IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

RoseMary Love, et al.,	
Plaintiffs,	**Case Number 1:00CV02502**
vs.	**Judge: Walton, J.**
Tom Vilsack, Secretary The United States Department of Agriculture,	
Defendant.	

REPLY IN SUPPORT OF MOTION FOR LEAVE TO FILE FOURTH AMENDED AND SUPPLEMENTAL COMPLAINT

Plaintiffs have sought leave of Court to file an amended and supplemental Complaint, which would (i) remove portions of their previous Complaint that are no longer at issue in this case; and (ii) add allegations related to Defendant United States Department of Agriculture's ("USDA's") conduct during this case. "The decision whether to grant leave to amend or supplement a complaint is within the discretion of the district court, but leave should be freely given unless there is a good reason, such as futility, to the contrary." *Wildearth Guardians v. Kempthorne*, 592 F. Supp. 2d 18, 23 (D.D.C. 2008) (internal quotation marks and citation omitted). In its Opposition to Plaintiffs' Motion for Leave, USDA has failed to show that there is any good reason for the Court to deny Plaintiffs' Motion. *See Abdullah v. Washington*, 530 F. Supp. 2d 112, 115 (D.D.C. 2008).

ARGUMENT

I. Plaintiffs' Filing of a Fourth Amended and Supplemental Complaint Is Not Barred By the Law of the Case.

USDA argues that Plaintiffs are somehow barred from asserting the equal protection and due process claims in their Fourth Amended and Supplemental Complaint by the law of the case because the Court denied Plaintiffs' Motion for Court Review last year. Def.'s Opp'n to Pls.' Mot. for Leave (Doc. 150) at 3. USDA is incorrect. Plaintiffs filed a Motion for Court Review and Supervision of Financial Distribution to Women Farmers, and for Appointment of Lead Counsel in November 2010. (Doc. 116.) Plaintiffs did *not* then request that they be allowed to amend their Complaint to assert additional constitutional claims; rather, they requested that the Court exercise its discretion to review and supervise USDA's administrative claims program, and to appoint Arent Fox lead counsel to assist women in the process. *Id.* at 27. The Court ultimately denied Plaintiffs' Motion, determining that it did not then have authority to grant the relief requested. *See* Transcript of Dec. 3, 2010 Status Conf. at 9-10 (excerpts attached as Exhibit A). The Court did not consider whether Plaintiffs could properly add constitutional claims, directly related to USDA's conduct in this case, to their previous Complaint.

Indeed, USDA's counsel articulated this "law of the case" argument when the possibility of Plaintiffs amending their Complaint was raised at the most recent Status Conference. Transcript of Oct. 21, 2011 Status Conf. at 24-25 (excerpts attached as Exhibit B). The Court suggested then that its decision on Plaintiffs' Motion for Court Review would not operate as a bar to Plaintiffs' potential amendment:

> THE COURT: The way I saw things last year I didn't think that a claim had been pled before me alleging discrimination in the formatting of these programs as compared to the other programs, *so I didn't see that as an issue that was before me and I wasn't addressing that particular issue*. Whether they are able to amend I

> don't know, I'd have to see you know what they do in that respect and whether that would be appropriate.

Id. at 25 (emphasis added). USDA's "law of the case" argument is simply not supported here.

II. Permitting Plaintiffs To File Their Amended and Supplemental Complaint Would Not Cause Substantial Prejudice to Defendant.

USDA asserts that allowing Plaintiffs to file their Fourth Amended and Supplemental Complaint would cause it "substantial prejudice," Def.'s Opp'n at 4, but this argument is similarly unfounded. Plaintiffs' last Complaint was docketed in 2006 (Doc. No. 78),[1] and USDA has not yet answered that iteration of the Complaint. This case remains stayed. No merits discovery has been conducted, and no trial date has been set.

Moreover, contrary to USDA's suggestions, *see* Def.'s Opp'n at 4-5, Plaintiffs' Memorandum in Support of their Motion for Leave to File and the proposed Amended and Supplemental Complaint itself make clear that Plaintiffs do not intend to re-litigate the class certification issue in this case. Pls.' Mem. in Support of Mot. for Leave to File (Doc. 149) at 2-3 (Nov. 7, 2011) ("the Fourth Amended and Supplemental Complaint makes clear that the allegations related to class certification will not be actively litigated and are pertinent only in the event that the parties agree upon a settlement class as part of an overall resolution of Plaintiffs' claims, as the government has done in connection with the settlement of other minority farmers' claims."). Plaintiffs would pursue class-wide relief only in a settlement context *with USDA*, so USDA cannot rely on the possibility of class litigation as causing substantial prejudice.[2]

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[1] Plaintiffs requested leave to file their Third Amended Complaint in April 2003 (Doc. 50), but that Complaint was not docketed until May 2006 (Doc. 78).

[2] Plaintiffs also must point out that, aside from adding the constitutional claims, they did take steps in the Fourth Amended and Supplemental Complaint to clarify the scope of this case. Plaintiffs did not simply "remove[] two sentences" from their previous Complaint, as USDA states. Def.'s Opp'n at 5 n.1. In addition to deleting their claim under the Administrative Procedure Act, Plaintiffs removed nearly four pages of "Class Action Allegations." *Compare* Third Am. Compl. (Doc. 78) *with* Proposed Fourth Am. and Suppl. Compl. (Doc. 149-1).

USDA has not made a showing that allowing Plaintiffs leave to file their Fourth Amended and Supplemental Complaint would cause it substantial prejudice. Indeed, resolving all claims between these parties in a single litigation is more efficient than requiring the parties to litigate certain of their claims in a separate suit. *These Plaintiffs* should be allowed to assert all claims against *this Defendant* arising out of Defendant's conduct in *this very case*. *See Hall v. CIA*, 437 F.3d 94, 100 (D.C. Cir. 2006) (supplements under Rule 15(d) should be "freely granted when doing so will promote the economic and speedy disposition of the entire controversy between the parties, will not cause undue delay or trial inconvenience, and will not prejudice the rights of any of the other parties to the action.").

III. Futility Cannot Operate as a Bar to Filing Because Plaintiffs' Amended and Supplemental Complaint States Viable Claims.

USDA's Opposition also fails to show that allowing Plaintiffs to amend and supplement their Complaint would be futile. Def.'s Opp'n at 5-7. Plaintiffs' Equal Credit Opportunity Act claims have already survived a Motion to Dismiss, *see* Memorandum (Doc. 28) (Dec. 13, 2001), and their Fourth Amended and Supplemental Complaint states "plausible" constitutional claims with adequate factual support. *See Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949-50 (2009); Fourth Am. and Suppl. Compl. at 25-35 & Counts III-IV.

First, Plaintiffs have standing to assert the due process and equal protection claims set out in their proposed Complaint. USDA posits that Plaintiffs cannot claim any injury related to the administrative claims process because it is "completely voluntary" and Plaintiffs "are free to ignore" it. Def.'s Opp'n at 5. That Plaintiffs could elect not to participate in the administrative program does not deprive them of standing to challenge the program's inequalities or somehow justify Defendant's creation of a discriminatory program. As the Supreme Court has recognized:

> When the government erects a barrier that makes it more difficult for members of one group to obtain a benefit than it is for members of another group, a member of the former group seeking to challenge the barrier need not allege that he would have obtained the benefit but for the barrier in order to establish standing. The "injury in fact" in an equal protection case of this variety is the denial of equal treatment resulting from the imposition of the barrier, not the ultimate inability to obtain the benefit.

Northeastern Fla. Chapter of the Associated Gen. Contractors of Am. v. City of Jacksonville, 508 U.S. 656, 666 (1993) (internal citations omitted). Plaintiffs seek to challenge the barriers USDA is erecting to make it more difficult for women to obtain redress than African-Americans and Native Americans with identical claims.[3]

Second, Plaintiffs' Fourth Amended and Supplemental Complaint asserts plausible claims against USDA. Plaintiffs make out a viable equal protection claim under the Fifth Amendment, alleging that "Defendant has intentionally proceeded unfairly, unequally, and disproportionately, favoring African-American and Native American farmers in the settlement of their claims while disfavoring similarly situated female farmers in the settlement of their identical claims," and that there is no "rational basis" for USDA's conduct. Fourth Am. and Suppl. Compl. ¶¶ 95, 101. As the Court has noted, USDA cannot offer a discriminatory program unless at least a rational basis exists for distinctions between groups. Transcript of Oct. 21, 2011 Status Conf. at 25 ("THE COURT: . . . I assume you would agree that . . . unless there's some rational basis for it you could not format a program that is significantly different than another program if the new formatting is in some way discriminatory.").

[3] Plaintiffs' "injury in fact" is also "actual or imminent." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). USDA has represented that the administrative claims program is final and the "Claims Period" will begin to run as soon as a claims administrator is in place and ready to accept claims. *See, e.g.*, Def.'s Status Report (Doc. 141) at 1-2 (Sept. 13, 2011) (program documentation "final"); Transcript of Oct. 21, 2011 Status Conf. at 11 (USDA expects award to be issued to claims administrator by the end of November 2011 and "within some several weeks the claims period could commence.").

USDA argues that Plaintiffs' equal protection claim cannot succeed because differences in class certification in suits brought by female and African-American and Native American farmers mean that Plaintiffs are not "similarly situated" to the other groups to whom USDA is offering preferable claims programs. Def.'s Opp'n at 6. But Plaintiffs' proposed Complaint explains why this distinction (the only one USDA has offered to justify its differing treatment of these groups) is irrelevant and a pretext for discrimination. *See, e.g.*, Fourth Am. and Suppl. Compl. ¶¶ 101-102 (the government agreed to enter a settlement class with one group, another class was certified only for non-monetary relief, and previous class certification rulings are irrelevant when the method chosen to settle the cases requires individualized proof). In fact, when the discrepancy in class certification rulings arose, USDA recognized that Plaintiffs *are* similarly situated to Native American farmers: "Now that there is an actual conflict in the certification of class actions in *virtually identical suits* by Hispanic, female, and Native American farmers, review by this Court may well be appropriate to ensure that *similarly-situated minority groups* are treated consistently." Def.'s Resp. to Pls.' Petition for Permission to Take An Interlocutory Appeal, *Garcia v. Vilsack*, D.C. Cir. Dkt. No. 04-8008, at 19-20 (Oct. 1, 2004) (emphasis added). Plaintiffs are similarly situated to the groups of African-American and Native American farmers because they "are in all *relevant* respects alike." *Nordlinger v. Hahn*, 505 U.S. 1, 10 (1992) (emphasis added).

Plaintiffs' proposed Complaint also states a Fifth Amendment due process claim upon which relief may be granted. USDA argues that Plaintiffs have no protectable property interest because the benefit offered by USDA (the administrative claims process) is offered voluntarily, at USDA's discretion. Def.'s Opp'n at 6-7.[4] That USDA is not mandated to offer an

[4] To the extent USDA suggests that a protectable property interest can never exist in a benefit that the government decides to offer voluntarily and at its discretion, it is incorrect. *See, e.g.*, *Goldberg v. Kelly*,

administrative claims program to any group of farmers does not mean that it may treat minority groups differently and impose procedural barriers on some groups but not others without justification. *See* Transcript of Oct. 21, 2011 Status Conf. at 24-25 (in response to defense counsel's argument that "the government is free to devise" its "voluntary claims process," the Court noted that, "even though you're talking about a voluntary program that nonetheless there are restrictions, it seems to me constitutional restrictions, on how that program can be developed."). Plaintiffs seek to challenge the procedural barriers built into the administrative claims program offered to them, including the more onerous evidentiary requirements, lack of assistance of counsel, and the requirement that Plaintiffs sign overbroad releases. Fourth Am. and Suppl. Compl. ¶¶ 92-94.

Moreover, beyond addressing procedural issues, the due process clause "bars certain arbitrary, wrongful government actions regardless of the procedures used to implement them." *Zinermon v. Burch*, 494 U.S. 113, 125 (1990) (citation omitted); *see also Daniels v. Williams*, 474 U.S. 327, 331 (1986) ("[t]he touchstone of due process is protection of the individual against arbitrary action of government.") (citation omitted). Plaintiffs' proposed Complaint alleges that USDA's conduct is "arbitrary, unreasonable, and contrary to the government's legitimate, and legally-mandated interest of treating all minorities in a nondiscriminatory manner." Fourth Am. and Suppl. Compl. ¶ 116. As described above, Plaintiffs have articulated why the only justification offered by USDA for treating Plaintiffs differently than other groups (class certification) is irrelevant. *See also id.* ¶ 117 ("USDA lacks legitimate justification for treating similarly situated members of different minority groups differently with regard to the claims

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397 U.S. 254 (1970); *Mathews v. Eldridge*, 424 U.S. 319 (1976); *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532 (1985). Plaintiffs have more than a "unilateral expectation," *Bd. of Regents of State Colleges v. Roth*, 408 U.S. 564, 577 (1972), that the government will treat Plaintiffs like their (admittedly) "similarly situated" African-American and Native American counterparts. *See* Def.'s Resp. to Pls.' Petition for Permission to Take An Interlocutory Appeal, *Garcia v. Vilsack*, at 19-20.

programs."). USDA's decision to treat Plaintiffs differently than others with identical claims is arbitrary, and accordingly violates their due process rights.

Allowing Plaintiffs to file their Fourth Amended and Supplemental Complaint would not be futile, as Plaintiffs have stated constitutional claims upon which relief may be granted, and Plaintiffs have standing to bring those claims.

CONCLUSION

"If the underlying facts or circumstances relied upon by a plaintiff may be a proper subject of relief, he ought to be afforded an opportunity to test his claim on the merits." *Foman v. Davis*, 371 U.S. 178, 182 (1962). For all of the reasons stated herein and in their Motion for Leave to File a Fourth Amended and Supplemental Complaint, Plaintiffs respectfully request that the Court grant their Motion and allow their proposed Complaint to be filed in this case.

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Respectfully submitted,

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