UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

GEORGE P. KEEPSEAGLE, et al.,

Plaintiffs,

v.

ANN VENEMAN,

Defendant.

Civil Action No. 99-03119 (EGS) [17] [127]

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 sub-classes in accordance with this Memorandum Opinion, and denies defendant's motion for a stay of the Court's September 28, 2001 Order.

Introduction

Plaintiffs and the class of Native American farmers and ranchers (hereinafter "farmer(s)") that they seek to represent applied for United States Department of Agriculture ("USDA") farm loan and benefit programs between January 1, 1981 and November 24, 1999. Eight hundred and thirty-eight (838) plaintiffs named in the Fifth Amended Complaint, and the members of plaintiffs' proposed class, make two common claims: (1) USDA discriminated against them on the basis of race in processing their farm program applications; and (2) USDA did not investigate complaints of discrimination. *See* Pls.' Mot. for Class Cert. at 92. According to the plaintiffs and class members, the USDA discriminated against them by, *inter alia,* denying them access to the programs or treating them less favorably than non-Native American farmers in processing their applications, servicing loans, and/or administering benefits. *See* Fifth Am. Compl. at 108-109. The plaintiffs and class members also allege that they complained of this discrimination to USDA, but that USDA failed to properly process and investigate their complaints. *See id.*

The plaintiffs and class members allege that USDA's discrimination against them in the administration of farm loan and benefits programs violates the Equal Credit Opportunity Act ("ECOA"), 15 U.S.C. § 1691e, the Administrative Procedures Act ("APA"), 5 U.S.C. § 706(2)(A),

and Title VI of the Civil Rights Act of 1964 ("Title VI"), 42 U.S.C. 2000d, *et seq.* In particular, plaintiffs allege that the discrimination in USDA's processing of credit applications and its failure to investigate is a violation of ECOA, and that discrimination in the department's processing of applications for non-credit programs and its failure to investigate such discrimination is a violation of the APA. Pls.' Reply at 7.

Plaintiffs seek declaratory and injunctive relief and damages. Pursuant to the ECOA, plaintiffs request damages and injunctive relief. *See* Fifth Am. Compl. at 85. Under the APA, plaintiffs pray for "appropriate relief," "including (1) compensation to plaintiffs and Class members for there having been no proper investigation of their complaints, and (2) specific performance with respect to their program benefits." *Id.* at 86. Plaintiffs also request "appropriate relief" under Title VI, including equitable performance and specific performance of program benefits. Finally, pursuant to the Declaratory Judgment Act ("DJA"), 28 U.S.C. § 2201, plaintiffs request declaratory judgment as to plaintiffs' and class members' "rights under [USDA's] farm programs including their right to equal credit, equal participation in farm programs, and their right to full and timely enforcement of racial discrimination complaints" under the APA. *Id.* at 84-85.

I. BACKGROUND

A. USDA's Farm Programs and Determination Process

USDA administers a variety of farm credit and benefit programs. Until 1994, USDA divided its administration of these programs between the Farmers Home Administration ("FmHA") (credit programs) and the Agriculture Stabilization and Conservation Service ("ASCS") (non-credit programs). In 1994, USDA consolidated these programs into the Farm Service Agency ("FSA").

A farmer seeking a farm credit or benefit is required to submit an application pursuant to USDA program policies. The local county committee and USDA staff and officials determine initially if the farmer is eligible for the program, and USDA staff ultimately grants or denies the application. *See generally* 7 C.F.R. §§ 1910.5, 1910.4(g), 1941.30, 1943.30 (2001).

B. USDA's Civil Rights Enforcement Structure and Procedure

Any farmer who believes that USDA denied his or her application for a program loan or benefit on the basis of race, or some other prohibited basis, has the option of filing a civil rights complaint with the Secretary of USDA and/or with the USDA office charged with investigating civil rights violations. From January 1, 1981, through November 24, 1999, a number of USDA offices were involved with civil rights investigations, including, inter alia, the Office of Civil Rights Enforcement and Adjudication ("OCREA"). In

processing these civil rights complaints, OCREA and the appropriate USDA agency were required to pursue conciliation, perform a preliminary inquiry, and make a final discrimination determination. If the farmer was dissatisfied with the final discrimination determination, the farmer was permitted to sue in federal court under the Equal Credit Opportunity Act ("ECOA"), 15 U.S.C. § 1691e. See *Pigford v. Glickman*, 82 F.R.D. 341, 342-344 (D.D.C. 1997).

C. Failings of USDA's Civil Rights Enforcement Unit

The plaintiffs and class members allege that USDA dismantled its civil rights enforcement unit in 1983 and has not investigated discrimination complaints since that time. Plaintiffs and class members contend that USDA, in two internal reports, admitted its failure to account for and to investigate these discrimination complaints. See Civil Rights Action Team, United States Department of Agriculture, Civil Rights at the United States Department of Agriculture (1997) (the "CRAT Report"); Office of Inspector General, U. S. Department of Agriculture Evaluation Report for the Secretary on Civil *Rights - Phase* I Report No. 50801-2-Hq(1) (1997)("OIG Report").

In the CRAT Report, USDA concluded that "[m]inority farmers have lost significant amounts of land and potential farm income as a result of discrimination by FSA programs and the programs of its predecessor agencies, ASCS and

FmHA." CRAT Report at 30. The report found that "[t]he process for resolving complaints has failed." *Id.* at 31. USDA also noted that disparities existed between "non minority loan processing and American Indian loan processing." *Id.* at 21.

In the OIG Report, USDA found that a significant number of USDA discrimination complaints filed were not processed, investigated or resolved. See OIG Report at 6. USDA concluded that the "program discrimination complaint process at FSA lacks integrity, direction and accountability," and that OCREA "does not have controls in place to monitor and track discrimination complaints." *Id.* at 9. In March 2000, USDA's Office of Inspector General issued a supplemental report finding that USDA had not made any significant changes in its system of processing discrimination complaints. *See* Office of Inspector General Audit Report, *Office of Civil Rights Status of Implementation of Recommendations Made in Prior Evaluations of Program Complaints, Audit Report 60801-4-Hq,* at i. (Mar. 2000).

D. Previous litigation involving requests for class certification by minority farmers alleging discrimination by USDA

Two cases involving claims by minority farmers against USDA have already been reviewed by judges of this Court. In *Williams v. Glickman,* Judge Flannery denied certification to a proposed class of African American and Hispanic American

farmers. Memo. Op., Civil Action No. 95-1149 (Feb. 14, 1997). In *Williams*, the plaintiffs proposed a class of:

> All African American or Hispanic American persons who, between 1981 and the present, have suffered from racial or national origin discrimination in the application for or the servicing of loans or credit from the FmHA (now Farm Services Agency) of the USDA, which has caused them to sustain economic loss and/or mental anguish/emotion [sic] distress damages.

Id. at 7.

Judge Flannery held that the class was not readily ascertainable because the initial determination of who qualified as a class member would require an individualized inquiry. *Id.* at 8. In addition, the court found that the class did not meet the requirements of Fed. R. Civ. P. 23 because the class was overbroad and did not meet the standards of commonality and typicality.

In a subsequent case, *Pigford v. Glickman,* Judge Friedman certified a class of African American farmers. 182 F.R.D. 341 (D.D.C. 1998). In *Pigford,* the court first certified a class for purposes of a liability determination. *Id.* at 351. This class included:

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

Id. at 345. The court distinguished this class from that in Williams by finding that the "parameters of the proposed

class ... are sufficiently clear to make the proposed class administratively manageable." *Id.* at 346. The parties in *Pigford* subsequently settled the case. *See Pigford v.* Glickman, 185 F.R.D. 82 (D.D.C. 1999). The Court is mindful of these cases in reviewing the instant motion for class certification, in particular because defendant relies extensively on Williams, and plaintiffs rely on *Pigford*.[2]

II. PLAINTIFFS' REQUEST FOR CLASS CERTIFICATION

Plaintiffs request that the Court certify this case as a class action because USDA's failure to properly process, account for, and/or investigate their complaints of racial discrimination presents common questions of law and fact. *See Pl.'s* Mot. for Class Cert. at 29-31. Plaintiffs also assert that USDA's alleged discrimination in denying them

1 The court, in approving the parties' Consent Decree, also approved a revised class definition presented in the decree:

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

Pigford, 185 F.R.D. at 92; see *also id.* at 93 ("None of the substantive changes to the class definition in any way affects the Court's analysis or conclusion that the case properly is certified as a class action.").

2 The Court notes that two additional related cases have been filed with this Court since the plaintiffs initiated the instant action. In *Love v. Glickman,* Civil Action No. 00-02502, plaintiffs are women and disabled farmers; in *Garcia v. Glickman,* Civil Action No. 00-02445, plaintiffs are Latino farmers. The Court has no reason to address these cases, but notes that there have been no rulings on the issue of class certification in these cases.

access to farm loans and benefits programs and/or treating them less favorably than non-Native-American farmers presents common questions of law and fact. *Id.* Plaintiffs maintain that class certification is in the best interest of justice because it will facilitate the efficient enforcement of rights and will conserve judicial resources by enabling the plaintiffs to establish USDA's discrimination on a systemic basis. *See* Pls.' Proposed Order at 4. Plaintiffs propose a class defined as:

> All 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 between January 1, 1981 and November 24, 1999, and who complained of that discrimination to the USDA, individually or through a representative.3

Id. Plaintiffs further propose four subclasses, depending on whether the applicant had complained orally or in writing, and whether the complaint is on file with USDA. *Id.*

3 This is plaintiffs' proposed class definition as found in their proposed order. In Plaintiffs' Motion for Certification of Class and in their Reply, the plaintiffs defined the proposed class as:

> All Native American participants in FSA's farm programs who petitioned USDA at any time between January 1, 1981, and November 24, 1999, for relief from acts of racial discrimination visited on them as they tried to participate in such farm programs and who, because of the failings in the USDA civil rights complaint processing system, were denied equal protection under the laws of the United States and deprived of due process in the handling of their discrimination complaints.

Pls.' Motion at 5-6; Pls.' Reply, at 5-6.

Plaintiffs present seven proposed class representatives.[4] All the proposed class representatives are farmers or ranchers. The representatives include members of four different tribes, who reside in three different reservations. *See Pls.'* Mot. for Class Cert. at 7, 10, 15, 18, 21; Pls.' Fifth Am. Compl. at 127. Plaintiffs have not categorized the proposed representatives' claims. However, it appears that at least five proposed class representatives allege discrimination in the processing of loan applications. All the proposed class representatives who are described in plaintiffs' motion allege that they have "timely filed, either directly or through [their] Tribal Council, complaints to the defendant regarding these acts of discrimination." See Pls.' Mot. for Class Cert. at 9-10, 15, 18, 20-21, 23.

III. DISCUSSION

A. Existence of the Class

Rule 23 of the Federal Rules of Civil Procedure governs any discussion of class certification. Fed. R. Civ. P. 23. While Rule 23 does not formally require plaintiffs to prove the existence of a class, some courts have found that "this is a common-sense requirement and ... routinely require it."

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4 Plaintiffs' motion presents five proposed class representatives: George B. Keepseagle; Gene Cadotte; Luther Crackos; John Fredericks; and Basil Alkire. Pls.' Motion for Class Cert. at 7-23. However, in plaintiffs' proposed order, they mention *seven* "lead plaintiffs" who are "representative of the class." Pls.' Proposed Order at 8. Presumably, plaintiffs are including as named representatives Keith and Claryca Mandan, whose claims are outlined in plaintiffs' Fifth Amended Class Action Complaint. Pls.' Fifth Am. Compl. at 127-30.

Pigford v. Glickman, 182 F.R.D. 341, 346 (D.D.C. 1998); *see Lewis v. National Football League*, 146 F.R.D. 5, 8 (D.D.C. 1992); *see also Simer v. Rios*, 661 F.2d 655, 669 (7th Cir. 1981) ("it is axiomatic that for a class action to be certified a `class' must exist"). Neither the D.C. Circuit nor the Supreme Court has engaged in this additional step of the class certification analysis. *See, e.g., Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 613-14, 117 S. Ct. 2231 (1997); *General Telephone Co. of the Southwest v. Falcon*, 457 U.S. 147, 160-61, 102 S. Ct. 2364 (1982) (reviewing only the prerequisites set out in Rule 23(a)); *Eubanks v. Billington*, 110 F.3d 87, 92 n.6 (D.C. Cir. 1997) (listing prerequisites for a class action). Nevertheless, the Court is persuaded that some initial review of the proposed class is appropriate to ascertain whether "the general outlines of the membership of the class are determinable at the outset of litigation." *Pigford*, 182 F.R.D. at 346. This inquiry is one concerned with the court's ability to clearly identify and manage the class, and thus does not involve a "particularly stringent test." *Id.*

Defendant argues that the proposed class is not readily ascertainable because, like the class proposed in *Williams*, it will require individualized inquiries into class members' allegations of discrimination. Def.'s Opp'n at 30. The *Williams* court held that "[b]ecause the Court must answer

numerous fact-intensive questions before determining if an individual may join the class, the proposed class is not clearly defined." Memo. Op., Civil Action No. 95-1149, at 9 (Feb. 14, 1997). *Williams* further held that the proposed class was "overly broad" because it was "not limited to any specific policy or practice which is alleged to be discriminatory; instead, the class purports to include those black and Hispanic farmers who have suffered from any type of discrimination in their dealings with the FmHA." *Id.*

Defendant contends that "[t]o the extent that plaintiffs' proposed class definition is read to encompass their individual damage claims under ECOA of discrimination in farm programs administered by USDA, the class is uncertifiable under Fed. R. Civ. P. 23." Def.'s Opp'n to Pls.' Proposed Order at 5. The defendant erroneously reads *Williams* to mean that "individual damages claims" under ECOA "inherently lack the commonality" necessary under Rule 23. *Id.* (citing Mem. Op. of Feb. 14, 1997, *Williams*, at 15)). This is an overly broad reading of *Williams* because *Williams* concerned a class that encompassed any and all forms of discrimination in connection with processing and servicing of loans. Thus, in order to determine whether an individual fit within the class, the court needed to decide the merits of the individual's discrimination claim.5 Here, as in

5 The Court does not suggest that classes that encompass a variety of forms of discrimination may never be certified. *See Eubanks v. Billington*, 110 F.3d 87, 92 (D.C. Cir. 1997) ("Title VII and other civil rights actions are frequently certified pursuant to Rule 23(b)(2)");

Pigford, by limiting the class to plaintiffs who have filed discrimination complaints concerning alleged discrimination in USDA's administration and processing of their applications, the plaintiffs' proposed class has clearly defined parameters.

1. Class Definition

The Court sua sponte modifies the proposed class in two ways for clarity and ease of administration. See *Council of and for the Blind of Delaware County Valley, Inc. v. Regan*, 709 F.2d 1521, 1543 n.44 (D.C. Cir. 1983) (en banc) (Spottswood, J., concurring in part, dissenting in part) (noting that "[f]ederal courts possess ample authority to redefine the class to bring it within acceptable limits," and gathering cases); *see also Barney v. Holzer Clinic, Ltd.*, 110 F.3d 1207, 1213-14 (6th Cir. 1997)(court of appeals sua sponte narrowing class definition and limiting judgment accordingly).

First, the Court removes the requirement that members must "believe" that they have experienced discrimination. Plaintiffs' proposed class definition tracks the language of the *Pigford* class, where the court *sua sponte* replaced the provision that class members have experienced discrimination with a condition that class members believe that they have experienced discrimination. 182 F.R.D. at 347. In this

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Marisol A. v. Giuliani, 126 F.3d 372, 376 (2d Cir. 1997) (certifying class of children injured by broad range of deficiencies in child welfare services).

manner, the court avoided a need to make any initial finding of discrimination in order to determine class membership. However, in the instant matter, plaintiffs propose a class that will be limited to individuals who have complained of discrimination. Thus, the requirement that class members believe that they have experienced discrimination is likely to be superfluous. Furthermore, the Court is apprehensive that such a "belief" requirement will lead to uncertain boundaries of the class. The Court concludes that the limitation imposed by the "complaint" requirement is fully sufficient to permit the Court to identify the class and its members.

Second, the Court follows *Pigford*'s lead in imposing concrete time periods on the time that class members farmed, the time during which they applied to USDA for participation in a federal farm program, and in which they filed a discrimination complaint with USDA. The plaintiffs' proposed class limits only the time period of participation in a USDA program from January 1, 1981 through November 24, 1999.

This Court, therefore, reviews the following class under Rule 23's requirements for certification:

> 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.

2. In Considering the Motion for Class Certification, the Court Does Not Evaluate the Merits of Plaintiffs' Claims

Defendant argues that plaintiffs' proposed class definition will not entitle them to money damages and that, therefore, the Court should not certify the class. *See* Def.'s Opp'n to Proposed Order at 5. Specifically, defendant contends that the APA does not permit monetary damages and that the plaintiffs' class, or a part of it, will be barred by the statute of limitations from seeking monetary damages pursuant to ECOA. *Id.* at 5, 16. In determining whether to certify a class, the Court should not examine the underlying merits of the claims. *See Eisen v. Carlisle & Jacquelin,* 417 U.S. 156, 177-78 (1974). The Supreme Court noted in *Eisen* that, "in determining the propriety of a class action, the question is not whether the ... plaintiffs have stated a cause of action or will prevail on the merits, but rather whether the requirements of Rule 23 are met." *Id.* at 178.

Defendant notes that plaintiffs' claims may be barred by the statute of limitations. The proposed class encompasses members who allege discrimination that occurred between January 1, 1981 and November 24, 1999. In 1999, Congress passed legislation tolling the statute of limitations for complaints of discrimination against USDA. *See* Agricultural, Rural Development, Food and Drug Administration, and Related Agencies Appropriations Act,

1999, Pub. L. No. 105-277, § 741, 112 Stat. 2681 (codified at 7 U.S.C. § 2297, Notes). The legislation requires that, in order for the statute of limitations to toll, a farmer must have filed his complaint of discrimination with USDA before July 1, 1997. Defendant argues that members of the proposed class will not benefit from this waiver.

In *Kifafi v. Hilton Hotels Retirement Plan,* the court recognized that, while the "class action mechanism cannot be used to resurrect stale claims," a "resolution of a statute of limitations issue at the class certification stage would impermissibly intrude upon the merits" of the class representative's claim. 189 F.R.D. 174, 177-78 (D.D.C. 1999). In the course of the *Pigford* litigation, the court revised the definition of the already certified class in order to reflect the new legislation. 185 F.R.D. at 93. The 1999 legislation may seem sufficiently clear so as to allow this Court to make similar modifications to the class. However, the plaintiff's proposed class includes farmers who have made both "written" and "oral" complaints, a factor which may trigger different statutes of limitations. See Def.'s Opp'n to Pls.' Proposed Order at 16-17. Thus, it would be impermissible for this Court to revise the definition of the class so as to effectively rule on the merits of class representatives' claims.

Defendant further argues that farmers who have "filed" orally, or whose complaints are not on file with USDA, are

not properly included in the class. Plaintiffs' proposed class would include all Native American farmers and ranchers who have lodged complaints, in writing or orally, with USDA, including those on file with USDA and those not on file.6 Individuals who made oral complaints, or whose complaints are not on file with USDA, may have a more difficult time succeeding on the merits of their claims. Obviously, an oral complaint, or one not on file, may also raise different questions of proof. Nevertheless, individuals making such complaints are clearly within the proposed class definition, and any further consideration of defendant's objection would constitute consideration of the merits. *See Eisen*, 417 U.S. at 177-78 (1974). Withholding judgment as to whether all class members are ultimately entitled to relief, the Court finds that a class including individuals who have filed both oral and written complaints individually or through a representative is clearly identifiable.

B. Rule 23(a)

The four prerequisites of Rule 23 (a) require plaintiffs to demonstrate that:

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6 Given plaintiffs' allegations, it is clear why they seek to include both written and oral complaints, whether or not they are on file at USDA. The CRAT Report described the USDA record-keeping of discrimination complaints as "virtually nonexistent." CRAT Report, at 24. Furthermore, the OIG Report further found that there was no reliable method of processing complaints, was a large backlog of unresolved cases, files could not be located and were "generally disorganized." OIG Report, at 7. The OIG Report also suggests that USDA may have destroyed some complaints. *Id.* at 1. Thus, plaintiffs who have filed complaints, or complained in meetings with USDA officials may not have such complaints "on file" with USDA.

> (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

Fed. R. Civ. P. 23(a); *see also General Tel. Co. v. Falcone,* 457 U.S. 147, 156, 102 S. Ct. 2364 (1982).

1. Numerosity

Plaintiffs' Fifth Amended Complaint identifies 838 Native-American farmers from more than a dozen states throughout the United States. *See Pls.'* Fifth Am. Compl. at 108. Based on farm census data and discussions with representatives from the Native-American community, plaintiffs estimate that the class may approach 19,000 members. Pls.' Mot. at 28. Defendant counters that plaintiffs' estimate of 19,000 members is based on "mere belief." Def.'s Opp'n at 33. However, the current number of plaintiffs fitting the class definition, approximately 814,[7] is sufficient to meet the numerosity requirement. *See Pigford,* 182 F.R.D. at 347-48 ("Plaintiffs have provided the names of four hundred and one named plaintiffs who they claim fall within the class definition. That alone is sufficient to establish numerosity, especially when the class members are located in different states."); *see also Coleman v. Pension Benefit Guaranty Corp.,* 196 F.R.D. 193,

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7 Plaintiffs have represented that they will remove 24 currently named plaintiffs, who did not complain of discrimination to USDA. Therefore, the current number of class members is presumably 814.

198 (D.D.C. 2000) (noting that the numerosity requirement is satisfied where it is clear that joinder would be impracticable).

2. Commonality

Plaintiffs have established that common questions of law and fact predominate the determination of liability. *See* Fed. R. Civ. P. 23(a)(2); *Falcon,* 457 U.S. at 159 n.15. The primary concern in assessing the commonality and typicality requirements of Rule 23 (a) is to ensure that "maintenance of a class action is economical and [that] the named plaintiff's claim and the class claims are so interrelated that the interests of the class members will be fairly and adequately protected in their absence." *Falcon;* 457 U.S. at 157 n.13 (noting that the commonality and typicality requirements of Rule 23(a) tend to merge). "The commonality test is met where there is at least one issue, the resolution of which will affect all or a significant number of the putative class members." *Lightbourne v. County of El Paso,* 118 F.3d 421, 426 (5th Cir. 1997).

The existence of factual distinctions differences between the claims of putative class members will not preclude a finding of typicality. *See Prado-Steiman v. Bush,* 221 F.3d 1266, 1279 n.14 (11th Cir. 2000). Here, USDA's alleged failure to properly process, account for, and/or investigate discrimination complaints affected each

class member. The plaintiffs assert three common factual and legal issues arising from that failure:

1. Did the USDA have a legal obligation to process and investigate complaints of discrimination it received?

2. If the USDA had such a duty, was there a systemic failure properly to process complaints in the specified time period?

3. If there was such a systemic failure, do plaintiffs have a private cause of action against the USDA?

Common questions of law and fact are also present in the issues involving USDA's alleged discrimination in denying the Native-American farmers access to farm loan and benefits programs or treating them less favorably than non-Native-American farmers.

The *Pigford* court identified common issues almost identical to those presented by plaintiffs. 182 F.R.D. at 348. In contrast, in *Williams*, the court held that a "common thread of discrimination" did not satisfy the requirement that plaintiffs demonstrate the existence of a common legal question. *Williams*, Me. Op. Of Feb. 14, 1997, at 13 (citing *Hartman v. Duffey*, 19 F.3d 1459, 1472 (d.c. Cir. 1994) for the proposition that "there is more to a showing of commonality than a demonstration that the class plaintiffs suffered discrimination on the basis of membership in a particular group"). However, plaintiffs need only show a "common thread" underlying the legal issues presented; here, they have alleged the existence of a

"unifying pattern of discrimination," which gives rise to their legal claims. *Pigford,* 182 F.R.D. at 348.

In *Marisol A. v. Giuliani,* the Second Circuit noted that plaintiffs challenged a variety of aspects of the child welfare system in New York. 126 F.3d 372, 376 (2d Cir. 1997). The claimed deficiencies ranged from allegations of inadequate training, to failure to investigate reported abuse, to failure to secure adoption placements. *Id.* The court noted that plaintiffs' claims "implicat[ed] different statutory, constitutional and regulatory schemes." *Id.* at 377. The district court identified as a common issue of law "whether each child has a legal entitlement to the services of which that child is being deprived ...." *Id.* On appeal, defendants argued that the district court erred "by conceptualizing the common legal and factual questions at this high level of abstraction." *Id.* While the Second Circuit held that the creation of subclasses was necessary for efficient management of the class, it affirmed the district court's certification of the class. *Id.* The Court of Appeals noted that plaintiffs had alleged that their injuries derived from "a unitary course of conduct by a single system," and that the plaintiffs' claims were not so unrelated to one another that class certification was inappropriate. *Id.*

Plaintiffs' claims are less varied than those presented by the *Marisol A.* plaintiffs. While it is true that

plaintiffs allege a variety of forms of racial discrimination by USDA, the alleged absence of a functioning, effective mechanism for investigating and resolving complaints of discrimination against Native American farmers exacerbates and prolongs any discrimination in the administration of USDA programs. It is clear that the systematic failure to process complaints of discrimination is a unifying characteristic of the class and raises common questions of fact and law.8

3. Typicality

Typicality focuses on the similarity of the legal and remedial theories behind the claims of named representatives and those of the putative class. *See Prado-Steiman,* 221 F.3d at 1278 n.14. Plaintiffs satisfy typicality if "each class member's claim arises from the same course of events that led to the claims of the representative parties and each class member makes similar legal arguments to prove the defendant's liability." *Baby Neal for and by Kanter v.*

8 Defendant's argument that the court should not certify the class because the commonality of claims alleged is a "sham" is without merit. *See* Def.'s Opp'n at 39. Defendant alleges that plaintiffs have no genuine interest in pursuing claims concerning the inadequacies of the complaint processing mechanism at USDA. She argues that they seek class certification on these issues in order to encourage a settlement, an objective that is misguided because defendant asserts she has no interest in settling plaintiffs' claims. *Id.*; Def.'s Opp'n to Proposed Order at 18. Whether plaintiffs have hopes of settlement and whether defendants are inclined to settle are issues irrelevant to this Court's consideration of whether plaintiffs have met the requirements for class certification. Furthermore, even if settlement were a possibility for the parties, the Supreme Court has cautioned that courts should give "undiluted, even heightened, attention" to class certification specifications in the context of settlement." *Amchem*, 521 U.S. at 619-20. The Court also notes that plaintiffs have continued to file Amended Complaints, all of which include the claim that the system for processing discrimination complaints was discriminatory, thus supporting a finding that they have not abandoned this claim.

Casey, 43 F. 3d 48, 58 (3d Cir. 1994); *see also Pigford,* 182 F.R.D. at 349.

Plaintiffs' claims arise from the alleged dismantling of USDA's civil rights office, and the conduct of USDA in failing to process complaints of discrimination brought to its attention by the class members. The same course of events were at issue in *Pigford,* where the court found that plaintiffs' claims were typical. 182 F.R.D. at 349. The allegations set forth by the proposed class representatives clearly fulfill the typicality requirement, as they arise out of the same alleged events and conduct, namely the systematic failure of any mechanism for processing discrimination complaints at USDA.

4. Fair and Adequate Representation

Plaintiffs' proposed class meets the fourth prong of Rule 23(a). Fed. R. Civ. P. 23 (a) (4) . Adequacy of representation refers to both legal counsel and class representatives. This, "the named representative must not have antagonistic or conflicting interests with the unnamed members of the class," and "the representative must appear able to vigorously prosecute the interests of the class through qualified counsel." *Twelve John Does v. District of Columbia,* 117 F.3d 571, 575 (D.C..Cir. 1997), citing *Nat'l Ass'n of Regional Medical Programs, Inc. v. Mathews,* 551 F.2d 340, 345 (D.C. Cir. 1976).

The proposed class representatives are able to "fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a)(4). In *Pigford,* the court held that the breadth of situations and interests presented by the over four hundred named plaintiffs was an assurance that all class members' interests would be fairly represented. *See Pigford,* 182 F.R.D. at 350. With more than 800 named plaintiffs, plaintiffs' claims encompass a breadth of issues. However, Rule 23(a)(4) is concerned with the named representatives, and here plaintiffs have proposed seven representatives. Plaintiffs assert that the claims of the lead plaintiffs are representative of the class. Pls.'. Proposed Order at 8. Specifically, plaintiffs claim:

> [A]s to all plaintiffs in this case, the allegations are similar, if not identical, to the allegations and causes of actions of the first five plaintiffs. Simply put, each and every plaintiff/class representative was denied a loan or program benefit or was denied a loan or program benefit on terms similar to those offered to white farmers, or was paid too late to properly farm, or was not given any assistance in the completion of FmHA forms/applications; and then each plaintiff complained on grounds of discrimination, but such discrimination complaint was never resolved pursuant to the law; and all of these events occurred during the period 1981-1999.

Pls.' Motion at 23. The Court does not have before it the factual allegations of all plaintiffs. Nevertheless, after a review of the 357 short questionnaires provided by plaintiffs, Exhibits 8-9, Pls.' Reply, and the allegations of the seven proposed class representatives contained in plaintiffs' motion for class certification, the Court finds

that the proposed representatives present a broad range of alleged discrimination. The Court finds no disparity of interest between the representatives and the class as a whole.

The proposed class representatives have also demonstrated that they are able to actively prosecute the interests of the class through competent counsel. The D.C. Circuit has held that counsel's failure to communicate with class members may constitute inadequate representation. *Twelve John Does, 117* F.3d at *576-77* (class dissenters alleged that class counsel was out of touch with class members). There have been no allegations of inadequate consultation in the instant case. Defendant asks the Court to consider counsel's other cases and concerns about quality of representation raised in those cases. The Court, however, finds no fault with plaintiffs' counsel in the instant matter, and will not engage in the speculation about potential future problems urged by defendant. In fact, the Court notes that lead counsel in this action, Alexander J. Pires, Jr. and Philip L. Fraas, successfully prosecuted *Pigford v. Glickman,* obtaining a settlement for class members that resulted in approximately $1 billion in damages and debt forgiveness to class members. Joining Mr. Pires and Mr. Fraas as of counsel are also several other distinguished attorneys. The Court concludes that

plaintiffs' counsel is fully able to fairly and adequately represent the class in this matter.

C. Subclasses

The plaintiffs request that the Court approve four subclasses, defined as follows:

1. Native-American farmers and ranchers who complained of USDC's discrimination to USDA orally and whose discrimination complaint is on file with USDA;

2. Native-American farmers and ranchers who complained of USDA's discrimination to USDA in writing and whose discrimination complaint is on file with USDA;

3. Native-American farmers and ranchers who complained of USDA's discrimination to USDA orally and whose discrimination complaint is not on file with USDA; and

4. Native-American farmers and ranchers who complained of USDA's discrimination to USDA in writing and whose discrimination complaint is not on file with USDA.

Pls.' Proposed Order at 4-5.

Fed. R. Civ. P. 23(c)(4) requires the court to treat each subclass as a separate class and determine whether it independently meets the requirements of Rule 23(a) and (b). *See* Fed. R. Civ. P. 23(c)(4); *see also* 7B Charles A. Wright, Arthur R. Miller & Mary K. Kane, Federal Practice and Procedure: Civil § 1790 (1986). The class representatives must also have standing in their own right to bring the claims of any identified subclasses. *See Prado-Steiman*, 221 F.3d at 1280.

As attachments to their Reply Brief, plaintiffs include questionnaires showing the type of complaints made by named plaintiffs' concerning race discrimination by USDA. Pls.` Reply at 32. According to the plaintiffs, the questionnaires demonstrate that 64 plaintiffs made written complaints to USDA, 191 made oral complaints to USDA, and 78 complained to their Tribal Council." Presumably, plaintiffs intend the complaints to the Tribal Council to constitute complaints relayed to USDA through a "representative." However, it is unclear how many, if any, complaints fit into each of the four proposed sub-classes. For example: are any of the complaints "on file"; are the complaints presented through the Tribal Council written or oral complaints? Thus, the Court can not determine whether each of the sub-classes individually meets the numerosity requirements of Rule 23(a).

Further, class representatives are not identified for each of the sub-classes. "[A] class representative must be part of the class and possess the same interest and suffer the same injury' as the class members." *East Tex. Motor Freight Sys., Inc. v. Rodriguez,* 431 U.S. 395, 403, 97 S. Ct. 1891 (1977), *quoted in Amchem,* 521 U.S. at 625-26

9 Exhibits 8 and 9 of Pls.' Reply are questionnaires completed by plaintiffs named in the Second Amended complaint and additional plaintiffs. At the time of this order, the plaintiffs have filed a Fifth Amended Complaint, joining several more plaintiffs.

10 An additional 24 plaintiffs did not complain of discrimination; plaintiffs represent that these individuals will be removed as plaintiffs. PIS.' Reply at 32 n.7.

(internal citations omitted). Without identified sub-class representatives, it is unclear to the Court how plaintiffs hope to demonstrate adequate representation pursuant to Rule 23(a)(4). The Court's study of the questionnaires proffered by plaintiffs reveals that only one proposed representative, Gene Cardotte, completed a questionnaire, wherein he indicates that he had filed a written complaint with USDA. In addition, Keith and Claryca Mandan, proposed class representatives whose claims are outlined in the Fifth Amended Complaint but not in the Motion for Class Certification, allege that they complained to various USDA officials. *See* Pls.' Fifth Am. Compl. At 130. The remaining four proposed class representatives simply allege that they complained, in writing or orally, individually or through a representative.

Plaintiffs have offered nothing that demonstrates to this Court which proposed class representatives are in a position to represent the four proposed sub-classes. Thus, plaintiffs cannot demonstrate that the sub-classes are adequately represented, and the sub-classes fail to meet the requirements of Rule 23(a).

Furthermore, while it is clear that each of the named representatives has standing to bring the claims raised by the class, this Court can not ascertain whether the named representatives have standing to raise the claims of the proposed subclasses. *See Prado-Steiman*, 221 F.3d at 1280

(remanding case to the district court, directing it to identify "at least one named representative of each class or subclass," who had standing for the claim of the class or subclass).

The Court, however, finds that sub-classes are necessary for the administration of this class. In *Amchem Products v. Windsor*, the Supreme Court found that the absence of subclasses in a class of individuals exposed to asbestos resulted in "no structural assurance of a fair and adequate representation for the diverse groups and individuals affected." 521 U.S. at 626; *see also Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 859 n. 33, 119 S. Ct. 2295 (1999) (holding that a conflict between sub-classes made a class untenable, but not reaching the question of whether "properly represented subclasses" would have resolved the conflicts).

The proposed subclasses should be clearly defined, administratively feasible, and facilitate discovery, mediation and trial. *See Pigford*, 182 F.R.D. at 346 (citing *Marisol A. v. Guiliani*, 126 F.3d 372 (2d Cir. 1997)). This Court is convinced that, with over 800 named plaintiffs, sub-classes are essential to an organized, efficient and fair hearing of class members' claims. However, the current sub-classes do not independently meet the requirements of Rule 23, as outlined above. The Court, therefore, orders plaintiffs to define sub-classes that meet the prerequisites

Of Rule 23(a), and to identify sub-class representatives with standing to bring the claims of each sub-class.

D. The Rule 23(b) Requirements

The Court finds that plaintiffs have met the requirements of Rule 23(b)(2).

1. Rule 23(b)(2)

Rule 23(b)(2) provides that a class may be certified where "the party opposing the class has acted or refused to act on rounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole." Fed. R. Civ. P. 23(b). As described above, plaintiffs contend that the defendant, by allegedly failing to enforce the civil rights laws, acted on grounds applicable to the whole class because the civil rights laws apply to each class member. *See Eubanks*, 110 F.3d at 92 ("Although the defining characteristic of the (b)(2) class is that it seeks declaratory or injunctive relief applicable to the class as a whole, it is not uncommon in employment discrimination cases for the class also to seek monetary relief, at least where the monetary relief does not predominate.").

Plaintiffs seek to remedy USDA's alleged racial discrimination through injunctive and declaratory relief, as contemplated by Rule 23(b)(2). The plaintiffs and class members request:

Declaratory relief under 28 U.S.C. § 2201;

Injunctive and declaratory relief under the Equal Credit Opportunity Act, 15 U.S.C. § 1691e (a)&(d);

Equitable relief under the Administrative Procedure Act, 5 U.S. C. § 706 (2) (A); and

Equitable relief under the Civil Rights Act of 1964, 42 U.S.C. § 2000d, et seq.

See Fifth Am. Compl. at 11 150-64.

Should plaintiffs and class members prove their allegations, a declaration that USDA discriminated on a class-wide basis against Native-American farmers in the administration of USDA's farm programs and suitable injunctive relief would be proper. Plaintiffs point to the injunctive relief that African-American farmers obtained through a consent decree in *Pigford,* which included "priority status for lending, an affirmative bar against further discrimination, and the creation of the Office of the Monitor to oversee that the Consent Decree is properly executed." See *Pigford* Consent Decree at 19-20. In the instant matter, plaintiffs seek to give Native-American farmers the benefits of such injunctive relief and "any additional measures needed to ensure" the eradication of discrimination against Native Americans in the application/processing procedures at USDA. See *Marisol A.,* 126 F.3d at 378 (finding that, although children in New York's welfare system had suffered different harms requiring

individual remedies, the system's deficiencies stemmed from central failures, and a 23(b)(2) class was appropriate).

Rule 23(b)(2) may not be invoked, however, where "the appropriate final relief relates exclusively or predominantly to money damages." Fed. R. Civ. P. 23(b)(2), Adv. Comm. Note (1966). Where monetary damages are incidental to a claim for injunctive relief, certification pursuant to subsection (b)(2) may be appropriate. *See Walsh v. Ford Motor Co.*, 807 F.2d 1000, 1003 n.7 (D.C. Cir. 1986).

In *Pigford*, Judge Friedman held that injunctive relief predominated plaintiffs' claims, even though they also sought substantial damages. 182 F.R.D. at 351. However, the *Pigford* class was certified pursuant to Rule 23(b)(2) for purposes of "liability," with the court reserving the issue of damages for a later time.

Plaintiffs' claims for injunctive and declaratory relief may clearly be certified under Rule 23(b)(2).11 Plaintiffs allege that USDA has failed to provide a mechanism for processing discrimination claims, essentially leaving plaintiffs with no remedy for perceived discriminatory conduct by USDA. The Court certifies the

11 Plaintiffs bring claims under the ECOA, Title VI and the APA, and seek declaratory, injunctive and equitable relief. The Fifth Circuit has held that a class should be certified on a claim-by-claim basis. *See Bertulli v. Independent Ass'n of Continental Pilots*, 242 F.3d 290, 295 (5th Cir. 2001) (reviewing RLA and LMRDA claims independently under Rule 23's requirements for certifications). While not adopting the Fifth Circuit's approach, the Court notes that the hybrid approach outlined in *Eubanks* may allow for a class to qualify for injunctive relief pursuant to Rule 23(b)(2) and for damages under Rule 23(b)(3), thus suggesting that certification of a class may limit the class to a type of remedy.

Class pursuant to Rule 23(b)(2) for purposes of declaratory and injunctive relief.

2. The Possibility of Certification as a Hybrid Class

Plaintiffs urge the Court to certify their class as a "hybrid" class. In *Eubanks v. Billington*, the D.C. Circuit noted that "variations in individual class members' monetary claims may lead to divergences of interest that make unitary representation of a class problematic in the damages phase." 110 F.3d at 95. The D.C. Circuit described a situation where a court has concluded "that the assumption of cohesiveness for purposes of injunctive relief that justifies certification as a (b)(2)b class is unjustified as to claims that individual class members may have for monetary damages." 110 F.3d at 96. The Circuit held that, in light of such a finding, a district court may adopt a hybrid approach and certify "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.*; *see also Thomas v. Albright*, 139 F.3d 227 (D.C. Cir. 1998) ("conclud[ing] that *Amchem* did not affect [the court's] holding in *Eubanks*").

Before certification of a hybrid class is appropriate, the district court must find that the assumption of cohesiveness underlying a Rule 23(b)(2) class action does

Not apply to the individual claims for monetary damages. *Thomas*, 139 F.3d at 236-37. Furthermore, a hybrid class action must meet the requirements of both subsections (b)(2) and (b)(3). *See id.* at 234; *Eubanks*, 110 F.3d at 96; *see also Thomas v. Powell*, 247 F.3d 260, 265 n.2 (D.C. Cir. 2001) ("By finding that a hybrid class action was unjustified, we necessarily found that the claims did not meet (b)(3)'s criteria for an opt out class action.").

In *Pigford*, the court concluded that a "hybrid" approach might be appropriate,[12] and that, following a determination of liability pursuant to a Rule 23(b)(2) certification, the court might re-certify the class pursuant to Rule 23(b)(3) for purposes of determining remedies. *See* 182 F.R.D. at 346. The characterization of the hybrid class as one distinguishing liability from remedies is misleading. As *Eubanks* explained, use of a hybrid is appropriate when the cohesion of the class certified for one remedy - injunctive relief - breaks down as to individual damages claims.

The Court today certifies plaintiffs' class pursuant to Rule 23(b)(2) only as to plaintiffs' claims for declaratory and injunctive relief. Without a developed factual record and without clear representation of subclasses, it is impossible for the Court to make a finding that claims for

12 The *Pigford* court did not certify the class as a hybrid, but simply noted that a hybrid class might be appropriate. 182 F.R.D. at 346. Thus, the court made no findings as to whether the class met the requirements of Rule 23(b)(3).

Individual compensatory relief will destroy the class cohesion. Similarly, the Court can not ascertain whether, should it permit class certification on plaintiffs' claims for all forms of requested relief, the claims for monetary damages would overshadow those for declaratory and injunctive relief. The Court maintains the power to revisit the definition of the class at any point, and in fact, has a continuing obligation to be vigilant and to ensure that the class is properly defined and manageable. Therefore, in the event that, after the completion of discovery and the identification of appropriate sub-class representatives, plaintiffs are able to demonstrate to the Court the existence of a class properly certifiable as a hybrid class or pursuant to Rule 23(b)(3), the Court will consider its certification at that time.[13]

E. Notice

Rule 23(c)(2) requires that "individual notice be sent out to all class members who can be identified with reasonable effort" to inform them of the class certification. *Eisen*, 417 U.S. at 177. The Court directs that notice be provided to all class members regarding the institution of this class action. In view of the fact that USDA has computerized records for most of the potential

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13 The Court is mindful of *Eubanks*' advice that district courts address questions of the need for notice and opt-out under Rule 23(b)(3) at an early stage in the proceedings, in order to permit the parties to ascertain whether class members intend to exercise their right to opt-out of a Rule 23(b)(3) class. 110 F.3d at 95. However, certification of a hybrid class is not currently appropriate.

class members, the Court orders USDA to provide plaintiffs with a list of all Native American farmers who applied for USDA farm programs between January 1, 1981 and November 24, 1999.

CONCLUSION

The Court has considered plaintiffs' motion for class certification and proposed order, the response and reply thereto, counsels' representations at oral argument, defendant's motion for a stay of the Court's September 28, 2001 order and the response and reply thereto, and the relevant statutory and case law. For the foregoing reasons, it is hereby

ORDERED that plaintiffs' motion for class certification [17-1] is **GRANTED**. The Court certifies the following class for plaintiffs' claims for declaratory and injunctive relief pursuant to Fed. R. Civ. P. 23(b)(2):

> 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 farm14 program during that time period; and (3) filed a discrimination complaint with the USDA individually or through a representative during the time period.

It is **FURTHER ORDERED** that plaintiffs shall file a proposed order by no later than **January 28, 2002**, which outlines appropriate subclasses in accordance with this memorandum and identifies class representatives for each of the named subclasses; and it is

14 The September 28, 2001 Order of this Court mistakenly identifies the relevant programs as "federal," instead of "farm" programs.

FURTHER ORDERED that defendant shall file its response to the proposed subclasses by no later than **February 28, 2002**; and it is

FURTHER ORDERED that plaintiffs shall file its reply to defendant's response by no later than **March 15, 2002**; and it is

FURTHER ORDERED that defendant's motion for a stay of the Court's September 28, 2001 Order [127) is **DENIED**; and it is

FURTHER ORDERED that USDA shall provide plaintiffs, by no later than **January 28, 2002** a list of all Native American farmers who applied for USDA farm programs between January 1, 1981 and November 24, 1999; and it is

FURTHER ORDERED that the parties shall jointly file a proposed "Notice of Pendency of Class Action" for the Court's review by no later than **January 28, 2002.**

IT IS SO ORDERED.

_____ _____

DATE **Emmet G. Sullivan**
United States District Judge

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