

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

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

**PLAINTIFFS’ RESPONSE TO USDA’S APRIL 12, 2016 STATUS REPORT AND
RENEWAL OF REQUEST FOR INFORMATION, DISCOVERY, AND A HEARING**

USDA’s recent Status Report, *see* Doc. 266 (Apr. 12, 2016), attached as an exhibit the Audit Report (“Report” or the “Audit Report”), which was recently completed by USDA’s Office of Inspector General (“OIG”). USDA’s Status Report offers no comment on or analysis of OIG’s Report. The Audit Report itself sets forth certain findings by OIG with regard to USDA’s Hispanic and Women Farmers and Ranchers Claims Resolution Process (“Claim Program”). The Audit Report provides more than enough information to demonstrate that the Claim Program violated the Framework that Defendant committed to follow and deprived claimants of fundamental rights, and the Report should compel the Court to grant Plaintiffs’ pending Request for Information, Discovery, and Hearing.

Among other things, the Report confirms that the claims of over 10,000 women and Hispanic farmers were denied without an evaluation of those actual claims, but solely because the adjudicator identified a purported “fraud concern” based on “patterns,” and that neither

USDA, nor its contracted adjudicator (or anyone else), investigated to determine whether claims were actually fraudulent. This is egregiously unfair and irresponsible, and it violates both the terms of the Framework and the promises made by the Government when it committed to fairly evaluate each of the submissions made in the Claim Program. Plaintiffs respectfully request that the Court act on their pending Request for Information, Discovery, and a Hearing (Doc. 249 (June 11, 2015)) to allow claimants to learn why their claims were denied and to permit harmed individuals to renew their claims that did not receive individual analysis.

I. Nearly Half of Claims Denied Due to Purported “Fraud Concerns” Without Actual Investigation.

The Report includes statistics that were previously shared with the Court: 22,000 of the nearly 54,000 claims submitted in the Claim Program were deemed timely and complete, and forwarded to the adjudication stage. Report at 3. And of those 22,000 claims, 47% – *nearly half* – were denied due to purported “fraud concerns.” *Id.* at 4. The Report explains that USDA deemed a claim to pose a “fraud concern” “if it contained similar characteristics to other claims, such as similar language, handwriting, format, phraseology, or geographic location.” *Id.* at 4, 9. The Report confirms suspicions previously voiced by Plaintiffs’ counsel, other advocates, and USDA’s own Minority Farmers Advisory Committee (“MFAC”) that USDA flatly denied over 10,000 claims without undertaking any investigation into whether they were actually fraudulent. As Plaintiffs have feared, USDA has denied thousands of claimants actual review on the merits of their claims because those claims allegedly fit a pattern deemed by USDA to signal untrustworthiness.

The Report states that USDA’s Office of the General Counsel determined that claims denied based on “fraud patterns” need not be investigated on their actual merits to determine whether fraud occurred. Report at 4 n.24, 9 n.46. That decision is shocking and violates the

Framework governing the process. Tens of thousands of women (and Hispanic) farmers reviewed the documents governing the Claim Program and made considered decisions to give up their rights to sue USDA for discrimination in exchange for participation in what they thought would be a Claim Program operated in accordance with the Framework and due process. Unfortunately, it is now clear that this did not occur for more than 10,000 claimants.

The Framework states that (a) reviews will be conducted to “deter and identify fraud,” (b) those reviews may include verifying information, including the claimant’s identity, truthfulness of the allegations in the claim, and whether there are “unusual concentrations of claims in particular areas,” and (c) USDA may take appropriate action, including referring suspected fraudulent claims to other agencies. Framework at 17, available at <https://www.farmerclaims.gov/Documents/USDA%20Framework%200011312%20Final.pdf>.

The Framework also states that USDA “must” refer claims that appear fraudulent to OIG, which will in turn refer claims as appropriate to the Department of Justice or law enforcement agencies. *Id.* at 17-18. The Audit Report makes abundantly clear that USDA made no effort to “identify” whether any claims were actually fraudulent. Instead, USDA allowed its contractor to issue blanket denials for nearly half of the timely and complete claims without bothering to determine whether they actually involved no fraud whatsoever.¹ Upon information and belief, USDA has

¹ While USDA’s Framework states that USDA will look out for unusual concentrations of claims in geographic areas, it did not represent that if several others in a claimant’s geographic region also filed claims, the claimant’s claim would be denied with no investigation into its truthfulness or merit. Several individuals in a similar geographic region seeking relief might most easily be explained, not by fraud, but by pronounced discrimination having occurred in a particular USDA/FSA office over the years, or by more people in an area knowing about the Claim Program because USDA did targeted outreach in specific areas. Moreover, similarities in phrasing or handwriting among claims reasonably result not from fraud, but from multiple claimants having employed the same attorney, advocate, or other individual to assist them in completing the paperwork and filing claims. Assistance of counsel was not built into this process, as it was for other claims processes for Native American and African American farmers, and so individuals were left to seek the help of advocates and others. That many advocates handwrote submissions for the claimants they assisted or were prone to similar phrasing does not make all claims filed with the help of those advocates fraudulent. The Audit Report seems to suggest that USDA did not consider these possibilities when denying claims for alleged “fraud concerns.”

not referred over 10,000 fraudulent claims to OIG for investigation, despite the Framework requiring USDA to do so if it believes that fraud has occurred.

Neither the Framework, nor due process or basic fairness, supports USDA summarily denying the claims of thousands of unsuspecting claimants who thought that they might finally have a chance to have their claims of discrimination truly heard by the agency that they feel wronged them. Rather than giving these claims the promised consideration on their individual merits, USDA approved denials based solely on “patterns,” without making any effort whatsoever to identify whether fraud actually occurred. Then, obfuscating that these women (and Hispanic) farmers’ claims were denied without the promised evaluation on the merits, USDA did not even notify the claimants that their claims were denied on the basis of “fraud concerns.” None of the denial letters issued by USDA, in which the basis for the denial was provided in a vague one-sentence explanation, told claimants that their claims were denied due to “fraud concerns,” although USDA and the Audit Report have made clear that over 10,000 claims were denied for this reason alone. *See* Report at 4 n.24, 9 n.46 (if claim was denied for failure to meet evidentiary requirements, it was not denied due to fraud concerns). If USDA is going to accuse thousands of individuals of fraud, and withhold monetary recovery from them for that reason, it should at least have a solid basis on the individual merits of a claim to make such an accusation and give a claimant actual notice of the basis for her denial, rather than leave claimants guessing about how their claims could possibly have come up short.

The government must comply with the commitments it made to claimants set forth as governing the Claim Program to which individuals submitted. And it must provide due process to claimants, rather than changing the goal posts along the way once claimants have agreed not to sue or appeal. *See* Doc. 249 at 5 (citing April 21, 2015 Hearing Transcript and *Pigford v.*

Vilsack, 777 F.3d 509 (D.C. Cir. 2015)). OIG's Report confirms that USDA has, once again, failed thousands of minority farmers.

II. Additional Issues Raised By the Audit Report.

While USDA's denial of claims for fraud without any actual investigation and adjudication on the individual merits is the most egregious shortcoming of the process identified by OIG's Report, the Audit Report identifies other flaws, both with the Report itself and the Claim Program.

As an initial matter, the Report focuses only on whether the claimants who prevailed should have received the funds they were paid, and not on whether the process was successful in identifying all claimants with meritorious claims. Moreover, the Audit Report identifies additional concerns with the Claim Program, beyond the denial of thousands of claims for "fraud":

- OIG reviewed a sample of 100 claims that the contractor deemed incomplete, and found that the contractor's determination was incorrect for 5 of those claims, which had not been forwarded for adjudication. Report at 7. Overall, OIG estimated that 96% of the more than 22,000 claims deemed incomplete were processed properly, but this means that an estimated 900 claims were improperly deemed incomplete. *Id.* at 8. There is no indication that all of these approximately 900 individuals were identified and their claims reconsidered.
- The audit does not evaluate at all whether claims deemed untimely by the contractor were correctly denied.
- OIG considered samples of claims from each of the three tiers, and determined that four of the 100 Tier 1(a) claims reviewed were adjudicated incorrectly, *id.* at 11, one of the 27

Tier 1(b) claims reviewed was adjudicated incorrectly, *id.* at 12, and OIG was “95 percent confident that more than 90 percent of the claims in [its] tier 2 universe [(30)] have no adjudication issues.” *Id.* at 13 n.63. While the contractor apparently corrected errors identified by OIG on some claims, there is no indication that all errors across all claims were corrected. The selective nature of the samples examined would indicate that there are likely hundreds of claims that were incorrectly adjudicated.

- OIG determined that USDA’s contractor, which has been paid more than \$13.5 million, was overpaid by \$144,000. *Id.* at 2, 16. OIG concluded that USDA should not seek recovery of these overpaid funds because USDA may have caused the issue leading to the overpayment. *Id.* at 18. In addition, the contract was overseen by a Contracting Officer’s Representative (“COR”) who did not meet the qualifications to oversee the contract, the COR him/herself was not properly supervised, and some contract files at USDA’s Procurement Operations Division could not be located. *Id.* As a result, OIG concluded that “officials did not execute effective internal controls and policies to oversee the development and management of the contract.” *Id.* at 17. The Report does not address whether these failures affected the processing of claims and the reliability of decisions, or whether USDA took actions to ensure that claimants were not adversely affected by these issues.

Unfortunately, this Audit Report, which was years in the making, raises more questions than it answers, in particular for claimants who gave up valuable legal rights to sue USDA in exchange for participation in what the Government promised would be a fair and transparent process. It was not.

III. Relief Sought.

Plaintiffs have had pending before the Court for nearly a year their Request for Information, Discovery, and a Hearing in connection with the Claim Program. *See* Doc. 249 (June 11, 2015). Given OIG's Audit Report and the information it contains, the relief sought in that Request is even more crucial now. USDA, which has not been forthcoming about the most fundamental aspects of the Claim Program, has admitted that it failed to honor its commitment to evaluate each individual claim on the merits and instead denied claims on the basis of general patterns that it deemed to be an indicator of untrustworthiness. USDA should be required to be transparent about this process, and should be required to disclose whose claims were denied due to "fraud concerns," and how and why they were identified. Individuals have a right to know the true reason for the denial of their claims. In addition, specific documents referred to in the Audit Report should be provided to Plaintiffs and made public, including the contractor's internal guidelines and fraud guidelines. Report at 3 n.16, 4.

This is not an academic exercise. Defendant publicly announced and promoted a Claim Program that was supposed to pay up to \$1.3 billion to women and Hispanic farmers who had been discriminated against. But, because claims were deemed fraudulent en masse, or otherwise denied a fair review, only \$207 million was actually paid. This represents a 6% overall rate of success, with USDA paying only about 15% of the funds allocated and publicly announced for the process. *See* June 8, 2015 Status Report (Doc. 248); Report at 32. USDA has failed to comply with its Framework and to provide a fair and transparent process. Women and Hispanic farmers who have suffered decades of discrimination by USDA deserve better than this. In announcing the Claim Program, USDA claimed that it would remedy its decades of discrimination against women and Hispanic farmers. Instead, it appears that thousands of

claimants have unfairly been denied the ability to make successful claims because of USDA's unwillingness to give their claims individual treatment. As a result, USDA has "saved" over \$1 billion that should have been awarded to successful claimants. This demands a remedy.

Dated: April 19, 2015

Respectfully submitted,

/s/ Alison Lima Andersen

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