UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

In re BLACK FARMERS DISCRIMINATION LITIGATION	)	**Misc. No. 08-mc-0511 (PLF)**
This document relates to	)	
ALL CASES	)	

MEMORANDUM OF LAW IN SUPPORT OF CLASS COUNSEL'S MOTION FOR AN AWARD OF ATTORNEYS' FEES AND EXPENSES

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I. INTRODUCTION AND BACKGROUND

This Court has preliminarily approved a second historic settlement between African-American farmers and the United States Department of Agriculture ("USDA"). The first settlement was approved by this Court on April 14, 1999 in the case of *Pigford v. Glickman*, 185 F.R.D. 82 (D.D.C. 1999) ("*Pigford*").[1] The Consent Decree approved by this Court in *Pigford* brought a measure of justice to thousands of farmers who suffered racial discrimination at the hands of their own government. The saga of trying to obtain justice for black farmers harmed by this racial discrimination does not end with *Pigford*, however. As the Court well knows, tens of thousands of individuals who requested to participate in *Pigford* did so after the claim filing deadline established in the Consent Decree had passed. In the end, over 60,000 potential *Pigford* claimants – nearly three times the number of claimants actually adjudicated – did not have their individual discrimination claims heard on the merits and were denied the opportunity to participate in the *Pigford* non-judicial claims process.

The present case arises from the remedial statute passed by Congress in 2008 to provide certain of those *Pigford* late filers an opportunity to have their claims adjudicated on the merits. Specifically, Congress passed Section 14012 of the 2008 Food, Conservation, and Energy Act ("Farm Bill")[2] which created a new cause of action designed to "giv[e] a full determination on the merits for each *Pigford* claim previously denied that determination." Farm Bill § 14012(d). On May 13, 2011, this Court preliminarily approved a Settlement Agreement that provides an orderly and just process for adjudicating the claims of *Pigford* late filers and for allocating to successful claimants the $1.25 billion fund Congress has appropriated for paying Section 14012

[1] *Pigford* involved two consolidated cases, *Pigford v. Glickman*, Case No. 97-1978, and *Brewington v. Glickman*, Case No. 98-1693.

[2] Pub. L. No. 110-246, 112 Stat. 1651 (June 18, 2008).

claims. In that Preliminary Approval Order, the Court certified a class (hereinafter, "Class") defined as:

> All individuals: (1) who submitted late-filing requests under Section 5(g) of the *Pigford v. Glickman* Consent Decree on or after October 13, 1999, and on or before June 18, 2008; but (2) who have not obtained a determination on the merits of their discrimination complaints, as defined by Section 1(h) of the Consent Decree.

By this Motion, Class Counsel request the Court to award attorneys' fees in the amount of 7.4% of the Settlement Fund Fee Base[3] as compensation for the years of work they have devoted to obtaining for the Class the enormous benefits provided by enactment of the 2008 Farm Bill, the Settlement Agreement, and the subsequent funding legislation enacted in 2010 – as well as for the significant work that remains to be done to ensure that the claims process prescribed by the Settlement Agreement is administered fairly, efficiently, and with integrity. To that end, Class Counsel have committed to providing Class Members the opportunity to obtain the direct assistance of Class Counsel at no out-of-pocket cost to them. The 7.4 % award sought by Class Counsel is expressly within the range authorized by the Settlement Agreement.

II. THE LITIGATION AND SETTLEMENT AGREEMENT

Plaintiffs will not repeat here the full history of both the *Pigford* and the present case that is detailed in their Memorandum of Law in Support of Motion for Preliminary Approval. *See* Docket No. 161. Plaintiffs will highlight, however, some of the more important facts that bear on this Court's assessment of the present request for an award of a percentage of the Settlement Fund Fee Base for attorneys' fees.

[3] For purposes of this Motion, the term "Settlement Fund Fee Base" means the $1.25 billion in total funds appropriated by Congress for the payment of successful Section 14012 claims, less the $22.5 million in settlement implementation costs that the Settlement Agreement specifies shall be subtracted from the $1.25 billion to yield the "Fee Base." *See* Settlement Agreement, § II.O.

A. *Pigford v. Glickman*

In 1997, African-American farmers initiated the *Pigford* case as a class action against the U.S. Department of Agriculture alleging discrimination by USDA in the administration of farm loan programs, in violation of the Equal Credit Opportunity Act, 15 U.S.C. § 1691(a), and the Administrative Procedure Act, 5 U.S.C. §§ 551, *et seq.* *Pigford* ultimately was settled, a class was certified, and on April 14, 1999, this Court entered a Consent Decree establishing a claims adjudication process by which class members could seek resolution of their discrimination claims. 185 F.R.D. 82.

The *Pigford* claims adjudication process provided for two "tracks." Under "Track A," a claimant who provided "substantial evidence" of discrimination by the USDA could obtain a liquidated damages award of $50,000, the discharge of all outstanding debt to USDA incurred in the loan program that formed the basis of the discrimination claim, and an additional 25% payment to offset taxes on this income. Under "Track B," a claimant could recover actual damages in an arbitration hearing process by proving by a preponderance of the evidence that he/she had been discriminated against by the USDA and had suffered actual economic losses in the amounts claimed.

Under the terms of the Consent Decree, *Pigford* class members were required to file their claims by October 12, 1999. Docket No. 161, Ex. 3. That deadline could be extended, but only upon a showing by the claimant that the failure to submit a timely claim was due to "extraordinary circumstances beyond [the claimant's] control." *Id.* By Court Order, the deadline for all such "late-filing" requests was set at September 15, 2000. *See* Order of July 14, 2000 (Docket No. 161, Ex. 6).

More than 60,000 "Late Filers" submitted a request to participate in the *Pigford* claims resolution process *after* the October 12, 1999 deadline set by the Consent Decree but *on or before* the September 15, 2000 "late-filing" deadline. More than 58,000 of these late-filing petitioners were determined not to have satisfied the "extraordinary circumstances" test set by the Court. In addition, thousands of additional individuals (so-called "Late-Late Filers") filed their "late-filing" request to participate in the *Pigford* claims resolution process *after* the September 15, 2000 deadline, but before passage of the Farm Bill on June 18, 2008.[4] Thus, altogether, more than 60,000 *Pigford* claimants with potentially meritorious claims did not have their individual claims heard on the merits in *Pigford*.

B. Section 14012 of the 2008 Farm Bill

The tens of thousands of unresolved late claims gave rise to significant dissatisfaction in the African-American farming community concerning the outcome of the *Pigford* case. Several of the lawyers who had served as class counsel in *Pigford* devoted substantial amounts of time to advocating on behalf of these late-filers. Their effort, in conjunction with the efforts of an array of farm advocacy organizations and activists, together with the strong support of a number of the members of the Congressional Black Caucus and others, led to the passage of Section 14012 of the 2008 Farm Bill. This portion of the Farm Bill, signed into law by President Bush on June 18, 2008, created a new cause of action for "any *Pigford* claimant who ha[d] not previously obtained a determination on the merits of a *Pigford* claim" to "obtain that determination . . . in a civil

[4] The Facilitator in the *Pigford* case, Epiq Systems, Inc. (formerly Poorman-Douglas Corporation), has records of more than 25,000 written communications relating to the *Pigford* settlement that were received after the September 15, 2000 late-filing deadline in *Pigford* but before the enactment of the Farm Bill in 2008. It is believed that many of these communications were not requests to participate in the *Pigford* claims process but were instead communications of a different nature. However, at this time, Epiq does not have a definitive count of how many of these 25,000 communications would satisfy the "request to participate" requirement of the Settlement Agreement. *See* Settlement Agreement, § II.T (defining "Late-Filing Request" as a "written request . . . seeking to participate in the claims resolution processes in the *Pigford* Consent Decree").

action brought in the United States District Court for the District of Columbia . . . ." Farm Bill § 14012(b). The term "*Pigford* claimant" was defined as "an individual who submitted a late-filing request under section 5(g) of the [*Pigford*] [C]onsent [D]ecree." Farm Bill § 14012(a)(4).

As with the *Pigford* Consent Decree, Section 14012 provides for two "tracks" by which claimants may obtain a determination of the merits of their discrimination claims: (1) an "expedited resolution[]" process, similar to Track A in the *Pigford* case, wherein claimants who prove the merits of their claims by "substantial evidence" are entitled to liquidated damages of $50,000, a payment in recognition of outstanding USDA debt, and a 25% tax payment to offset the additional income, Farm Bill § 14012(e);[5] and (2) a process similar to Track B in the *Pigford* case, wherein claimants who satisfy the higher "preponderance of the evidence" standard of proof for their claims are entitled to recover their actual damages. Farm Bill § 14012(f). And, as in the *Pigford* Consent Decree, Section 14012(g) limits loan acceleration and foreclosures during the pendency of a Section 14012 claim.

There are, however, significant differences between the remedial process established by the *Pigford* Consent Decree and that provided for by Section 14012. First, and most significant, is the limitation on funds available for "payments and debt relief" under Section 14012. While the *Pigford* claims resolved under the Consent Decree were paid from the Judgment Fund,[6] and thus were not subject to a funding limitation, claims resolved pursuant to Section 14012 are to be paid solely from funds appropriated to the Secretary of Agriculture or made available from the Commodity Credit Corporation for this specific purpose. Under the Farm Bill as passed in 2008,

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[5] The 2010 Claims Resolution Act, Pub. L. No. 111-291, § 201, 124 Stat. 3064, 3070 (2010), deleted Subsection 14012(e) and renumbered all subsequent subsections of Section 14012. Thus, for example, Subsection 14012(f) is now codified as Subsection 14012(e). For purposes of consistency, we have used the current codification to refer to these provisions of the Farm Bill.

[6] 31 U.S.C. § 1304.

this fund was limited to a total of $100 million, an amount that would have permitted fewer than 1,600 Pigford late filers to obtain the full relief authorized by Section 14012. The Farm Bill anticipated, however, the possibility that additional funds could be appropriated to pay Section 14012 claims by "authorizing to be appropriated such [additional] sums as are necessary to carry out [Section 14012]." Farm Bill § 14012(h)(2). However, prior to the Settlement Agreement in this case, no such additional funds had been appropriated for this purpose.

Second, the *Pigford* Consent Decree required USDA to pay the substantial costs of implementing the Decree (including the cost of the *Pigford* Facilitator, neutral adjudicators, and Class Notice), the cost of the *Pigford* Monitor, and attorneys' fees from funds separate from those paid out from the Judgment Fund as awards to claimants. Section 14012 of the Farm Bill, by contrast, fails to provide *any* funding for Class Notice, Neutrals, an Ombudsman, or any other components of an extrajudicial claims process. Likewise, Section 14012 provides no funding for attorneys' fees or costs, with the result that the only source of funds available to compensate Class Counsel is the Settlement Fund itself. *See* Farm Bill §§ 14012(c), 14012(h).

Finally, the *Pigford* Consent Decree required claimants to show that they had received less favorable treatment from USDA than a "specifically identified, similarly situated white farmer," in order to obtain relief. *See* Consent Decree § 9(a)(i)(C). This requirement, a leading cause of claim denials in the *Pigford* claims process, was likewise imposed by Section 14012, although the burden of adducing such evidence was made easier by the requirement in original Section 14012(e) that USDA provide claimants with information "on farm credit loans and noncredit benefits, as appropriate, made within the claimant's county" during the relevant time period of the claim.[7]

[7] As noted above, in accordance with the Settlement Agreement, the Claims Resolution Act deleted Subsection 14012(e).

C. Litigation of Section 14012 Claims

Even before Section 14012 of the 2008 Farm Bill became law, many of the lawyers and law firms involved in *Pigford* were fielding inquiries and being retained by late-filing claimants to assist them in pursuing some kind of remedy to obtain an adjudication of their *Pigford* claims. After the passage of Section 14012, these lawyers and firms, who now are among Class Counsel appointed in this case, began to hold workshops, meetings, and otherwise communicate with late-filing *Pigford* claimants that Congress had provided a vehicle for many of them to obtain an adjudication of their late-filed *Pigford* claims. Other lawyers and law firms in addition to those involved in *Pigford* also began to receive inquiries about the new remedy provided by Section 14012, and these firms likewise undertook substantial outreach and educational efforts aimed at late filers.

As a result of these outreach and educational efforts, tens of thousands of potential claimants individually retained the various lawyers and law firms that now comprise Class Counsel in this case to assist them with pursuing a remedy under Section 14012. Consistent with the standard contingency fee agreements most of these firms were using, many of these retention agreements provided that the contracting lawyer or law firm would be entitled to 33% (and in some cases more) of any recovery a late-filing claimant might receive by virtue of a claim filed under Section 14102. On the basis of these signed retention agreements, the lawyers and law firms that now make up Class Counsel began to file suit in this Court as provided by Section 14012.

Between May 2008 and February 2010, more than 28,000 African-American farmers, represented by 25 different law firms, and in 17 separate Complaints, filed suit in this Court

under Section 14012.[8] These complaints were consolidated by this Court into the above-captioned case, *In re Black Farmers Discrimination Litigation*, Misc. No. 08-mc-0511 (D.D.C.).[9]

When these individual cases were first filed, many of the lawyers filing Section 14012 actions sought to have the Court administer the cases on a consolidated basis, much like a mass tort. Certain of Class Counsel obtained Court authorization to provide information to potential claimants through a Court-sanctioned website, a toll-free number, and other methods of communication. *See* Case Management Order No. 1 (Dec. 15, 2008) (Docket No. 31). These counsel also agreed to modify their contingency fee contracts with potential Section 14012 claimants to cap the amount of any attorneys' fee recovered at 20%.

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[8] The seventeen complaints, in order of filing, are:

a. *Agee v. Schafer*, C.A. No. 08-0882;
b. *Kimbrough v. Schafer*, C.A. No. 08-0901;
c. *Adams v. Schafer*, C.A. No. 08-0919;
d. *National Black Farmers Association v. Schafer*, C.A. No. 08-00940;
e. *Bennett v. Schafer*, C.A. No. 08-00962;
f. *McKinney v. Schafer*, C.A. No. 08-1062;
g. *Bolton v. Schafer*, C.A. No. 08-1070;
h. *Black Farmers and Agriculturists Association, Inc v. Schafer*, C.A. No. 08-1188 (this case has been amended and renamed *Copeland v. Vilsack*);
i. *Hampton v. Schafer*, C.A. No. 08-1381;
j. *Robinson v. Schafer*, C.A. No. 08-1513;
k. *James v. Schafer*, C.A. No. 08-2220;
l. *Beckley v. Vilsack*, C.A. No. 09-1019;
m. *Sanders v. Vilsack*, C.A. No. 09-1318 (dismissed for lack of service);
n. *Russell v. Vilsack*, C.A. No. 09-1323;
o. *Bridgeforth v. Vilsack*, C.A. No. 09-1401;
p. *Allen v. Vilsack*, C.A. No. 09-1422; and
q. *Anderson, v. Vilsack*, C.A. No. 09-1507.

[9] After the execution of the initial form of the Settlement Agreement on February 18, 2010, the following six additional complaints were filed:

a. *Edwards v. Vilsack*, C.A. No. 10-0465;
b. *Latham v. Vilsack*, C.A. No. 10-0737;
c. *Andrews v. Vilsack*, C.A. No. 10-0801;
d. *Sanders v. Vilsack*, C.A. No. 10-1053;
e. *Johnson v. Vilsack*, C.A. No. 10-0839; and
f. *Abney v. Vilsack*, C.A. No. 10-1026.

Together with amendments to the 17 earlier filed complaints, these complaints added more than 19,000 additional claimants to this case.

D. February 18, 2010 Settlement Agreement

For the better part of two years, counsel for the Plaintiffs in the consolidated actions vigorously pursued the claims of the thousands of individual clients on whose behalf they had filed suit, including researching the array of legal issues relating to Section 14012 and developing an appropriate strategy to secure relief for their clients, extensive briefing on class certification, coordination of case management efforts, and many months of intensive, arms-length settlement negotiations with USDA counsel. These efforts culminated in the execution of a comprehensive Settlement Agreement on February 18, 2010, which provides for a non-judicial claims process to resolve finally and globally all Section 14012 cases through certification of a Federal Rule of Civil Procedure 23(b)(1)(B) "limited fund" settlement class. Subject to Court approval, the Settlement Agreement also provides for a fee award in the range of 4.1 % to 7.4% of the total funds appropriated for the Settlement (minus $22.5 million specified for costs of implementing the Agreement). Settlement Agreement, § VIII.B. This fee award would be paid into a Common Benefit Fund to compensate Class Counsel for: (a) their work on behalf of all Class Members prior to, and through, final approval of the Settlement by this Court; (b) their work on behalf of individual Track A Claimants through the claims process set forth in the Settlement Agreement; and (c) any work performed on behalf of the overall Class following the Settlement. Settlement Agreement, § II.N.[10]

[10] Under the Settlement Agreement, counsel representing Track B claimants are entitled to negotiate contingency agreements with their clients, at a fee of not more than an 8% contingency. Settlement Agreement § II.QQ. Contingency fees earned by counsel for their successful work on Track B claims, while paid from the successful claimants' awards, will reduce the amount of the Common Benefit Fee for Class Counsel. Settlement Agreement §§ II.N, V.E.10. Thus, if the Court makes an award of $90.8 million for fees and expenses (*i.e.*, 7.4% of the Settlement Fund Fee Base) and the total amount of contingency fees paid by successful Track B claimants totals $2 million, then the Common Benefit Fee that would be allocated among Class Counsel would be reduced by $2 million to $88.8 million.

Class Counsel propose that the fees approved by this Court as part of a Common Benefit Fund will be administered by the Plaintiffs' Steering Committee, a subgroup of Class Counsel, under the guidance of Lead Class Counsel, according to the terms of a Counsel Participation Agreement ("Participation Agreement") that has been agreed to by Class Counsel.[11] The Participation Agreement, *inter alia*, provides for Lead Class Counsel to apportion the claims preparation and submission work among all Class Counsel, and provides for compensation to Class Counsel to be distributed in close proportion to the overall work effort each Class Counsel will have undertaken for the benefit of the Class. The Participation Agreement also provides a mechanism for Class Counsel to seek reimbursement of certain costs associated with implementing the claims process under the Settlement Agreement for the benefit of the Class. A copy of this Participation Agreement is attached hereto as Exhibit A.[12]

Under the Settlement Agreement, both Class Counsel and non-Class Counsel may represent Track B Claimants and be compensated through these contingency fees, which will be negotiated by each individual Claimant and his or her counsel. Settlement Agreement § II.QQ. The Parties agreed, as part of the Settlement, that counsel representing Track B Claimants should be permitted to seek an award that is sufficient to compensate them meaningfully for the additional effort involved in preparing and submitting Track B claims, but is not so great as to

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[11] Two firms that the Court has preliminarily approved as Class Counsel firms are not signatories to the Participation Agreement: Relman, Dane & Colfax and Kindaka Sanders. Both of these firms have made contributions to the overall effort of Class Counsel to date, and they likely will participate in some of the claims preparation work under the Settlement Agreement. Lead Class Counsel propose to take responsibility for allocating to these firms a reasonable portion of the overall Common Benefit Fee for the work these Class Counsel perform for the benefit of the Class.

[12] The entire fee-sharing agreement between Class Counsel consists of three documents, the Counsel Participation Agreement and two other agreements, which are exhibits to the Participation Agreement. All three documents are attached hereto as Exhibit A. For ease of reference, these documents are collectively referred to herein as the Participation Agreement.

diminish significantly a successful Track B Claimant's award. To balance these factors, the Settlement Agreement limits the contingency fee for Track B claims to 8% of an individual claimant's Track B recovery. Settlement Agreement, § X.A.

Track A Claimants, by contrast, are entitled to the assistance of Class Counsel in preparing and submitting their claims, without any charge beyond the "percentage-of-the-fund" awarded as a Common Benefit Fee. The Parties, therefore, expect that the vast majority of Class Members will utilize Class Counsel. Settlement Agreement § VIII.A.2. However, the Settlement Agreement recognizes that there may be some Class Members who will want to engage individual counsel other than Class Counsel to assist them with the preparation of claims. The Settlement Agreement permits such involvement by lawyers other than Class Counsel in the claims process, but requires that the Class Member pay for such individual representation out of his or her own funds; and, to protect the Class members from paying excessive fees for assistance in the claims process, the Settlement Agreement imposes a 2% cap on contingency fees charged by such non-Class Counsel. Settlement Agreement, § X.A.

E. The Claims Resolution Act of 2010

Following the execution of the initial form of the Settlement Agreement on February 18, 2010, Class Counsel engaged in substantial efforts advocating for Congress to satisfy the funding requirement of the Settlement and thus provide the necessary additional funding to afford meaningful relief for farmers with meritorious claims (even if it did not provide sufficient funding to pay all successful claimants the full amount of relief authorized by Section 14012). These extensive advocacy efforts involved more than 1,000 hours of attorney time and included numerous briefings and discussions over many months with Members of Congress and their staffs.

After several attempts to appropriate additional funds fell short, Congress, on November 30, 2010, finally passed the Claims Resolution Act of 2010 ("CRA"),[13] which provides an additional $1.15 billion to fund the Settlement that the Parties had negotiated. This Act, which the President signed into law on December 8, 2010, specifically provides that these additional funds are intended "to carry out the terms of the Settlement Agreement," and *expressly conditions* the availability of these funds on the "[S]ettlement [A]greement dated February 18, 2010 (including any modifications agreed to by the parties) [being] approved by a court order that is or becomes final and nonappealable." CRA §§ 201(a), 201(b).

The language of the CRA also makes clear that the additional $1.15 billion that was appropriated is the maximum amount of funds that will be appropriated for the payment of Section 14012 claims. Specifically, the Act deleted two sections of the Farm Bill: original Section 14012(i)(2), which had "authorized to be appropriated such [additional] sums as are necessary to carry out [Section 14012]," and original Section 14012(j), which required reports on the depletion of the first $100 million, presumably so that Congress could determine whether additional appropriations were warranted. CRA §§ 201(f)(4)(B), 201(f)(5).

The CRA also includes several provisions aimed at promoting the integrity of the claims process and deterring any potential fraud in the process. For example, the Act requires that: (1) the Neutrals be approved by the Secretary of Agriculture, the Attorney General, and the Court, and be administered "oaths of office" by the Court before adjudicating claims; (2) the Neutrals be authorized under certain conditions to require claimants to provide additional documentation; (3) attorneys filing claims on behalf of claimants certify that, to the best of their knowledge, information, and belief, the claims they submit "are supported by existing law and the factual contentions have evidentiary support"; and (4) the General Accounting Office and the

[13] Pub. L. No. 111-291, 124 Stat. 3064, 3070 (2010).

USDA Inspector General undertake certain reviews and/or audits relating to the claims process. CRA §§ 201(g), 201(h).

F. The Efforts of Class Counsel

The benefits provided to the Class by the Settlement Agreement are the result of extensive and sustained efforts by Class Counsel spanning at least five years, and, for some Class Counsel, longer. In addition, Class Counsel have incurred substantial out-of-pocket costs over this period of time. Class Counsel have received no compensation for these efforts and expenditures and, under the Settlement Agreement, will receive at most only very limited compensation until the entire claims process is completed in late 2012 or even later.[14] Beyond the tens of thousands of hours expended by Class Counsel leading up the Settlement Agreement and the submission of that Agreement to this Court for preliminary approval, Class Counsel already have devoted substantial time to the implementation of the Settlement Agreement, including the design and testing of a claims preparation and submission process that will enable Class Counsel to provide assistance to tens of thousands of Class Members located in more than 40 states. Given that more than 50,000 potential claimants have already contacted the Claims Administrator since the Notice Program approved by the Court commenced, it is readily apparent that Class Counsel will have to devote many thousands more hours over the next 12-18 months in assisting members of the Class between now and the completion of the entire claim process.

[14] The Settlement Agreement provides that Class Counsel will not receive the fees awarded by the Court until after the claims of successful Class Members have been paid. *See* Settlement Agreement § V.E.10. The only exception is the possible award of a portion of the $20 million authorized for Interim Implementation Costs for an interim, partial payment of Class Counsel fees. *See* Settlement Agreement, §§ IV.E, X.E.

1. Amount of Class Counsel's Work to Date

The work effort of Class Counsel in this case to date has already been enormous. The firms comprising Class Counsel have reported substantially in excess of 40,000 attorney hours and 60,000 paralegal hours spent to date in connection with this matter. As the Attached Declaration of Professor Theodore Eisenberg notes, using the rates set forth in the current "Laffey Matrix," the value of this time *already* expended by Class Counsel for the benefit of the Class exceeds $28,000,000. *Id.* In addition, Class Counsel already have advanced substantial sums in connection with meetings with Class Members, communicating with Class Members outside of formal Notice process, travel, transcripts, copying, and other costs of litigation.

2. Amount of Future Work

The work of Class Counsel, of course, is far from over. Although the contested phase of the litigation has concluded (assuming the Court approves the Settlement and the time for appeal expires without the need for further legal work), Class Counsel are required under the Settlement Agreement to provide ongoing service to the Class and its individual members through assistance with the claims process and the monitoring of the various monetary, debt relief, and tax payments that are called for by the Settlement Agreement.

Class Counsel's post-settlement obligations are both extensive and manifold. Most significantly, Class Counsel have agreed to provide assistance, without additional charge, to all Class Members electing to submit claims under Track A who want the assistance of counsel. Settlement Agreement § VIII.A.2. The claims process will require Class Counsel to assist such class members with preparing and filing claims for monetary relief available under the Settlement Agreement.

In order to be available to the maximum number of Class Members who request the assistance of Class Counsel in the claims process, Class Counsel will be scheduling meetings in more than a dozen states where significant numbers of Class Members are located. In states such as Alabama and Mississippi where there are heavy concentrations of Class Members, Class Counsel will be scheduling multiple group meetings in different areas of the states in order to make it possible for Class Members in different geographic regions within the states to participate in a one-on-one in-person meeting with an attorney. As a result, Class Counsel will be scheduling scores of meetings during the 180-day claim period established by the Settlement Agreement.

Multiple attorneys will attend each of these group meetings with the goal of enabling each and every Class Member who attends such a meeting to have the opportunity to meet individually and in-person with an attorney for the purpose of preparing a claim form. In addition, to ensure that each of these group meetings is run efficiently, it will be necessary for Class Counsel to provide paralegals and other support staff to provide logistical assistance to the claimants and Class Counsel. Of course, Class Counsel will have to bear the very substantial transportation and lodging costs for these attorneys and support staff to attend these scores of meetings. Class Counsel will also have to bear the costs of renting facilities for hosting these meetings and an array of other costs associated with these meetings.

To date, the Claims Administrator has received more than 15,000 requests for claim packages from persons who appear to be Class Members and more than 35,000 additional requests for claim packages from persons who may or may not be Class Members. It is abundantly clear from these early responses to the Class Notice that Class Counsel will be required to field a large and dedicated team of attorneys, paralegals, and support staff to identify

Class Members from the thousands of individuals seeking to participate in this Settlement, to assist Class Members with the preparation and submission of their claims, and to otherwise serve the Class and implement the Settlement Agreement. Beyond the one-on-one meetings with Class Members and putative Class Members, around the country, Class Counsel have already devoted substantial time, and will have to continue to devote substantial time throughout the claims period and beyond, to responding to questions from Class Members as well as others who seek to participate in the claims process regarding the overall claims process, the status of their individual claims, and the distribution of funds.

Finally, Class Counsel are required by the Claims Resolution Act of 2010 to fulfill the "integrity" requirements of the claims process imposed by Congress in the CRA, the requirements of which have been incorporated into the Settlement Agreement. Under these provisions, Class Counsel are required to verify that, to the best of their knowledge, information, and belief, any claim they submit on behalf of a claimant "are supported by existing law and the factual contentions have evidentiary support" – a requirement that will call for careful preparation and detailed discussion with each claimant. Settlement Agreement § V.A.1.c; CRA § 201(g)(5). In addition, Class Counsel must ensure that the processes and procedures of the claims process are robust enough to meet the standards of the General Accounting Office and the USDA Inspector General, who, pursuant to the Claims Resolution Act, are obligated to undertake certain reviews and audits relating to the claims process. CRA § 201(h).

III. ARGUMENT

A. The Court Should Use the "Percentage-of-the-Fund" Method to Determine Fees in This Case.

Unlike in *Pigford* and most other civil rights class actions, there is no statutory basis for an award of attorneys' fees in this case. Thus, the only basis for compensating Class Counsel in

this case is by means of a common fund. *See Swedish Hospital Corp. v. Shalala*, 1 F.3d 1261, 1265 (D.C. Cir. 1993) (citing *Sprague v. Ticonic Nat'l Bank,* 307 U.S. 161 (1939)). The Common Fund doctrine, which has long been recognized in equity, allows "a litigant or lawyer who recovers a common fund for the benefit of persons other than himself or his client" to recover "a reasonable attorney's fee from the fund as a whole," rather than having all the fees borne by the representative plaintiff or his counsel. *Id.* (citing *Boeing Co. v. Van Gemert,* 444 U.S. 472 (1980)). The rationale for this doctrine is that beneficiaries of the fund will be unjustly enriched by the attorneys' efforts unless the costs of litigation are spread among them. *Boeing Co.*, 444 U.S. at 478; *Swedish Hospital Corp*., 1 F.3d at 1265; *Bebchick v. Wash. Metro. Area Transit Comm'n*, 805 F.2d 396, 402 (D.C. Cir. 1986).

The rule in this Circuit, established by the Court of Appeals in the *Swedish Hospital* case and consistently followed since then,[15] is that a percentage-of-the-fund approach, rather than a lodestar approach, is the appropriate method for determining a reasonable attorneys' fee award in common fund cases. *Swedish Hospital*, 1 F.3d at 1271. As the court of appeals explained in *Swedish Hospital*, the common fund and lodestar methods for awarding fees serve different purposes and have different rationales: the common fund method approximates the contingent fee arrangements that compensate attorneys in the market and aligns the interests of the class and

[15] *See, e.g., Democratic Cent. Committee of Dist. of Columbia v. Washington Metropolitan Area Transit Com'n*, 3 F.3d 1568 (D.C. Cir. 1993); *Radosti v. Envision EMI, LLC*, 760 F. Supp. 2d 73 (D.D.C. 2011); *In re Dept. of Veterans Affairs (VA) Data Theft Litig.*, 653 F. Supp. 2d 58 (D.D.C. 2009); *Wells v. Allstate Ins. Co.*, 557 F. Supp. 2d 1 (D.D.C. 2008); *Vista Healthplan, Inc. v. Warner Holdings Co. III, Ltd.*, 246 F.R.D. 349 (D.D.C. 2007); *Cohen v. Chilcott*, 522 F. Supp. 2d 105 (D.D.C. 2007); *Freeport Partners, L.L.C. v. Allbritton*, Civ. No. 04-2030(GK), 2006 WL 627140 (D.D.C. March 13, 2006); *Fresh Kist Produce, L.L.C. v. Choi Corp., Inc.*, 362 F. Supp. 2d 118 (D.D.C. 2005); *In re Lorazepam & Clorazepate Antitrust Litig.*, MDL No. 1290, 2003 WL 22037741 (D.D.C. June 16, 2003); *In re Lorazepam & Clorazepate Antitrust Litig.*, 205 F.R.D. 369 (D.D.C. 2002); *In re First Databank Antitrust Litig.*, 209 F. Supp. 2d 96 (D.D.C. 2002); *In re Newbridge Networks Sec. Litig.*, Civ. No. 94-1678-LFO, 1998 WL 765724 (D.D.C. Oct. 23, 1998).

counsel in achieving success, while the lodestar method used in fee-shifting cases is meant to ensure that compensation, paid by the opposing party, is available to attorneys who offer private enforcement of certain statutes even where the results obtained are modest or non-monetary. *Swedish Hosp. Corp.*, 1 F.3d at 1268-70.

The court of appeals in *Swedish Hospital* further reasoned that using a lodestar approach in common fund cases is undesirable because it fails to align class counsel's interest with that of the class; encourages inefficiency (as class counsel may be incentivized to prolong litigation and bloat their hours with the understanding that their reported hours would not be challenged in a truly adversarial context); and imposes greater demands on scarce judicial resources. *Id.* at 1268-69. By contrast, use of the percentage-of-the-fund approach in common fund cases more accurately reflects the economics of law practice, leads to better use of scarce judicial resources, and avoids substantial delay in making fee awards. *Id.* at 1268-70.

Finally, the court of appeals noted that a percentage-of-the-fund approach is less subjective than the lodestar approach, stating that "under the [percentage-of-the-fund approach], the court need not second-guess the judgment of counsel as to whether a task was reasonably undertaken or hours devoted to it reasonably expended." *Id.* at 1270; *see also Democratic Cent. Comm. of Dist. of Columbia*, 3 F.3d at 1573 (noting that the percentage of the fund method was the best way to achieve the goals in common fund cases of fair and reasonable compensation, predictability, simplification, the discouragement of abuses and fairness to the parties). Under the law of this Circuit, therefore, the percentage-of-the-fund approach is the most appropriate method for setting the attorneys' fees in this action.

The percentage-of-the fund approach in this case is also consistent with the Parties' intent, as reflected in the Settlement Agreement. In the Settlement Agreement, USDA agreed that

"Class Counsel shall be paid Common Benefit Fees for their reasonable and compensable work on behalf of the Class" and that that amount "shall be at least 4.1% and not more than 7.4% of the Fee Base." Settlement Agreement §§ X.B and E. Thus, applying a percentage-of-the-fund method in this case is warranted both by the Parties' Agreement and by the governing law of this Circuit.

B. A Fee Award of 7.4% Is Reasonable and Justified Under the Percentage-of-the-Fund Method In Light of the Efforts and Risks Undertaken by Class Counsel and the Extraordinary Results Achieved in this Case.

When determining the appropriate percentage for an award of attorneys' fees in a percentage-of-the-fund case, courts have a duty to ensure that the overall fee award is reasonable. *Swedish Hospital*, 1 F.3d at 1265. In assessing the reasonableness of a fee request, the district courts in this Circuit have generally considered the following factors: (1) the size of the fund created and the number of persons benefitted; (2) the skill and efficiency of the attorneys involved; (3) the complexity and duration of the litigation; (4) the risk of nonpayment; (5) the amount of time devoted to the case by plaintiffs' counsel; (6) the awards in similar cases; and (7) the presence or absence of substantial objections by members of the class to the settlement terms and/or to the attorneys' fees requested. *See, e.g.*, *Wells*, 557 F. Supp. 2d at 6-7; *In re Lorazepam*, 2003 WL 22037741, at *8 (citing *Gunter*, 223 F.3d at 195 n.1); *In re Baan Co. Sec. Litig.*, 288 F. Supp. 2d 14, 17 (D.D.C. 2003). A review of these factors demonstrates that the 7.4% fee award Class Counsel seeks in this case is reasonable, appropriate, and warranted.

1. Class Counsel Have Obtained Substantial Benefits for the Class.

Both the substantive terms of the Settlement Agreement, including the establishment of the non-judicial claims process specified in the agreement, and the level of the funding obtained to pay successful claims resulting from that process, provide enormous benefits to the Class.

These benefits were the direct result of the intense and sustained efforts of Class Counsel in this action over the duration of the case and of Class Counsel's effective advocacy to obtain the $1.15 billion in additional funding for this settlement that is provided by the Claims Resolution Act of 2010.[16] The terms of the Settlement Agreement therefore confer exceptional benefits on the class and manifestly justify the fee award requested in this case.

The terms of the Settlement Agreement negotiated by Class Counsel provide a number of substantial benefits to the Class. First, because the Settlement Agreement establishes a non-judicial claims process for determining the validity of claims of Class Members, the Agreement will enable successful Class Members to receive their awards far more quickly than if their claims were required to be individually adjudicated by this Court. But for the establishment of the non-judicial claims process, each Class Member would be required to litigate his/her individual claim before a judicial officer under the formalities imposed by the Federal Rules of Civil Procedure and by the Federal Rules of Evidence. Even if this Court somehow could have found sufficient judicial resources to adjudicate the claims of the tens of thousands of Class Members, there can be no doubt that the process would have taken years to complete. Thus, the relative speed of the claims resolution process established by the Settlement Agreement provides a very important benefit for the Class. The importance of this benefit is particularly significant because so many of the Class Members are in the late stages of life.

Second, the Settlement Agreement significantly reduces the evidentiary burden for Class Members, as compared with the evidentiary burden they would confront in the absence of the Settlement Agreement. For example, while Section 14012 requires a claimant to demonstrate

[16] Indeed, Class Counsel Phillip Fraas, David Frantz, and Faya Rose Sanders, all of whom served as Class Counsel in *Pigford*, also devoted substantial time to the ultimately successful efforts to persuade Congress to enact Section 14012 of the Farm Bill. Without that legislative achievement, the Class would have no ability to obtain any recovery at all.

that a specific similarly situated white farmer had been given preferential treatment by the USDA, under the Settlement Agreement negotiated by Class Counsel, Class Members need not adduce "similarly situated white farmer" evidence in order to prevail on a Track A claim. As the Court knows, the "similarly situated white farmer" requirement presented a significant hurdle to claimants in *Pigford* and resulted in many members of the *Pigford* class being denied an award.

Class Counsel were also able to obtain, through the Settlement Agreement, the agreement of the USDA, during the time Class Members' claims are under review in the claims process, to hold off foreclosures on any loans that form the basis of the Class Members' claims. Settlement Agreement, § VI. Under Section 14012(g) of the Farm Bill, and absent the Settlement Agreement, USDA would have been required to postpone foreclosures on loans only if the claimant could make "a prima facie case in an appropriate administrative proceeding that the acceleration or foreclosure is related to a *Pigford* claim." Under the Settlement Agreement negotiated by Class Counsel this forbearance happens automatically without claimants having to seek foreclosure-relief in an administrative proceeding.

Beyond the substantive terms of the Settlement Agreement, the very achievement of the Settlement Agreement was critical to the 2010 appropriation by Congress of the additional $1.15 billion for the payment of claims under Section 14012. The role of the Settlement Agreement as a precondition to additional funding is made clear by the Claims Resolution Act, which expressly states that the additional monies being appropriated are conditioned upon Court approval of the Settlement Agreement in this case. CRA §§ 201(a), (b). Moreover, Section 201(c) of the CRA provides that use of the additional funds "shall be subject to the express terms of the Settlement Agreement." Thus, but for the Settlement Agreement negotiated by Class Counsel, it is likely that only the $100 million appropriated in the 2008 Farm Bill would now be available to pay

class members' claims. In other words, but for Class Counsel's successful negotiation of the Settlement Agreement, the funds available to compensate Class Members for the discrimination they suffered likely would be less than 10% of the $1.25 billion that now constitutes the Settlement Fund. Put another way, the additional funding provided by Congress as a result of Class Counsel's successful negotiation of the Settlement Agreement will make it possible for more than ten (10) times as many Class Members to receive the full amount of the remedy established by Section 14012.

Beyond successfully negotiating the Settlement Agreement that was the predicate for the $1.15 billion in additional funding provided by Congress, Class Counsel also played an active and essential role in advocating to Congress regarding the significance of the Settlement and the need for Congress to provide the additional funding made available under the Claims Resolution Act of 2010. Specifically, Class Counsel engaged in numerous meetings with both House and Senate staff throughout the period following the execution of the February 18, 2010 Settlement Agreement, particularly in the weeks leading up to the passage of the CRA. Class Counsel also played an active role in developing language that ultimately was included in the CRA.

In all, the Settlement negotiated by Class Counsel provides Class Members with an array of substantial benefits that will enable Class Members with meritorious Section 14012 claims to obtain relief much more quickly and with a significantly reduced evidentiary burden. In addition, Class Counsel's efforts were a key to producing the lion's share of the funds available to fulfill the promise of Section 14012. These benefits fully support Class Counsel's request for a fee of 7.4% of the Settlement Fund Fee Base.

2. Class Counsel Have Demonstrated Considerable Skill and Efficiency.

The Court has already preliminarily appointed as Lead Class Counsel three highly experienced attorneys: Andrew H. Marks of Crowell & Moring LLP in Washington, D.C., Henry Sanders of Chestnut, Sanders, Sanders, Pettaway & Campbell, L.L.C. in Selma, Alabama; and Gregorio A. Francis of Morgan & Morgan, P.A. in Orlando, Florida. As detailed in Plaintiffs' Memorandum of Law in Support of Motion for Preliminary Approval, these lead counsel combine considerable experience in class actions and large case management, as well as, in the case of Mr. Sanders, invaluable experience from his work in the *Pigford* case.

In addition to Lead Class Counsel, the Court has appointed as Class Counsel a number of attorneys who have significant experience with national class actions and/or significant trial experience and who will be able to advocate effectively for Class Members in the claims process contemplated by the Settlement Agreement. Included among this group are four additional counsel, David Frantz, Phillip Fraas, Faya Rose Sanders, and Anurag Varma, who were extensively involved in *Pigford* and who have brought to the present case both considerable knowledge of USDA farm loan programs and their institutional knowledge of the *Pigford* case.

Without the experience and expertise of Class Counsel, Plaintiffs would not be in the favorable position that they are today. The institutional knowledge of the *Pigford* case held by several of Class Counsel was necessary for Counsel to be able to understand the unique issues presented in this case, to identify potential pitfalls, and to develop strategies to resolve those issues in light of the lessons learned from *Pigford*. Andrew Marks, Laurel Malson, and other lawyers with Crowell & Moring have provided significant experience litigating with the Department of Justice, knowledge regarding this Court and its procedures, and the legal acumen to tackle many of the complex legal and ethical issues presented by this case.

In addition, having experienced class action specialists as a part of the group has ensured that Class Members will have the protection of Federal Rule of Civil Procedure 23(b)(1) and thereby receive a fair share of the monies that Congress has allocated. The Law Offices of James Scott Farrin has provided significant sophistication and expertise in communicating with thousands of Class Members and others seeking information about the status of the case, settlement, Congressional funding, and now, claims submission and development of individual claims. The Farrin firm has also been instrumental in developing procedures and training support personnel to handle the volume of work expected during the claims administration process in an efficient and fair manner. Finally, as noted above, Class Counsel's advocacy skills also played a critical role in generating the additional $1.15 billion in settlement funding provided by the Claims Resolution Act.

Without the experience and expertise of all of the Class Counsel firms working together on the various facets of this case, Class Members would not be in a position to finally receive the adjudication of their *Pigford* claims that they have sought for so long. This factor, therefore, also supports the request for a 7.4% fee award in this case.

3. The Complexity and Duration of this Case Support Class Counsel's Fee Request.

The Settlement before this Court is the culmination of nearly three years of litigation and intensive negotiations between the Parties, and many more years of advocacy to Congress and the Executive Branch by some of the lawyers who are Class Counsel, and by black farmer organizations and others. The complexity of the Settlement Agreement that was reached demonstrates the skill level required by counsel to establish terms that would ensure that the claims of the Class Members are resolved fairly, efficiently, and with integrity.

For the better part of two years, counsel for the Plaintiffs in the array of cases consolidated by this Court in *In re Black Farmers Discrimination Litigation* vigorously pursued the claims of the tens of thousands of their individual clients who had retained them to pursue claims under Section 14012. These efforts included extensive briefing on class certification, coordination of case management, and intensive, arms-length settlement negotiations. Over the course of this extended period, the Parties exchanged 20 or more comprehensive settlement drafts, held numerous face-to-face negotiation sessions, and participated in many more conference calls to hammer out the terms of the initial Settlement Agreement executed on February 18, 2010. These negotiations were carried out by "experienced, capable counsel," including more than 20 law firms on the Plaintiffs' side and a highly experienced team of Department of Justice and USDA lawyers on the other side.

Even after the parties reached that initial Settlement Agreement, Class Counsel have been required to continue to negotiate changes to the Agreement, first in response to suggestions from the Court and second in response to requirements imposed by Congress in the Claims Resolution Act. These additional negotiations, which resulted in a number of significant changes to the Settlement Agreement, also required a high level of skill by Class Counsel in order to accommodate new requirements into the existing structure of the Agreement.

In addition, as noted earlier, following execution of the initial form of the Settlement Agreement on February 18, 2010, Class Counsel turned their efforts toward advocating for Congress to satisfy the funding contingency of the Settlement, and helped secure $1.15 billion in additional funding to afford meaningful relief for *Pigford* claimants with meritorious claims.

Class Counsel have also devoted substantial efforts to developing a claims preparation process that can fairly and efficiently handle the tens of thousands of expected claims of Class

Members and ensure that all claims are processed and submitted within the 180-day "claims period" mandated by the Settlement Agreement. To meet this challenge, Class Counsel are assembling a large team of lawyers, paralegals, and administrative staff to assist claimants in preparing and submitting claims. It has taken and will continue to take significant skill to marshal these resources and develop practices and procedures that will allow for a fair and efficient claims process that also addresses the claim integrity issues raised by Congress in the Claims Resolution Act.

The geographic dispersion of potential claimants across the United States has added considerable complexity to the task Class Counsel have faced and will face in the claims preparation process. Initial client outreach and case screening has required substantial time and expense because claimants are located in more than 40 states and in hundreds of communities throughout these states. Ongoing communications with clients and claimants during the litigation and settlement phases of the case has been made more difficult because of this fact, and Class Counsel anticipate that the claims process will require considerable time and expense to complete because of this, as well. At present, Class Counsel plan to hold scores of meetings throughout the country to enable as many of the tens of thousands of expected claimants as possible to meet in person with Class Counsel and their teams so that the Class Members, if they desire, can obtain the direct assistance of counsel in completing their claim forms. The logistics involved in coordinating and staffing these planned meetings present enormous challenges. Only through Class Counsel's expertise and efficiency will they be able to meet this challenge.

Moreover, the USDA farm loan programs that underlie Class Members' discrimination claims are complicated. Class Counsel will need significant expertise in this area in order to effectively and efficiently prepare thousands of claim forms. This expertise will also be

necessary for Class Counsel to fulfill their obligation to certify that claims they submit are, to best of counsel's knowledge, information, and belief "supported by existing law and the factual contentions have evidentiary support," as required by the Claims Resolution Act. To help ensure all lawyers involved in the claims preparation process have the necessary expertise, Class Counsel have already held a two-day training session for lawyers and paralegals participating in the claims review and submission process to educate them about, among other things, the USDA farm loan programs that are at issue in this case. Class Counsel will also be scheduling additional training sessions for those counsel who did not participate in the initial training session, as well as ongoing training for counsel assisting claimants throughout the claims period. Class Counsel have enlisted the assistance of the Farmers Legal Action Group to prepare training materials and assist in educating all those who will be involved in assisting claimants complete their claim forms. The complexity of this case therefore supports the 7.4% fee award requested.

The duration of this case further supports the fee requested by Class Counsel in this case. Class Counsel have devoted tens of thousands of attorney hours and even more paralegal hours over the past several years in litigating these cases. Class Counsel have also expended large sums of money in support of these efforts. Class Counsel have received no compensation for any of this work or any reimbursement of any of these expenses. Beyond that, Class Counsel will not receive the bulk of any fee award until the entire claims process is completed and all successful Class Members receive their awards. *See* Settlement Agreement § V.E.10.

4. Class Counsel Have Faced a Significant Risk of Non-Payment.

Class Counsel have already devoted tens of thousands of hours and incurred substantial expenses in this case without receiving any payment; and prior to the Settlement Agreement, Class Counsel faced a significant risk that they would never receive compensation for the work

they had performed. When the various lawyers who are now Class Counsel first accepted clients with Section 14012 claims, they did so under traditional contingency fee contracts that would have provided compensation to the attorneys only in the event of a successful recovery.

A recovery in any particular case was far from guaranteed at that time, however, as several significant obstacles potentially stood in the way of success. First, most lawyers retained by individual claimants could not be certain whether, at the end of the day, such claimants would qualify as a "*Pigford* claimant" under Section 14012. Thus, the filing lawyer faced a significant risk that any work performed on behalf of a particular claimant would be uncompensated. Next, without the Settlement Agreement, each individual claimant likely would be required by Section 14012 to present "similarly situated white farmer evidence." While Section 14012 at that time required the USDA to provide such information to the claimant, there was no guarantee that the USDA had retained such information so that it could be made available and no guarantee even if such information were available that it would establish a valid claim. Other evidentiary difficulties made recovery for the lawyers uncertain, as well. For instance, the USDA often did not retain information regarding loan denials prior to 1999, thereby potentially requiring claimants to rely upon the testimony of witnesses who might now be deceased or unable to remember the events of so long ago. It light of these difficulties, there was significant risk to counsel in any individual case that the claimant would be unsuccessful on the merits and that counsel therefore would receive no compensation for their work on behalf of such claimants.

Even if counsel had been able to present a meritorious case on behalf of an individual claimant, in the absence of the Settlement Agreement there was significant risk that there would not be sufficient funds available to pay the claimant and hence to pay counsel. As discussed above, at the time Class Counsel filed these cases, Congress had appropriated only $100 million

to fund the payment of all successful Section 14012 claims. This $100 million fund would have been woefully inadequate to pay all expected claims and thus presented the significant risk that either all successful claimants would receive only a small award or that thousands of successful claimants would receive no award at all. Accordingly, prior to Class Counsel's work in negotiating the settlement and advocating to Congress for additional funding, there was significant risk to counsel there would be little or no money available from the initial $100 million fund to pay any recovery to a particular claimant or to that claimant's lawyer.

Finally, absent settlement, counsel faced the considerable risk that the Court may have denied Plaintiffs' motion to certify a class and required individual litigation of each claim. Indeed, in several other cases alleging discrimination by USDA brought by other protected classes, the courts involved have refused to certify a class. *See, e.g.*, *Love v. Veneman*, 224 F.R.D. 240 (D.D.C. 2004), *aff'd sub nom Love v. Johanns*, 439 F.3d 723 (D.C. Cir. 2006) (denying class certification for similarly situated women farmers); *Garcia v. Veneman*, 224 F.R.D. 8 (D.D.C. 2004), *aff'd sub nom Garcia v. Johanns*, 444 F.3d 625 (D.C. Cir. 2006) (denying class certification for Hispanic farmers). In the absence of class certification, any particular claimant would have faced substantial risk for the reasons discussed above, and that claimant's lawyer, therefore, would have faced a corollary risk.

5. Class Counsel Have Devoted Substantial Efforts to Achieving This Settlement To Date and Are Committed to Devoting Significantly More Time and Effort in the Claims Administration Process for as Long as the Process Takes.

Class Counsel have devoted tremendous time and effort over the past three years ensuring that there was a successful resolution of this case for the benefit of Class Members, and Class Counsel will continue to devote many thousands of additional hours and expend large sums over the next two years to ensure the successful implementation of the Settlement

Agreement. Class Counsel already have devoted well over 40,000 attorney hours and 60,000 paralegal hours to this case. As demonstrated above, Class Counsel have expended significant time communicating with and educating potential claimants regarding their rights under Section 14012; significant time evaluating potential claimants' cases at the outset to determine whether to file a Section 14012 claim on their behalf; significant time litigating and settling this case; and significant time working to obtain funding for the Settlement. In addition, Class Counsel have devoted substantial time and expense to developing a claims process that can provide full and expeditious relief for legitimate late-filing *Pigford* claimants while at the same time safeguarding the integrity of the claims process, as required by Congress.

The significant efforts of Class Counsel are continuing. Given the complexity of this case and the potential for widespread misinformation regarding this Settlement, it is essential to provide Class Members with access to experienced and informed counsel to assist them in completing and submitting their Claim Packages within the 180-day time period established by the Settlement Agreement. Accordingly, under the Settlement, Class Counsel will be available to assist all Class Members proceeding under Track A. Settlement Agreement § VIII.A.2. In this regard, Class Counsel will devote efforts to assisting Class Members with preparing and filing claims for monetary relief available under the Settlement Agreement. In addition, Class Counsel are also in the process of hiring and supervising a substantial team of attorneys and paralegals who will assist Class Counsel in providing assistance individually to Class Members across the country.

6. The Award Sought in this Case Is Reasonable When Compared to Fee Awards in Similar Cases.

The 7.4% fee award Class Counsel seek in this case is demonstrably reasonable and, in fact, falls below the range typically awarded in common fund cases. The majority of fee awards

in common fund cases in the D.C. Circuit and nationally fall within a 20% to 30% range, with 25% often used as a benchmark. *See Swedish Hosp. Corp.*, 1 F.3d at 1263, 1272 (affirming an award of 20% of the common fund and noting that "a majority of common fund class action fee awards fall between twenty and thirty percent"); *In re Dep't of Veterans Affairs (VA) Data Theft Litig.*, 653 F. Supp. 2d 58, 61 (D.D.C. 2009) ("The majority of fee awards nationally appear to fall in a range of 20 percent to 30 percent of the common fund."); *Vizcaino v. Microsoft Corp.*, 290 F.3d 1043, 1047-1048, 1050 n.4 (9th Cir. 2002) (summarizing fees awarded in 34 common fund settlements from 1996-2001 and noting that the benchmark award in the Ninth Circuit is 25%); 4 Alba Conte and Herbert Newberg, *Newberg on Class Actions* § 14.6 at 568 (4th ed. 2002) (noting that many courts apply a benchmark of 25% of the award); *In re Lorazepam*, 2003 WL 22037741, at * 7-8 (30% fee award); *In re Baan Co. Sec. Litig.*, 288 F. Supp. 2d at 17-21 (28% fee award). Courts in this Circuit have awarded fees of up to 45% of the common fund. *See Wells v. Allstate Ins. Co.*, 557 F. Supp. 2d 1, 7-8 (D.D.C. 2008). In view of the typical benchmarks, Class Counsel's request of an award totaling 7.4% of the Settlement Fund Fee Base is manifestly reasonable.

While the courts in some larger recovery cases have awarded common fund fees below the 20- 30% range, even in these so-called "mega-fund" cases the fees awarded are commonly in the range of 15% or more. *See In re Lorazepam*, 2003 WL 22037741, at *7 (citing *Shaw v. Toshiba Am. Info. Sys., Inc.*, 91 F. Supp. 2d 942, 989 (E.D. Tex. 2000) (surveying cases)); *see also In re Lease Oil Antitrust Litig.*, 186 F.R.D. 403, 443-448 (S.D. Tex. 1999) (25% of more than $190 million)*; In re NASDAQ Market-Makers Antitrust Litig*., 187 F.R.D. 465, 470 (S.D.N.Y. 1998) (14% of $1 billion); *In re Combustion, Inc.*, 968 F. Supp. 1116, 1136-40 (W.D. La. 1997) (36% of $127 million).

It is also noteworthy that the 7.4% fee Class Counsel are requesting in this case is less than the 8% percentage fee awarded to Class Counsel by Judge Sullivan earlier this year in *Keepseagle v. Vilsack*, Case No. 99-cv-3119, which involved a settlement fund of $760 million dollars. As this Court is aware, *Keepseagle* involved discrimination claims by Native American farmers much like the discrimination claims asserted by black farmers in the current case. Indeed, the *Keepseagle* settlement agreement recently approved by Judge Sullivan was modeled on the Settlement Agreement now before the Court in this case. The similarity of *Keepseagle* to the current case makes the 8% fee percentage awarded in that case particularly relevant here.

While *Swedish Hospital* makes clear that this Court need not and should not engage in a traditional lodestar analysis when determining a reasonable fee in this case, a lodestar "cross-check" demonstrates that a 7.4% fee award is wholly reasonable and appropriate in this case. Class Counsel's fee request is for 7.4% of the Settlement Fund Fee Base (see fn.4, *supra*). This translates to a fee request of approximately $90.8 million. As noted above, Class Counsel have already devoted more than 40,000 attorney hours and more than 60,000 paralegal hours in connection with the cases that are the subject of the Settlement Agreement. As Professor Theodore Eisenberg discusses in his Declaration in support of the present Motion (*see* Exhibit B), if the Court were to apply rates from the "Laffey Matrix" to these hours to assess the value of the work *already* performed by Class Counsel, the result would be a value of more than $28 million. Thus, an award of 7.4% of the Settlement Fund in this case would equate to a multiplier of approximately 3.2 of the total lodestar Class Counsel *already* have devoted to this case. This multiplier will, of course, be substantially lower after the thousands of hours that Class Counsel will be spending on the implementation of the Settlement, including providing individual assistance to Class Members who wish to submit claims, are taken into account. Moreover, this

multiplier does not take into account the very large expenditures of out-of-pocket funds that Class Counsel have already made and the additional expenditures that Class Counsel will be required to make in the coming months in order to conduct the scores of in-person claim meetings throughout the country in the 180-day period following this Court's approval of the Settlement Agreement.

The 7.4% fee request in this case is wholly reasonable in light of this lodestar multiplier analysis. Fees awarded pursuant to the common fund doctrine frequently represent multiples of up to 4 times the lodestar. *See In re Lorazepam*, 2003 WL 22037741, at *9 (observing that "multiples ranging up to four are frequently awarded in common fund cases") (citing *In re Prudential Ins. Co. of Am. Sales Practices Litig.*, 148 F.3d 283, 341 (3d Cir. 1998)); *Wal-Mart Stores, Inc. v. VISA USA, Inc.*, 396 F.3d 96, 123 (2d Cir. 2005) (noting that "multipliers of between 3 and 4.5 have become common" and approving a multiplier of 3.5 in mega-fund case) (quotation marks omitted) (citing *In re NASDAQ*, 187 F.R.D. at 489); *Vizcaino v. Microsoft Corp*., 290 F.3d 1043, 1051 & n.6 (9th Cir. 2002) (approving a multiplier of 3.65 and noting that it fell within the typical range in common fund cases). The D.C. Circuit has previously approved a multiplier of 3.2 times the lodestar. *See Swedish Hosp. Corp.*, 1 F.3d at 1263, 1272. Other courts have approved significantly higher multipliers in cases that resulted in recoveries similar to that obtained here. *See, e.g.*, *In re UnitedHealth Group Inc. PLSRA Litig.*, 643 F. Supp. 2d 1094, 1106 (D. Minn. 2009) (approving multiplier of 6.5 times lodestar in mega-fund settlement of $925 million); *In re Enron Corp. Sec. Litig.*, 586 F. Supp. 2d 732, 791-803 (S.D. Tex. 2008) (approving multiplier of 5.2 times lodestar in mega-fund settlement of $7.2 billion); *In re Cardinal Health, Inc. Sec. Litig.*, 528 F. Supp. 2d 752, 768 (S.D. Ohio 2007) (awarding multiplier of 6 times lodestar in mega-fund settlement of $600 million); *In re WorldCom, Inc.*

Sec. Litig., 388 F. Supp. 2d 319, 358-359 (S.D.N.Y. 2005) (approving multiplier of four times lodestar in $6.1 billion mega-fund settlement); *In re NASDAQ*, 187 F.R.D. at 488-89 (S.D.N.Y. 1998) (approving lodestar multiple of 3.97 in mega-fund settlement of $1.027 billion).

A multiplier of approximately 3.2 in this case, therefore, falls well within the typical range of such awards. Accordingly, when the lodestar approach is considered as a "check" on the percentage award sought herein, the reasonable multiplier that a 7.4% fee would represent, as demonstrated by the multipliers approved in other cases, further confirms the reasonableness of the fees sought by Class Counsel.

In sum, whether evaluated by the percentage of the common fund available to the class or as a multiple of the lodestar, the amount of the attorneys' fees and costs sought in this case is reasonable and well within the range of fees and costs awarded in other cases where large common funds were created.

C. A 7.4% Award Is More Favorable for Class Members Than the Rate Successful Claimants Would Have Been Obligated to Pay Under the Retention Agreements They Agreed to With Their Individual Counsel.

In adopting a percentage-of-the-fund analysis for common fund cases, the D.C. Circuit reasoned that such a method, "more accurately reflects the economics of litigation practice." *Swedish Hospital*, 1 F.3d at 1269. The court further noted that, "'[p]laintiffs' litigation practice, given the uncertainties and hazards of litigation, must necessarily be result-oriented. It matters little to the class how much the attorney spends in time or money to reach a successful result.'" *Id.* (quoting *Howes v. Atkins*, 668 F. Supp. 1021, 1025 (E.D.Ky. 1987)). The court also noted Seventh Circuit Judge Posner's assertion that a percentage-of-the-fund approach most closely approximates the manner in which attorneys are compensated in the marketplace for these kinds of cases. *Id.* As Judge Posner reasoned:

> The judicial task might be simplified if the judge and the lawyers spent their efforts on finding out what the market in fact pays not for individual hours but for the ensemble of services rendered in a case of this character…. The class counsel are entitled to the fee they would have received had they handled a similar suit on a contingent fee basis with a similar outcome.

Matter of Continental Illinois Sec. Litig., 962 F.2d 566, 572 (7th Cir. 1992).

As detailed in the Declaration of Professor Theodore Eisenberg (Exhibit B), this particular case is unusual in that the Court has direct evidence of the "market" price for counsel's services in a case of this nature. That is because, in contrast to most class action cases, we know that soon after Section 14012 was enacted into law, tens of thousands of individuals signed retention agreements with various counsel which provided for the attorneys to be compensated for their work at a 33% contingency rate. Later, at the urging of this Court, all of the lawyers who have now been appointed as Class Counsel agreed to accept a lowered percentage of 20%. Whether the Court considers 20% or 33% the appropriate rate for purposes of this analysis, it is clear that the 7.4% fee that Class Counsel are seeking is far more favorable for Class Members than any contingency rate they could have bargained for outside the context of this Settlement.

D. The 2% and 8% Caps on Track A and Track B Individual Counsel Are Reasonable, in the Best Interests of the Class, and Further Confirm the Reasonableness of Class Counsel's Fee Request.

In the usual class case, the claims process is relatively straightforward so that the assistance of counsel generally is not required for individual claimants to prepare and submit a claim that will be successful. The evidence that a claimant is required to submit in order to recover in this case is substantially more complicated than in most class actions. For this reason, Class Counsel have assumed responsibility for providing individual assistance to every Class Member who seeks such assistance in preparing and submitting their claims.

While Class Counsel believe that most Class Members will utilize Class Counsel to assist them in the claim process because there will be no out-of-pocket cost to Class Members for this assistance, the parties agreed in the Settlement Agreement that Class Members who wanted to use their own attorneys to assist them in the claim process should be allowed to do so. However, the parties were also concerned that Class Members not be overcharged by overreaching lawyers. For that reason, the parties agreed that a cap of 2% of any recovery should be imposed on the fees that could be charged by individual counsel who may be retained by a Class Member to assist with the Track A claims process. Settlement Agreement § X.A.

Because Class Counsel have done all of the work on behalf of the Class to put individual Class Members in a position to be able to obtain a Track A award based solely on the submission of a valid claim form, the work that any attorney would reasonably need to do to assist an individual Class Member is limited. For this reason, the proposed 2% cap on individual counsel fees in Track A cases strikes a reasonable balance between fairly compensating individually retained lawyers for their limited work in completing Track A claim forms and protecting claimants from overpaying such counsel. Moreover, when compared to the 7.4% fee sought by Class Counsel for the work on this case from start to finish, a 2% cap on Track A individual fee recoveries (which is approximately 27% of the Class Counsel's requested fee) is reasonable.

With respect to Track B claims, the proposed 8% cap on fees for such cases recognizes the increased complexity and burden on the lawyer of presenting such a claim but still limits the overall fee based on the fact that most of the work necessary to get to the point of being able to file a Track B claim has already been performed by Class Counsel. The parties agreed on this 8% cap for the same reasons they agreed on the 2% cap for Track A claims, namely to properly incentivize and compensate lawyers retained by individual claimants while ensuring that Class

Members will not be overcharged for the work that individual counsel may perform in assisting them in the claims process.

E. The Award of Fees to Class Counsel Should Be Directed to Lead Class Counsel to Allocate Among All Class Counsel in Accordance With the Terms of the Counsel Participation Agreement.

Class Counsel ask the Court to direct that the fees approved by this Court as part of a Common Benefit Fund be directed to the three Lead Class Counsel. As noted above, with two exceptions, the lawyers and law firms comprising Class Counsel have entered the detailed Counsel Participation Agreement that is attached hereto as Exhibit A.

The Participation Agreement provides that any fees awarded by the Court to these firms for their work in connection with this case will be administered, under the guidance of Lead Class Counsel, by the Plaintiffs' Steering Committee, a subgroup of Class Counsel, according to the terms of the Participation Agreement. The Agreement also makes Lead Class Counsel responsible for apportioning the claims preparation and submission work among all Class Counsel, and provides that the fees to be paid to each Class Counsel should be in close proportion to the overall work effort each Class Counsel will have undertaken for the benefit of the Class. The Participation Agreement also provides a mechanism for Class Counsel to seek reimbursement of certain costs associated with implementing the claims process under the Settlement Agreement for the benefit of the Class. Finally, the Participation Agreement includes a dispute resolution clause that will require any disputes regarding the allocation of fees among Class Counsel to be submitted to binding arbitration.

As Magistrate Judge Facciola noted in *In re Vitamins Antitrust Litigation*, in numerous class actions, courts have "directed lead counsel to apportion the attorneys' fees awards as they deem appropriate, based on their assessments of class counsel's relative contributions." 398 F.

Supp. 2d 209, 224 (D.D.C. 2005) (citations omitted).[17] In adopting this approach, "these courts noted that, because lead counsel had led the cases from their inception, they were 'better able to describe the weight and merit of each [counsel's] contribution." *Id.* (quoting *In re Linerboard Antitrust Litig*., MDL No. 1261, 2004 WL 1221350, at *18 (E.D. Pa. June 2, 2004)). Such an approach makes sense "from the standpoint of judicial economy" "because it relieves the [c]ourt of the 'difficult task of assessing counsel's relative contributions.'" *In re Linerboard Antitrust Litig*., 2004 WL 1221350, at *18 (quoting *In re Prudential*, 148 F.3d at 329 n. 96).

The Participation Agreement represents an agreement among Class Counsel that addresses the relative amount of work each Class Counsel firm will take on. The guiding principle underlying this agreement is that the allocation of fees among counsel will be based on the work that has been performed and that will be performed for the benefit of the Class.[18] The Participation Agreement charges Lead Class Counsel with the responsibility to ensure that work is allocated to the various firms appointed as Class Counsel to correlate with each firm's ultimate share of any fee award. To effectuate this agreement, the Participation Agreement requires all signatory firms to maintain contemporaneous time records and to report periodically their time to Lead Class Counsel so that Lead Class Counsel can ensure each firm is contributing the agreed-upon percentage of work.

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[17] In *In re Vitamins*, Chief Judge Hogan made an overall attorneys' fee award of $123,188,032, but initially did not rule regarding the allocation of the fee award. 398 F.Supp.2d at 222. Subsequently, Judge Hogan ordered class counsel to "allocate the attorneys' fees award and expense award in a manner which, in the opinion of [class counsel], fairly compensates respective counsel in view of their contributions to the prosecution of Plaintiffs' claims." *Id.*

[18] Following the execution of the Counsel Participation Agreement, two of the signatory firms, Morgan and Morgan, P.A. ("the Morgan Firm"), and the Law Offices of James Scott Farrin (the "Farrin Firm"), entered into a agreement to reallocate 10% of the fee that was to be paid to the Farrin Firm to the Morgan Firm in exchange for the Morgan Firm's agreement to increase its workload and to assist in the financing of certain costs that the Farrin Firm had previously paid during the prosecution of the consolidated cases.

The Participation Agreement also empowers Lead Class Counsel to allocate attorneys' fees to any lawyers or law firms not parties to the Participation Agreement if Lead Class Counsel believes such lawyers or firms can and do provide services benefiting the class. Again, the guiding principle for the allocation of any fee award to such lawyers or law firms is the amount of work that such lawyer or law firm provides for the benefit of the Class.

Because the Participation Agreement embodies a fair and appropriate process for the allocation of the fees awarded by the Court, Class Counsel request this Court to approve its provisions and to direct any fee award made to Class Counsel generally to Lead Class Counsel for them to distribute in accordance with Class Counsel's fee sharing agreement.

IV. CONCLUSION

For the reasons set forth herein, Class Counsel ask that the Court approve a Fee Award of 7.4% of the Settlement Fund Fee Base. Class Counsel further ask that Common Benefit Fees be directed to Lead Class Counsel for allocation among Class Counsel in accordance with the Counsel Participation Agreement submitted to the Court.

Respectfully submitted,

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