason of, with respect to, in connection with, or which arise out of, any matters alleged in the Case that the Class Releasors, or any of them, have against the Government Releasees, or any of them.

XIX. NO ADMISSION OF LIABILITY

A. Neither this Settlement Agreement nor any order approving it is or shall be construed as an admission by the Secretary and/or the United States of the truth of any allegation or the validity of any claim asserted in the Case, or of the liability of the Secretary and/or the United States, 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 Secretary and/or the United States, nor shall this Settlement Agreement 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 the subject of any discovery or construed by anyone for any purpose whatsoever as an admission or presumption of any wrongdoing on the part of the Secretary and/or the United States, nor as an admission by any Party to this Settlement Agreement that the consideration to be given hereunder represents the relief which could have been recovered after trial.

1. The Secretary and the United States deny liability and damages as to each of the claims and requests for damages that were or could have been raised

in the Case, and this Settlement Agreement does not constitute, and may not be construed as, a determination or an admission of a violation of any law, rule, regulation, policy, or contract by the Secretary and/or the United States, the truth of any allegation made in the Case, or the validity of any claim asserted in the Case. This Settlement Agreement does not constitute, and may not be construed as, a determination or an admission that the Secretary and/or the United States is liable in this matter, that the Class or any Member is a prevailing party, that the Class or any Member was substantially justified in any claim or position, or that any claim, defense, or position of the United States was substantially unjustified.

2. Neither the determination to pay money nor the payment of money under the Non-Judicial Claims Process shall be deemed to be a finding of fact, conclusion of law, or an admission of liability or damages by the Secretary and/or the United States, and any such determination to pay money or the payment of money under the Non-Judicial Claims Process shall not be admissible in any civil, criminal, or administrative action or proceeding, nor shall it be construed by anyone for any purpose whatsoever as an admission or presumption of any wrongdoing on the part of the Secretary and/or the United States, nor as an admission by any Party to this Settlement Agreement that the consideration to be given hereunder represents the relief which could have been recovered after trial.

3. Nothing herein shall be construed to preclude the use of this Settlement Agreement to enforce the terms thereof.

XX. CONTACT INFORMATION FOR THE SECRETARY AND FSA

A. The reports, forms, transmissions, accountings, and documentation that must or may be provided to the Secretary under this Settlement Agreement shall be sent via electronic transmission or overnight delivery to (1) Counsel of Record for the Secretary in the Case, and (2) General Counsel, U.S. Department of Agriculture, 1400 Independence Avenue SW, Washington, DC 20250.

B. The reports, forms, transmissions, accountings, documentation, and checks that must or may be provided to FSA under this Settlement Agreement shall be sent via electronic transmission or overnight delivery to Deputy Administrator, Farm Loan Programs U.S. Department of Agriculture, Farm Service Agency, 1400 Independence Avenue SW, Washington, DC 20250, STOP 0520.

XXI. INTEGRATION

This Settlement Agreement and its Exhibits constitute the entire agreement of the Parties, and no prior statement, representation, agreement, or understanding, oral or written, that is not contained herein, will have any force or effect.

XXII. MODIFICATION

This Settlement Agreement may be modified only with the written agreement of the Parties and with the approval of the District Court, upon such notice to the Class, if any, as the District Court may require.

XXIII. DUTIES CONSISTENT WITH LAW AND REGULATIONS

Nothing contained in this Settlement Agreement shall impose on the Secretary 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.

XXIV. DUTY TO DEFEND

The Parties to this Settlement Agreement shall defend against any challenges to it in any forum.

XXV. HEADINGS

The headings in this Settlement Agreement are for the convenience of the Parties only and shall not limit, expand, modify, or aid in the interpretation or construction of this Settlement Agreement.

XXVI. SEVERABILITY

Should any non-material provision of this Settlement Agreement be found by a court to be invalid or unenforceable, then (A) the validity of other provisions of this Settlement Agreement shall not be affected or impaired, and (B) such provisions shall be enforced to the maximum extent possible.

XXVII. COUNTERPARTS

This Settlement Agreement may be executed in counterparts. All executed counterparts and each of them shall be deemed to be one and the same instrument.

AGREED:

For the Plaintiffs:

Respectfully submitted,

Joseph M. Sellers, Bar No. 318410
Christine E. Webber, Bar No. 439368
Peter Romer-Friedman, Bar No. 993376
COHEN MILSTEIN SELLERS & TOLL PLLC
1100 New York Avenue, N.W.
Suite 500, West Tower
Washington, DC 20005
Telephone: (202) 408-4600
Facsimile: (202) 408-4699

David J. Frantz, Bar No. 202853
CONLON, FRANTZ & PHELAN
1818 N Street, N.W.
Suite 400
Washington, DC 20036-2477
Telephone: (202) 331-7050
Facsimile: (202) 331-9306

Paul M. Smith, Bar No. 358870
Katherine A. Fallow, Bar No. 462002
Jessica Ring Amunson, Bar No. 497223
Carrie F. Apfel, Bar No. 974342
JENNER & BLOCK LLP
1099 New York Ave., N.W.
Suite 900
Washington, DC 20001-4412
Telephone: (202) 639-6000
Facsimile: (202) 639-6066

Anurag Varma, Bar No. 471615
PATTON BOGGS LLP
2550 M Street, N.W.
Washington, DC 20037
Telephone: (202) 457-6000
Facsimile: (202) 457-6315

Phillip L. Fraas
STINSON MORRISON HECKER
1150 18th St. NW, Suite 800
Washington, DC 20036
Telephone: (202) 785-9100
Facsimile: (202) 785-9163

Sarah Vogel
SARAH VOGEL LAW PARTNERS
222 N. 4th St.
Bismarck, ND 58501
Telephone: (701)221-2911
Facsimile: (701) 221-5842

Attorneys for Plaintiffs

Dated: 11/1/10

For the Secretary:

TONY WEST
Assistant Attorney General

RONALD C. MACHEN JR.
United States Attorney
Civil Division, Room E4216
555 Fourth Street NW
Washington, DC 20530
Telephone: (202) 514-7178

Joshua E. Gardner
Attorney, Federal Programs Branch
Civil Division
20 Massachusetts Avenue NW, Room 6146
Washington, DC 20001
Telephone: (202) 514-1944

Dated: November 1, 2010

SO ORDERED

Dated: _____

_____
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

MARILYN KEEPSEAGLE, *et al.*,	)	
Plaintiffs,	)	Civil Action No. 99-03119 (EGS)
v.	)	
TOM VILSACK,	)	
Defendant.	)	

ORDER ON MOTION FOR PRELIMINARY APPROVAL OF SETTLEMENT, AND AN ORDER CERTIFYING SETTLEMENT CLASS AND APPROVING CERTAIN PROVISIONS IN SETTLEMENT AGREEMENT

Upon consideration of Plaintiffs' Motion for Preliminary Approval of Settlement, Settlement Class, Notice, Proposed Administrators, Attorney's Fees, and Service Awards, and the revised Settlement Agreement filed on November 1, 2010, and the entire record herein

It is hereby **ORDERED** that the motion is **GRANTED**:

(1) The Settlement Agreement, as revised November 1, 2010, is preliminarily approved;

(2) Attorney's fees for individual counsel for Track A Claimants are capped at 2% of a Track A final award, and attorney's fees for individual counsel for Track B Claimants are capped at 8% of a Track B final award;

(3) Kinsella Media, LLC is approved as the Notice Administrator for the Settlement Agreement;

(4) Epiq Systems is approved as the Claims Administrator for the Settlement Agreement;

(5) JAMS is approved as the Neutral for the Settlement Agreement;

(6) The provision for Implementation Costs set forth in Section VII.B-D of the Settlement Agreement is approved. The Secretary is authorized to disburse to Class Counsel, for the benefit of the Class, the funds specified in Section VII. The Court finds that the expenditure of such funds for this Settlement Agreement are a proper and consistent use of the funds, and that the Secretary shall not be liable in any other context or proceeding for these funds in the event that the Settlement Agreement becomes void or is voided;

(7) The following attorneys are approved as Class Counsel: Joseph M. Sellers, Christine E. Webber, Peter Romer-Friedman of Cohen Milstein Sellers & Toll, PLLC; David J. Frantz of Conlon, Frantz & Phelan, LLP; Paul M. Smith, Katherine A. Fallow, Michael Brody, Jessica Ring Amunson, and Carrie Apfel of Jenner & Block, LLP; Anurag Varma of Patton Boggs LLP; Phillip L. Fraas of Stinson, Morrisson and Hecker; and Sarah Vogel;

(8) The following individuals are approved as Class Representatives: Gene Cadotte, Keith Mandan, Porter Holder, Marilyn Keepseagle, and Claryca Mandan;

(9) The Court hereby affirms its prior decision certifying the class described below to allow it to pursue declaratory and injunctive relief pursuant to Fed. R. Civ. P. 23(b)(2), and to allow the same class to pursue claims for damages pursuant to Fed. R. Civ. P. 23(b)(3):

> All persons who are Native American farmers and ranchers who (1) farmed or ranched or attempted to farm or ranch between January 1, 1981 and November 24, 1999; (2) applied to the USDA for participation in a farm loan program during that period; and (3) filed a discrimination complaint with the USDA either individually or through a representative with regard to alleged discrimination that occurred during the same time period.

(10) The proposed Notices, attached as Exhibits I and J to the revised Settlement Agreement, are approved, and the parties' plan for dissemination of notice of the Settlement Agreement pursuant to Fed. R. Civ. P. 23(e)(1) is approved;

(11) A status report from the Notice Administrator must be filed no later than December 15, 2010;

(12) A status conference will be held on January 4, 2011 at 11:30 AM;

(13) Plaintiffs' Petition for an Award of Attorneys' Fees must be filed no later than January 14, 2011;

(14) Plaintiffs' Memorandum in Support of Class Representative Service Awards must be filed no later than January 21, 2011;

(15) All objections to the Settlement Agreement and all opt-out notices must be postmarked no later than February 28, 2011;

(16) The Notice Administrator will file a declaration and any additional necessary documentation regarding the provision of notice for this Settlement Agreement, and regarding the objections and opt-out notices received, by no later than March 15, 2011;

(17) Any response the Defendant may file to the Petition for an Award of Attorneys' Fees and the Memorandum in Support of Class Representative Service Awards must be filed no later than March 18, 2011;

(18) Any responses either or both parties file in response to objections to or comments about the proposed Settlement Agreement must be filed no later than April 1, 2011;

(19) Pursuant to Rule 23 (e), Fed. R. Civ. P., the Court will hold a fairness hearing on April 28, 2011 at 10:00 AM in Courtroom 24A.

(20) This Order shall be published wherever the parties or the Notice Administrator publish the Settlement Agreement.

SO ORDERED.

Signed: **Emmet G. Sullivan**
United States District Court Judge
November 1, 2010