

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

_____	)	
	)	
<b>ROSEMARY LOVE, et al.,</b>	)	
	)	
<b>Plaintiffs,</b>	)	
	)	<b>Case Number: 1:00CV02502</b>
<b>vs.</b>	)	
	)	<b>Judge: Walton, R.</b>
<b>ANN VENEMAN, SECRETARY</b>	)	
<b>UNITED STATES DEPARTMENT OF</b>	)	
<b>AGRICULTURE,</b>	)	
	)	
<b>Defendant.</b>	)	
_____	)	

**PLAINTIFFS’ RESPONSE TO USDA’S STATUS REPORT,  
AND REQUEST FOR INFORMATION, DISCOVERY, AND A HEARING**

**INTRODUCTION**

Plaintiffs submit this Response to USDA’s Status Report, filed June 8, 2015. ECF Doc. 248 (“Status Report”). As the Status Report indicates, the government’s Hispanic and Women Farmers and Ranchers Claims Resolution Process (“Claim Program”) has concluded, and claims filed had only a 6% rate of success. Countless women gave up their rights to pursue discrimination claims in Court and are now left baffled as to why their claims were denied. For the reasons stated below, Plaintiffs request that (a) the Court require USDA to provide additional information regarding the standards applied by its claims administrator, Epiq Systems (“Epiq”), and claims adjudicator, JAMS, in their evaluations of the claims submitted, and the standards used by any government entity, agency, or contractor to determine fraud in claims submitted, (b) the Court allow Plaintiffs to take oral and written discovery as to these subjects; and (c) the Court hold a hearing on the results of the Claim Program.

## DISCUSSION

### I. Results of the Claim Program and Futile Attempts to Obtain Information

According to USDA's Status Report, 53,803 claims were submitted to the Claim Program; 22,163 (or 41.19%) of the claims were deemed timely and complete by the claims administrator, and thus forwarded to the claims adjudicator for consideration on the merits. Status Report at 1. Only 3,210 claims were granted, just 6% of the total claims submitted, and less than 15% of those considered on the merits. *Id.* at 2. Of those forwarded to the claims adjudicator, more than *half* – 10,361 – were denied due to “fraud concerns.” *Id.* Of the approximately \$1.3 billion pledged by the government for cash awards to women and Hispanic farmers who had been the victims of USDA's past discrimination, only \$200 million (approximately 15%) is slated to be paid out. *Id.* at Ex. A. Of the \$160 million in possible debt relief, only \$7 million (about 4%) will be awarded. *Id.*<sup>1</sup>

The denial letters received by claimants offer only a one-sentence explanation, and do not provide any detail at all about the reason claims were denied. Attached as Exhibits 1 and 2 are samples of two denial letters received by claimants. The letters state simply that the claim did not meet the evidentiary standard or that the applicant failed to provide sufficient documentation. Significantly, the Status Report indicates that 10,361 of the 18,953 claims that were denied after being sent to the adjudicator (54.67%) were denied “due to fraud concerns.” Status Report at 2. In other words, approximately three times the number of claims were denied on the basis of “fraud concerns” than were granted at all. Nonetheless, upon information and belief, not a single

---

<sup>1</sup> USDA has known about statistics relating to the Claim Program, presumably including rejections due to “fraud concerns,” since at least March 2015. *See* USDA's Status Report, ECF Doc. 235. Yet USDA waited until June 8, 2015, the very day that the tolling of the statute of limitations period for women with discrimination claims ended, to provide the information set forth in the Status Report. This left women affected by these statistics with two days to commence legal action.

denial letter received by a claimant states that a claim was denied due to “fraud concerns.” Inexplicably, USDA’s claims adjudicator evidently chose to deny a majority of the claims it reviewed on the basis of “fraud concerns” without so notifying the claimants, and instead misrepresented the real basis for the denial of their claims.

Claimants, attorneys, and advocates are left to speculate as to why claims might not have met Claim Program standards and what standards were actually applied. For example, it appears that many Tier 1(a) claims may have been denied simply because the claimant complained orally, rather than in writing, to USDA about her discriminatory treatment. If that is true, this reason for denial is inappropriate and in contravention of the Framework, which required only that Tier 2 applicant complaints be in writing. *Compare* Framework at 10 (Tier 2 claimant must have “filed a *written* complaint . . .”) (emphasis added); *with id.* at 11 (Tier 1(a) claimant need only to have “filed an administrative discrimination complaint . . .”); 13-14 (Tier 1(b) claimant need only to have “complained of discrimination . . .”), *available at* <https://www.farmerclaims.gov/Documents/USDA%20Framework%20011312%20Final.pdf>. Despite a written complaint being unnecessary under the Framework for Tiers 1(a) and (b), thousands of claims may have been denied solely because the individual’s complaint to USDA was made orally.<sup>2</sup>

Plaintiffs’ counsel has been inundated with calls and letters from confused claimants who have no idea why their claims were denied, and who want answers from USDA. Claimants feel that they have been once again mistreated by USDA because the Claim Program required them to execute releases that bar future litigation, and only after they submitted those releases were

---

<sup>2</sup> Notably, USDA’s own instructions to its personnel regarding permissible customer complaints permit verbal complaints of discrimination. *See* USDA Notice AO-1174 at 3 (Sept. 30, 1998) (“A [customer] complaint [about program discrimination] may be filed verbally or in writing.”), attached as Exhibit 3.

their claim packages found to be insufficient in some unstated way. Claimants whose claims were denied for providing insufficient documentation are left wondering why that issue was not flagged early in the process, when Epiq could have rejected incomplete claim forms, thus rendering claimants' releases ineffective. Now those releases likely bar claimants with purported insufficient documentation from pursuing lawsuits against USDA. USDA's failure to tell 10,361 claimants the real reason for the rejections – "fraud concerns" – raises further questions of whether USDA and its agents in fact conducted a full and fair process that adhered to identifiable and appropriate standards. Having undertaken the Claim Program, USDA and its contractors were bound to conduct it in accordance with the Framework . When it was instituted, the Claim Program was heralded by USDA as a way to put discrimination behind the Department, but the results of the program are, at best, suspicious, and at worst, discriminatory, in breach of the Framework, and lacking in due process.

Counsel for USDA advised the Court at an April 21, 2015 hearing that Epiq, USDA's hired claims administrator, is in the "best position in the first instance to resolve [mistakes]" and that recourse to the administrator is "where it should be resolved," before a claimant proceeds to address her concerns with the Court. Transcript of April 21, 2015 hearing at 53-54, attached as Exhibit 4. But claimants have tried to direct their questions to Epiq, and have had no success in determining the specific nature of the defects of their claim packages or why their claims were actually rejected. Accordingly, claimants are unable to ascertain whether there may have been simple review and adjudication errors that perhaps could still be fixed, or whether more systemic "errors" have been made by the application of improper or entirely discretionary standards in evaluating claims and rendering decisions that have resulted in the denial of nearly 95% of the claims submitted.

Without more information about why claims were denied and what standards were applied, claimants have no way to judge whether the claims administrator and/or adjudicator hired by the government misapplied the Framework's standards and requirements, or whether any "fraud" reviews were appropriately conducted and based in fact. Neither the rejected claimants nor their attorneys and advocates who assisted with those claims can determine why claims were not granted, particularly when they were substantively similar to other filed claims that were granted. The Claim Program provides for no appeal of denied claims, and Epiq has declined requests to explain the bases for specific denials.

As both the D.C. Circuit, in a recent decision involving a claimant who utilized the claims process for black farmers arising out of *Pigford v. Vilsack*, 777 F.3d 509 (D.C. Cir. 2015), and this Court observed at the April 21, 2015 hearing, the Court can require USDA to adhere to the obligations it has undertaken as articulated in the Framework.<sup>3</sup> Even counsel for USDA conceded in open court on April 21 that coming to the Court alleging a breach of the Framework would be an option for claimants who were wronged. Ex. 4 at 53. But without information from USDA regarding the standards actually applied by Epiq and JAMS when reviewing and adjudicating the claims submitted, and applied by the government in any reviews for fraud, claimants cannot determine whether the Claim Program was fairly and accurately administered or whether the decisions complied with the Framework.

---

<sup>3</sup> The Court stated at the April 21, 2015 hearing, "as far as those individuals who are participating in the process is concerned, if the agency doesn't comply with what they develop as the framework, I don't buy the proposition that those matters cannot be brought before this court and the agency required to comply with what it said it would do when this framework was established." Ex. 4 at 55-56.

## II. Relief Sought

Plaintiffs accordingly request that the Court require USDA to provide to Plaintiffs and the Court the following information with respect to the Claim Program:

- Number of claims, and amount of awards and debt relief granted to women farmers/ranchers by Tier;
- Number of claims granted and denied to women farmers, broken out by state of submission, and by race/nationality of applicant;
- Number of claims denied under each basis or denial category utilized by the administrator and/or adjudicator, such as “fraud,” “untimely,” “incomplete,” “insufficient evidence,” “insufficient documentation,” “*Pigford* claimant,” etc., broken out by gender and race/nationality of applicant;
- What category of claim denial was communicated to the 10,361 claimants whose claim forms were deemed timely and complete and whose claims were then denied due to “fraud concerns;”
- What entity, agency, or contractor(s) reviewed for possible fraud, what standards were applied, and what referrals to other legal agencies or law enforcement were made by USDA, Epiq, JAMS, or others in connection with the 10,361 claims denied due to “fraud concerns;”
- What standards were applied by the claims administrator and/or adjudicator when reviewing and adjudicating claims, including with respect to (a) documentation requirements for constructive applicants; (b) documentation requirements for all other applicants; (c) what standards were applied to witness affidavits for constructive applicant claims; (d) whether oral complaints were deemed

sufficient, and if so, for which Tier(s); (e) what level of detail was required to be included in an oral and written complaint, respectively; (f) how the adjudicators applied the evidentiary standards of “substantial evidence” and “preponderance of the evidence”; and (g) how the standards applied to the review and adjudication of claims by the claims administrator and/or adjudicator in this Claim Program differed from the standards applied by Epiq, JAMS, and other contractors in the previous administrative claims programs for black and Native American farmers and ranchers.

Plaintiffs and their counsel should be able to learn the above information, probe the answers to currently existing questions, and ask the follow-up questions that USDA’s answers prompt. Accordingly, Plaintiffs also request that the Court allow them a reasonable time to conduct discovery with respect to the Claim Program and the standards applied. The information listed above and to be learned through discovery is necessary for claimants to better understand why claims were denied, and whether errors occurred that can be remedied by the Court. It may clarify matters for confused claimants and preclude the filing of legal claims with the Court by claimants who cannot get additional information from the administrator and/or adjudicator and who feel that there have been improprieties in the handling of their claims or breaches of the Claim Program Framework. Plaintiffs ask that the Court require USDA to provide the above requested information in a Report to the Court within a reasonable time (30 days), and then allow Plaintiffs a reasonable time (120 days) to conduct oral and written discovery with respect to the Claim Program.

Finally, Plaintiffs request that the Court schedule a hearing to assess the Claim Program and its results, and to determine whether further action is necessary with regard to the pending

case and additional related cases that may be filed by claimants who allege that the Framework has been breached by the handling of their claims.

### **CONCLUSION**

For the reasons stated herein, Plaintiffs respectfully request that the Court require USDA to provide the above-described information, allow Plaintiffs to conduct discovery, and schedule a hearing.



Date: June 11, 2015

Respectfully submitted,

/s/ Barbara S. Wahl

Marc L. Fleischaker #004333  
Barbara S. Wahl #297978  
Kristine J. Dunne #471348  
Alison Lima Andersen #997260  
ARENT FOX LLP  
1717 K Street, N.W.  
Washington, D.C. 20006  
Telephone: (202) 857-6000  
Facsimile: (202) 857-6395

Roderic V.O. Boggs  
WASHINGTON LAWYERS  
COMMITTEE FOR CIVIL RIGHTS  
AND URBAN AFFAIRS  
11 Dupont Circle, N.W. - Suite 400  
Washington, D.C. 20036  
Telephone: (202) 319-1000  
Facsimile: (202) 319-1010

Alexander John Pires, Jr. # 185009  
PIRES COOLEY  
4401 Q Street, N.W.  
Washington, D.C. 20007  
Telephone: (202) 333-1134  
Facsimile: (202) 338-3635

Philip L. Fraas # 211219  
STINSON MORRISON HECKER, LLP  
1150 18th Street, N.W. – Suite 800  
Washington, D.C. 20036  
Telephone: (202) 572-9904  
Facsimile: (202) 572-9946