IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ROSEMARY LOVE, *et al.*,	)	
Plaintiffs,	)	
	)	**Judge: Robertson, J.**
vs.	)	
ANN VENEMAN, SECRETARY UNITED STATES DEPARTMENT OF AGRICULTURE,	)	**Case No: 1:00CV02502**
Defendant.	)	

PLAINTIFFS' MOTION FOR CLASS CERTIFICATION

Now come Plaintiffs, by and through counsel, to move for class certification pursuant to Fed. R. Civ. P. 23. At this time, plaintiffs seek certification only of the first two subclasses set forth in the Third Amended Complaint: (1) women who were denied applications to apply for farm loans of the basis of gender; and (2) women who actually applied for farm loans, but were denied them on the basis of gender. Plaintiffs reserve the right to pursue certification of the third subclass at a later time. In support of this motion, plaintiffs submit the attached Memorandum in Support of Their Motion for Class Certification and exhibits attached thereto.

Respectfully submitted,

/s/

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Dated: January 16, 2004

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PLAINTIFFS' MEMORANDUM IN SUPPORT
OF THEIR MOTION FOR CLASS CERTIFICATION

Plaintiffs submit this Memorandum in support of their motion for certification of two subclasses set forth in the Third Amended Complaint.[1] At this time, plaintiffs seek certification only of the first two subclasses: (1) women who were denied applications to apply for farm

[1] Plaintiffs' initial motion for class certification was denied without prejudice on March 20, 2002. At that time, plaintiffs sought certification of the following class:

> All women who farmed or attempted to farm who were discriminated against on the basis of gender in obtaining a farm loan, including the servicing and continuation of a loan, from the United States Department of Agriculture, during the period from January 1, 1981 through December 31, 1996, and timely complained about such treatment, or from the period October 19, 1998 through the present.

On July 28, 2003, the Court permitted the plaintiffs to amend their complaint to set forth three distinct subclasses of women farmers who were discriminated against by the defendant in obtaining farm loans on the basis of their gender. These three subclasses are:

> (a) women who requested but were denied loan applications because of gender discrimination; (b) women who applied for loans but never received any loans as a result of gender discrimination; and (c) women who obtained at least one farm loan, but experienced delays in receiving the loan(s) or difficulty in obtaining loan servicing, or who were discriminatorily refused other loans.

loans on the basis of gender; and (2) women who actually applied for farm loans but were denied them on the basis of gender. Plaintiffs reserve the right to pursue certification of the third subclass at a later time.

Both subclasses for which certification is sought are comprised of women farmers who sought and were denied access to certain farm loan programs because of their gender as a result of the operation of the farm loan system perpetuated by the United States Department of Agriculture ("USDA"). USDA local officials were given extensive discretion to determine who received not only loans, but even loan applications, without adequate criteria, guidelines, accountability and/or oversight. USDA's willingness to let local officials, almost exclusively white males, exercise nearly unfettered discretion in the dissemination of loan applications and in the granting of farm loans without adequate accountability to or supervision by the national authority resulted in a pattern and practice of deterring and excluding women farmers from participating in farm loan programs. These excluded women are the subject of this motion for class certification.

It is irrefutable that women have received far less than a proportionate share of farm loans. The statistical evidence submitted with this Memorandum demonstrates that women farm operators have received both fewer loans and fewer dollars than they should have received had the program operated fairly on a national basis. For the relevant period, women comprised approximately 6.9 percent of the farm operators but received only 3.2 percent of the credit lent, less than half what would be expected in a fair system. *See* Expert Report of Patrick M. O'Brien (Jan. 12, 2004) ("O'Brien Report"), attached as Exhibit 1, at 6; section I(C), *infra*. Nor did women fare any better with regard to the number of loans. Nationally, women operators received only 52 percent of the number of loans they could have expected had they received their

proportionate share of the loans. O'Brien Report, attached as Exhibit 1, at 11. Although women farmers have been designated as a "socially disadvantaged minority" that has been targeted to receive farm loans, Food, Agriculture, Conservation, & Trade Act of 1990, 7 U.S.C. §§ 2003(e)(1), 2279 (2004), they have been disadvantaged rather than advantaged in both the number of loans received and the total dollars lent. O'Brien Report, attached as Exhibit 1, at 10, 12. Had they received even a portion of the loan monies earmarked for socially disadvantaged minorities, the shortfall of the loans they actually received and those they should have expected to receive would be even greater. *Id.*

Why have women not received an appropriate share of USDA loans? It is not because they have not tried. Rather, the stark statistics are brought to life by the very real experiences of the named plaintiffs and the putative class members. Their individual yet common experiences show that USDA has, in fact, routinely and persistently discriminated against women on the basis of gender in every region of the country. Thousands have been denied applications because of a perception that women should not be farmers. And thousands more have been permitted to apply only to have those applications denied through the arbitrary application of subjective or non-existent criteria. Already nearly 1000 women have come forward with declarations supporting their claims. The declarations of these putative class members, which are attached to this Memorandum as Exhibits 2 and 2a,[2] illustrate that women all over the country have experienced the same gender-based discrimination asserted by these two subclasses – the refusal of local officials to either give them a loan application, or to grant them a loan.

[2] *See also* Exhibits 13-31, 34-53, 54-72, 77 for Declarations of other putative class members.

I. FACTUAL BACKGROUND

The Court is already familiar with the structure and operations of USDA with regard to the Farmer's Home Administration and the Farm Service Agency,[3] the USDA agencies responsible for administering the farm loan programs at issue in this case. *See* Tr. of Class Certification Hearing Before Judge Robertson, *Love v. Veneman*, C.A. No. 00-2502 (JR) (D.D.C. March 20, 2002) ("Cert. Tr."), attached as Exhibit 53; *see also Garcia v. Veneman*, 211 F.R.D. 15 (D.D.C. 2002) (Robertson, J.) ("*Garcia* Opinion").[4] Nonetheless, highlighting several key aspects of the system will be useful for understanding how these two subclasses of women farmers have been the subject of discriminatory decisionmaking.

A. USDA's National Loan Program Permits Unchecked, Discretionary and Discriminatory Loan Decisions at the Local Level

The USDA loan system is national in nature. USDA's guidelines with regard to decisionmaking about loans emanate from USDA's administrative headquarters in Washington, D.C. The farm loan program administrator establishes the criteria that are supposed to be utilized by all county committees in determining who should receive applications and who

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[3] Prior to 1995, the arm of the USDA that administered these loans was the Farmer's Home Administration ("FmHA"). In connection with a reorganization of the USDA, the Farm Service Administration ("FSA") became the operative agency in 1995. Both agencies are referred to here as "FSA."

[4] The present motion for class certification is substantially different than the plaintiffs' previous motion for class certification and the *Garcia* plaintiffs' motion. Plaintiffs' prior motion in this case was for certification of a single, undifferentiated class rather than the current two subclasses for which certification is currently sought. Moreover, in differentiating the subclasses, the distinctions between them have become clearer and are emphasized in this motion. The legal analysis for class certification for the first subclass, women refused an application, is akin to that employed in public accommodation cases, in which a defendant is required by statute to provide services to members of the public without discrimination but does in fact discriminate. Here, as in public accommodation cases, USDA has maintained no statistics as to the dissemination of loan applications. The basis for the class certification for the second subclass, women who were denied loans on the basis of gender, is based on the excessive subjectivity of the USDA farm loan system that allowed local officials to exercise unchecked, extraordinary discretion in granting farm loans, to the detriment of women farmers. Again, USDA has maintained little data.

should be granted loans. These criteria are published as federal regulations in Title 7 of the Code of Federal Regulations. Internal directives, which theoretically provide additional guidance about the national regulations and other matters, are issued by the FSA in Washington, D.C. to the county committees, which are expected to archive and maintain the directives. *See*, *e.g.*, USDA FmHA Directive AN 1668 (Oct. 23, 1987), attached as Exhibit 3 (directing county committees where to file the directive, as well as the date the directive expires). In addition, certain data involving FSA loans subsequent to October 1999 are maintained in central databases.[5] County committees are expected to provide the requested data to the central clearinghouse in Kansas City, Missouri, where they are stored in a mainframe computer. Dep. of Wayne Evans, dated Aug. 21, 2002, attached as Exhibit 4, at 21-23. In addition, the appeals and complaint processes are all conducted centrally, at the national level. The National Appeals Division is responsible for considering appeals from disappointed applicants. 7 C.F.R. pt. 11 (2004). The Office of Civil Rights is charged with receiving, investigating and remedying complaints from applicants who claim that they have been denied loans or otherwise mistreated on the basis of their sex, race, color, national origin or other protected class membership. 7 C.F.R. § 2.300 (2004). Notwithstanding USDA's centralized authority, decisionmaking with respect to individual farm loans is vested almost entirely in the hands of USDA officials at the local level.

[5] There are no data whatsoever for the two subclasses for the time period prior to 1999. USDA has never collected any data about individuals requesting loan applications. USDA has nonetheless maintained extensive data about farm loans programs, and the application process in particular. The data currently retained – only for post October 1999 loans that were granted – include when an application was first received, when the file was completed for review by the county committee, the date of the review by the county committee, the number of days from submission of the completed file until decision by the county committee, and the county committee's ultimate decision on the application. Despite this extensive information, USDA has chosen not to maintain any data concerning the reason for the rejection of applications or the number of applications that are distributed.

Although initial loan decisions are made locally and the standards are established nationally in Washington, D.C., USDA has chosen to operate a loan system where there are no apparent mechanisms to hold local officials accountable for their refusal to disseminate application forms or for their abuse of discretion in the granting of farm loans. An aggrieved applicant may appeal to the National Appeals Division, but that process is initiated by the applicant herself, who may not have the time, means or sophistication to pursue an appeal. A woman who has not been given an application may not even appeal that action because she is not an "applicant." An applicant who feels that she has been subjected to discrimination may theoretically also complain to the Office of Civil Rights. But as numerous congressional and other reports have documented for many years, and as recently as 2003, the Office of Civil Rights has been understaffed, overwhelmed and nearly dysfunctional for so many years that a complaint to that Office could not be considered an effective check on the actions of local officials.[6] Notwithstanding the substantial power and discretion vested in the local officials to determine who receives an application and an applicant's eligibility for a farm loan, USDA has established no national mechanism or process whereby USDA itself routinely reviews the decisions of its local officials to insure that they are non-discriminatory. Simply stated, USDA has deliberately chosen to operate a system that fails to keep in check the decisionmaking of local officials.

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[6] The failure of the Office of Civil Rights to function in any meaningful way has been the subject of repeated criticism of a variety of congressional and other reports. *See generally* USDA Office of Inspector General, *Report for the Secretary on Civil Rights Issues – Phase I* (Feb. 27, 1997) ("OIG Phase I Report"), attached as Exhibit 7; USDA Office of Inspector General, *Minority Participation in Farm Service Agency's Farm Loan Programs – Phase II* (Sept. 29, 1997) ("OIG Phase II Report"), relevant pages attached as Exhibit 8; U.S. Comm'n on Civil Rights, *Ten-Year Check-Up: Have Federal Agencies Responded to Civil Rights Recommendations? Volume III: An Evaluation of the Departments of Agriculture and the Interior, the Environmental Protection Agency, and the Small Business Administration* (Sept. 2003) ("2003 Report"), relevant pages attached as Exhibit 9.

USDA's failure at the national level to hold the local officials accountable for their decisionmaking is all the more remarkable in light of the decades of criticism of USDA's civil rights abuses by local officials. For approximately four decades, beginning in at least 1965 and continuing to the present, USDA's pattern and practice of gender discrimination against minority farmers, including women, has been a subject of much criticism. *See, e.g., Civil Rights Legislation and Other Issues: Hearing Before the House Comm. on Agric.*, 105th Cong. 18 (Oct. 23, 1997) ("October 1997 Hearing"), attached as Exhibit 6 (testimony of Rep. Eva M. Clayton); *see also Treatment of Minority and Limited Resource Producers by the U.S. Department of Agriculture: Hearing Before the House Subcomm. on Dep't Operations, Nutrition, and Foreign Agric.*, 105th Cong. 23-24, 55-71 (March 19, 1997) ("March 1997 Hearing"), attached as Exhibit 10 (statement and testimony of David H. Harris, Jr., Executive Director, Land Loss Prevention Project). During this time period, governmental agencies (including the USDA itself) and politicians have frequently remarked upon and lamented USDA's civil rights violations at both the local and national level. *See* Section I(E), *infra.* Despite these criticisms and the pleas for reform, the steps USDA has taken to eradicate its civil rights abuses have been minimal and ineffective. This is clearly evidenced in the Civil Rights Commission's 2003 Report, which documents the continued failures of the USDA's civil rights enforcement program. *See* 2003 Report, attached as Exhibit 9.

B. The Excessive Subjectivity in the USDA's Loan Application Process

To initiate the loan process, a farmer or potential farmer first has to obtain an application from the county USDA office by requesting an application in person or over the phone. Although 7 C.F.R. § 1910.4(b) (2004) requires all persons requesting loan applications to receive them, this mandate is routinely ignored by USDA, and county offices all over the country have

repeatedly refused to provide applications to women. Although widespread refusal of local offices to provide applications to women and minority farmers has been documented and acknowledged for years,[7] local offices' refusal to provide applications to women persists. Personnel in the county offices have routinely told women that the office does not have application forms or that the women should not complete applications because there are no loan funds available.[8] Women who have requested applications have been informed that they are too early to apply for a loan, that they are too late to apply for a loan, or that they need not bother filling out an application because they were not eligible to receive a loan or because their husbands should apply. The declarations submitted with this Memorandum are illustrative. *See, e.g.*, Declaration of Glenda Anthony, attached as Exhibit 13, at ¶ 3; Declaration of Drusilla James, attached as Exhibit 14, at ¶¶ 3-4; Declaration of Ruth Alma Jackson, attached as Exhibit 15, at ¶¶ 3-4; Declaration of Linda D. Holloway, attached as Exhibit 16, at ¶¶ 4-7; Declaration of Rosie L. King, attached as Exhibit 17, at ¶¶ 4-5; Declaration of Sherry McDonald, attached as Exhibit 18, at ¶¶ 3-4. Named plaintiff Lind Marie Bara-Weaver has been refused applications

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[7] *See, e.g.*, 144 Cong. Rec. S11,434 (Oct. 5, 1998), attached as Exhibit 12 (statement of Sen. Charles Robb); s*ee also* U.S. House of Representatives, Comm. on Gov't Operations, *The Minority Farmer: A Disappearing American Resource; Has the Farmers Home Administration Been the Primary Catalyst?*, H.R. Rep. No. 101-984, *8 (Nov. 20, 1990) ("1990 Report"), attached as Exhibit 11 (stating that local FSA employees often refused to provide women and other minority farmers with loan applications and told those farmers that they did not qualify and therefore they should not "bother" to apply); March 1997 Hearing, attached as Exhibit 10, at 60 (testimony of David H. Harris, Jr.) (There is "a continued pattern whereby minority farmers who . . . apply for various . . . credit programs are told that applications are not available for another several weeks. When they return, they are then told that all resources are committed.").

[8] As Senator Robb reported to the U.S. Senate, since applications are funded on a first-come, first-served basis, a local USDA official's recommendation to delay submission of a loan application until the local office received funds would result in the women farmer falling behind white male farmers in having her loan funded. 144 Cong. Rec. S11,434, attached as Exhibit 12 (statement of Sen. Robb). As Senator Robb noted, "Many farmers have cited stories in which their applications have been purposely processed later than those of non-minority farmers. The loan money then, in effect, was dispersed to non-minority farmers first. Then, when many minority farmers checked the status of their applications, the USDA officials responded by stating there wasn't any money left." *Id*.

from USDA local offices in locations as different as Loudon County, Virginia and Flagler County, Florida. *See* Declaration of named plaintiff Lind Marie Bara-Weaver, attached as Exhibit 19, at ¶¶ 4-5, 8-12. USDA itself has admitted that county offices commonly deter women and other minority farmers who have requested loan applications. *See* USDA Civil Rights Action Team, *Civil Rights at the U.S. Department of Agriculture* 20 (Feb. 1997) (the "CRAT Report"), attached as Exhibit 5, at 2, 26. As a result of these and similar tactics, many class members were never able to advance beyond the first step of the lending process. *See, e.g.*, Declaration of Ruth Alma Jackson, attached as Exhibit 15, at ¶ 4; Declaration of Rosetta F. Anderson, attached as Exhibit 20, at ¶¶ 6-7; Declaration of Glenda Anthony, attached as Exhibit 13, at ¶¶ 3-5; Declaration of Starlene Johnson, attached as Exhibit 21, at ¶¶ 3-9; Declaration of Thelma B. Journey, attached as Exhibit 22, at ¶¶ 5-8; Declaration of Drusilla James, attached as Exhibit 14, at ¶¶ 3-5; Declaration of Linda D. Holloway, attached as Exhibit 16, at ¶¶ 4-7. This refusal to even provide a woman with an application has had the desired effect of keeping some women out of farming. *See, e.g.*, Declaration of Cynthia Ephfrom, attached as Exhibit 23, at ¶ 10; Declaration of Maxine Harris, attached as Exhibit 24, at ¶ 6; Declaration of Terri Jackson, attached as Exhibit 25, at ¶ 6; Declaration of Virginia Ann Phillips, attached as Exhibit 26, at ¶ 6; Declaration of Dana Walker, attached as Exhibit 27, at ¶ 6. In other instances, women who were already engaged in farming were forced to sell portions of their farms, lose their farms or abandon farming altogether because they could not even get a loan application from USDA, the lender of last resort. *See, e.g.*, Declaration of Elaine Sheets, attached as Exhibit 28, at ¶ 6; Declaration of Dorothy Bean, attached as Exhibit 29, at ¶ 5; Declaration of Sharlene Nichols, attached as Exhibit 30, at ¶ 6; Declaration of Emma Walker, attached as Exhibit 31, at ¶ 7. These declarations are anecdotal, but they are typical and representative of a national problem.

See Expert Report of Lou Anne Kling (Jan. 9, 2004) ("Kling Report"), attached as Exhibit 32, at 2; Section II(A)(1), *infra*.

If a woman farmer is persistent enough to be able to submit a farm loan application, pursuant to USDA regulations a threshold decision is made about her "eligibility" for an FSA loan. 7 C.F.R. § 1910.4(h)(i) (2004). The eligibility determination is made by local officials using criteria established by USDA nationally for uniform use by county committees throughout the country. As the Court noted in the *Garcia* Opinion, local officials' determinations of eligibility are premised on a number of factors that are determined by USDA at the national level. *Garcia* Opinion at 13. During the majority of the time period at issue in this case, seven factors were to be considered by local FSA officials to determine eligibility: (1) whether the applicant was a United States citizen; (2) whether the applicant had the legal capacity to incur loan obligations; (3) the education/farming experience of the applicant; (4) the applicant's character; (5) the applicant's commitment to carry out undertakings and obligations; (6) the applicant's inability to obtain sufficient credit elsewhere; and (7) whether the farm was a family farm.[9]

Only two of the factors are in fact entirely objective in nature – citizenship and legal capacity to enter into a loan. Determining whether these two factors have been met requires no analysis or subjectivity by the local officials, can be answered yes or no, and are in the nature of threshold requirements that an applicant needs to possess before she can even be considered for a loan by the local officials. All of the other factors require some degree of discretion and

[9] The Court's *Garcia* Opinion discussed only the regulations in effect from 1997 through the present, which utilized additional factors – loan history, previous debt forgiveness and delinquency on any federal debt. *Garcia* Opinion at 13. The Court noted that these factors "cannot be characterized as subjective." *Id.* These three factors, however, are not relevant to the two subclasses for which certification is now being sought: women who never received an application and women who never received a loan.

interpretation by the local officials. The factors of education, character and commitment to honor obligations are entirely subjective, as this Court has already recognized. *Garcia* Opinion at 12-13. For many years the family farm criterion was also left to the discretion of local officials since FSA guidelines defined a family farm only as "[a] farm which . . . [p]roduced agricultural commodities for sale in sufficient quantities so that it is recognized in the community as a farm rather than a rural residence." 7 C.F.R. § 1941.4 (1989). It was left to the local county committee to distinguish between a family farm and a rural residence based on theoretical community standards, which were never articulated. Similarly, the criterion that the applicant be unable to obtain credit elsewhere was also determined at the discretion of the local official. There were no guidelines as to the lengths to which an applicant would be required to go to demonstrate that she could not get credit elsewhere. So if an applicant could perhaps get a loan from a private lender at an exorbitant rate or at unworkable terms, she could nonetheless be found to be capable of obtaining credit elsewhere.

C. USDA Has Discriminated Against Women in Granting Farm Loans

It is irrefutable that women have not received their equitable share of farm loans. The available data[10] yields the unassailable conclusion that women farm operators have received fewer numbers of loans and less loan dollars than they should have received. *See* O'Brien

[10] USDA destroyed all application data prior to October 1997, except with regard to closed loans, which are not pertinent to the two subclasses at issue here. USDA has represented that during the course of the conversion from the MRS to the MAC data systems, USDA chose not to preserve the applications data prior to October 1997. USDA claims that no pre-1997 applications data exists and that it chose not to retain even a single copy of the MRS database. *See* Letter from Mark T. Quinlivan, Esq. to Barbara Wahl, Esq., dated August 14, 2002, attached as Exhibit 48. In 2000, USDA began to use the MAC data system and shut down the MRS system, failing to keep any copies of the data on disk or otherwise. When the MRS system information was destroyed, USDA was already a defendant in this lawsuit, as well as in *Garcia v. Veneman*, *supra*, and *Keepseagle v. Veneman*, C.A. No. 99-03119 (D.D.C) (EGS), and was already on notice that the data retained in the MRS system would be relevant, indeed important to these cases.

Report, attached as Exhibit 1, at 1-15. Mr. O'Brien, formerly employed as an economist by USDA, is an expert in FSA data. He utilized official USDA farm census and other data to conduct his analysis and compile his report. *Id.* at 3-4. He analyzed data from the national, state and county levels pertaining to farm operations and loans. O'Brien Report, attached as Exhibit 1, at 6, 7, 11. The data collected at these three different levels are consistent in demonstrating the adverse results of a discriminatory system.

Throughout the period in question, women received a disproportionately small share of FSA dollars loaned. The national statistics show that women comprised an average of 6.9 percent of the farm operators, but received only 3.2 percent of the credit lent. *Id*. at 6. Similarly, when analyzed on a state by state basis, the statistics demonstrate that women received on average 40 percent or less of the FSA loan proceeds than they could have expected if the allocation of loan funds had matched the gender make-up of the states' operator pools. *Id.* This disproportionate allocation is repeated in the county statistics where the vast majority of counties reported that women operators comprised 7.2 percent of the operators but received only 1.9 percent of the funds lent by USDA. *Id.* at 7. Stated differently, if women had received their proportionate share of loan proceeds between 1981 and 2001, they would have been lent $2.4 billion out of the total $34.5 billion that was lent. *Id*. In fact, women received only $1.1 billion, and were accordingly shortchanged $1.3 billion. *Id*. This shortfall would be even larger if women, as a socially disadvantaged minority, were expected to receive a portion of the loan monies earmarked for such groups. *Id*. at 9. As a socially disadvantaged minority, women operators should have in fact received 7.9 percent of the total funds lent, or $2.7 billion, nearly 2.5 times more than the $1.1 billion that they actually received. *Id.*

Nor did women fare any better with regard to the number of loans made. The national statistics provide that women received about 3.6 percent (or 21,000) of loans made, compared to an expected 6.9 percent (or 40,000 loans) based on their share of the operator pool. *Id*. at 11. Thus women farm operators received 52 percent of the number of loans that they could have expected if the number of loans they received had equaled their proportionate share of the operator pool.[11] *Id*. The shortfall is 19,000 loans. *Id*. The state and county data depict the same pattern. *Id.* If it were assumed that as a targeted group, women farm operators should have received a proportionate share of the funds earmarked for socially disadvantaged minorities, women should have received 7.9 percent of the loans received, or 46,000 loans, suggesting a shortfall of 25,000 loans. *Id.* at 12.

While women fared slightly better later in the relevant time period, the apparent improvement is misleading because the number and percentage of women farmers has been increasing. While African-Americans and men in general are leaving farming in vast numbers, the number of women turning to farming has increased, and accordingly their proportionate share of the operator pool has become larger. *Id.* at 13. So although from the early 1980s to the late 1990s women borrowers' share of the dollars loaned increased from 2.2 percent to 5.0 percent and from 2.1 percent to 6.3 percent for the number of loans made, these improvements did not keep pace with the growth of the number of women in farming. *Id*. As a result, the number of loans and dollars lent to women improved from the early 1980s to the late 1990s, but the number of women who took up farming and sought loans from FSA grew at an even greater rate. *Id*. at 13-14.

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[11] This percentage varied over time. O'Brien Report, attached as Exhibit 1, at 11. Women received roughly two-fifths of the number of loans that they could have expected to be given according to the 1982 and 1987 census figures. *Id*. Their share increased to roughly half in 1992 and three-fourths in 1997. *Id.*

Mr. O'Brien's analysis has been reviewed for statistical soundness by another plaintiffs' expert, Dr. Fritz Scheuren, the President of the American Statistical Association, and one of the foremost statisticians in the United States. *See* Expert Report of Dr. Fritz J. Scheuren (Jan. 16, 2004) ("Scheuren Report"), attached as Exhibit 33, at 2. Dr. Scheuren concludes that the methodology employed by Mr. O'Brien and the conclusions reached are statistically appropriate and fairly represent the shortfall in loans and money received by women. *Id*.

D. Discriminatory Treatment of Named Plaintiffs and Class Members

The named plaintiffs and the putative class members have been subjected to individual yet common experiences of discrimination at the hands of USDA's local officials as demonstrated by the nearly 1000 declarants from all over the country, whose declarations are attached to this Memorandum at Exhibits 2, 2a, 13-31, 34-43, 54-72, 77. Many women found that local officials simply refused to provide them with applications for loans, often indicating that the refusal was on account of their gender. *See, e.g.,* Declaration of Vanessa Howell, attached as Exhibit 34, at ¶ 6 (upon entering a local FSA office, Ms. Howell was told that they had "never seen a woman come to the office and talk about farming" and that she probably would not qualify for the loan); Declaration of named plaintiff Lind Marie Bara-Weaver, attached as Exhibit 19, at ¶ 4 (repeatedly told that no applications were available, but when her husband requested an application, he was able to obtain one); Declaration of Glenda Anthony, attached as Exhibit 13, at ¶ 5 (refused an application by the local FSA supervisor, who told her that "farming business was too risky for women" and that he "couldn't do anything to help [her]"); Declaration of Dana Walker, attached as Exhibit 27, at ¶ 4 (local county supervisor in Lincoln County, Arkansas refused to provide an application and told her that "farming was not something that was suitable for a young woman and there were too many risks involved");

Declaration of Barbara Martin, attached as Exhibit 35, at ¶ 6 (refused an application and asked "Why would a woman want to farm?;" "Are you farming by yourself?;" "You know farming is hard work;" and "You could be a model."); Declaration of Carolyne R. Adkins, attached as Exhibit 36, at ¶ 7 (discouraging her from applying because the officer "had never seen a woman raise that much vegetation" and suggesting that she "should just stick with [her] little truck patch"); Declaration of Tanga L. Hill, attached as Exhibit 37, at ¶¶ 3-4 (refused an application by two different persons in the county office because "they could not accept applications from female farmers").

Even if they succeeded in obtaining loan applications, filling them out, and submitting them, along with an acceptable farm and home plan, women found that their applications were rejected on entirely subjective and discriminatory grounds. *See, e.g.*, Declaration of Dorothy Graham, attached as Exhibit 38, at ¶¶ 4, 6 (application rejected because of her "choice of farming operation," which entailed raising livestock including goats); Declaration of named plaintiff Gail Lennon, attached as Exhibit 39, at ¶ 3 (county supervisor told her that he was rejecting her for a farm loan because she was a woman and pregnant); Declaration of Rosetta F. Anderson, attached as Exhibit 20, at ¶ 4 (county supervisor told her that women could not obtain farm loans because "farming was not a woman's job" and suggested that if she wanted a loan she should have her husband apply); Declaration of Laurel Feist, attached as Exhibit 40, at ¶ 8 (county supervisor told her that her application was rejected because the committee "was 'not familiar' with sheep farming"); Declaration of Rosemary Love, attached as Exhibit 77, at ¶ 9 (rejected on subjective grounds).

Many women never even received an official written response from the FSA office to their loan applications. *See, e.g.*, Declaration of Rosetta F. Anderson, attached as Exhibit 20, at ¶

7 (despite multiple inquiries, she never received a response to her loan application); Declaration of Frances Bell, attached as Exhibit 41, at ¶ 6 (loan application verbally rejected and she was told that she should "give up on trying to operate a chicken farm, and that there wasn't any more funding"); Declaration of Yolanda Sprawling, attached as Exhibit 42, at ¶ 5 (when she inquired about the status of her loan application, she was told that "young women [don't] do farming"); Declaration of Carolyn J. Edwards, attached as Exhibit 43, at ¶ 10 (loan officer told her that the office did not have "a lot of women applying for loans, so it will take longer for you").

The nearly one thousand declarants are from every region of the country and engaged in different types of farming. They graphically demonstrate the widespread, rampant discrimination in USDA farm loan programs. Former Farm Loan Program Administrator Lou Anne Kling concludes that the experiences the declarants report are common and pandemic in the farm loan system.[12] Kling Report, attached as Exhibit 32, at 2. On an individual scale, their experiences provide direct evidence of the reasons for the statistical results and the findings of the United States Commission on Civil Rights and USDA itself – that USDA has treated women differently than men in distributing loan applications and in granting loans.

E. USDA's Longstanding History of Discrimination Against Women Farmers Persists

The longstanding pattern of discrimination that women farmers have faced in their attempts to secure farm loans from USDA is well known and even acknowledged by USDA. Despite USDA's official recognition of its civil rights violations, the rampant gender discrimination that women farmers continue to experience today has not been eliminated.

[12] The declarations of named plaintiffs and putative class members are further supported by declarations of farm advocates Betty A. Puckett and Benny Bunting, who have witnessed first-hand USDA's discriminatory conduct toward women who farmed or attempted to farm. *See* Declaration of Betty A. Puckett, attached as Exhibit 75; Declaration of Benny Bunting, attached as Exhibit 76.

1. Governmental Reports and Congressional Testimony Document USDA's Civil Rights Violations

USDA's discrimination against minority farmers was officially acknowledged in 1965 when the United States Commission on Civil Rights ("Civil Rights Commission") found that the USDA discriminated in its loan program delivery activities. *See* U.S. Comm'n on Civil Rights, *Report on Equal Opportunity in Farm Programs: An Appraisal of Services Rendered by Agencies of the United States Department of Agriculture* 100 (1965), relevant pages attached as Exhibit 44. In 1982, the Civil Rights Commission re-examined the issue of USDA's pattern of discrimination towards minority farmers and concluded that the FSA was engaging in widespread discriminatory practices in loan approval, loan servicing and farm management assistance. *See generally* U.S. Comm'n on Civil Rights, *The Decline of Black Farming in America* 132, 150 (1982), attached as Exhibit 45. Despite these findings, no improvement in USDA's treatment of women farmers was forthcoming. *See, e.g.*, 1990 Report, attached as Exhibit 11, at *29-30 (concluding that the FSA "has been a catalyst in the decline of minority farming" because it has denied minority farmers access and full participation in the USDA loan program).

USDA's gender discrimination continued to pervade its farm loan programs throughout the 1990s. *See, e.g.*, U.S. Comm'n on Civil Rights, *Federal Title VI Enforcement to Ensure Nondiscrimination in Federally Assisted Programs* 304-05, 308 (June 1996) ("1996 Report") (determining that FSA had many difficulties with its civil rights enforcement); D.J. Miller & Assoc., Inc., *Producer Participation and EEO Complaint Process Study for the Farm Service Agency (FSA)*, II-1 – II-17, III-17 – III-19 (Mar. 15, 1996) (the "D.J. Miller Report"), relevant pages attached as Exhibit 46 (finding that women farmers' participation in FSA programs was significantly lower than male farmers' participation and that women farmers received lower

average loan payments than male farmers);[13] U.S. General Accounting Office, *Farm Programs: Efforts to Achieve Equitable Treatment of Minority Farmers* 10 (Jan. 1997), attached as Exhibit 47 (finding that the disapproval rate for farm loans was six percent higher for minority applicants than for non-minority applicants);[14] OIG Phase I Report, attached as Exhibit 7, at *1, 5, 13 (observing that the FSA's discrimination complaint process lacked accountability and that FSA lacked management oversight for the processing of civil rights complaints); OIG Phase II Report, attached as Exhibit 8, at 1, i (finding that the USDA had resolved only 32 of its 241 outstanding discrimination complaints since the OIG had issued its initial report and determining that since February 1997, the backlog of discrimination complaints had increased from 241 to 474 for the FSA).

In February 1997, USDA's own Civil Rights Action Team ("CRAT") issued the CRAT Report, which summarized the results of its investigation of the patent discrimination suffered by minority farmers, including women. In its Report, the CRAT described a continuing pattern and practice of discrimination against women and other minority farmers throughout the relevant time period:

> The problems [discrimination by county-level USDA employees, advisory boards who administer USDA programs and USDA managers] are not new, nor are they unknown. Studies, reports, and task forces have documented the problems in report after report . . . Despite the fact that discrimination in program delivery . . .

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[13] The FSA commissioned D.J. Miller & Associates to investigate the low participation by women and other minority farmers in loans received from FSA. D.J. Miller Report, attached as Exhibit 46, at 1. D.J. Miller and Associates found that FSA officers inconsistently applied loan eligibility criteria to women farmers, which contributed to the low participation of women farmers in FSA programs. *See id.* at III-2, III-20 - III-23. It determined that the power and discretion of the FSA staff also contributed to the low participation of women farmers in FSA programs. *See id.*

[14] During a March 1997 hearing, Robert A. Robinson, the Director of the Food and Agriculture Issues of the Resources, Community, and Economic Development Division of the General Accounting Office, reemphasized this point. *See* March 1997 Hearing, attached as Exhibit 10, at 6-7 (statement of Robert A. Robinson).

> has been documented and discussed, it continues to exist to a large degree unabated.

CRAT Report, attached as Exhibit 5, at 2. The CRAT reported that FSA officers often told women farmers who sought farm loan applications that no applications were available and that they should check back with the FSA office at a later time. *See id.* at 16; *cf.* 1990 Report, attached as Exhibit 11, at *8 (finding that FSA often advised women and other minority farmers that they did not qualify for farm loans and that they should not "bother" to apply). The CRAT Report also noted that USDA failed to provide women farmers with assistance in the farm loan process and with information as to why they were denied a loan, if in fact, they were denied. *See* CRAT Report, attached as Exhibit 5, at 26.

As a result of the CRAT's findings, in 1997, Congress held several hearings relating to the numerous deficiencies in USDA's civil rights program. During those hearings, witnesses and congressmen assessed the USDA's forty-plus years of civil rights violations against women farmers and other minorities. *See, e.g.*, March 1997 Hearing, attached as Exhibit 10, at 23-24, 55-71 (statement and testimony of David H. Harris, Jr.); *id.* at 28-30 (statement of Jennifer Felzien, President of Women Involved in Farm Economics) (testifying about USDA's longstanding history of gender discrimination); *Treatment of Minority and Limited Resource Producers By the U.S. Department of Agriculture: Hearing Before the House Subcomm. on Dep't Operations, Nutrition and Foreign Agric.*, 105th Cong. 178-79 (July 17, 1997) ("July 1997 Hearing"), attached as Exhibit 49 (testimony of Lawrence C. Lucas, President, USDA Coalition of Minority Employees) (stating that the USDA has a culture of discrimination that has existed for many years); *id*. at 90-93 (statement of Rep. Earl F. Hilliard); *id*. at 142-43 (statement of Rep. John Conyers, Jr.); *id*. at 149-50 (statement of Mary Frances Berry, Chairperson, U.S. Civil Rights Commission); *id*. at 157-61 (statement of Sen. Robb) (outlining USDA's failures to

implement recommendations set forth in the CRAT Report); October 1997 Hearing, attached as Exhibit 6, at 18 (testimony of Rep. Clayton) ("Since 1965, there have been complaints about the discrimination from farm services and credit. Not just by Afro-Americans, but by minorities[15] and farmers of small farms. This isn't a recent incident, these aren't a few people."); *id.* at 46-48 (statement of Millie Turner, President, National Ass'n of Credit Specialists); *USDA's Civil Rights Programs and Responsibilities: Hearing Before the House Subcomm. on Dep't Operations, Oversight, Nutrition and Forestry*, 106th Cong. 68-71 (Oct. 14, 1999), relevant pages attached as Exhibit 50 (statement of James G. Tatum, Rural America Association of Community Based Organizations).

USDA's discrimination against women and minorities has been so blatant and longstanding that the Secretary of Agriculture, Dan Glickman, was compelled to admit that USDA had an extensive history of discrimination against women farmers and other minorities:

> We [USDA] have a long history of both discrimination and perceptions of unfairness that go literally back to the middle of the 19th century. For those who look back on the progress made in the 1960s of the historic civil rights laws passed in that time and think we got the job done, I can say just from my experiences at USDA, we do not yet fully practice what we preach.

July 1997 Hearing, attached as Exhibit 49, at 94 (statement of Dan Glickman, Secretary, U.S. Dep't of Agriculture).

Despite the spotlight on USDA's pattern and practice of gender discrimination, USDA made few strides towards improving its civil rights record. In 2000, USDA again acknowledged its inability to eliminate gender discrimination in its farm loan programs. *See* USDA, *Commitment to Progress: Civil Rights at the United States Department of Agriculture* 36 (Apr.

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[15] Representative Clayton emphasized that women farmers are included in the group of minorities who suffered from the USDA's longstanding discriminatory practices. *See* October 1997 Hearing, attached as Exhibit 16, at 91 (testimony of Rep. Clayton).

2000) ("2000 Commitment Report"), attached as Exhibit 51 (noting that in 2000, FSA county officials failed to process loan applications for women and other minority farmers in a timely and equitable manner); *id.* at iii (statement from USDA Secretary Dan Glickman conceding that the USDA is "keenly aware that we are still far from the finish line" in ending civil rights violations); *see also Review of the Operation of the Office of Civil Rights, USDA and the Role of the Office of General Counsel, USDA, in Addressing Discrimination Complaints Pertaining to Program Delivery and Employment: Hearing Before Sen. Comm. on Agric., Nutrition and Forestry*, 106th Cong. (Sept. 12, 2000) (statement of Chairman Dick Lugar), relevant pages attached as Exhibit 52 (stating that discrimination against women farmers and other minorities continues to persist at USDA); *id.* at *3 (statement of John Zippert, Federation of Southern Cooperatives/Land Assistance Fund), *available at* http://agriculture.senate.gov/Hearings/Hearings_2000/September_12__2000/zipp1.pdf (last visited on Jan. 14, 2004) (testifying that "[d]iscrimination and disparity in service has not stopped at USDA.").

As recently as September 2003, the Civil Rights Commission reported that USDA had made only slow progress in civil rights enforcement. *See* 2003 Report, attached as Exhibit 9. The Civil Rights Commission noted that since 1996, civil rights enforcement has been a low priority for the USDA. *Id.* at 31. The Civil Rights Commission also recognized that "[s]ince the . . . 1996 report, there is little evidence that [USDA] has changed or improved what the Commission found to be a complicated civil rights enforcement program, nor has it addressed the Commission's recommendations significantly." *Id.* at 2. The Civil Rights Commission concluded that the USDA "has not made significant strides to . . . improve civil rights enforcement." *Id.* at xi.

Federal courts have held that refusal to change behavior known to cause discrimination demonstrates the kind of intent necessary to establish a prima facie case of discrimination. *See, e.g.*, *Baer v. First Options of Chicago, Inc.*, No. 90-C-9207, 1993 U.S. Dist. LEXIS 19489, at *87 (N.D. Ill. Dec. 10, 1993) (finding that defendant's failure to keep records after notice constitutes enough evidence for a prima facie case of disparate treatment); *EEOC v. Inland Marine Indus.*, 729 F.2d 1229, 1235 (9th Cir. 1984) (same), *accord Local 189, United Papermakers & Paperworkers v. United States*, 416 F.2d 980, 997 (5th Cir. 1969) (holding that the "requisite intent may be inferred" from the defendants' persistent conduct after the discriminatory implications had become known to them); *McNeil v. McDonough*, 515 F. Supp. 113, 129 (D.N.J. 1980), *aff'd*, 648 F.2d 178 (3d Cir. 1981) (explaining that a refusal to change known discriminatory behavior will be held as deliberate and intentional).

2. USDA's Dismantling of Its Office of Civil Rights Exacerbated Gender Discrimination

Under USDA regulations, if a woman feels discriminated against in her attempt to participate in a farm loan program, she can file an internal complaint with the USDA seeking redress. The complainant is then entitled to have a USDA civil rights investigator investigate the complaint, issue findings and/or provide remedies in the case of a finding of discrimination. *Keepseagle v. Veneman*, C.A. No. 99-03119 (D.D.C. Dec. 12, 2001) (EGS), ("*Keepseagle* Opinion"), attached as Exhibit 74, at 45, *petition for leave to appeal denied* (D.C. Cir. Oct. 29, 2002). However, in early 1983, the civil rights enforcement arm of USDA was dismantled. Discrimination complaints have not been properly investigated since 1983, even though the

applicable agency regulations have not been repealed. *Id.* at 5; *see generally* CRAT Report, attached as Exhibit 5; OIG Phase I Report, attached as Exhibit 7.[16]

The absence of an effective Office of Civil Rights removed one of the few checks on the unbridled discretion of the local county committees. With an Office of Civil Rights that was incapable of receiving, investigating and remedying complaints, there has been virtually no mechanism to restrain or inhibit the improper exercise of discretion by local officials. So local officials utilizing nearly completely subjective loan criteria, without adequate regulatory guidance, have made decisions about loan applications that are rarely subject to review – to the detriment of women farmers.

II. ARGUMENT

Plaintiffs' class claims arise under the Equal Credit Opportunity Act ("ECOA"), 15 U.S.C. §§ 1691, *et seq.* (2004), which prohibits gender discrimination in the extension of credit. Specifically, plaintiffs allege that USDA discriminated against them in violation of ECOA when it denied them access to farm loans. Women farmers were discriminated against by USDA in obtaining loan applications and in the granting of farm loans as a result of a nationwide system that allowed (and ultimately encouraged) local officials to flout their obligations to women applicants by refusing to provide applications and to deny loans on the basis of subjective and non-reviewable criteria.

Plaintiffs are not required to show that every woman farmer was discriminated against or that every USDA official discriminated, but rather that a pattern and practice of discrimination existed and was common throughout the enterprise. Plaintiffs intend to pursue their claims under

[16] In passing legislation that extended the statute of limitations for discrimination claims brought against USDA, Congress itself has recognized that women and other minorities have suffered discrimination at the hands of USDA without recourse to adequate remedies. *See* Omnibus Consolidated

both disparate impact and disparate treatment theories of liability. *See Massey v. First Greensboro Home Equity, Inc.*, No. 97-1292-CIV-T-17, 1998 WL 231141, at *8 (M.D. Fla. Apr. 27, 1998) (courts have followed Title VII precedent in allowing plaintiffs in ECOA actions to establish discrimination based on discriminatory treatment and/or disparate impact); *Bhandari v. First Nat'l Bank of Commerce*, 808 F.2d 1082, 1100 ("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."), *reh'g en banc*, 829 F.2d 1343 (5th Cir. 1987).

A. Plaintiffs Have Met the Requirements of Rule 23(a)

Rule 23(a) provides that members of a class may sue as representative parties on behalf of all class members if:

> (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). These requirements limit the class to those individuals whose claims are fairly represented by the claims of the named plaintiffs. *See Gen. Tel. Co. of the Southwest v. Falcon*, 457 U.S. 147, 156 (1982).

In the Court's prior hearing on class certification, the Court indicated that it was not concerned about the plaintiffs meeting the Rule 23(a) requirements of numerosity and adequacy of representation, Fed. R. Civ. P. 23(a)(1) and (4). Cert. Tr., attached as Exhibit 53, at 21:14-17, 25:20-23. And USDA has never challenged plaintiffs' assertion that they have met the requirements for numerosity and adequacy of representation. Those points will be addressed

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Appropriations Act for Fiscal Year 1999, P.L. 105-277, Div. A, § 101(a) [§ 741], 112 Stat. 2681 (codified at 7 U.S.C. § 2279); *see also* 144 Cong. Rec. S8308 (July 16, 1998) (statement of Sen. Robb).

only briefly here. Commonality and typicality will be the primary focus of the plaintiffs' discussion.

1. Plaintiffs Have Met the Commonality and Typicality Requirements

In *Bynum v. District of Columbia*, 214 F.R.D. 27, 34 (D.D.C. 2003), this Court distinguished between commonality and typicality. The Court explained that "[w]hile commonality requires a showing that the *members* of the class suffered an injury resulting from the defendant's conduct, the typicality requirement focuses on whether the *representatives* of the class suffered a similar injury from the same course of conduct." *Id.* (emphasis in original); *see also In re Pepco Employment Litig.*, No. 86-0603, 1992 WL 442759, at *5 (D.D.C. Dec. 4, 1992) (explaining that "[t]he typicality inquiry employs commonality's requirements but applies those requirements to the relationship between class members and their representatives instead of that between the class members themselves"). Thus, the typicality requirement focuses on whether the named plaintiffs suffered the same alleged injury from the same alleged discriminatory practices that the putative class members suffered, while the commonality requirement is designed to insure that all named plaintiffs *and* putative class members suffered the same alleged injury as a result of the same allegedly discriminatory practices.

a. Commonality

Rule 23(a)(2) of the Federal Rules of Civil Procedure requires that there be "questions of law or fact common to the class." Fed. R. Civ. P. 23(a)(2). It is not required that every question of law or fact be identical for each class member. *Bynum*, 214 F.R.D. at 33 (citing *Forbush v. J.C. Penney Co.*, 994 F.2d 1101, 1106 (5th Cir. 1993); *Cox v. Am. Cast Iron Pipe Co.*, 784 F.2d 1546, 1557 (11th Cir.), *cert. denied*, 479 U.S. 883 (1986)). "[F]actual variations among the class members will not defeat the commonality requirement, so long as a *single aspect or feature* of

the claim is common to all proposed class members." *Bynum*, 214 F.R.D. at 33 (emphasis added) (citing *Pendleton v. Schlesinger*, 73 F.R.D. 506, 508 (D.D.C. 1997), *aff'd*, 628 F.2d 102 (D.C. Cir. 1980)). In fact, this Court has adopted the position that the "only proper inquiry is . . . whether there is *some aspect or feature* of the claims which is common to all." *Id*. (emphasis added) (citing *Marisol A. by Forbes v. Giuliani*, 929 F. Supp. 662, 690 (S.D.N.Y. 1996), *aff'd*, 126 F.3d 372 (2d Cir. 1997)). Thus, commonality requires not that the representative plaintiffs have endured exactly the same injury or injuries, but only that the named plaintiffs in a proposed class action suit demonstrate that the members of the class suffered at least one common injury resulting from the defendant's conduct. *Id.* at 34.

When the class is broad and geographically divergent, plaintiffs must make a "specific presentation identifying the questions of law or fact that [are] common to the claims of [the class plaintiffs] and of the [putative] members of the class [they seek] to represent." *Falcon*, 457 U.S. at 158. In order to establish commonality in such a case, a plaintiff must demonstrate "significant proof" that the defendant:

> [O]perated under a general policy of discrimination . . . if the discrimination manifested itself in . . . practices in the same general fashion, such as through entirely subjective decisionmaking processes. In this regard, it is noteworthy that Title VII prohibits discriminatory employment *practices*, not an abstract policy of discrimination. The mere fact that an aggrieved private plaintiff is a member of an identifiable class of persons of the same [protected class] is insufficient to establish his standing to litigate on their behalf all possible claims of discrimination against a common employer.

Id. at 159 n.15 (emphasis in original).

In footnote 15, the Supreme Court cited "entirely subjective decisionmaking processes" as just one example of "significant proof that an employer operated under a general policy of

discrimination . . . in hiring and promotion practices . . . ." *Id.*[17] In fact, nothing in the *Falcon* decision says that "entirely subjective" decisionmaking is the only applicable test in judging a system that utilizes subjective decisionmaking. Indeed, inflexibly requiring "entirely subjective" criteria would encourage lenders, employers and governmental entities to decentralize decisionmaking simply to immunize themselves from future class actions. There would be no class action lawsuits in cases involving decentralized decisionmaking and excessive subjectivity because every defendant could point to at least one objective standard, rule or regulation in their decisionmaking processes. This simply is not, and should not be, the law.[18]

The District of Columbia Circuit and several other federal courts that have considered the issue have made it clear that excessively (albeit not entirely) subjective decisionmaking, coupled

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[17] It is important to note that a demonstration of "significant proof" does not require the plaintiffs to *prove* the merits of their case at the class certification stage. As this Court explained in *Adair v. England*, "[i]n determining whether to certify a class, the court should not consider the underlying merits of the plaintiff's claims." 209 F.R.D. 5, 8 (D.D.C. 2002) (citing *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 177-78 (1974); *In re Lorazepam & Clorazepate Antitrust Litig.*, 202 F.R.D. 12, 14, 21 (D.D.C. 2001), *review denied*, 289 F.3d 98 (D.C. Cir. 2002)). This Court went on to explain that "'when a court is in doubt as to whether to certify a class action, *it should err in favor of allowing a class.*'" *Id*. (emphasis added) (citation omitted); *see also Mooney v. Aramco Servs. Co.*, 54 F.3d 1207, 1213 (5th Cir. 1995) ("Because the court has minimal evidence [on which to base its class certification decision], this determination is made using a fairly lenient standard . . . ."). Because of this lenient standard, courts often grant "conditional certification" of a proposed class. *See Mooney*, 54 F.3d at 1214.

[18] In fact, this Court has recognized that "[s]lavish adherence to the word 'entirely' would be unwise." *Garcia Opinion* at 11 (order denying class certification). This Court, in the March 2002 hearing on class certification in this case, also declared that "the emphasis that the parties have placed on the footnote in the Falcone [sic] case puts way to much freight on a footnote in a Supreme Court opinion." Cert. Tr., attached as Exhibit 53, at 4:21-23. One example would be a company with more than one plant, where the local plants each have hiring autonomy based upon criteria established at the corporate level. There is nothing in *Falcon* or any other case which precludes a Title VII class action on a national basis simply because there is local hiring authority. *See, e.g., McReynolds v. Sodexho Marriott Servs., Inc.*, 208 F.R.D. 428, 442 (D.D.C. 2002), *petition for leave to appeal denied* (D.C. Cir. Feb. 25, 2003) (granting certification of nationwide class challenging "tens of thousands of employment decisions . . . made by thousands of managers, at thousands of work sites dispersed across the country," where employer's company-wide policies and practices allowed individual managers to make employment decisions based on subjective criteria) (citation omitted); *Thomas v. Christopher*, 169 F.R.D. 224, 237 (D.D.C. 1996), *aff'd in part*, 139 F.3d 227 (D.C. Cir.), *cert. denied*, 525 U.S. 1033 (1998) (settlement class certified for State Department employees throughout the world who challenged promotion decisions, where the State

with evidence tending to show that the process results in a pattern and practice of discrimination, will provide the basis for a finding of commonality. *See, e.g., Cook v. Billington*, No. 82-0400, 1992 WL 276936, at *4-5 (D.D.C. Aug. 14, 1991) (holding that despite the Library of Congress' "objective criteria and standardized qualifications" in promotion evaluations, "excessive use of subjective decision-making" during the promotion process meets the commonality requirement, and pointing out that "subjectivity is often a convenient pretext for discriminatory practices"); *see also Caridad v. Metro-North Commuter R.R.*, 191 F.3d 283, 291-92 (2d Cir. 1999), *cert. denied*, 529 U.S. 1107 (2000) (finding a sufficient showing of commonality based upon "discriminatory implementation and effects" of "company-wide policies" that provided supervisors with substantial discretionary authority, *without sufficient oversight*, notwithstanding the company's objective employment practices) (emphasis added); *Buycks-Roberson v. Citibank Fed. Sav. Bank*, 162 F.R.D. 322, 330, 331 (N.D. Ill. 1995) (determining that "'subjective decisionmaking' is sufficient to satisfy the commonality requirement of Rule 23(a)(2) and the dictates of [*Falcon*]" despite the existence of facially objective loan underwriting criteria); *Shores v. Publix Super Mkts., Inc.*, No. 95-1162-CIV-T-25(E), 1996 WL 407850, at *6 (M.D. Fla. Mar. 12, 1996) (holding that despite the store's objective and uniform promotion system and evaluation process, its decentralized system "of delegating hiring and promotion decisions to managers, who make those decisions on the basis of subjective criteria," is "adequate to meet the commonality requirement of Rule 23").

Recently, in *Staton v. Boeing Co.*, the Ninth Circuit Court of Appeals approved class certification for a class encompassing 15,000 employees working at separate Boeing facilities in twenty-seven different states. 327 F.3d 938, 953 (9th Cir. 2003). Class counsel in that case

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Department's personnel procedures were subjective in nature and allowed supervisors to make subjective assessment of employees' work performance).

documented discrimination from more than 200 of those employees at various facilities. *Id.* Citing *Falcon*'s footnote 15, Boeing objected to the class on the basis that at least some employees, those subject to collective bargaining agreements, were evaluated on some objective criteria. *Id.* at 955. The Ninth Circuit, however, rejected Boeing's argument explaining:

> We understand footnote fifteen of *Falcon* to present a demonstrative example rather than a limited exception to the overall skepticism toward broad discrimination class actions . . . . That is, as we read *Falcon*, it does not generally ban all broad classes but rather precludes a class action that, on the basis of one form of discrimination against one or a handful of plaintiffs, seeks to adjudicate all forms of discrimination against all members of a group protected by Title VII, § 1981, or a similar statute.

Id. Similarly, in *Sodexho*, this Court explained that "*Falcon*'s footnote 15 . . . carved out an exception to the across-the-board rule for 'entirely subjective *decisionmaking processes*,' rather than requiring entirely subjective hiring criteria." 208 F.R.D. at 442 (emphasis in original); *see also Dean v. Boeing Co.*, No. 02-1019-WEB, 2003 U.S. Dist. LEXIS 8787, at *75 n.21 (D. Kan. Apr. 24, 2003) (quoting the plaintiffs' argument that "[t]he proper focus of inquiry is on the *process* permitted by the [defendant's] policies, not on the specific criteria adopted . . . .") (emphasis in original).

Thus, decentralized decisionmaking should not be and is not a *per se* bar to a finding of commonality. *See Thomas*, 169 F.R.D. at 237-38 (finding commonality for a class of State Department officers and officer candidates throughout the world despite the State Department's highly decentralized but centrally administered personnel system); *Arnett v. Am. Nat'l Red Cross*, 78 F.R.D. 73, 76 (D.D.C. 1978) (finding commonality for a broad class of plaintiffs when decentralized units with decisionmaking authority were overseen by the national headquarters); *Hyman v. First Union Corp.*, 982 F. Supp. 1, 5-7 (D.D.C. 1997) (finding commonality although the class members held different positions, worked in different offices of the defendant, and

evaluations were made by local supervisors); *cf. Caridad*, 191 F.3d at 292 (finding that the plaintiffs' challenge to "subjective components of company-wide employment practices [did] not bar a finding of commonality"); *Shores*, 1996 WL 407850, at *6 (finding that commonality can properly be based on an employer's decentralized decisionmaking processes using subjective criteria).

i. Subclass One: Women Denied Applications

Plaintiffs have submitted 622 declarations from women, including three of the named plaintiffs (Lind Marie Bara-Weaver, Joyce A. King and Phyllis L. Robertson),[19] who assert that they were denied loan applications on the basis of gender. The experiences of this sampling of women from all over the country are remarkably similar. They each report that they communicated with a local USDA office in person or by phone, asked for a loan application and the local USDA personnel refused to provide one. *See, e.g.*, Declaration of Carolyne R. Adkins, attached as Exhibit 36; Declaration of Cynthia Ephfrom, attached as Exhibit 23; Declaration of Linda D. Holloway, attached as Exhibit 16; Declaration of Ruth Alma Jackson, attached as Exhibit 15. The excuses given by the local USDA personnel varied. *See, e.g.*, Declaration of Glenda Anthony, attached as Exhibit 13, at ¶ 3 ("you're too early in the process"); Declaration of Treasha Jackson, attached as Exhibit 54, at ¶ 5 (county officer told her "it was too late for [her]: there is no more money"); Declaration of Joyce A. King, attached as Exhibit 55, at ¶ 46 ("women were not cut out for farming" and "women were risky and could not make a profit"); Declaration of Phyllis L. Robertson, attached as Exhibit 56, at ¶ 7 (while waiting for an application in the office and watching men receive applications, she was told that there were no applications left); *see also* Section I(D), *supra*. But the results were the same. In some instances, enterprising

[19] *See* Declaration of Lind Marie Bara-Weaver, attached as Exhibit 19; Declaration of Joyce A. King, attached as Exhibit 55; and Declaration of Phyllis L. Robertson, attached as Exhibit 56.

women had male relatives, friends or neighbors contact the local USDA office and ask for an application, and the males obtained loan applications from the same local USDA offices that denied them to the women. *See, e.g.*, Declaration of Lind Marie Bara-Weaver, attached as Exhibit 19, at ¶ 4. In fact, many women were told to come back with their husbands or other male family member to apply. *See, e.g.*, Declaration of Carolyn R. Mank, attached as Exhibit 57, at ¶¶ 3-4, 6; Declaration of Bonita Thorne, attached as Exhibit 58, at ¶ 3; Declaration of Dorothy Matthews, attached as Exhibit 59, at ¶ 7. In fact, over 200 of the declarants knew of men who received either applications or loans at the time they were attempting to get loans. *See, e.g.*, Declaration of Julia Deshazer, attached as Exhibit 60, at ¶¶ 5, 9; Declaration of Rancharese Walker, attached as Exhibit 61, at ¶ 3; Declaration of Louise Coleman, attached as Exhibit 62, at ¶ 5; Declaration of Sharon L. Mims, attached as Exhibit 63, at ¶ 3; Declaration of Anna Lanier, attached as Exhibit 64, at ¶ 6.

Local USDA officials have persistently and routinely denied women loan applications despite a regulation that provides that anyone who asks for a loan application should receive one.[20] 7 C.F.R. § 1910.4(b) (1989). In refusing to provide women with applications, local USDA officials blatantly and repeatedly ignored USDA regulations that require them to volunteer to assist applicants in filling out the forms.[21] 7 C.F.R. § 1910.3(a) (1989). These abuses have been allowed to flourish because of the lack of supervision, accountability and

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[20] Section 1910.4(b) of 7 C.F.R. states in pertinent part: "All persons requesting an application will be provided [one]." 7 C.F.R. § 1910.4(b) (1989).

[21] Since at least 1989, 7 C.F.R. § 1910.3 has provided, among other things, that "All persons wishing to submit an application will be encouraged to do so. No oral or written statement will be made to applicants or prospective applicants that would discourage them from applying for assistance, based on any ECOA 'prohibited bases.' The filing of written applications *will be encouraged* even though funds may not be currently available, since complete applications must be considered in the date order received . . . ." 7 C.F.R. § 1910.3 (1989) (emphasis in original).

checks and balances in the USDA loan system. There is no mechanism in the USDA loan system by which USDA checks that local offices are disseminating loan applications when they are requested, encouraging applicants and assisting, as required, although USDA has been repeatedly criticized for its refusal to provide loan applications to women and minorities. *See* Section I(E), *supra*.

A specific statistical analysis of the women who were denied loan applications on the basis of gender and comparing that data with men who were denied is simply not possible. USDA has never collected data with regard to the dissemination of loan applications. As a result, there are no data on the number of applications distributed, the gender of those who received or were denied applications, the number of people who were refused loan applications, and the reason for the refusal. Without this information, no statistical analysis can be performed.

In the absence of any data, the legal analysis for class certification for this subclass should be akin to that employed in public accommodation cases rather than Title VII cases. Public facilities are required to provide services to members of the public without discrimination, but maintain no data on customers rejected or deterred. Here, USDA has maintained no statistics as to the dissemination and denial of loan applications. In such a situation, courts have held that strong anecdotal evidence by itself may satisfy a party's burden of proof of demonstrating discrimination. *See, e.g., United States v. Lansdowne Swim Club*, 713 F. Supp. 785, 811 (E.D. Pa. 1989), *aff'd*, 894 F.2d 83 (3d Cir. 1990) (holding that "[n]otwithstanding the invalidity of the government's statistical evidence, anecdotal evidence may satisfy the government's burden of proof. When the statistics are flawed, 'strong evidence of individual instances of discrimination becomes vital to the plaintiff's case.'") (quoting *EEOC v. Sears, Roebuck & Co.*, 839 F.2d 302, 311 (7th Cir. 1988)). With considerably less anecdotal evidence than plaintiffs present in this

case and with completely invalid statistical evidence, the court in the *Lansdowne* case held that the government had established a *prima facie* case that "Lansdowne Swim Club ha[d] engaged in a widespread pattern or practice of discrimination against blacks . . . ." *Id.* at 823. In this case, plaintiffs have presented not only nearly one thousand declarations, but also the expert opinion of Ms. Kling, the statistical report and opinion of Mr. O'Brien and the opinion of Dr. Scheuren, all of which confirm those facts. Surely this Court may rely on this extensive anecdotal and circumstantial evidence to conclude that there is commonality.

ii. Subclass Two: Women Denied Loans on the Basis of Gender

Plaintiffs have submitted 498 declarations of women who attest that they were denied loans based on their gender, including six of the named plaintiffs (Lind Marie Bara-Weaver, Margaret E. Odom, Joyce Acomb, Edith Scruggs, Maryland B. Wynne, and Mary L. Brown).[22] These 498 declarations come from 30 states across the country.

Their extensive anecdotal evidence plainly evidences the repetitive discriminatory conduct of USDA all over the country. The expert report of Lou Anne Kling confirms the pattern and practice reflected in the declarations. *See* Exhibit 32. The experiences of the declarants are remarkably similar. They recount how they applied for loans only to be rejected on the basis of gender. *See, e.g.*, Declaration of Julia Deshazer, attached as Exhibit 60, at ¶¶ 5, 10 (stating that "the FSA doesn't normally let women have loans"); Declaration of Carolyn J. Edwards, attached as Exhibit 43, at ¶ 10 (told it would take longer for her because of her gender); Declaration of Laurel Feist, attached as Exhibit 40, at ¶ 5 (told that the "loan program was designed for men"); Declaration of Maryland B. Wynne, attached as Exhibit 68, at ¶ 6 (after a

[22] *See* Declaration of Lind Marie Bara-Weaver, attached as Exhibit 19; Declaration of Margaret Odom, attached as Exhibit 65; Declaration of Joyce Acomb, attached as Exhibit 66; Declaration of Edith Scruggs, attached as Exhibit 67; Declaration of Maryland B. Wynne, attached as Exhibit 68; Declaration of Mary L. Brown, attached as Exhibit 69.

long delay, told there were no funds and that "women were 'wasting their time'" farming and attempting to obtain FSA loans); Declaration of Cecelia Cheeseboro-Early, attached as Exhibit 70, at ¶¶ 4-5 (told that single females "don't know what they're doing" and that the FSA "didn't have any money for single women"); Declaration of Kimberly Preston Brewton, attached as Exhibit 71, at ¶ 7 (asked if she "could farm the land like a man can"); Declaration of Cleo D. Cowans, attached as Exhibit 72, at ¶ 3 (told she could "only get a loan if she slept" with the interviewing officer). The sameness of their experiences is not coincidental, and the sheer number of these declarations demonstrates that the instances of such conduct are not merely occasional or aberrant. These declarations show that discrimination against women on the basis of gender is the way USDA has conducted business.

An analysis of data pertaining to women and farm loans leads to the irrefutable conclusion that women have been the subject of extensive, widespread discrimination in the granting of farm loans. Plaintiffs' expert Patrick O'Brien has conducted a comparison of the statistics pertaining to women and farm loans. *See* O'Brien Report, attached as Exhibit 1, at 6-8. Utilizing data USDA produced in this case, as well as publicly available Census of Agriculture data, Mr. O'Brien has concluded that throughout the relevant time period, women farmers received proportionately far fewer farm loans, both in terms of dollars lent and numbers of loans. See Section I(C), *supra*. Mr. O'Brien concludes that during the period at issue, women received less than half the loan dollars they should have expected to obtain had they received their proportionate share of the dollars available. O'Brien Report, attached as Exhibit 1, at 6-8. Similarly, women received less than half the number of loans they should have received had they received their proportionate share. *Id.* at 11-12. This disparity is even greater if one considers that as a socially disadvantaged minority, women should have received funds that were specially

earmarked for loans to such groups. *Id.* at 10, 12. Dr. Scheuren has affirmed Mr. O'Brien's analysis and conclusions. Scheuren Report, attached as Exhibit 33, at 2.

At the class certification stage of a case, a court "should accept plaintiffs' statistical evidence as true." *Sodexho*, 208 F.R.D. at 434. Nonetheless "it is essential . . . to provide specific proof to show that there are issues of fact and law common to the potential class [commonality] and that plaintiffs' claims are typical of the claims of the potential class [typicality]." *Gonzalez v. Brady*, 136 F.R.D. 329, 333 (D.D.C. 1991). "Specific proof" is "most often submitted in the form of affidavits [and] can go far to bolster bottom line statistics." *Id.* (citing *Selzer v. Bd. of Educ.*, 112 F.R.D. 176, 180 (S.D.N.Y. 1986)). The 498 declarations of women who were denied loans on the basis of gender provide such further evidence. Although regression analysis has often been adopted in discrimination cases as the statistical method by which to make "'quantitative estimates of the effects of different factors on some variable of interest,'" *Sodexho*, 208 F.R.D. at 444 (quoting *Valentino v. United States Postal Serv.*, 674 F.2d 56, 70 (D.C. Cir. 1982)), it is not mandatory. Here it is simply not possible. There are no data available to conduct such an analysis due to USDA's destruction of the records prior to October 1999, and its failure to even record the reason a loan was denied. In such a situation, in order to avoid an unredressable wrong, Mr. O'Brien's data, combined with Dr. Scheuren's statistical conclusions, should be credited. They show the national effects of the practices identified by the plaintiffs and illustrated in the nearly 1000 declarations and Ms. Kling's report. As the Supreme Court has cautioned, "statistics are not irrefutable; they come in infinite variety and, like any other kind of evidence, . . . their usefulness *depends on all of the surrounding facts and circumstances*." *Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 336 (1997) (emphasis added) (quoting 110 Cong. Rec. 14270 (1964) (statement of Sen. Hubert H. Humphrey)).

Perfect data are not always available, and the lack of perfect data is not fatal to a case. *Palmer v. Schultz*, 815 F.2d 84, 100 (D.C. Cir. 1987), *on remand*, 662 F. Supp. 1551 (D.D.C. 1987), *aff'd in part*, 905 F.2d 1544 (D.C. Cir. 1990). As Justice Brennan explained in *Bazemore*, speaking for a unanimous Supreme Court, "[w]hile the omission of variables from a regression analysis may render the analysis less probative than it otherwise might be . . . failure to include variables will affect the analysis probativeness, not its admissibility." *Bazemore v. Friday*, 478 U.S. 385, 400 (1986) (Brennan, J., concurring). The Circuit Court of Appeals for the District of Columbia has recognized that in class action suits, "statistical evidence is virtually *always* lacking in [its] degree of precision . . . . 'In most cases, conditions are far from ideal, with incomplete qualification data and non-random samples being the rule rather than the exception.'" *De Medina v. Reinhardt*, 686 F.2d 997, 1010 (D.C. Cir. 1982) (quoting D. Baldus & W. Cole, *Statistical Proof of Discrimination* 26-27 (1980)) (emphasis added).

USDA has failed to maintain, and therefore produce application data that would permit a statistical analysis that controls for a variety of factors, such as the reason for loan denial or to specifically compare the gender of denied applicants. Although the O'Brien Report does not control for differences between women and all other applicants, this is directly attributable to the inadequacy of USDA's data. Plaintiffs should not be penalized for this failure. In the *Palmer* case, the Circuit Court of Appeals for the District of Columbia held that "'plaintiffs cannot be legitimately faulted for gaps in their statistical analysis *when the information necessary to close those gaps was possessed only by the defendant*[ ].'" *Palmer*, 815 F.2d at 110 (emphasis added) (quoting *Trout v. Hidalgo*, 517 F. Supp. 873, 883 (D.D.C. 1981), *vacated on other grounds*, 465 U.S. 1056 (1984)). Recently, in the *Sodexho* case, this Court excused the plaintiffs' failure to control for education and experience (two important variables that ideally should have been

taken into account in the plaintiffs' statistical analysis) because of the defendant's failure to record such data. *Sodexho*, 208 F.R.D. at 444 n.25; *see also Adams v. Ameritech Servs., Inc.*, 231 F.3d 414, 424 (7th Cir. 2000) (explaining that the Seventh Circuit rejects criticism that a plaintiff's data is flawed when a plaintiff uses the best available data from the defendant) (citing *Mister v. Illinois Cent. Gulf R.R. Co.*, 832 F.2d 1427, 1430 (7th Cir. 1987)).

b. Typicality

The typicality requirement mandates that "the claims or defenses of the representative parties [be] typical of the claims or defenses of the class." Fed. R. Civ. P. 23(a)(3). This Court has emphasized that the purpose of the typicality requirement is to insure that the named plaintiffs will act "'on behalf of, and safeguard the interests of, the class.'" *Bynum*, 214 F.R.D. at 34 (quoting *Littlewolf v. Hodel*, 681 F. Supp. 929, 935 (D.D.C. 1988), *aff'd*, 877 F.2d 1058 (D.C. Cir. 1989), *cert. denied*, 493 U.S. 1043 (1990)). Typicality focuses on the similarity of the legal and remedial theories behind the claims of the named plaintiffs and the other members of the class. *Id.* at 35. Whether or not the representative class members will succeed with their claims is not pertinent to the typicality inquiry. *In re Pepco Employment Litig.*, 1992 WL 442759, at *5. As with the commonality requirement, "[f]actual variations between the claims of class representatives and the claims of other class members claims [sic] do not negate typicality." *Bynum*, 214 F.R.D. at 34 (citing *Wagner v. Taylor*, 836 F.2d 578, 591 (D.C. Cir. 1987)); *see also United States v. Trucking Employers, Inc.*, 75 F.R.D. 682, 688 (D.D.C. 1977) (listing numerous cases holding the same).

Here, the named plaintiffs satisfy the typicality requirement because all named plaintiffs and potential class members were adversely affected in the same way by USDA's subjective and unchecked decisionmaking process. *See, e.g.*, *Buycks-Roberson*, 162 F.R.D. at 333 (holding that

a potential class of African-Americans who alleged that Citibank violated ECOA when it intentionally discriminated against them on the basis of race with respect to home loan programs met the typicality requirement because the "named representatives' claims ha[d] the 'same essential characteristics' as the potential class, *i.e.*, they were African-Americans who were allegedly denied home loan[s] based upon their race or the racial composition of their neighborhoods"). Though the class members reside in different areas of the United States, all of them experienced essentially the same discriminatory treatment when they applied or attempted to apply for USDA farm loans. With regard to subclass 1, chiefly exemplified by the allegations of named plaintiffs Lind Marie Bara-Weaver, Joyce A. King and Phyllis L. Robertson, USDA's lack of oversight over the local office's implementation of the regulations, caused the named plaintiffs and putative class members to be denied the opportunity to obtain loan applications because of their gender. *See also* Section I(D), *supra*. With regard to subclass 2, chiefly exemplified by the allegations of named plaintiffs Maryland B. Wynne, Lind Marie Bara-Weaver, Edith L. Scruggs, Joyce L. Acomb, Margaret E. Odom, and Mary L. Brown, local county committees' utilization of subjective criteria in determining whether loan applications would be approved, without any check or oversight at the national level and coupled with a dismantled and/or ineffective civil rights mechanisms, caused the named plaintiffs and class members to be discriminatorily denied loans on the basis of their gender. *See also* Section I(D), *supra*. Thus, the named plaintiffs, whose experiences reflect those of the two subclasses, have met their burden of demonstrating that all "the named plaintiffs' claims are based on the same legal theory as the claims of the other class members" and that "the named plaintiffs' injuries ar[ose] from the same course of conduct that [gave] rise to the other class members' claims." *Bynum*, 214 F.R.D. at 35.

2. Plaintiffs Will Fairly and Adequately Protect the Interests of the Class

Rule 23(a)(4) requires that the named representatives "will fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a)(4). "In order to satisfy the requirements of Rule 23(a)(4), the interests of the class representatives must not be antagonistic to those of the remaining class members, and the representative parties, through their attorneys, must be prepared to prosecute the action vigorously." *Kifafi v. Hilton Hotels Ret. Plan*, 189 F.R.D. 174, 177 (D.D.C. 1999) (citations omitted). Consequently, the adequacy of representation requirement focuses on "concerns about the competency of class counsel and conflicts of interest." *Falcon*, 457 U.S. at 157 n.13.

Both conditions of the adequacy of representation requirement are met in the instant matter. In this case, there are no conflicting interests between the named plaintiffs and the members of the class. *Cf. Wagner v. Taylor*, 836 F.2d at 595 (discussing the adequacy of the plaintiff, a supervisory attorney, to represent a class that included both nonsupervisory employees and his own supervisor against whom he had lodged a discrimination complaint). Each subclass representative has claims typical of and consistent with the subclass.

Additionally, the Court has already found that plaintiffs' counsel is competent to prosecute this case as a class action. *See* Cert. Tr., attached as Exhibit 53, at 25:20-23, 34:7-10, 46:19-20; *see also* Defendant's Opposition to Plaintiff's Motion for Class Certification, at 22, *Love v. Veneman*, No. CA 00-2502 (JR) (Mar. 14, 2001). Adequacy of representation is therefore met.

3. This Class Is So Numerous That Joinder of All Members Is Impracticable

Rule 23(a)(1) requires that a class be "so numerous that joinder of all members is impracticable." Fed. R. Civ. P. 23(a)(1). Courts do not require evidence of the exact class size

or the identity of class members in order for a class to satisfy the numerosity requirement of Rule 23. Typically, a proposed class of at least forty members satisfies the numerosity requirement. *See In re Pepco Employment Litig.*, 1992 WL 442759, at *4; *Markham v. White*, 171 F.R.D. 217, 221 (N.D. Ill. 1997) (determining that a class with 35 to 40 plaintiffs has sufficient members to satisfy the numerosity requirement where the class members reside in different states).

In the instant matter, the two proposed subclasses satisfy the numerosity requirement because of the large number of subclass members located throughout the United States. According to the latest census statistics, there are 165,102 women farmers in the United States. USDA, *Census of Agriculture Announcement* (Dec. 29, 2000), attached as Exhibit 73, at 1. While USDA has produced no data for the relevant time period identifying the number of women who were denied applications or who were discriminatorily denied loans on the basis of gender, the nearly 1,000 declarations attached to this Memorandum demonstrate that there is a significant number of women nationwide who believe that USDA discriminated against them in denying them farm loan applications or farm loans and who desire to be members of the potential class. *See* Declarations of putative class members and named plaintiffs, attached as Exhibits 2, 2a, 13-31, 34-43, 54-72, 77. Due to the large number and geographic dispersion of the class members, joinder would be highly impractical, as would a suggestion that each litigate her own case. There is no dispute that plaintiffs meet the numerosity requirement. *See* Cert. Tr., attached as Exhibit 53, at 21:14-17, 34:1-6 ("It is not an onerous standard and we are no longer challenging them on the issue of numerosity").

B. Plaintiffs Have Met the Requirements of Rule 23(b)

In addition to the four requirements of Rule 23(a), the Court must consider whether the proposed class action satisfies the requirements of at least one of the subsections of Rule 23(b),

in light of the relief sought by the plaintiffs. The plaintiffs in the instant action seek predominantly injunctive and declaratory relief and, to a lesser extent, monetary relief. It is appropriate to certify a class pursuant to Rule 23(b) where, as here, there is commonality among the class with regard to the USDA's discriminatory treatment of class members and the relief proposed by the class is primarily injunctive and declaratory, not monetary.

1. The Requirements of Rule 23(b)(2) Are Satisfied

Rule 23(b)(2) allows a court to certify a class action if the party opposing the class has acted in a manner "generally applicable to the class, consequently making entry of declaratory or injunctive relief appropriate." Fed. R. Civ. P. 23(b)(2). Rule 23(b)(2) is appropriate notwithstanding the existence of monetary claims, even when a portion of such monetary relief takes the form of "damages" rather than "equitable relief," so long as the monetary claims do not predominate but rather are incidental to a claim for injunctive relief. Fed. R. Civ. P. 23(b)(2) advisory committee notes (Rule 23(b)(2) is not proper where "the appropriate final relief relates exclusively or predominantly to money damages."); *see also Thomas v. Albright*, 139 F.3d 227, 235 (D.C. Cir.) *cert. denied*, 525 U.S. 1033 (1998); *Walsh v. Ford Motor Co.*, 807 F.2d 1000, 1003 n.7 (D.C. Cir. 1986), *cert. denied*, 482 U.S. 915 (1987); *Pigford v. Veneman*, 182 F.R.D. 341, 351 (D.D.C. 1998); *Robinson v. Metro-North Commuter R.R. Co.*, 267 F.3d 147, 164 (2d Cir. 2001), *cert. denied*, 535 U.S. 951 (2002) (a court may allow Rule 23(b)(2) certification despite monetary claims if it finds that "even in the absence of a possible monetary recovery" reasonable plaintiffs would bring the suit to obtain the injunctive or declaratory relief sought and that relief would be "both reasonably necessary and appropriate were the plaintiffs to succeed on the merits.").

Rule 23(b)(2) was specifically adopted to govern civil rights cases, such as this one. *See* Fed. R. Civ. P. 23(b)(2) advisory committee notes; *see also Pigford*, 182 F.R.D. at 350-51. In *Pigford*, Judge Friedman granted class certification for a class of African-American farmers under Rule 23(b)(2), where the "monetary relief [did] not predominate [over the declaratory and injunctive relief]." *Pigford*, 182 F.R.D. at 351 (granting class certification for liability phase). The injunctive relief sought here is much more specifically spelled out than in *Pigford*. Similarly, in *Thomas v. Albright*, the D.C. Circuit Court of Appeals affirmed the settlement of a Title VII class action under Rule 23(b)(2), even though the class sought (and received) $3.8 million in "monetary relief," which included "up to $575,000" to be paid to a few individual class members chosen on the basis of, among other things, "the *severity* of the discrimination and the degree of economic hardship they suffered." *Thomas v. Albright*, 139 F.3d at 229 (emphasis added).

Most recently, the D.C. Circuit Court of Appeals let stand this Court's granting of class certification under Rule 23(b)(2) in both *Sodexho, supra*, and *Keepseagle, supra*, despite the existence of monetary claims. In *Sodexho*, this Court granted class certification for purposes of determining liability on plaintiffs' Title VII claims, while holding off until after liability is established to decide on class certification with regard to remedies. *See* 208 F.R.D. at 448-49. The *Sodexho* court reasoned that class certification was appropriate for the liability phase because "[a]ny finding of liability [would be] tied to the actions of Sodexho with respect to the class as a whole, and any subsequent injunctive or declaratory relief would have a significant impact on the company's policies and practices in relation to the entire plaintiff class," even though plaintiffs sought monetary damages in addition to injunctive and declaratory relief. *Id.* at 448. In *Keepseagle*, this Court again granted class certification for the liability phase, and left

open the possibility of certifying the remedy portion of the case as a (b)(2) or (b)(3) certification, pending the development of a factual record on which to determine whether the requested individual compensatory relief would predominate or destroy class cohesion. *See Keepseagle Opinion*, attached as Exhibit 74, at 34-35.

In the instant matter, USDA's conduct – through the county committees and other local county officials – is "generally applicable" to the entire class of women who were discriminated against in the distribution and review of farm loan applications, and plaintiffs have requested predominantly injunctive and declaratory relief that would impact the entire class. *See* Third Amended Complaint at 28-30. Among the considerable injunctive relief sought, plaintiffs request a permanent mandatory injunction "requiring that USDA adopt lending practices in conformity with the requirements of the Equal Credit Opportunity Act and the Administrative Procedure Act"; a permanent injunction prohibiting USDA from "discriminatory lending practices" including "refusing applications to, or otherwise deterring, women farmers from applying for farm loans;" and an order "mandating that USDA institute an effective system for investigating and timely responding to complaints of gender discrimination in connection with [the] provision of applications for . . . farm loans." *Id.* at 28-29. In addition to injunctive and declaratory relief, plaintiffs have requested "compensatory damages appropriate to the proof at trial." *Id.* at 29. However, this requested relief in no way overshadows the declaratory and injunctive relief plaintiffs seek, nor is there any evidence on which to establish at this juncture that such compensatory relief will destroy class cohesion. Therefore, it is appropriate to certify the proposed class pursuant to Rule 23(b)(2), at least with regard to liability.

2. Alternatively, the Proposed Subclasses May be Provisionally Certified as a Hybrid Case

Alternatively, Rule 23(b)(3) allows for class certification where "the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members," such as monetary relief, "and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy." *See Eubanks v. Billington*, 110 F.3d 87, 91 (D.C. Cir. 1997). The subcategories of Rule 23(b) are not mutually exclusive, and thus a court may certify a class as a combination or "hybrid" certification: (b)(2) certification with regard to liability, and (b)(3) certification for the remedy phase. *See* Fed. R. Civ. P. 23(c)(4)(A) (stating that "an action may be brought or maintained as a class action with respect to particular issues"). Hybrid certification may be appropriate where a court determines that, due to the existence of common questions of law or fact which predominate, maintaining the case as a class action is superior to other available methods for the fair and efficient adjudication of the controversy, but where there is evidence establishing that the monetary relief is so individualized as to destroy class cohesion and thus preclude (b)(2) certification for the entirety of the case. *See Eubanks*, 110 F.3d at 95 (certifying hybrid class for monetary claims where "variations in individual class members' monetary claims may lead to divergencies of interest that make unitary representation of a class problematic in the damages phase"); *Taylor v. District of Columbia Water & Sewer Auth.*, 205 F.R.D. 43, 48 (D.D.C. 2002) (holding that individual compensatory damages did not preclude class certification) (citing *Eubanks*, 110 F.3d at 96 (affirming class certification pursuant to (b)(2) for race discrimination claim where class sought $8.5 million in compensatory damages)); *Thomas v. Albright*, 139 F.3d at 234 (affirming class certification pursuant to (b)(2) for race discrimination claim where class sought $2.4 - $4 million in damages); *cf. Robinson*, 267 F.3d at 167-68 (holding that district

courts should "'take full advantage of this provision'" to certify separate issues in order to "'reduce the range of disputed issues' in complex litigation and achieve judicial efficiencies").

In the instant case, for members of both subclasses, the declaratory and injunctive relief clearly predominates and a high level of class cohesion is maintained. Plaintiffs' Third Amended Complaint is tailored to meet the commonality requirement of Rule 23(a), and in turn the Rule 23(b) requirement of class cohesion. *See* Section II(A)(1), *supra*. As such, there is no factual basis for finding that the monetary relief sought would destroy class cohesion, and thus no clear basis for granting hybrid certification at this time. Rather, the Court should certify the class as a (b)(2) class, or provisionally certify the class a hybrid.

IV. CONCLUSION

Subclasses 1 and 2 should be certified. The subclass members are sufficiently numerous that proceeding as a class is efficient and appropriate. The class members experienced the same problems in attempting to obtain loan applications and farm loans as a result of gender discrimination exacerbated by the lack of national oversight and the excessive subjectivity in USDA's farm loan programs. The claims and experiences of the proposed class representatives and their counsel will adequately represent the interests of the class. Consistent with Rule 23(b), the USDA acted in a discriminatory manner generally applicable to the entire proposed class, making the entry of class-wide declaratory and injunctive relief appropriate. Therefore, the proposed subclasses should be certified under Rule 23(b)(2).

For these reasons, as well as those set forth in their prior memorandum in support of class certification, plaintiffs request that their motion for class certification be granted.

Respectfully submitted,

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