IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

PLAINTIFFS' RESPONSE TO DEFENDANT'S STATUS REPORT

On September 13, 2011, the Defendant filed with the Court a status report concerning the progress of the finalization and implementation of a proposed settlement program (the "Program") for women and Hispanic farmers who were subjected to discrimination by the United States Department of Agriculture ("USDA") in connection with farm loans. As Plaintiffs' counsel, we have received and reviewed the documents related to the Program that were provided by the Defendant and also lodged with the Court in Chambers. We have also recently met and corresponded with counsel for the Defendant regarding the Program.

Plaintiffs and thousands of other women farmers who believe they have cognizable discrimination claims against USDA support a fair and accessible administrative process for deserving women claimants. Governmental action to remedy the decades of discrimination against women farmers is long overdue. But the Program as currently proposed is seriously

flawed. The Administration is offering women farmers who have been subjected to discrimination less in monetary compensation and debt relief than other minority groups. Particularly in light of the inherent disparity in the awards available for women (and Hispanic) claimants, the administrative process must be fair and user-friendly so that women claimants have a fair chance to receive some recompense for the discrimination they have suffered. Unfortunately, that is not the case under the Administration's proposed Program.

There are two overarching problems with the Program that threaten to substantially undermine the goal of providing recompense to eligible women farmers: **(1) the excessively high evidentiary hurdles required to state a claim; and (2) the Program's failure to provide legal services for the claimants**. Both of these problems, particularly when combined, are likely to prevent deserving women claimants from obtaining remuneration.

The Excessively Burdensome Evidentiary Standard

Under Tier 2 of the Program, to be eligible to receive $50,000, claimants must provide copies of original loan applications and supporting documentation, along with original written complaints of discrimination. This requirement is both excessively burdensome and substantially higher than that required of African-American and Native American farmers in their respective settlement processes. *See* Settlement Agreement, *In re Black Farmers Discrimination Litig.*, Misc. No. 08-mc-0511 (PLF), at 26 (Feb. 18, 2010) ("*Pigford II*" Settlement); Settlement Agreement, *Keepseagle v. Vilsack*, No. 1:99-cv-02119 (EGS), at 24 (Nov. 1, 2010). This requirement seems to be specifically designed so that claimants will be unable to meet it. Indeed, it is extraordinarily unlikely that claimants will have retained documents submitted as long as thirty years ago, even if they made copies of those materials at

the time they were submitted. USDA itself makes no claim to possess any such documentation, and has stated that it will not provide any supporting documentation to any claimant even if USDA has retained it. Plaintiffs are not aware of any governmental agency regulation or policy that requires the retention of documents for such duration, yet women claimants will be required to provide them.

Tier 1 of the Program requires claimants to satisfy a less onerous standard of "substantial evidence," which Defendant has advised will not require the submission of specific documents, except for constructive applicants.[1] The framework, application, and other documentation provided by Defendant provides no examples of what will constitute "substantial evidence," and the definition of "substantial evidence" that is provided is so nebulous that the applicants are unlikely to understand what is required. Given the complexity of the forms and the concepts at issue, it is unlikely that women farmers will be able to navigate the Program's paperwork in order to submit successful claims.

These serious defects are particularly glaring, as well as galling and insulting to women farmers, because once again they are being treated less favorably than other minority groups. Neither the *Pigford* nor the *Keepseagle* claimants have the same burdensome evidentiary Tier 2 standard as do women farmers. Moreover, both the *Pigford* and *Keepseagle* claimants are being provided with *free* legal counsel. Women claimants, on the other hand, not only must clear substantially more onerous evidentiary hurdles for Tier 2 claims, but they will not be assisted by

[1] Constructive applicants are those who attempted to obtain loan applications but were unable to do so because of the actions of USDA. The Program will require women constructive applicants to provide: (1) a copy of a written complaint filed within one year of the discriminatory incident; or (2) a sworn statement from a witness to the discriminatory event. Again, it is highly unlikely that women have retained copies of paperwork from up to thirty years ago, and also unlikely that, if there was a witness, a claimant will be able to find that person up to thirty years later, alive and with a clear memory of the event. Once again, these requirements are not imposed on constructive applicants in *Pigford* or *Keepseagle*.

legal counsel for any claims, unless they are willing to pay for those services and can find lawyers willing to assist for the fee permitted under the Program.

The Program's Failure to Provide Legal Services for Women and Hispanic Claimants

The overly burdensome evidentiary standard for women claimants is exacerbated by two additional factors: (1) the Administration's refusal to provide legal services as part of the Program; and (2) the provision limiting to $1,000 legal fees paid from any recovery awarded to a claimant. The Administration's refusal to provide free legal counsel to women claimants, while doing so for African-American and Native American farmers, is both discriminatory and inexplicable.

The purported explanation that the Administration need not do so because women were never certified as a class is a non sequitur. *Keepseagle* was certified as a class only for injunctive and declaratory relief and not for the payment of any monetary claims. For African-American farmers, the Administration has agreed to enter into a *second* class-wide settlement and *consented* to a settlement class, although the *Pigford II* claimants no longer had any actionable claims because the deadline for the submission of claims had long ago passed. *See* Settlement Agreement at 12, *In re Black Farmers Discrimination Litig.*, Misc. No. 08-mc-0511 (PLF) (Feb. 18, 2010). *Pigford II* was provisionally certified as a class in conjunction with the agreed upon settlement. *See* Order Granting Preliminary Approval, *In re Black Farmers Discrimination Litig.*, Misc. No. 08-mc-0511 (PLF) (May 13, 2011). Moreover, as the case law makes clear, class certification can be agreed to in the context of a settlement, even where the court has previously denied it. *See, e.g., In re Terazosin Hydrochloride Antitrust Litig.*, Case No. 99-MDL-1317, 2005 U.S. Dist. LEXIS 46189, at *12 (S.D. Fla. Mar. 17, 2005). The fact that

the Program treats women as a class for purposes of recovery makes the excuse of the lack of class certification even more hollow.

Nor can the refusal to provide counsel to women claimants be excused on the basis of concerns about Congressional spending. The Justice Department's Judgment Fund is providing the funding for the Program, as it is for the Native American settlement program. No Congressional expenditures or approval would be needed to provide women claimants with the legal advice they will plainly need in order to participate in the Program.

Nor is the $1,000 limitation on legal fees to be paid from an award likely to provide women claimants with the legal help they will require. While Plaintiffs recognize that the Administration's intent in requiring this limitation is to curb unscrupulous advisors from preying on claimants in exchange for "helping" them with the application process, the $1,000 limitation is not likely to achieve that goal. First, the limitation will not stop unscrupulous advisors from demanding excessive fees to be paid *in advance* of any award, or from funds other than the award itself. In previous claims programs, the most serious abuses have allegedly arisen when claimants were charged excessive fees by lawyers and non-lawyers simply for assistance with filling out forms, before a determination was made on the claimant's entitlement to an award. Second, $1,000 will be far less than the actual fees incurred by capable counsel to assist a claimant, thereby deterring competent counsel from doing so. It is estimated that on average the expenditure of 10 to 15 hours per applicant will be necessary for a lawyer to determine a claimant's eligibility for the program, collect the necessary facts, ascertain whether documents exist and review them, counsel the client about whether she should make a claim through the Program or proceed with legal action, explain the settlement and release requirements to the

claimant, assist with filling out and submitting the forms, follow up with the Program administrator and the client, as necessary, and communicate with the client with regard to the adjudicator's determination. A fee of $1,000 will not adequately compensate a capable, responsible lawyer for this work.

Moreover, the absence of legal services through the Program will necessarily result in more instances of defective claims, invalid claims, fraudulent claims, and fewer awards to deserving claimants. The Program's provision pertaining to legal fees, or lack thereof, is likely to increase the instances of fraud rather than deter it. The application process is complex, and the forms insufficiently user-friendly for an unsophisticated population. The legal concepts of release, substantial evidence, and discrimination are not inherently understood by most of the claimants. Given the high stakes for women claimants – they must release their claims upon submission of their applications, which releases may or may not be accepted, depending upon the determinations of the administrator and adjudicator – advice provided by counsel will be essential. Yet most women claimants may not even know a lawyer, no less be able to consult meaningfully with one about the process, and afford to pay fees to obtain the necessary legal advice. These problems would be remedied by the inclusion of legal services to women claimants as part of the Program under the same terms and conditions that such services are being provided to Native American claimants.

There are other flaws in the Program, including inconsistencies between the framework and the application form itself, the overreaching releases required, the lack of clarity as to what participation in other programs bars recovery under this Program, and other matters which will not be addressed here. These deficiencies are far overshadowed by the undue evidentiary burden

imposed on women claimants under the current iteration of the Program, exacerbated by the lack of legal services available to claimants through the Program. Together, these problems with the Program portend that eligible women farmers will not receive recompense through the Program, and the Administration's efforts to put this sordid chapter in USDA's history behind us will be marred by a deeply flawed and inoperable Program that fails to accomplish its stated goals.

It is not a satisfactory answer for the Administration to offer a grossly flawed Program and flippantly respond to criticisms by saying that women need not apply if they don't like it. Secretary Vilsack and the Obama Administration have determined, appropriately, that women farmers should be compensated for the decades of persistent and omnipresent discrimination they have endured. Secretary Vilsack and the Obama Administration have voluntarily agreed to provide proportionately more funds and more accessible claim procedures for African-American and Native American farmers than for women and Hispanic farmers who have been subjected to the same discrimination, thereby discriminating further against women and Hispanic farmers. *See Cantu v. Vilsack*, 1:2011cv00541 (RBW). Moreover, as a responsible sovereign, the Administration should try to make the Program accessible to and usable by the women farmers the Program is ostensibly intended to help. Certainly after the experience with both the *Pigford* settlement, which necessitated a second program because of the serious flaws with the initial program, as well as with the *Keepseagle* program, the Administration should know how to structure and operate a successful settlement program for minority farmers. Plaintiffs are not asking for perfection. But the Program should be structured so that it will permit recovery for deserving women claimants, not just supply Secretary Vilsack and the Administration with a

public relations tool before the next election whereby they can announce that they have provided redress to women farmers.

There is still time before the launch of the Program for these serious deficiencies to be remedied. Plaintiffs continue to engage in dialogue with the Defendant on these issues; the Court's inquiry and efforts to help the parties craft a fair, equitable and accessible Program will be welcome.

Dated: October 14, 2011

Respectfully submitted,

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