IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

PLAINTIFFS' REPLY IN SUPPORT OF MOTION FOR COURT REVIEW AND SUPERVISION OF FINANCIAL DISTRIBUTION TO WOMEN FARMERS, AND FOR APPOINTMENT OF LEAD COUNSEL

The government opposes the Court's review of the settlement program proposed by the United States Department of Agriculture ("USDA"), notwithstanding its intent to use the Court's authority, rules and clerk's office to implement that program. By virtue of its Opposition to Plaintiffs' Motion for Court Review and Supervision of Financial Distribution to Women Farmers and for Appointment of Lead Counsel, the government is taking the position that it should be permitted to evade judicial review of the settlement program, while using the Court's offices as a clearinghouse for settlement claims. Yet, the government's Opposition effectively concedes that the settlement program is deeply flawed in numerous material aspects. The government's principal objections to Plaintiffs' request that the Court carefully review the proposed program are that: 1) because Plaintiffs have been denied class certification, they are not entitled to Court scrutiny of USDA's proposed settlement program; and 2) because the settlement program is voluntary, the government may do what it wants, without Court

supervision. These arguments are entirely without merit, contradict well-established case law, and seek to impose dangerous precedent whereby the courts lose control over their own dockets in the face of action by the executive branch of the government.

The government offers no opposition whatsoever to Plaintiffs' request that the law firm of Arent Fox LLP ("Arent Fox") be appointed lead counsel for all eligible claimants. By virtue of the fact that the government's Opposition does not oppose or even address this point, the Court and Plaintiffs may assume that this aspect of Plaintiffs' motion is conceded. *See Int'l Union, United Gov't Sec. Officers of Am. v. Clark*, 704 F. Supp. 2d 54, 60 (D.D.C. 2010) ("when a party's opposition to a motion fails to respond to arguments raised by the opposing party, a court may treat those unopposed arguments as conceded.").

I. Prior Denial of Class Certification Does Not Preclude the Court from Granting the Relief Requested.

In its Opposition, the government has taken the curious position that the Court cannot grant the relief requested by Plaintiffs – careful scrutiny of the proposed settlement program to ensure its fairness to participants and to preclude unnecessary burden on the courts – because the Plaintiffs were denied class certification.[1] Opp. at 3-5. The government fails to cite even a single case to support this specious argument. *Id.* In fact, the government's argument flies in the face of well-established case law that a court has the inherent authority to control and mange its docket, not only in complex cases and mass tort actions, but in *any* type of case.

[1] The government's second argument – that no change of circumstances justifies the Court revisiting its prior denial of class certification – is even more peculiar, because Plaintiffs have not asked for such reconsideration. In fact, as Plaintiffs made clear in their opening memorandum, they are **not** seeking to revisit class certification and by this Motion address only the current procedural posture of the case. *See* Pl. Mem. at 12 ("**Plaintiffs are not asking that the Court revisit class certification.**") (emphasis in original).

Examples of a court's authority to control its docket outside of the context of class actions abound. For example, in *Link v. Wabash R.R. Co.*, 370 U.S. 626, 630-31 (1962), the Supreme Court upheld the trial court's sua sponte dismissal of an action arising out of an automobile accident, noting that "[t]he authority of a court to dismiss sua sponte for lack of prosecution has generally been considered an 'inherent power,' governed not by rule or statute but by the control necessarily vested in courts to manage their own affairs so as to achieve the orderly and expeditious disposition of cases." Similarly, in *ITT Cmty. Dev. Corp. v. Barton*, 569 F.2d 1351, 1359 (5th Cir. 1978), the court of appeals upheld the trial court's order requiring the payment of funds into the court's registry on the grounds "that a federal court, sitting in equity, possesses all of the common law equity tools of a Chancery Court (subject, of course, to congressional limitation) to process litigation to a just and equitable conclusion." Moreover, in *In re Zyprexa Prods. Liab. Litig.*, 594 F.3d 113, 116-17 (2d Cir. 2010), a multi-district litigation in which consumers sued the manufacturer of an antipsychotic medication, claiming that it caused diabetes, the court appointed lead counsel to coordinate and manage pretrial proceedings on the basis of the court's inherent authority. *See also* Manual for Complex Litigation (Fourth) §10.1 (2010) ("the court's express and inherent powers enable the judge to exercise extensive supervision and control of litigation.").

The government gamely tries to argue that this Court has no authority to control its own docket because this is neither a "complex" case nor a mass tort action. Opp. at 4. But a court's authority to manage its docket is not limited to such circumstances. Courts are empowered to exercise such broad authority as is appropriate in order to control their dockets. *See, e.g.*, *Landis v. N. Am. Co.*, 299 U.S. 248, 254-55 (1936) ("the power [is] inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and

for litigants. How this can best be done calls for the exercise of judgment, which must weigh competing interests and maintain an even balance"); *MacAlister v. Guterma,* 263 F.2d 65, 68 (2d Cir. 1958) (every court has broad inherent authority to control its docket); *Bothwell v. Republic Tobacco Co*., 912 F. Supp. 1221, 1226 n.7 (D. Neb. 1995) ("a court possesses the inherent power to do those things necessary to ensure a fair and just process, as well as a fair and just final outcome").[2]

Moreover, this is exactly the type of case in which the Court should exercise such authority and oversight to ensure first, that the Plaintiffs' rights are not trammeled, and second, that court resources are not improperly used. *See* Pl. Mem. at 7-9, 12-14. Here, both types of dangers lurk.

Without the exercise of control by the Court, serious defects in the program may undermine the ability of women farmers to obtain the relief the program is meant to provide. For example, through the claims process, claimants will be forced to forfeit their bona fide legal claims in exchange for the mere chance that they will be accepted into the program. Many women will likely file complaints that are broader than necessary to participate in the program and then dismiss them with prejudice, thus giving up additional viable claims, which would be

[2] In any event, the government's contention that this is not a complex case is not sustainable. *See* Manual for Complex Litigation (Fourth) §10.123 (2010) ("Complex litigation frequently involves two or more separate but related cases."). Here there are potentially hundreds of thousands of separate but related cases, clearly qualifying this case as complex. Moreover, just a few of the particular features of this action demonstrate that it is in fact complex. There are potential settlement claimants in every state of the Union and they number in the hundreds of thousands. Each potential claimant has a different amount of damages and different outstanding indebtedness. There are hundreds of Farm Service Agency offices that had decision-making authority over the loan and loan servicing requests of women farmers, and each such office followed its own practices and procedures as a result of their extensive independence. The time period for the settlement claims spans approximately two decades. The relevant programs and regulations pertaining to the distribution of loan applications, the granting of loans, and the servicing of loans changed significantly over the years and affected not only USDA's contemporaneous decisions in the granting of loans, but also had lingering effects on indebtedness, interest rates, and loan forgiveness.

considered res judicata in any later attempt to assert them. Moreover, claimants will not have an opportunity to learn of or rebut USDA's challenges to their claims. *See* Pl. Mem. at 15-22.

In addition, the program's potential burden on the courts is of serious concern. Protecting and conserving the courts' resources is an important basis for the broad authority granted the courts to control their dockets, and must be considered when the Court evaluates the program. *See, e.g., Mercury Vapor Processing Techs., Inc. v. Vill. of Riverdale*, 545 F. Supp. 2d 783, 790 (N.D. Ill. 2008) (court has "inherent authority to manage its own docket in a manner that conserves scarce judicial resources . . ."). USDA's use of the federal courts for the filing of complaints, which must then be immediately dismissed with prejudice, will entail a monumental amount of work for federal district court clerk's offices around the country, and could pose myriad problems. *See* Pl. Mem. at 7-9. The government's settlement program requires that all filings, both those with the court and with the claims adjudicator ("Adjudicator"), be accomplished within a 180-day claims period. The program could be announced at any time,[3] and the federal courts will likely be under immediate, significant pressure to process these complaints and dismissals in time for claimants to meet the government's 180-day timetable. This will not only burden clerk's offices nationwide, but will necessarily adversely impact all other parties and counsel who are litigating or seeking to litigate in the federal courts.

The government's response to this issue is entirely inadequate, and increases Plaintiffs' concern that the USDA program has not been carefully thought through.[4] Protesting that the

[3] At the October 26, 2010 status conference, counsel for the government represented to the Court that the government expected to commence the program in mid- to late-November 2010.

[4] The government argues that the intent of the program is to reduce the burdens on the Court and the parties by eliminating discovery, motions practice, and trials. Opp. at 5. Plaintiffs do not question the government's *intent*. But the means to be employed by the program seem not to have been carefully considered in terms of the burden on the court system and on claimants. The government seems not to have taken into account the practical effect of its proposed use of the courts in connection with the program, and its stated intention to unilaterally impose this

filing of a complaint is not a mere formality, the government makes clear that the real reason for its insistence on the use of the courts is the availability of Rule 11, which it hopes will deter fraudulent filings. Opp. at 6. But Rule 11 is not only unnecessary, it is also unlikely to be useful.

Rule 11 is entirely unnecessary because the government has other, more effective tools to defeat fraud. Claimants will have to submit their claim forms to the Adjudicator under oath, under penalty of perjury, which carries even more severe penalties that those available under Rule 11. *Compare Hoffman Plastic Compounds, Inc. v. N.L.R.B.*, 535 U.S. 137, 157 (2002) (noting that both civil and criminal penalties are available for perjury) *with Atkins v. Fischer*, 232 F.R.D. 116, 126 (D.D.C. 2005) (listing possible Rule 11 sanctions: "striking the offending paper, issuing an admonition, reprimand, or censure; requiring participation in seminars or other educational programs; ordering a fine payable to the court; [or] referring the matter to disciplinary authorities."). In addition, the program anticipates the ability to combat fraud by extensive auditing, with particular scrutiny of the claims of constructive applicants. Pl. Mem. at 20. Audits can be initiated by the Justice Department, USDA and/or the Adjudicator, as they see fit.

In addition, given the program's proposed procedures, it is extremely unlikely that Rule 11 could ever be used. A plaintiff who files a fraudulent complaint in violation of Rule 11 will, under the requirements of the program, be compelled shortly thereafter to dismiss that complaint with prejudice, without any review of the complaint by the government. By the time the government determines that the complaint was fraudulent and filed in violation of Rule 11, the

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program on the judicial system, utilizing its resources while evading court approval, seems ill-considered and arrogant.

Court will have lost jurisdiction over the plaintiff, who will by then presumably have filed her claim before the Adjudicator. Any remedy for a fraudulent filing is unlikely to be imposed by the courts.

The government's insistence on the use of the courts for the availability of Rule 11 demonstrates once again that the program does not appear to have been carefully thought out. The entire federal judicial system, involving hundreds of district courts all over the country, will be inundated with complaints and their clerk's offices overwhelmed with administrative and filing work, all because of the extremely unlikely possibility that Rule 11 could be invoked against a plaintiff. The added burden on the judicial system is not worth the slight chance that Rule 11 could be useful.

Nor is the burden on the courts justified by the government's assertion that "[t]he filing requirement also protects plaintiffs because it will prevent their claims from being time-barred once the stay of the statute of limitations is lifted." Opp. at 6. This makes no sense. The stay must remain in place until the expiration of the program's 180-day claims period, since claimants may technically file during that period. Plaintiffs who have already filed their complaints need not be concerned about the expiration of the statute of limitations. New plaintiffs who file complaints in order to participate in the settlement program must immediately dismiss their complaints with prejudice within the 180-day period, so they too have no need to worry about any lifting of the stay by the Court. Women farmers who do *not* want to participate in the settlement program but instead wish to pursue their own lawsuits must file complaints before the stay is lifted, but these women would not participate in the program in any event, so their actions have nothing whatsoever to do with the requirement that those who wish to participate in the program must file a complaint. In sum, the filing of a complaint as a precondition to

participating in the program is completely unrelated to saving timed-barred legal claims for women farmers.

In its Opposition, the government grossly underplays the burden that will be imposed on the courts as a result of the program. Its only response to the tsunami of additional work that threatens to overwhelm federal courts all over the country is that the government will not oppose the filing of aggregated complaints by groups of plaintiffs. Opp. at 6. This is not a remedy. There are hundreds of thousands of potential plaintiffs residing in every state. Some will choose to be represented by counsel and some will not. All claimants will have to file complaints and then dismiss them with prejudice. In every courthouse where complaints are filed, the clerk's office will have to process the complaints and civil cover sheets; issue summonses; do the necessary internal paperwork, including docketing the complaints and making the appropriate electronic entries in ECF jurisdictions; assign judges; collect filing fees; and provide file-stamped copies to plaintiffs. Upon receipt of the stipulations of dismissal, the clerk will have to check to ensure that the filings are acceptable, make the appropriate docket entries, and provide file-stamped copies to plaintiffs. Plaintiffs who file pro se, and there is no telling how many such plaintiffs there will be, will require substantial handholding by the clerk of the court. In jurisdictions where electronic filing is required, there are likely to be even greater problems, as pro se plaintiffs are likely unfamiliar with the process and many may not have computers. Plaintiffs will also likely be confused and/or outraged by the filing fee requirements, and clerks will have to answer their questions and concerns. The government's decision not to oppose the filing of complaints on behalf of groups of plaintiffs will do little to ameliorate the burden on clerk's offices. The potential claimants number in the *hundreds of thousands.* If every potential claimant must file a complaint in federal court as a precondition to participating in the program,

it will be impossible to avoid the filing of a huge number of complaints in district courts all over the country, even if every complaint includes numerous plaintiffs. In short, the government's answer that it won't oppose the filing of single complaints by multiple plaintiffs is wholly inadequate.

II. The Government Offers No Justification for Imposing an Unfair Process on Women Farmers.

In their opening memorandum, Plaintiffs identified a host of problems with the program as currently contemplated that will result in unfairness to women farmers. Pl. Mem. at 15-22. The government does not dispute any representations made by Plaintiffs about how the program is intended to operate, and does not justify any of the unnecessary hurdles or procedural flaws that Plaintiffs identified. The requirements that will likely present serious problems for women farmers who wish to participate include:[5]

- In order to provide notice to potential participants, the government plans to post notices in USDA field offices and do some mailing of a summary notice and fact sheet, but has not committed to use all of its extensive databases for purposes of providing notice. The notice provided by the government will likely deprive many thousands of eligible claimants from learning about the program and making timely submissions. Pl. Mem. at 15-17.

- A claimant must relinquish all claims against the government, prior to knowing whether her claims will even be accepted for processing by the Adjudicator, and many claimants will likely unwittingly dismiss more claims than are necessary to participate in the program. Pl. Mem. at 17.

- The government may oppose claims and make submissions in connection with asserted claims, although the claimant will not know if the government has done so and will have no opportunity to refute any information submitted or assertions made by the government. Pl. Mem. at 18-19.

- The Adjudicator may award debt relief only if the debt arose from an event of discrimination on which the claimant "succeeded" before the Adjudicator, and relief will "sweep forward" in the same program in which the

[5] This is by no means an exhaustive list.

gender discrimination occurred. The claimant will not know which event of discrimination the Adjudicator chooses to recognize for purposes of the $50,000 award, which effectively deprives claimants of participation in the debt relief decision-making process. Pl. Mem. at 18-19.

• Constructive applicants – those who attempted to apply for a farm loan but could not due to gender discrimination – who choose to participate in the process will face substantially heightened burdens in order to succeed on their claims, will be subjected to more auditing, and will have their awards held back while the audits are performed. Pl. Mem. at 19-20.

The government does not bother to justify any of the requirements set out above and elsewhere in Plaintiffs' opening memorandum. This failure is telling. The government's sole justification for its actions is that the program is voluntary. Opp. at 3. This is insufficient. The laudatory purposes of the program do not permit the government to impose any process it wishes on claimants, regardless of the lack of fairness of that process. *Cf. Thomas v. Union Carbide Agric. Prods. Co.*, 473 U.S. 568, 596 n.1 (1985) (the "government is not free to dispose of individual claims of entitlement in any manner it deems fit.") (Brennan, J., concurring); *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 539-41 (1985) (where legislature creates a property right, it cannot also define the process due to individuals in a manner that does not comport with due process).

Plaintiffs have moved for a careful review of the program by the Court in order to ensure that claimants will be accorded the requisite levels of fairness and due process. That the government fails to even justify the contours of its program makes Plaintiffs even more wary that the interests of claimants will be fairly considered in the program absent Court review and oversight. The Court should exercise its inherent powers to manage its docket and "ensure that all settling litigants are treated fairly." *In re Zyprexa Prods. Liab. Litig.*, 433 F. Supp. 2d 268, 270 (E.D.N.Y. 2006).

III. Arent Fox's Role as Claimants' Lead Counsel.

The government has not opposed the Court's appointment of Arent Fox as lead counsel for claimants, whom the government has acknowledged are akin to a "putative class." *See* Opp. at 6 (The government has a "plan to offer every woman who would have comprised the **putative class** a chance to resolve her claim much more efficiently and cheaply through a voluntary ADR process than the claim can be resolved through civil litigation.") (emphasis added). Arent Fox already represents approximately 3,000 women farmers, the firm has been heavily involved in this case for a decade, and has been negotiating with the government about this program for the last year.

Arent Fox's role as claimants' lead counsel should be delineated by the Court. Among other things, the notice that is to be provided to prospective claimants should advise that Arent Fox has been appointed claimants' lead counsel, and Arent Fox's contact information should be included in the notice. In its capacity as lead counsel, Arent Fox will consult with the government about the substance of the forms that claimants are to submit to the Adjudicator. Arent Fox should receive a copy of whatever the government files in response to a claim, and on behalf of the claimant be provided an opportunity to correct or refute that information where appropriate.

Arent Fox is willing to meet and to communicate with the government, as Arent Fox has on many prior occasions, in order to work out its role as claimants' counsel in order to best serve the claimants and to facilitate the process. Arent Fox suggests that the parties report back to the Court before the formal launch of the program as to the particulars of Arent Fox's role as claimants' lead counsel, which can then be reviewed by the Court and memorialized in an order.

CONCLUSION

The Administration plans to provide women farmers who have suffered discrimination the opportunity to receive monetary relief and debt forgiveness through a settlement program. As discussed above and set out more fully in Plaintiffs' opening memorandum, the Court should review the program to ensure that deserving women farmers receive the relief that is envisioned by the program. Plaintiffs accordingly request that the Court grant their Motion and exercise careful scrutiny of the program. Plaintiffs further request that the Court grant their Motion to appoint Arent Fox LLP lead counsel for claimants.

Respectfully submitted,

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