

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

52,961 D

TIMOTHY PIGFORD, *et al.*,

Plaintiffs,

v.

DAN GLICKMAN, Secretary,
United States Department of Agriculture,)

Defendant.

Civil Action No. 97-1978 (PLF)

ORDER

In light of the objections raised at the fairness hearing held on March 2, 1999, and in response to a correspondence from the Court, the parties have filed a revised proposed consent decree along with a letter clarifying certain points. A copy of the correspondence between the parties and the Court and a copy of the revised proposed consent decree can be viewed by accessing the web site for the United States District Court for the District of Columbia at www.dcd.uscourts.gov. Copies of these documents also are on file in the Clerk's Office. Accordingly, it is hereby

ORDERED that any class member with comments on or objections to the changes made in the revised proposed consent decree may file those comments or objections in writing in the Clerk's Office by March 29, 1999. Comments or objections shall be limited to the changes made in the revised proposed consent decree. The Court already has before it all

of the objections to the original proposed consent decree, and it will not consider any further objections to those provisions of the proposed consent decree that have not been revised.

SO ORDERED.

DATE:

PAUL L. FRIEDMAN
United States District Judge

Ma 22, 1999
Letter from Judge Friedman 3/5/99
Letter from [unclear] 3/19/99
Re: Consent Decree

52,961 D

March 5, 1999

Alexander J. Pires, Jr., Esq.
Conlon, Frantz, Phelan & Pires
1818 N Street, N.W.
Suite 700
Washington, D.C. 20036

Michael Sitcov, Esq.
United States Department of Justice
Civil Division
Federal Programs Branch
PO Box 883, Room 920
Washington, D.C. 20044

Re: Timothy Pigford, et al. v. Dan Glickman
Civil Action No. 97- 1978

Dear Messrs. Pires and Sitcov:

I have reviewed the objections that have been filed, as well as your submissions in support of the Consent Decree. I also have carefully considered all of the points raised at the fairness hearing. It strikes me that some of the objectors have raised genuine concerns that should be addressed by counsel before I issue my final ruling on the fairness of the proposed Consent Decree. I therefore wanted to bring to your attention some of the concerns that I believe are most compelling and/or most easily addressed so that you may have an opportunity to amend the proposed Consent Decree as you see fit before I issue any ruling.

To that end, I have enclosed a list of suggestions and proposed revisions. You should not draw any conclusions with respect to my ultimate ruling in this matter based upon what is included in or excluded from this list. As you will see, many of the concerns are easily addressed by clarifying the language of the proposed Consent Decree. Other suggested revisions are an attempt to provide a level of comfort or assurance to class members who understandably take very little comfort in promises made by the USDA. To the extent that I have included specific language, it is intended only as a suggestion to address the specific concern raised. It is, of course, ultimately up to the parties to decide upon the contents of the final proposed Consent Decree that they want me to review under the relevant standards.

I will refrain from making a final decision regarding the fairness of the proposed Consent Decree until after March 19, 1999. If in the meantime you agree upon any changes and want to submit an amended proposed Consent Decree or have a conference call or meeting to

discuss these matters further, please notify Chambers.

1. Paragraph 1(b) -- Revise to add: "Within ten days after the entry of the Consent Decree, Michael K. Lewis shall provide counsel for both sides with a list of the criteria that will be used to select those other persons who will be assigned responsibility for deciding Track B claims. In the event that a person other than Michael K. Lewis is needed to decide a Track B claim, Mr. Lewis shall provide the parties with a list of five potential designees. Each side will be afforded the opportunity to strike two designees from the list, and Mr. Lewis shall select a name from the remaining designees."

2. Paragraph 5(b)(ii) -- Revise to indicate that declarations by a claimant's family member or members will suffice if credible but that a non-relative's declaration may be given greater credence depending upon the circumstance.

3. Paragraph 5(b)(iv) -- Same.

4. Paragraph 5(d) -- Provide a reasonable period within which to change tracks for "good cause" and define "good cause." In the alternative, provide a fallback form of relief for those who do not meet the preponderance of the evidence standard under Track B but who the arbitrator determines have met the substantial evidence standard.

5. Paragraphs 9(a)(i)(C) and 9(b)(i)(B) -- After the phrase "that accorded specifically identified, similarly situated white farmers," add "or the manner in which white farmers seeking the same benefit or service generally were treated at that time."

6. Paragraph 9(a)(v) -- At the hearing, Mr. Pires represented that if a farmer was denied relief under Track A, the denial would be reviewed by JAMS-Endispute. There is no provision for that in the Consent Decree. If there in fact is going to be a level of review when an adjudicator denies relief under Track A, that review mechanism should be described.

If there is no level of review when a farmer is denied relief under Track A, there at least should be a "savings" provision with a mechanism to correct technical errors.

7. Paragraph 9(b)(v) -- Same.

8. Paragraph 10(i) -- There should be a "savings" provision with a mechanism to correct technical errors.

9. Paragraph 1 l(c) -- Revise to add: "except that to the extent that creditworthiness is an eligibility criterion, prior credit problems should not be considered if they resulted, in whole or in part, from transactions that were the subject of claim(s) resolved in the class member's favor."

10. The role and independence of the Monitor was the subject of concern expressed in many of the objections, at least in part because neither the specific functions of the Monitor nor the Monitor's relationship with the USDA is clearly articulated in the Consent Decree. In order for class members to have some comfort that the Consent Decree will provide the promised relief, it appears that the role and independence of the Monitor need to be clarified and perhaps expanded. Some suggestions follow; other changes probably also would be appropriate.

A. Paragraph 12(a) -- Revise as follows: "From a list of three persons submitted to it jointly by the parties, or, if after good faith negotiations they cannot agree, two persons submitted by each party, the Court shall appoint an independent Monitor who shall report directly to the Court. The Monitor shall remain in existence for a period of five years and shall not be removed except for good cause found by the Court. The Monitor's fees and expenses shall be paid by the USDA."

B. Paragraph 12(b)(i) -- Add a comma after "the Secretary" and add the words "the Court."

C. Revise to add "Paragraph 12(b)(iv): Monitor the USDA's mechanism for reviewing and responding to complaints of discrimination in its credit and benefit programs. "

11. Paragraph 13 should include a role for the Monitor and eliminate or shorten the 60-day period in subparagraph (c).

12. Paragraph 17 -- Revise to add: "Nothing in this consent decree shall be construed to release the USDA from liability for any claims for relief not raised in this complaint."

13. Paragraph 19 -- Revise to add: "The USDA shall exert best efforts to ensure compliance with all applicable statutes and regulations prohibiting discrimination, including but not limited to ECOA; Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d, *et. seq.*; 7 C.F.R. Pt. 15; and 12 C.F.R. Pt. 626."

14. Paragraph 21 -- Revise to add: "Nothing in the preceding sentence shall be construed to affect the Court's jurisdiction to enforce the consent decree on a motion for contempt filed in accordance with ¶ 13."

I look forward to hearing from you on or before March 19.

Sincerely,

Paul L. Friedman

cc: Michael K. Lewis, Esq.

U.S. Department of Justice

Civil Division

Washington, D.C. 20530

March 19, 1999

BY HAND DELIVERY

Hon. Paul L. Friedman
United States District Judge
United States Courthouse
3rd. St. & Constitution Ave., N.W.
Washington, D.C. 20001

Re: Pigford, et al. v. Glickman (D.D.C.)
Brewington, et al. v. Glickman (D.D.C.)

Dear Judge Friedman:

We are writing in response to your March 5, 1999 letter in which you suggested a number of revisions to the Consent Decree in the above-captioned cases. We appreciate your input and have carefully considered your suggestions. We have attempted to modify the Decree in accordance with your suggestions, so long as the changes would not fundamentally alter the nature of the agreement struck by the parties. Consistent with this approach, we have modified the Decree as follows:

1. We agree that the potential exists for Michael Lewis to be faced with a substantial number of arbitrations simultaneously, making it impossible for him to arbitrate each case personally. Rather than requiring that Mr. Lewis nominate five alternate arbitrators for each case that he cannot handle personally, we have agreed that ¶ 1(b) of the Decree should be modified to require him to develop a single list of alternates which the parties would pre-approve and from which Mr. Lewis can select an arbitrator for any arbitration that he is unable to handle himself.

2. To address your suggestion that the Decree explicitly provide that prior credit problems that arose in whole or in part from a transaction that was the subject of a claim resolved in a class member's favor, the parties have agreed to add the following language to the end of ¶ 11(c):

except that outstanding debt discharged pursuant to §§ 9(a) (III) (A) or 10(g) (ii), above, shall not adversely affect the claimant's eligibility for future participation in any USDA loan or loan servicing program.

3. We agree that it would be appropriate for the Court to select the Monitor. Accordingly, § 12(a) of the Decree has been modified to read as follows:

From a list of three persons submitted to it jointly by the parties, or, if after good faith negotiations they cannot agree, two persons submitted by plaintiffs and two persons submitted by defendant, the Court shall appoint an independent Monitor who shall report directly to the Secretary of Agriculture. The Monitor shall remain in existence for a period of 5 years and shall not be removed except upon good cause. The Monitor's fees and expenses shall be paid by USDA.

We also modified § 12(b)(i) to require the Monitor to provide copies of his reports to the Court.

The parties also agree that there should be a mechanism to correct clear technical errors in the process for determining class membership or in a particular adjudication or arbitration. To this end we have added a new subparagraph (iii) to § 12(b) to authorize the Monitor to direct the appropriate decision maker to re-examine a claim whenever the Monitor determines that "a manifest error has occurred in the screening, adjudication, or arbitration of a claim and has resulted or is likely to result in a fundamental miscarriage of justice[.]"^{1/}

4. Although the parties do not believe that it would be appropriate to require the participation of the Monitor in the

^{1/} This change also is reflected in §§ 9(a)(v), 9(b)(v) and 10(i).

"cooling-off" process mandated by ¶ 13, we have shortened that period from 60 to 45 days.

5. We have added to ¶ 21 the sentence that you proposed to make it clear that entry of the Decree would not affect the Court's jurisdiction to enforce the Decree's terms.

Paragraph 6 of your letter reflects the confusion in the parties' explanations during the March 2 hearing of the role that JAMS-Endispute will play in the adjudication process under ¶ 9 of the Consent Decree. During the hearing the parties' counsel inaccurately portrayed JAMS-Endispute as performing a review process for class members whose Track A claims were decided in defendant's favor. What the parties had intended to explain was that Poorman-Douglas will review each Track A claim and either prepare a recommended decision or note its inability to reach a recommended decision on liability. JAMS-Endispute will then reevaluate every claim that Poorman-Douglas has reviewed. In those cases where Poorman-Douglas has recommended a decision on liability, JAMS-Endispute will then make the final decision in all Track A claims. In those cases where Poorman-Douglas is unable even to recommend a decision, JAMS-Endispute will reach its own decision without the benefit of Poorman-Douglas' assessment of liability. There is, then, no unique "level of review when an adjudicator denies relief under track A" that requires discussion in the Decree.

Most of your remaining suggestions involve various aspects of the Track A adjudication process. We have declined to incorporate them because they would, if adopted, fundamentally alter the nature of the agreement that is at the heart of the Consent Decree. That agreement is reflected in Track A, which is designed to provide an expeditious, inexpensive, and final process for resolving the claims of, and providing fair liquidated damages to, class members who lack strong evidence for their claims.

For example, the agreement would be frustrated if claimants were permitted to support their claims to class eligibility through declarations by family members. First, the government has a strong argument that under Section 741, the statute of limitations is waived only for farmers who filed a written complaint of discrimination with USDA. Although as part of a settlement USDA is willing to permit oral complaints to be sufficient, some credible

corroboration is required to reduce the possibility of fraud. Thus the reason for a non-familial affidavit. While familial affidavits might be truthful, of course, the assessment of class eligibility is a ministerial function under the Decree and there is no mechanism to assess credibility. Accepting the suggestion in your letter would turn the ministerial function of determining class membership into an adjudicatory process in which case-by-case credibility assessments would have to be made in literally hundreds (if not thousands) of cases. This would unduly burden the streamlined process intended under the Decree.

A more serious problem would be created if a class member whose claim is denied under Track B nonetheless were permitted to recover under Track A if the arbitrator determined that the class member produced "substantial evidence" in support of his claim. If that option were available under Track B, virtually every class member who elects to seek relief under the Decree would choose to proceed under Track B. Not only would such a change increase exponentially the cost to the parties of implementing the Decree, it also would make it impossible for the parties or the arbitrator to come close to adhering to the deadlines for disposition of Track B claims imposed by ¶ 10(a)-(e). Thus, this change could make the Decree unworkable.

We also are unable to agree to allow class members to split their claims for declaratory and injunctive relief from their claims for money damages so that at the conclusion of the Track A or B process, class members then could assert a "claim[] for relief not raised in th[e Seventh Amended] complaint." In addition to posing substantial claim preclusion and separation of powers concerns, see Plaut v. Spendthrift Farms, 514 U.S. 211 (1995), such a provision would deprive USDA of one of the fundamental benefits that both sides hope to achieve through the Consent Decree; viz., repose with respect to the credit and benefit claims that class members who elect to participate in the Consent Decree process may have against USDA.

Finally, the parties are not in a position to agree to incorporate in the Decree a requirement that USDA use its "best efforts to ensure compliance with all applicable statutes and regulations prohibiting discrimination," including ECOA and Title VI. Although USDA is wholly committed to ensuring compliance with all salient discrimination laws, such a provision would intrude

upon USDA's unreviewable discretion to determine whether and when to undertake particular enforcement actions, see Heckler v. Chaney, 470 U.S. 821 (1985), for the benefit of persons who are not parties to the Decree, regarding claims that cannot be asserted against the United States or its agencies, see WEAL v. Cavazos 906 F.2d 742, 748-50 (D.C. Cir. 1990) (Title VI cannot be asserted against the government). Accordingly, USDA cannot agree to this change.

In sum, we again thank you for your suggestions and believe that the incorporated changes strengthen the Decree without unraveling its fundamental tapestry. Enclosed is a revised, executed version of the Consent Decree that reflects the changes explained in ¶¶ 1-5, above. We would ask that the Court undertake its analysis of the fairness and reasonableness of the Decree in light of these changes.

Sincerely yours,

Alexander J. Pires, Jr.
Co-lead Counsel for Plaintiffs

Philip D. Bartz
Deputy Assistant Attorney
General
Civil Division

could have, been asserted by the plaintiffs in this litigation;
and

WHEREAS, in light of the remedial purposes of this Consent Decree, the parties intend that it be liberally construed to effectuate those purposes in a manner that is consistent with law;
and

WHEREAS the parties have entered into this Consent Decree for the purpose of ensuring that in their dealings with USDA, all class members receive full and fair treatment that is the same as the treatment accorded to similarly situated white persons;

NOW THEREFORE, the plaintiffs and the defendant, Dan Glickman, Secretary of the United States Department of Agriculture ("USDA"), hereby consent to the entry of this decree with the following terms:

1. Definitions

The following terms shall have the following meanings for purposes of this Consent Decree.

(a) The term "adjudicator" shall mean (i) the person or persons who is/are assigned by the facilitator to undertake the initial review of, and where appropriate make recommended decision on Track A claims under ¶ 9, below; and (ii) JAMS-Endispute, Inc.,

which shall make the final decision in all Track A claims and resolve issues of tolling under ¶ 6, below.

(b) The term "arbitrator" shall mean Michael K. Lewis of ADR Associates, and the other person or persons selected by Mr. Lewis who meet qualifications agreed upon by the parties and by Mr. Lewis and whom Mr. Lewis assigns to decide Track B claims under ¶ 10, below.

(c) The term "claimant" shall mean any person who submits a claim package for relief under the terms of this Consent Decree.

(d) The term "claim package" shall mean the materials sent to claimants who request them in connection with submitting a claim for relief under the provisions of this Consent Decree. The claim package will include (i) a claim sheet and election form and a Track A Adjudication claim affidavit, copies of which are attached hereto as Exhibit A; and (ii) associated documentation and instructions.

(e) The term "class counsel" shall mean Alexander J. Pires, Jr. and Phillip L. Fraas, Lead Counsel for members of the class defined in ¶ 2(a), infra. In addition, the following counsel and law firms have been acting, and will continue to act, as Of Counsel in this case: J.L. Chestnut, of Chestnut, Sanders, Sanders & Pettaway, P.C., Selma, AL.; T. Roe Frazer of Langston,

Frazer, Sweet & Freese, P.A., Jackson, MS.; Hubbard Saunders, IV, of The Terney Firm, Jackson, MS.; Othello Cross, of Cross, Kearney & McKissic, Pine Bluff, AR., Gerard Lear of Speiser Krause, Arlington, VA.; and William J. Smith, Fresno, CA.

(f) The term "credit" shall mean the right granted by a creditor to a debtor to defer payment of debt or to incur debt and defer its payment or to purchase property or services and defer payment therefor.

(g) The term "defendant's counsel" shall mean the United States Department of Justice.

(h) The term "discrimination complaint" shall mean a communication from a class member directly to USDA, or to a member of Congress, the White House, or a state, local or federal official who forwarded the class member's communication to USDA, asserting that USDA had discriminated against the class member on the basis of race in connection with a federal farm credit transaction or benefit application.

(i) The term "facilitator" shall mean the Poorman-Douglas Corporation, which shall receive claims pursuant to this Consent Decree and assign claims to adjudicators and arbitrators for final resolution. The parties may, by agreement and without the Court's approval, assign to the facilitator such additional tasks related

to the implementation of this Consent Decree as they deem appropriate.

(j) The term "preponderance of the evidence" shall mean such relevant evidence as is necessary to prove that something is more likely true than not true.

(k) The term "priority consideration" means that an application will be given first priority in processing, and with respect to the availability of funds for the type of loan at issue among all similar applications filed at the same time; provided, however, that all applications to be given priority consideration will be of equal status.

(l) The term "substantial evidence" shall mean such relevant evidence as appears in the record before the adjudicator that a reasonable person might accept as adequate to support a conclusion after taking into account other evidence in the record that fairly detracts from that conclusion. Substantial evidence is a lower standard of proof than preponderance of the evidence.

(m) The term "USDA" shall include the United States Department of Agriculture and all of its agencies, instrumentalities, agents, officers, and employees, including, but not limited to the state and county committees which administer USDA credit programs, and their staffs.

(n) The term "USDA listening session" shall mean one of the meetings of farmers and USDA's representatives conducted by USDA's Civil Rights Action Team between January 6, 1997 and January 24, 1997.

2. Class Definition

(a) Pursuant to Fed. R. Civ. P. 23(b)(3) the Court hereby certifies a class defined as follows:

All African American farmers who (1) farmed, or attempted to farm, between January 1, 1981 and December 31, 1996; (2) applied to the United States Department of Agriculture (USDA) during that time period for participation in a federal farm credit or benefit program and who believed that they were discriminated against on the basis of race in USDA's response to that application; and (3) filed a discrimination complaint on or before July 1, 1997, regarding USDA's treatment of such farm credit or benefit application.

(b) Any putative class member who does not wish to have his claims adjudicated through the procedure established by this Consent Decree may, pursuant to Federal Rule of Civil Procedure 23(c)(2), request to be excluded from the class. To be effective, the request must be in writing and filed with the facilitator within 120 days of the date on which this Consent Decree is entered.

3. Duties of Facilitator

(a) Poorman-Douglas Corporation shall serve as the facilitator and shall perform the following functions:

(i) publish the Notice of Class Settlement in the manner prescribed in ¶ 4, below;

(ii) mail claim packages to claimants who request them;

(iii) process completed claim packages as they are received;

(iv) determine, pursuant to the terms of this Consent Decree, which claimants satisfy the class definition as contained in ¶ 2(a);

(v) transmit to adjudicators claim packages submitted by claimants who contend that they are entitled to participate in the claims process due to equitable tolling of ECOA's statute of limitations under the particular circumstances of their claim;

(vi) transmit to the adjudicator the claims packages of class members with ECOA claims who elect to proceed under Track A;

(vii) transmit to the arbitrator the claims packages of class members with ECOA claims who elect to proceed under Track B;

(viii) transmit to the adjudicator the claims packages of class members who assert only non-credit benefit claims; and

(ix) maintain and operate a toll-free telephone number to provide information to interested persons about the procedure for filing claims under this Consent Decree.

(b) The facilitator's fees and expenses shall be paid by USDA.

4. Class Notice Procedure

(a) Within 10 days after the entry of the Order granting preliminary approval of this Consent Decree the facilitator shall mail a copy of the Notice of Class Certification and Proposed Class Settlement (a copy of which is attached hereto as Exhibit B) to all then-known members of the class.

(b) As soon as possible after entry of the Order granting preliminary approval of this Consent Decree the facilitator shall take the following steps:

(i) arrange to have 44 commercials announcing the preliminary approval of the Consent Decree and the time and place of the fairness hearing aired on the Black Entertainment Network, and 18 similar commercials on Cable News Network, during a two-week period;

(ii) arrange to have one-quarter page advertisements announcing the preliminary approval of the Consent Decree and the time and place of the fairness hearing placed in 27 general circulation newspapers, and 115 African-American newspapers, in an 18-state region during a two-week period; and

(iii) arrange to have a full page advertisement announcing the preliminary approval of the Consent Decree and the time and place of the fairness hearing placed in the editions of TV Guide that are distributed in an 18-state region, and a half page advertisement in the national edition of Jet Magazine.

(c) USDA shall use its best efforts to obtain the assistance of community based organizations, including those organizations that focus on African-American and/or agricultural issues, in communicating to class members and potential class members the fact that the Court has preliminarily approved this Consent Decree and the time and place of the fairness hearing.

5. Class Membership Screening; Election by Claimant; Processing.

(a) The facilitator shall send claim packages to claimants who request them.

(b) To be eligible to obtain relief pursuant to this Consent Decree, a claimant must complete the claim sheet and return it and any supporting documentation to the facilitator. The claimant must also provide to the facilitator evidence, in the form described below, that he filed a discrimination complaint between January 1, 1981 and July 1, 1997:

(i) a **copy** of the discrimination complaint the claimant filed with USDA, or a copy of a USDA document referencing the discrimination complaint; or

(ii) a declaration executed pursuant to 28 U.S.C. § 1746 by a person who is not a member of the claimant's family and which (1) states that the declarant has first-hand knowledge that the claimant filed a discrimination complaint with USDA; and (2) describes the manner in which the discrimination complaint was filed; or

(iii) a copy of correspondence from the claimant to a member of Congress, the White House, or a state, local, or federal official averring that the claimant has been discriminated against, except that, in the event that USDA does not possess a copy of the correspondence, the claimant also shall be required to submit a declaration executed pursuant to 28 U.S.C. § 1746 by the claimant stating that he sent the correspondence to the person to whom it was addressed; or

(iv) a declaration executed pursuant to 28 U.S.C. § 1746 by a non-familial witness stating that the witness has first-hand knowledge that, while attending a USDA listening session, or other meeting with a USDA official or officials, the claimant was explicitly told by a USDA official that the official would

investigate that specific claimant's oral complaint of discrimination.

(c) In order to be eligible for relief under §§ 9 or 10, below, a claimant must submit his completed claim package to the facilitator postmarked within 180 days of the date of entry of this Consent Decree, except that a claimant whose claim is otherwise timely shall have not less than 30 days to submit a declaration pursuant to subparagraph (b) (iii), above, after being directed to do so without regard to the 180-day period.

(d) At the time a claimant who asserts an ECOA claim submits his completed claim package, he must elect whether to proceed under Track A, see § 9, below, or Track B see § 10, below, except that claimants whose claims arise exclusively under non-credit benefit programs shall be required to proceed under Track A. A class member's election under this subparagraph shall be irrevocable and exclusive.

(e) Each completed claim package must be accompanied by a certification executed by an attorney stating that the attorney has a good faith belief in the truth of the factual basis of the claim, and that the attorney has not and will not require the claimant to compensate the attorney for assisting him.

(f) Within 20 days of receiving a completed claim package the facilitator shall determine, pursuant to subparagraph (b), above, whether the claimant is a member of the class as defined by ¶ 2(a). If a claimant is determined to be a class member, the facilitator shall assign the class member a consent decree case number, refer the claim package to an adjudicator or an arbitrator, as appropriate, and send a copy of the entire claim package to the class counsel and defendant's counsel along with a notice that includes the class member's name, address, telephone number, social security number, consent decree case number, and that identifies the track under which the class member is proceeding. If a claimant is found not to be a class member, the facilitator shall notify the claimant and the parties' counsel of that finding.

(g) A claimant who satisfies the definition of the class in ¶ 2(a), above, but who fails to submit a completed claim package within 180 days of entry of this Consent Decree may petition the Court to permit him to nonetheless participate in the claims resolution procedures provided in §§ 9 & 10, below. The Court shall grant such a petition only where the claimant demonstrates that his failure to submit a timely claim was due to extraordinary circumstances beyond his control.

6. Tolling of ECOA's Statute of Limitations.

(a) In addition to the class defined herein, a person who otherwise satisfies the criteria for membership in the class defined in ¶ 2(a), above, but who did not file a discrimination complaint until after July 1, 1997, shall be entitled to relief under this Consent Decree by demonstrating, consistent with Irwin v. United States, 498 U.S. 89 (1990), that:

(i) he has actively pursued his judicial remedies by filing a defective pleading during the applicable statute of limitations period;

(ii) he was induced or tricked by USDA's misconduct into allowing the filing deadline for the applicable statute of limitations period to pass; or

(iii) he was prevented by other extraordinary circumstances beyond his control from filing a complaint in a timely manner, provided that excusable neglect shall not qualify as extraordinary circumstances.

(b) Within 10 days of a receiving a completed claim package from a person who did not file a discrimination claim until after July 1, 1997, the facilitator shall forward the claim to an adjudicator. The adjudicator shall then determine whether the claim is timely pursuant to subparagraphs (a)(i), (ii), or (iii),

above. If the claim is found to be qualified under subparagraph (a), above, the adjudicator shall return the claim package to the facilitator, along with a written determination to that effect. The facilitator shall then process the claim pursuant to ¶ 5(f), above, and the claimant shall be eligible for the relief provided herein for class members. If the claim is found by the adjudicator to be untimely, the adjudicator shall return the claim package to the facilitator with a written determination to that effect. The facilitator shall promptly notify the claimant of the adjudicator's decision.

7. Interim Administrative Relief

Upon being advised by the facilitator that a claimant satisfies the class definition in ¶ 2(a), above, or that a claimant has met the criteria for equitable tolling under ¶ 6, above, USDA shall immediately cease all efforts to dispose of any foreclosed real property formerly owned by such person. USDA also will refrain from foreclosing on real property owned by the claimant or accelerating the claimant's loan account; however, USDA may take such action up to but not including foreclosure or acceleration that is necessary to protect its interests. USDA may resume its efforts to dispose of any such real property after a

final decision in USDA's favor on the class member's claim pursuant to §§ 9 or 10, below.

8. Response by USDA to a Track A Referral Notice

In any Track A case USDA may, within 60 days after receipt of the materials and notice the facilitator is required, pursuant to § 5(f), above, to furnish to USDA with respect to persons who are determined to be class members, provide to the adjudicator assigned to the claim, and to class counsel, any information or materials that are relevant to the issues of liability and/or damages.

9. Track A - Decision by Adjudicator

(a) In cases in which a class member asserts an ECOA violation and has elected to proceed under Track A:

(i) the adjudicator shall, within 30 days of receiving the material required to be submitted by the class member under § 5, along with any material submitted by defendant pursuant to § 8, above, determine on the basis of those materials whether the class member has demonstrated by substantial evidence that he was the victim of race discrimination. To satisfy this requirement, the class member must show that:

(A) he owned or leased, or attempted to own or lease, farm land;

(B) he applied for a specific credit transaction at a USDA county office during the period identified in ¶ 2(a), above;

(C) the loan was denied, provided late, approved for a lesser amount than requested, encumbered by restrictive conditions, or USDA failed to provide appropriate loan service, and such treatment was less favorable than that accorded specifically identified, similarly situated white farmers; and

(D) USDA's treatment of the loan application led to economic damage to the class member.

(ii) The adjudicator's decision shall be in a format to be agreed upon by the class counsel and defendant's counsel, and shall include a statement of the reasons upon which the decision is based.

(iii) In any case in which the adjudicator decides in a class member's favor, the following relief shall be provided to the class member:

(A) USDA shall discharge all of the class member's outstanding debt to USDA that was incurred under, or affected by, the program(s) that was/were the subject of the ECOA claim(s) resolved in the class member's favor by the adjudicator. The discharge of such outstanding debt shall not adversely affect the

claimant's eligibility for future participation in any USDA loan or loan servicing program;

(B) The class member shall receive a cash payment of \$50,000 that shall be paid from the fund described in 31 U.S.C. § 1304 ("the Judgment Fund");

(C) an additional payment equal to 25% of the sum of the payment made under subparagraph (B), above, and the principal amount of the debt forgiven under subparagraph (A), above, shall be made by electronic means directly from the Judgment Fund to the Internal Revenue Service as partial payment of the taxes owed by the class member on the amounts paid or forgiven pursuant to those provisions;

(D) The injunctive relief made available pursuant to ¶ 11, below; and

(E) The immediate termination of any foreclosure proceedings that USDA has initiated against any of the class member's real property in connection with the ECOA claim(s) resolved in the class member's favor by the adjudicator; and the return of any USDA inventory property that formerly was owned by the class member but which was foreclosed in connection with the ECOA claim(s) resolved in the class member's favor by the adjudicator.

(iv) If the adjudicator determines that a class member's claim is not supported by substantial evidence, the class member shall receive no relief under this Consent Decree.

(v) The decision of the adjudicator shall be final, except as provided by ¶ 12(b)(iii), below. The parties hereby agree to forever waive their right to seek review in any court or before any tribunal of the decision of the adjudicator with respect to any claim that is, or could have been decided by the adjudicator.

(b) In cases in which a class member asserts only non-credit claims under a USDA benefit program:

(i) the adjudicator shall, within 30 days of receiving the material required to be submitted by the class member under ¶ 5, along with any material submitted by defendant pursuant to ¶ 8, above, determine on the basis of those materials whether the class member has demonstrated by substantial evidence that he was the victim of race discrimination. To satisfy this requirement, the class member must show that:

(A) he applied for a specific non-credit benefit program at a USDA county office during the period identified in ¶ 2(a), above; and

(B) his application was denied or approved for a lesser amount than requested, and that such treatment was different than

the treatment received by specifically identified, similarly situated white farmers who applied for the same non-credit benefit.

(ii) The adjudicator's decision shall be in a format to be agreed upon by the parties, and shall include a statement of the reasons upon which the decision is based.

(iii) In any case in which the adjudicator decides in a class member's favor, the following relief shall be provided to the class members:

(A) USDA shall pay to the class member the amount of the benefit wrongly denied, but only to the extent that funds that may lawfully be used for that purpose are then available; and

(B) The injunctive relief made available pursuant to ¶11(c)-(d), below.

(iv) If the adjudicator determines that a class member's claim is not supported by substantial evidence, the class member shall receive no relief under this Consent Decree.

(v) The decision of the adjudicator shall be final, except as provided by ¶ 12(b)(iii), below. The parties hereby agree to forever waive their right to seek review in any court or before any tribunal of the decision of the adjudicator with respect to any claim that is, or could have been decided by the adjudicator.

(c) The adjudicator's fees and expenses shall be paid by USDA.

10. Track B - Arbitration

(a) Within 10 days of receiving the completed claim package of a class member who has elected to proceed under Track B, the arbitrator shall notify the class member and defendant of the date on which an evidentiary hearing on the class member's claim will be held. The hearing shall be scheduled for a date that is not less than 120 days, nor more than 150 days, from the date on which the hearing notice is sent.

(b) At least 90 days prior to the hearing described in subparagraph (a), above, USDA and the class member shall file with the arbitrator and serve on each other a list of the witnesses they intend to call at the hearing along with a statement describing in detail the testimony that each witness is expected to provide, and a copy of all exhibits that each side intends to introduce at such hearing. The parties shall be required to produce for a deposition, and for cross examination at the arbitration hearing, any person they identify as a witness pursuant to subparagraph (a), above.

(c) Each side shall be entitled to depose any person listed as a witness by his opponent pursuant to subparagraph (b), above.

(d) Discovery shall be completed not later than 45 days before the date of the hearing described in subparagraph (a), above.

(e) Not less than 21 days prior to commencement of the hearing described in subparagraph (a), above, each side shall (i) notify the other of the names of those witnesses whom they intend to cross-examine at the hearing; and (ii) file with the arbitrator memoranda addressing the legal and factual issues presented by the class member's claim.

(f) The hearing shall be conducted in accordance with the Federal Rules of Evidence. All direct testimony shall be introduced in writing and shall be filed with the arbitrator and served on the opposing side at least 30 days in advance of the hearing. The hearing shall be limited in duration to eight hours, with each side to have up to four hours within which to cross examine his opponent's witnesses, and to present his legal arguments.

(g) The arbitrator shall issue a written decision 30-60 days after the date of the hearing. If the arbitrator determines that the class member has demonstrated by a preponderance of the evidence that he was the victim of racial discrimination and that

he suffered damages therefrom, the class member shall be provided the following relief:

(i) actual damages as provided by ECOA, 15 U.S.C. § 1691e(a) to be paid from the Judgment Fund;

(ii) USDA shall discharge all of the class member's outstanding debt to the Farm Service Agency that was incurred under, or affected by, the program(s) that were the subject of the claim(s) resolved in the class member's favor by the arbitrator. The discharge of such outstanding debt shall not adversely affect the claimant's eligibility for future participation in any USDA loan or loan servicing program;

(iii) The injunctive relief made available pursuant to ¶ 11, below; and

(iv) The immediate termination of any foreclosure proceedings that have been initiated against any of the class member's real property in connection with the ECOA claim(s) resolved in the class member's favor by the arbitrator, and the return of any USDA inventory property that was formerly owned by the class member but which was foreclosed in connection with the ECOA claim(s) resolved in the class member's favor by the arbitrator.

(h) If the arbitrator rules in the defendant's favor, the class member shall receive no relief under this Consent Decree.

(i) The decision of the arbitrator shall be final, except as provided by ¶ 12(b)(iii), below. The parties hereby agree to forever waive their right to seek review in any court or before any tribunal of the decision of the arbitrator with respect to any claim that is, or could have been decided, by the arbitrator.

(k). The arbitrator's fees and expenses shall be paid by USDA.

11. Class-Wide Injunctive Relief

(a) USDA will provide each class member who prevails under §§ 9(a) or 10 with priority consideration, on a one-time basis, for the purchase, lease, or other acquisition of inventory property to the extent permitted by law. A class member must exercise his right to the relief provided in the preceding sentence in writing and within 5 years of the date this order.

(b) USDA will provide each class member who prevails under §§ 9(a) or 10 with priority consideration for one direct farm ownership loan and one farm operating loan at any time up to five years after the date of this Order. A class member must notify USDA in writing that he is exercising his right under this agreement to priority consideration in order to receive such consideration.

(c) Any application for a farm ownership or operating loan, or for inventory property submitted within five years of the date of this Consent Decree by any class member who prevails under ¶¶ 9 or 10, will be viewed in a light most favorable to the class member, and the amount and terms of any loan will be the most favorable permitted by law and USDA regulations. Nothing in the preceding sentence shall be construed to affect in any way the eligibility criteria for participation in any USDA loan program, except that outstanding debt discharged pursuant to ¶¶ 9(a) (iii)(A) or 10(g)(ii), above, shall not adversely affect the claimant's eligibility for future participation in any USDA loan or loan servicing program.

(d) In conjunction with any application for a farm ownership or operating loan or for inventory property submitted by a class member who prevails under ¶¶ 9 or 10, above, USDA shall, at the request of such class member provide the class member with reasonable technical assistance and service, including the assistance of qualified USDA employees who are acceptable to the class member, in connection with the class member's preparation and submission of any such application.

12. Monitor

(a) From a list of three persons submitted to it jointly by the parties, or, if after good faith negotiations they cannot agree, two persons submitted by plaintiffs and two persons submitted by defendant, the Court shall appoint an independent Monitor who shall report directly to the Secretary of Agriculture. The Monitor shall remain in existence for a period of 5 years and shall not be removed except upon good cause. The Monitor's fees and expenses shall be paid by USDA.

(b) The Monitor shall:

(i) Make periodic written reports (not less than every six months) to the Secretary and class counsel and defendant's counsel on the good faith implementation of this Consent Decree;

(ii) Attempt to resolve any problems that any class member may have with respect to any aspect of this Consent Decree;

(iii) Direct the facilitator, adjudicator, or arbitrator to reexamine a claim where the Monitor determines that a clear and manifest error has occurred in the screening, adjudication, or arbitration of the claim and has resulted or is likely to result in a fundamental miscarriage of justice; and

(iv) Be available to class members and the public through a toll-free telephone number in order to facilitate the lodging of any consent decree complaints and to expedite their resolution.

(c) If the Monitor is unable within 30 days to resolve a problem brought to his attention pursuant to subparagraph (ii), above, he may file a report with the parties' counsel who may, in turn, seek enforcement of this Consent Decree pursuant to ¶ 13, below.

13. Enforcement Procedures

Before seeking any order by the Court concerning the alleged violation of any provision of this Consent Decree, the parties must comply with the following procedures:

(a) The person seeking enforcement of a provision of this Consent Decree shall serve on his opponent a written notice that describes with particularity the term(s) of the Consent Decree that are alleged to have been violated, the specific errors or omissions upon which the alleged violation is based, and the corrective action sought. The person alleging the violation shall not inform the Court of his allegation at that time.

(b) The parties shall make their best efforts to resolve the matter in dispute without the Court's involvement. If requested to do so, the movant shall provide to his opponent any information and materials available to the movant that support the violation alleged in the notice.

(c) The person who served the notice of violation pursuant to subparagraph (a), above, may not move for enforcement of this Consent Decree until at least 45 days after the date on which he served the notice.

14. Attorney's Fees

(a) Class counsel (for themselves and all Of-Counsel) shall be entitled to reasonable attorney's fees and costs under ECOA, 15 U.S.C. § 1691e(d), and to reasonable attorney's fees, costs, and expenses under the APA, 28 U.S.C. § 2412(d) (as appropriate), that are generated in connection with the filing of this action and the implementation of this Consent Decree. Defendant reserves the right to challenge any and all aspects of class counsel's application for fees, costs, and/or expenses.

(b) Recognizing the fees, costs, and/or expenses already incurred, and given the anticipated fees, costs, and/or expenses to be incurred by class counsel in the implementation of this Consent Decree, defendant will make a one-time payment to class counsel of \$1,000,000 as a credit toward class counsel's application for attorney's fees, costs, and/or expenses. The payment shall be made to class counsel and of counsel (payable to Alexander J. Pires, Jr. and Phillip L. Fraas) within 20 days of the date on which this Consent Decree is entered by the Court.

This one-time payment shall be credited against any ultimate award or negotiated settlement of fees, costs, and expenses, and to the extent any such ultimate award or settlement is less than this one-time payment, class counsel shall refund to defendant the entire amount by which this one-time payment exceeds the award or settlement amount.

(c) The provision of attorney's fees, costs, and/or expenses in this Consent Decree is by agreement of the parties and shall not be cited a precedent in any other case.

15. Parties' Respective Responsibilities

No party to this Consent Decree is responsible for the performance, actions, or obligations of any other party to this Consent Decree.

16. Fairness Hearing

(a) Upon the parties' execution of this Consent Decree, the parties shall transmit the Decree to the Court for preliminary approval; request that the Court schedule a fairness hearing on the Consent Decree; and request that the Court, upon issuance of an order granting preliminary approval of this Decree, issue an order setting aside the dates currently scheduled for trial and staying this litigation.

(b) Within 5 days of the execution of this Consent Decree by class counsel and defendant's counsel, the Notice of Class settlement provided for in ¶ 4, above, containing, inter alia, a notice of the fairness hearing on this Consent Decree shall be sent to all known, potential members of the class. The fairness hearing will be held at 10:00 AM on March 2, 1999, in Courtroom 20 of the E. Barrett Pettyman United States Courthouse at 3rd St. and Constitution Ave., N.W., Washington, D.C. Any objections to the entry of this Consent Decree shall be filed not later than February 15, 1999.

17. Final Judgment

If, after the fairness hearing, the Court approves this Consent Decree as fair, reasonable, and adequate, a Final Judgment, the entry of which shall be a condition precedent to any obligation of any party under this Consent Decree, shall be entered dismissing with prejudice, pursuant to the terms of this Consent Decree and Rule 41(a)(1) (ii) of the Federal Rules of Civil Procedure, all claims in the litigation.

18. Releases

As provided by the ordinary standards governing the preclusive effects of consent decrees entered in class actions, all members of the class who do not opt out of this Consent Decree pursuant to ¶ 2(b), above, and their heirs, administrators, successors, or assigns (together, the "Releasers"), hereby release and forever discharge the defendant and his administrators or successors, and any department, agency, or establishment of the defendant, and any officers, employees, agents, or successors of any such department, agency, or establishment (together, the "Releasees") from -- and are hereby themselves forever barred and precluded from prosecuting -- any and all claims and/or causes of action which have been asserted in the Seventh Amended Complaint, or could have been asserted in that complaint at the time it was filed, on behalf of this class, by reason of, or with respect to, or in connection with, or which arise out of, any matters alleged in the complaint which the Releasers, or any of them, have against the Releasees, or any of them. It also is expressly understood that any class-wide claims of race-based discrimination in USDA's credit programs by members of the class defined in ¶ 2(a), above are barred unless the operative facts giving rise thereto did not occur prior to the entry of this Decree.

19. Defendant's Duty Consistent With Law and Regulations

Nothing contained in this Consent Decree or in the Final Judgment shall impose on the defendant any duty, obligation or requirement, the performance of which would be inconsistent with federal statutes or federal regulations in effect at the time of such performance.

20. No Admission of Liability

Neither this Consent Decree nor any order approving this Consent Decree is or shall be construed as an admission by the defendant of the truth of any allegation or the validity of any claim asserted in the complaint, or of the defendant's liability therefor, nor as a concession or an admission of any fault or omission of any act or failure to act, or of any statement, written document, or report heretofore issued, filed or made by the defendant, nor shall this Consent Decree nor any confidential papers related hereto and created for settlement purposes only, nor any of the terms of either, be offered or received as evidence of discrimination in any civil, criminal, or administrative action or proceeding, nor shall they be construed by anyone for any purpose whatsoever as an admission or presumption of any wrongdoing on the part of the defendant, nor as an admission by any party to this Consent Decree that the consideration to be

given hereunder represents the relief which could be recovered after trial. However, nothing herein shall be construed to preclude the use of this Consent Decree in order to effectuate the consummation, enforcement, or modification of its terms.

21. No Effect if Default

Subject to the terms of ¶ 17, above, and following entry by the Court of Final Judgment, no default by any person or party to this Consent Decree in the performance of any of the covenants or obligations under this Consent Decree, or any judgment or order entered in connection therewith, shall affect the dismissal of the complaint, the preclusion of prosecution of actions, the discharge and release of the defendant, or the judgment entered approving these provisions. Nothing in the preceding sentence shall be construed to affect the Court's jurisdiction to enforce the Consent Decree on a motion for contempt filed in accordance with ¶ 13.

22. Effect of Consent Decree if Not Approved

This Consent Decree shall not become binding if it fails to be approved by the Court or if for any reason it is rendered ineffective in any judicial proceeding before initially taking effect. Should it fail to become binding, this Consent Decree shall become null and void and shall have no further force and

effect, except for the obligations of the parties under this paragraph. Further, in that event: this Consent Decree; all negotiations in connection herewith; all internal, private discussions among the Department of Justice and/or USDA conducted in furtherance of the settlement process to determine the advisability of approving this Consent Decree; and all statements made by the parties at, or submitted to the Court during, the fairness hearing shall be without prejudice to any person or party to this Consent Decree, and shall not be deemed or construed to be an admission by any party to this Consent Decree of any fact, matter, or proposition.

23. Entire Terms of Agreement

The terms of this Consent Decree constitute the entire agreement of the parties, and no statement, remark, agreement, or understanding, oral or written, which is not contained herein, shall be recognized or enforced.

24. Authority of Class Counsel

Class counsel who are signatories hereto hereby represent, warrant, and guarantee that such counsel are duly authorized to execute this Consent Decree on behalf of the plaintiffs, the members of the plaintiff class, and all Of-Counsel for the plaintiffs.

25. Duty to Defend Decree

The parties to this Consent Decree shall employ their best efforts to defend this Consent Decree against any challenges to this Consent Decree, in any forum.

Consented to:

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Of Counsel:

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Gerald R. Lear
Hubbard I Sanders, IV
Willie Smith

SO ORDERED.

PAUL L. FRIEDMAN
United States District Judge

DATE: