IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

MARILYN KEEPSEAGLE, et al., Plaintiffs, v. TOM VILSACK, Secretary, United States Department of Agriculture, Defendant.	Civil Action No. 1:99CV03119 (EGS) Judge: Emmet G. Sullivan Magistrate Judge: Alan Kay

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' MOTION FOR AN AWARD OF ATTORNEYS' FEES AND EXPENSES

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I. INTRODUCTION AND RELIEF REQUESTED

On October 19, 2010, class counsel, on behalf of the class, entered into a landmark settlement of this action with the United States Department of Agriculture ("USDA").[1] The USDA has agreed to make far-reaching programmatic changes to its farm loan and farm loan servicing programs, and to fund a settlement worth $760 million.[2] This Settlement Agreement, achieved after nearly eleven years of hard-fought litigation, would not have been possible but for the skill, creativity, perseverance, and hard work of class counsel. More importantly, the Settlement will provide significant monetary compensation to class members and will improve the USDA's farm loan programs for Native American (and other minority) farmers and ranchers for years to come.

Class counsel worked vigorously and without compensation for over eleven years to achieve this result. Pursuant to Federal Rules of Civil Procedure 23(h) and 54(d)(2), Plaintiffs now respectfully move for an award of attorneys' fees and expenses in the amount of 8% of the $760 million common fund of monetary benefits to the class,[3] which

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[1] A slightly revised final Settlement Agreement was filed on November 1, 2010. Dkt. No. 576.

[2] Pursuant to the Settlement, the government will provide a cash fund of $680 million from which damages will be paid to eligible class members. In addition, the USDA will extinguish outstanding farm loan debt held by eligible class members up to a total of $80 million; as explained *infra* Section III.C, the full $80 million in debt relief is likely to be awarded. Combining the cash fund and debt relief, the Settlement makes $760 million in monetary relief available to the class. *See* Mem. of Law in Support of Motion for Preliminary Approval of Settlement and an Order Certifying Settlement Class and Approving Certain Provisions in Settlement Agreement at 1-2 (Oct. 22, 2010) Dkt. No. 571-1 (hereafter "Motion for Preliminary Approval").

[3] As explained *infra* Section III.C, the award is appropriately based on the full amount of the $680 cash compensation fund plus $80 million in debt relief made available to the class, even though any unclaimed benefits could be payable as *cy pres* contributions or revert to the government.

amounts to $60.8 million. This award will compensate class counsel for the fees and expenses they have incurred over the eleven years of litigating this action. Through November 30, 2010, class counsel have invested 41,088.21 hours in the case, amounting to $16,246,882.80 in fees, and have incurred $1,637,057.68 in expenses. Declaration of Joseph M. Sellers ("Sellers Decl.") at ¶ 20 (attached as Ex. 1). Class counsel will also undertake considerable work and incur substantial expenses in implementing the monetary and programmatic terms of the Settlement over the next five years and providing assistance to class members who file claims. Class counsel projects that future fees and expenses for such work will total approximately $8.65 million. The fee award here will be class counsel's only compensation for this prospective work.

Because this action resulted in the establishment of a settlement fund, attorneys' fees are properly awarded pursuant to the common fund doctrine, rather than pursuant to the fee shifting provisions of the Equal Credit Opportunity Act. 15 U.S.C.§ 1691e(d). The Supreme Court has long held that a "litigant or a lawyer who recovers a common fund for the benefit of persons other than himself or his client is entitled to a reasonable attorney's fee from the fund as a whole." *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980). As explained more fully below, case law clearly supports the award of fees under the common fund doctrine when a case results in the creation of a pool of funding for the benefit of class members, even where a successful plaintiff could have otherwise recovered attorneys' fees from the defendant pursuant to a fee shifting statute.

Here, an award at the top of the 4% to 8% range set forth in the Settlement Agreement is fully supported by the extraordinary results obtained as a consequence of class counsel's tremendous efforts. Class counsel secured substantial relief, including

$760 million in monetary relief for the class,[4] which amounts to 98% of the $776 million that Plaintiffs' expert computed to be the maximum amount of demonstrable economic losses sustained over the class period. In addition, the Settlement provides for significant programmatic improvements in the way the USDA provides farm loans to the approximately 61,000 Native Americans currently engaged in farming and ranching, as well as to the many who will enter the field in the future. The purpose of this relief is to permit as many Native Americans as possible to continue to farm and ranch while simultaneously nurturing the next generation of Native American farmers and ranchers. This Settlement was not achieved easily or quickly, but rather is the fruit of eleven years of hard-fought litigation including a vigorous contest on class certification, two appeals to the D.C. Circuit, and five years of robust discovery and motion practice on a number of other complex issues. Thus, as this memorandum will demonstrate, the fee request is amply justified in this case.

Notably, the percentage of the common fund sought here is less than half the percentage typically awarded in common fund cases. Courts within the D.C. Circuit have awarded fees from a common fund in amounts of 20% to 30% of the total fund, and have approved fees of up to 45% of the common fund. *See In re Dep't of Veterans Affairs Data Theft Litig.*, 653 F. Supp. 2d 58, 60 (D.D.C. 2009); *see also Wells v. Allstate Ins. Co.*, 557 F. Supp. 2d 1, 7-8 (D.D.C. 2008) (approving a fee of 45% and noting that it is

[4] This $760 million figure does not include interest on the cash portion of the monetary settlement. If the Court approves the Settlement, payment of the $680 million will occur after the time for appeals has passed. However, class counsel will disburse these funds only after the claims process is completed. In the interim, class counsel will deposit these funds in highly secure, interest-bearing accounts. These funds could accrue between $3 and $6 million in interest, which would provide additional monetary relief available for disbursement to the class after deduction of taxes on the interest and costs associated with setting up and administering the account.

"toward the high end of the range of percentages generally awarded"); *In re Vitamins Antitrust Litig.*, 2001 U.S. Dist. LEXIS 25067, 58-60 (D.D.C. July 13, 2001) (citing cases). Even in mega-fund cases where the fund is comparable to that here, "fees of fifteen percent are common." *In re Lorazepam & Clorazepate Antitrust Litig.*, 2003 U.S. Dist. LEXIS 12344 at *26 (D.D.C. June 16, 2003) (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, 443-44 (S.D. Tex. 1999) (25% of more than $190 million)*; In re NASDAQ Market-Makers Antitrust Litig*., 187 F.R.D. 465 (S.D.N.Y. 1998) (14% of $1 billion); *In re Combustion, Inc.*, 968 F. Supp. 1116, 1139-40 (W.D. La. 1997) (36% of $127 million).

Members of the class will have ample opportunity to comment on the award of attorneys' fees and costs that Plaintiffs seek, should they wish to do so. In November, notice of the requested fee award range was sent to potential class members and included in the notice published in media outlets targeting Native American farmers and ranchers across the country. Additionally, class counsel have attended several meetings with class members and have other such meetings planned in the near future. The amount of attorneys' fees and costs being sought has been and will continue to be disclosed at each event.

Finally, as is detailed in Section III.D. below, the requested award is supported by the seven factors generally considered in assessing the reasonableness of a common fund fee award: (1) the size of the fund created and the number of persons benefitted; (2) the presence or absence of substantial objections by members of the class to the settlement terms and/or attorneys' fees requested; (3) the skill and efficiency of the attorneys

involved; (4) the complexity and duration of the litigation; (5) the risk of nonpayment; (6) the amount of time devoted to the case by plaintiffs' counsel; and (7) the awards in similar cases. *Wells*, 557 F. Supp. 2d at 6-7. For all of these reasons, the requested award of attorneys' fees and costs should be granted.

II. BACKGROUND

A. The Litigation

On November 24, 1999, George Keepseagle, Luther Crasco, John Fredericks, Jr., Gene Cadotte, and Basil Alkire,[5] individually and on behalf of all others similarly situated ("Plaintiffs"), filed suit against the USDA under *inter alia*, the Equal Credit Opportunity Act, 15 U.S.C. §§ 1691-1691f, alleging that the USDA discriminated against Native Americans in its Farm Loan Program, causing them substantial economic losses. Complaint ¶¶ 136-39, Dkt. No. 1; *see also* Eighth Amended Complaint ¶¶ 134-36, Dkt. No. 460. Plaintiffs alleged discrimination under both disparate treatment and disparate impact theories of liability, and alleged that discrimination took various forms, including: (1) outright denials of farm loans and loan servicing; (2) widespread failure to provide Native American farmers the assistance in preparing farm loan applications available to white farmers, and recognized by the USDA recognized as necessary; (3) unjustified delays in approval of loans; and (4) provision of loans that were smaller than those applied for or contained more onerous conditions than loans made to similarly situated white farmers. *See, e.g.*, Eighth Amended Complaint ¶¶ 51-85, Dkt. No. 460.

[5] Since the filing of the complaint, Luther Crasco, John Fredericks, Jr., and Basil Alkire have died, and George Keepseagle stepped down from the representative role for health reasons. Additionally, Claryca and Keith Mandan became Class Representatives in 2000, and Marilyn Keepseagle and Porter Holder became Class Representatives in 2006.

The USDA denied the allegations and moved for judgment on the pleadings or, in the alternative, summary judgment, arguing that plaintiffs' claims were time-barred, barred by res judicata, or not cognizable under governing law. *See* Dkt. Nos. 39, 235, 449. As the case moved forward, the USDA continued to contest the action vigorously at every stage, renewing these and other defenses. In total, the parties filed over 150 motions during the course of the litigation.

One of the hardest-fought issues was whether the suit could proceed as a class action, and if so, what relief could be pursued by the class. In 2001, two years after the suit was filed, the Court certified a class under Rule 23(b)(2), permitting it to seek declaratory and injunctive relief and defining the class as:

> All Native American farmers and ranchers who (1) farmed or ranched between January 1, 1981 and November 24, 1999; (2) applied to the USDA for participation in a farm program during that period; and (3) filed a discrimination complaint with the USDA either individually or through a representative during the time period.

Keepseagle v. Veneman, 2001 WL 34676944 at *15 (D.D.C. Dec. 12, 2001). At that time, the Court deferred consideration of Plaintiffs' request to certify a class for monetary relief until the nature of the relief being sought and its compatibility with class certification could be developed in the record. *Id.* at *14

The Secretary twice sought review in the Court of Appeals of this Court's class certification decision. The USDA first sought interlocutory review of class certification, which was denied by the D.C. Circuit in October 2002, after full briefing and oral argument. *In re Veneman*, 309 F.3d 789 (D.C. Cir. 2002). The Secretary later petitioned for a writ of mandamus and sought to stay all proceedings in this action. Following briefing, the D.C. Circuit again denied the USDA's request. Order Denying Writ of

Mandamus, No. 04-5031 (D.C. Cir. Mar. 3, 2004); *see* Dkt. No. 218. The parties subsequently plunged into five years of extensive discovery, which is described below. In November 2005, this Court denied without prejudice Plaintiffs' request to permit the class to pursue claims for damages, advising the parties that it would entertain such a request upon conclusion of discovery. *See Keepseagle v. Johanns*, 236 F.R.D. 1, 1-2 (D.D.C. 2006). The Court also rejected the USDA's request to reconsider the previous decision to certify a class in light of denials of certification in similar suits against the USDA. *Id.* at 3-4 n.1.

Discovery was overseen by this Court with the assistance of Magistrate Judge Kay. The temporal scope of the class claims, spanning more than two decades, and the geographic scope of the evidence implicated by the nationwide claims, inevitably led to lengthy and extensive discovery. Class counsel traveled to 13 states to conduct 8 expert depositions, more than 40 depositions of Plaintiffs' non-expert witnesses, and more than 50 depositions of the USDA's non-expert and Rule 30(b)(6) witnesses. *Id.* Additionally, counsel interviewed nearly 1000 potential class members to build their case. *Id.* Ultimately, the parties exchanged and reviewed more than two million pages of hard copy and electronic documents and produced ten reports from experts in the fields of social psychology, sociology, agricultural economics, statistics, and USDA's farm loan programming. *See* Sellers Decl. at ¶ 3 (Ex. 1). Moreover, the parties' attempts to define the appropriate contours of discovery on nationwide claims stretching back over twenty-five years were hard-fought, marked by several motions to compel and repeated attempts by the USDA to stay proceedings. The parties engaged in particularly extensive briefing on the questions of whether Plaintiffs should be compelled to produce far-reaching

personal financial data covering the twenty-five year period and whether the USDA could withhold documents under the deliberative process privilege. *See, e.g.*, Dkt. Nos. 372, 422, 437, 472.

In addition to motion practice devoted to the scope and nature of discovery permitted in this action, the parties continued to vigorously contest a host of issues fundamental to the litigation. One such issue concerned whether previously filed oral complaints were sufficient to allow otherwise time-barred ECOA complaints under 7 U.S.C. § 2279, known as § 741. The USDA moved for judgment as a matter of law on Plaintiffs' ECOA complaints, arguing that the pleadings did not allege that Plaintiffs had filed complaints within the meaning of § 741. The parties briefed the issue extensively and produced evidence of the USDA's historical approach to oral complaints; the Court ultimately held that oral complaints were sufficient to support jurisdiction. *See* Dkt. Nos. 235, 246, 275. Another dispute concerned the USDA's failure to put a litigation hold in place until late 2008. In light of the litigation hold delay and the widespread and longstanding failure of the USDA to create and maintain records of civil rights complaints, Plaintiffs were concerned that they would be unable to prove class membership without the key documents that properly should have been in the USDA's possession. With the Court's approval, Plaintiffs sought additional discovery from the USDA about its recordkeeping problems and the litigation hold. Having concluded that the USDA had failed to create and maintain vast quantities of key documents, on August 18, 2009, Plaintiffs filed a motion asking the Court to remedy the USDA's evidentiary failures by issuing an order allowing Plaintiffs to establish class membership through alternative means. Dkt. Nos. 528, 529. The Secretary opposed the motion,

which is still pending. Plaintiffs then renewed their motion for class certification on the monetary claims, moving on December 4, 2009, to certify a class to assert claims for damages under Rule 23(b)(3). Dkt. No. 551.

That same day, the Court stayed proceedings to allow the parties to explore the possibility of settlement. Following a decade of extensive discovery, substantial briefing and motion practice, and two appeals to the D.C. Circuit, the parties began settlement negotiations. These negotiations spanned another ten months, during which class counsel engaged in myriad meetings, telephone conferences, and other communications with the USDA and with the named Plaintiffs, with whom they consulted regularly, before the parties reached a settlement of this action hours before the parties appeared before the Court on October 19, 2010 to announce the Settlement. By that point, the docket listed nearly 600 entries.

B. The Settlement Agreement

The Settlement Agreement provides far-reaching and unprecedented benefits to past, current, and future Native American farmers and ranchers, and represents a major achievement for the class. Dkt. No. 576. The Settlement provides class members with substantial monetary relief, the total value of which is $760 million, to address the harm they suffered from the USDA's past practices. It also provides programmatic relief to improve the responsiveness of the USDA's farm loan program to the needs of Native Americans and help ensure that Native American farmers and ranchers will have equal and meaningful access to farm loan program benefits.

1. Monetary Relief

The monetary relief secured through the Settlement includes several components. First, the Settlement creates a $680 million fund, from which damages may be awarded to

compensate class members for discrimination they may have suffered since 1981. Even apart from the $80 million in debt relief, discussed below, the $680 million in monetary relief represents 88% of the $776 million that Plaintiffs' expert Patrick O'Brien, a 27-year veteran of the USDA's Economic Research Service, calculated as the maximum amount of quantifiable net economic losses that Native Americans suffered from 1981 through 2007. *See* Motion for Class Certification, Ex. 2, Dkt. No. 551-4 (Dec. 4, 2009) at 6-7. Individual class members will be able to receive substantial monetary relief from this fund, and may claim their awards through one of two tracks. Successful claimants filing under Track A, which employs a "substantial evidence" standard in assessing claims, will receive presumptive awards in amounts up to $50,000, depending upon the number of successful claims. These claimants will receive an additional monetary benefit in the amount equal to 25% of their award that will be paid to the IRS to reduce or eliminate taxes on the award. Successful claimants filing under Track B, which employs a "preponderance of the evidence" standard, will receive payment of their actual damages up to $250,000, subject to an overall cap of $50 million. In the event any portion of the damages fund goes unclaimed, it will be disbursed to *cy pres* beneficiaries, designated by class counsel and approved by the Court, for the benefit of the Native American farming and ranching community.

Second, the Settlement makes available an additional $80 million to the class for debt relief. Every claimant who carries farm loan debt and receives a damage award through either Track A or Track B will be eligible to receive both a debt relief award and a debt relief tax award. Based on an analysis of the outstanding loan debt of Native American farmers and ranchers, Plaintiffs' expert Pat O'Brien predicts the full $80

million in relief is likely to be claimed. Declaration of Pat O'Brien ("O'Brien Decl.") at ¶¶ 3-8 (attached as Ex. 2). If the $80 million allocated for debt relief does not extinguish *all* outstanding farm loan debt owed by the class, the USDA will offer loan servicing to every class member with any remaining outstanding debt. The loan servicing options include a reduction in the amount of outstanding federal loan debt, a reduction of the interest rate on such debt, or several other alternatives. Furthermore, the USDA has agreed to suspend through the conclusion of the claims process all efforts to accelerate, foreclose, use administrative offsets, or refer offsets to the U.S. Treasury on any FSA Farm Program loan made to Native American farmers or ranchers. In addition, the USDA will not dispose of any foreclosed property formerly owned by such individuals.

Finally, while the award of attorneys' fees and costs will be paid from the common fund made available to the class, the costs for providing notice to potential class members, and for administering the claims process, will be paid separately by the USDA, which has agreed to pay up to an additional $20 million to cover such administrative costs.

2. Programmatic Relief

Although there have been several suits brought by women and minority farmers against the USDA over the past 13 years, this is the first to secure forward-looking programmatic relief aimed at improving the responsiveness of the farm loan programs to the needs of Native Americans and other "socially disadvantaged farmers," as the USDA refers to this population. The USDA has agreed to make numerous changes that will improve the delivery of farm loan programs to Native Americans, help keep Native Americans on their land, and nurture future generations of Native American farmers and ranchers. These changes will provide critically important benefits to what the United

States Census has counted to be over 61,000 Native Americans currently engaged in farming and ranching,[6] as well as to future generations of Native American farmers and ranchers. Some of the key elements of the programmatic relief are summarized below.

First, in recognition of the importance of creating a forum for Native American farmers and ranchers to raise and resolve with the USDA any ongoing concerns about the delivery of farm loan program services, the Settlement establishes a new Federal Advisory Committee. Known as the Council for Native American Farming and Ranching, this 15-member Council will consist of 11 Native American leaders and advocates and four senior USDA officials. The Council will focus on issues related to the participation of Native American farmers and ranchers in USDA farm loan programs and will provide guidance to help eliminate barriers to greater participation in these programs. It will also serve as a forum through which leaders of the USDA and the Native American community can address problems in the delivery of farm loan services and develop strategies for enhancing delivery of these services to Native Americans.

Second, the Settlement provides for the appointment of an Ombudsperson at the USDA to address the concerns of *all* socially disadvantaged farmers, including Native American farmers and ranchers. The Ombudsperson will report the concerns of minority farmers to the new Council on a regular basis.

Third, the Settlement requires the USDA to undertake a number of new and unprecedented initiatives that should dramatically improve the delivery of farm loan services to Native Americans. Subject to the availability of funding, the USDA will, for

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[6] *See* Census of Agriculture, Table 55, *available at* http://www.agcensus.2007/Full_Report/Volume_1,_ Chapter_1_US/st99_1_055_055.pdf.

the first time, establish farm loan sub-offices on Indian Reservations at Tribal Headquarters. These sub-offices will provide, *inter alia*, technical assistance and outreach to Native Americans. The managers of these sub-offices will be required to demonstrate an understanding of the culture of the tribes where the offices are located. In addition, the USDA will offer instruction to Native Americans at 10 to 15 regional venues on financial, business, and marketing planning skills, basic and advanced business management skills training, and instruction on leasing requirements. In connection with this commitment, the USDA has agreed to create and distribute a customer's guide to assist applicants for farm loans and loan servicing to navigate the complex process for securing these important benefits.

Fourth, the USDA will undertake a comprehensive review of its regulations, handbooks, instructions, and administrative notices, in consultation with Class Counsel, and will make changes necessary to ensure these rules are responsive to the unique features of Native American culture.

Fifth, the Settlement requires that the USDA regularly collect and report data comparing loans awarded and sought by Native Americans to the Council, the Ombudsperson, and Class Counsel. These reports will permit detection of any disparities that may arise and aid in the formulation of measures to address them. The data will be reported on a county by county basis in the 15 states with the highest concentration of Native American farmers and ranchers, and on a statewide basis elsewhere. The Council, Class Counsel, or the Ombudsmen may ask the USDA Inspector General to examine any loan disparities that they believe warrant such attention.

Sixth, the USDA will take unprecedented action to make credit available to Native Americans who otherwise, because of past financial difficulties, would likely encounter difficulty obtaining credit from either the USDA or commercial banks. These measures include a commitment that prior debt settlements with the USDA, which would be eligible for debt relief under the Settlement Agreement, will not adversely affect the debtor's ability to obtain credit from the USDA in the future. These provisions will ensure that debt relief received by class members, either in the past or through the Settlement, will not affect their ability to secure credit in the future.

C. The Efforts of Class Counsel

The benefits created by this Settlement are the product of extensive efforts by class counsel spanning 11 years. These efforts are as yet wholly uncompensated: counsel agreed to represent the class on terms under which their right to compensation and the amount of compensation are dependent entirely upon the outcome of the litigation and on the extent of any success achieved. As a consequence, Plaintiffs' counsel have yet to receive any payment for their time or reimbursement of the considerable litigation expenses they advanced on behalf of the class. Nor are class counsel finished with the work they will perform on behalf of the class. These efforts will continue for several more years. First, class counsel will devote their efforts primarily to assisting class members with preparing and filing claims for monetary relief available under the Settlement Agreement. In addition to work class counsel will perform in this regard, they are also in the process of hiring and supervising a team of several dozen paralegals and attorneys who will provide assistance personally to class members across the country who are participating in the claims process. Second, class counsel will oversee implementation of the programmatic elements of the Settlement and

monitor the USDA's compliance with the terms of the Settlement Agreement over the five-year lifetime of the agreement.

1. Class Counsel's Work to Date

The volume of work already performed on behalf of the class is substantial. To date, class counsel have expended more than 40,000 hours in their work in this case. *See* Decl. of Sellers at ¶ 20 (Ex. 1); *see also* Declaration of David J. Frantz ("Frantz Decl.") (attached as Ex. 3); Declaration of Phillip L. Fraas ("Fraas Decl.") (attached as Ex. 4); Declaration of Paul M. Smith ("Smith Decl.") (attached as Ex. 5); Declaration of Sarah M. Vogel ("Vogel Decl.") (attached as Ex. 6); and Declaration of Anurag Varma ("Varma Decl.") (attached as Ex. 7). At current hourly rates, the time already expended by class counsel in representing the class amounts to $16,246,882.80.[7] Decl. of Sellers at ¶ 20 (Ex. 1). In addition, class counsel have advanced $1,637,057.68 in expenses for expert witness fees, travel, transcripts, copying, and similar such costs. *Id.* The records of the time expended by class counsel in this action, maintained contemporaneously with the work performed, are voluminous and contain confidential and privileged information. Consistent with established practice in common fund cases, class counsel have summarized the records in their supporting declarations, attached as Exhibits 1, 3-7, and, should the Court request, they will make the records available for *in camera* review. *See*

[7] Where , as here, counsel receive payment only at the conclusion of litigation, use of current hourly rates to calculate the lodestar is appropriate to account for the delay in payment, as is an award of interest on expenses advanced by counsel. *See, e.g., Copeland v. Marshall,* 641 F.2d 880, 893 n.23 (D.C. Cir. 1980) (en banc) (noting that lodestar may be "based on present hourly rates, rather than the lesser rates applicable to the time period in which the services were rendered," to account for the delay in payment); *Fischel v. Equitable Life Assur. Soc'y of U.S.,* 307 F.3d 997, 1010 (9th Cir. 2002) (district court abused its discretion where it failed to compensate for delay in payment by using current hourly rates or adding interest to award of old hourly rates).

In re Ins. Brokerage Antitrust Litig., 579 F.3d 241, 284 (3d Cir. 2009) (summaries of time records sufficient in common fund case because Court used information only to cross-check reasonableness of fee award); *Gunter v. Ridgewood Energy Corp.*, 223 F.3d 190, 200 (3d Cir. 2000) (appropriate for counsel to wait to submit detailed time records until Court requested them).

2. Prospective Work

The work of class counsel is far from over. Although the litigation has concluded (assuming the Court approves the Settlement and the time for appeal expires without incident), class counsel will continue to provide service to the class through assistance with the claims process and implementation and monitoring of the programmatic relief through an agreement in effect for five years.

Class counsel's post-settlement obligations are manifold. First, counsel must provide the class with notice of the Settlement Agreement. Counsel has undertaken an ambitious notice strategy intended to inform and educate Native American farmers and ranchers of the Settlement, and to avoid some of the perceived problems with communication of the *Pigford* settlement to that class of farmers. Class counsel have already begun traveling around the country to numerous meetings with Native American farmers and ranchers to explain the terms of the Settlement Agreement and claims process to them. *See* Status Report (Dec. 15, 2010), Dkt. No. 580 (informing the court that class counsel had or would soon travel to Spokane, WA, Albuquerque, NM, Las Vegas, NV, Bismarck, ND, and Laughlin, NV to speak with potential class members about the Settlement). Second, counsel will work with the Claims Administrator and Neutrals to ensure that both claims tracks are properly established and implemented according to the terms of the Settlement.

Third, and most significantly, class counsel have agreed to provide assistance, without additional charge, to class members who elect to submit claims under Track A. Class members are free to secure individual counsel of their choice to assist with their Track A claims, paying such counsel a fee of up to 2% of their fee award; however, class counsel has agreed to provide such assistance at no charge to the claimant. To ensure that appropriate assistance is available to class members across the country seeking to submit claims, class counsel project they will hire, train, supervise, and equip approximately 56 employees over the next year. Sellers Decl. at ¶ 21 (Ex. 1). Using conservative billing rates, class counsel estimate that they will incur approximately $6.5 million in additional fees for this work. *Id.*

Fourth, class counsel have a duty to answer class member questions and provide class members with information regarding the status of their claims and the distribution of funds. Fulfilling this responsibility will likely require significant time and resources.

Finally, class counsel will be involved with, and monitor, implementation of the programmatic relief provided by the Settlement Agreement. Because the Settlement Agreement provides for the creation of unique new programs and entities, such as the Council for Native American Farming and Ranching, class counsel foresee a substantial role in assuring that these new developments are carefully implemented to achieve the goals embodied by the Settlement. For example, counsel will be involved in helping to educate and recruit persons to serve on the new Council, and will consult with the Office of Tribal Relations regarding USDA regulations, handbooks, instructions, and administrative notices to ensure they are responsive to the unique features of Native American Culture. Since the Settlement Agreement was preliminarily approved in

November, class counsel have already devoted substantial time to proposing programmatic changes and meeting with USDA officials to work through these proposals. Sellers Decl. at ¶ 21 (Ex. 1).

Class counsel's responsibilities will likely be most significant in the first year of the settlement term as they educate and assist class members with the claims process and work with the USDA in undertaking programmatic changes. *Id.* Counsel project that they will devote an average of 20 hours a week for 50 weeks in 2011; at an average billing rate of $500, this amounts to $500,000 in class counsel fees. Counsel project that they will incur approximately $150,000 in additional fees through the remaining four years of the settlement term. *Id.* These fees are in addition to the projected $6.5 million that counsel will incur for the work of new employees hired to assist class members with the claims process. Finally, counsel project that costs for travel, equipping the 56 contract employees, and other expenses will total approximately $1.5 million. *Id.* In sum, counsel predict incurring an additional $7.15 million in fees and $1.5 million in costs, for which their only reimbursement will come from the award sought here. *Id.*

III. ARGUMENT

A. The "Percentage-of-the-Fund" Method Is the Appropriate Mechanism for Determining Fees in this Case.

As the parties negotiated an award of attorneys' fees and costs payable from the common fund created by the Settlement Agreement, the amount of the award, as the D.C. Circuit has held, is properly determined using the percentage-of-the-fund method. *Swedish Hosp. Corp. v. Shalala*, 1 F.3d 1261, 1271 (D.C. Cir. 1993) ("[A] percentage-of-the-fund method is the appropriate mechanism for determining the attorney fees award in common fund cases."); *see also Democratic Cent. Comm. of Dist. of Columbia v.*

Washington Metro. Area Transit Comm'n, 3 F.3d 1568, 1573 (D.C. Cir. 1993). "It is by now well established that 'a litigant or lawyer who recovers a common fund for the benefit of persons other than himself or his client is entitled a reasonable attorney's fee from the fund as a whole.'" *Swedish Hosp. Corp.*, 1 F.3d at 1265 (quoting *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980)). As the D.C. Circuit has explained, where a common fund exists, fees should be determined by the percentage-of-the-fund method, and not based on the lodestar. *Swedish Hosp. Corp.*, 1 F.3d at 1268-70.

The percentage-of-the fund method applies even though attorneys' fees could have been awarded pursuant to the fee-shifting provisions of the Equal Credit Opportunity Act, 15 U.S.C. § 1691e(d), if the class had prevailed at trial. Courts regularly award attorneys' fees in settlements using the common fund method, even where a fee-shifting statute is available. For example, in a class action alleging racial discrimination in employment, which is covered by the fee-shifting provisions of 42 U.S.C. § 1988, the Ninth Circuit concluded "that there is no preclusion on recovery of common fund fees where a fee-shifting statute applies." *Staton v. Boeing Co.*, 327 F.3d 938, 967 (9th Cir. 2003); *see also Suffolk v. Long Island Lighting Co.*, 907 F.2d 1295, 1327 (2d Cir. 1990) (awarding fees using common fund rather than fee-shifting provision of the RICO Act); *Nilsen v. York County*, 400 F. Supp. 2d 266, 271 n.12 (D. Me. 2005) (reaching same conclusion in § 1983 action); Third Circuit Task Force, *Court Awarded Attorney Fees*, 108 F.R.D. 237, 255-56 (1985) (explaining that common fund method should be used when a common fund is created even when statutory fee-shifting is

available).[8] The Third and Seventh Circuits similarly concluded that a fee award could be calculated using the common fund method, notwithstanding that the fee-shifting provisions of ERISA, 11 U.S.C. § 1132(g)(1), applied to the underlying suit. *See Brytus v. Spang & Co.*, 203 F.3d 238, 246-47 (3d Cir. 2000); *Florin v. Nationsbank of Georgia, N.A.*, 34 F.3d 560, 564 (7th Cir. 1994) ("Common fund principles properly control a case which is initiated under a statute with a fee-shifting provision but is settled with the creation of a common fund."); *see also Central States Southeast & Southwest Areas Health & Welfare Fund v. Merck-Medco Managed Care, L.L.C.*, 504 F.3d 229, 249-50 (2d Cir. 2007) (affirming award of fees as a percentage of the common fund in ERISA case).[9]

The courts, including the Supreme Court, have long distinguished between common fund cases—where the fee is a percentage of the fund—and fee-shifting cases, where the fee is based on the lodestar. *See Swedish Hosp. Corp.*, 1 F.3d at 1268; *Blum v. Stenson*, 465 U.S. 886, 900 n.16 (1984). As the D.C. Circuit has explained, the common fund and lodestar methods for awarding fees serve different purposes and rationales: the

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[8] Courts have also awarded attorneys' fees as a percentage of a common fund in cases under ECOA. *See Smith v. DaimlerChrysler North America LLC*, No. 00-cv-06003 (D.N.J. Oct. 24, 2005) (Dkt. No. 150) (attached as Ex. 8) (approving $17.5 million fee award, which the court estimated to be 14% to 20% of the value of the injunctive relief secured on behalf of the class, under common fund doctrine in ECOA action); *Cason v. Nissan Motor Acceptance Corp.*, No. 98-cv-223 (M.D. Tenn. Mar. 27, 2003) (Dkt. No. 590, 605) (margin order in ECOA action awarding $6 million in attorneys' fees, which represents 15% of the value of the common benefit obtained for the class) (margin order and memorandum in support of order attached as Ex. 9).

[9] Although the D.C. Circuit has not directly addressed the question, in *Swedish Hospital* it cited with approval a number of securities and antitrust cases where the courts applied the percentage-of-the-fund approach, even though fee-shifting statutes were available in those cases. *Swedish Hosp. Corp.*, 1 F.3d at 1367 (citing *In re Workers Comp. Ins. Antitrust Litig.*, 77 F. Supp. 284 (D. Minn. 1991); *In re SmithKline Beeckman Corp. Sec. Litig.*, 751 F. Supp. 525 (E.D. Pa. 1990); and *In re Activision Sec. Litig.*, 723 F. Supp. 1373, 1377-78 (N.D. Cal. 1989)).

common fund method approximates the contingent fee arrangements that compensate attorneys in the market and aligns the interests of the class and counsel in achieving success, while the lodestar method used in fee-shifting cases is meant to ensure that reliable 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 nonmonetary. *Swedish Hosp. Corp.*, 1 F.3d at 1268-70. Tying fees from common funds to the lodestar amount 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. Therefore, the limitations on the lodestar applied by the Supreme Court in fee-shifting cases do not apply to common fund cases, which are properly treated as a different animal altogether. *See, e.g.*, *Swedish Hosp. Corp.*, 1 F.3d at 1269 ("We disagree with the proposition that *Burlington* and *King* mandate an unenhanced lodestar approach in common fund cases."); *see also In re Washington Public Power Supply Sys. Sec. Litig.*, 19 F.3d 1291, 1301 (9th Cir. 1994) (holding that the district court abused its discretion in refusing to award a multiplier in common fund case). For these reasons, the Supreme Court's recent decision in *Perdue v. Kenny A*, 130 S. Ct. 1662 (2010), which addressed limitations on the calculation of attorneys' lodestar fees under fee-shifting statutes, is inapplicable.[10] *See, e.g.*, *Klein v. O'Neal, Inc.*, 705 F. Supp. 2d 632, 683 (N.D. Tex. 2010) ("[T]he Supreme Court did not purport to overrule

[10] *Perdue* held that the amount of attorneys' fees available under federal fee-shifting statutes, such as 42 U.S.C. § 1988, is presumptively the lodestar amount, 130 S. Ct. at 1673, and concluded that enhancements of the lodestar amount in federal fee-shifting cases should be considered only in "rare circumstances." *Id.*

the reasoning or results of common fund fee awards. . . . *Perdue* therefore neither requires nor suggests that this court reconsider [its prior percent of the fund award in a common fund case]."); *Dewey v. Volkswagen of Am.*, --- F. Supp. 2d ----, 2010 U.S. Dist. LEXIS 79304, at *27, *45 (D.N.J. July 30, 2010) (noting that post-*Perdue*, lodestar multipliers are rarely permitted in fee-shifting cases, but that in common fund cases where awards are based on percentage of the fund, multipliers are often appropriate, even where fees might alternately be available under a fee-shifting statute); *Lambrecht v. Taurel*, No. 08-cv-68, 2010 U.S. Dist. LEXIS 75633 at *8-10 (S.D. Ind. June 8, 2010) (concluding that *Perdue* did not preclude award of a multiplier in common fund case); *Navarro v. Servisair*, No. 08-cv-02716, 2010 U.S. Dist. LEXIS 41081 at *5-12 (N.D. Cal. Apr. 27, 2010) (citing *Perdue* in the context of lodestar multipliers, and awarding a multiplier in common fund case after noting that the "Ninth Circuit has expressed general approval of multipliers between 1.0 and 4.0 in common fund cases").[11]

[11] Three district courts in the Sixth Circuit have suggested that *Perdue* counsels against large multipliers even in common fund cases, as under Sixth Circuit precedent no firm distinction exists between fee analyses under the common fund and lodestar methods for computing fees. *See Van Horn v. Nationwide Prop. & Cas. Ins. Co.*, No. 08-cv-605, 2010 U.S. Dist. LEXIS 42357 at *16-*21 (N.D. Ohio Apr. 30, 2010) (suggesting that *Perdue* provides "persuasive caution" that multipliers should be used infrequently but nonetheless awarding 1.2 times lodestar for a recovery that the court did *not* believe was "outstanding"); *Lonardo v. Travelers Indem. Co.*, 706 F. Supp. 2d 766, 816 (N.D. Ohio 2010) (noting that the objector to the settlement seeking fees conceded that *Perdue* precluded the enhancement of the lodestar amount); *Eppard v. ViaQuest, Inc.*, No. 09-cv-234, 2010 U.S. Dist. LEXIS 122769 at *6-10 (S.D. Ohio Nov. 2, 2010) (concluding that the settlement at issue did not create a common fund, but continuing that under Sixth Circuit precedent, *Perdue* counseled in favor of awarding the lodestar amount regardless). Those decisions conflict with the binding precedent of this Circuit, which clearly distinguish the two approaches.

B. The Fee Award Sought by Counsel Is at the Lower End of the Range Applied in Common Fund Cases.

At 8% of the monetary relief benefiting the class, the award of attorneys' fees and costs sought here falls well 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 Dept of Veterans Affairs Data Theft Litig.*, 653 F. Supp. 2d at 61 ("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, 1050 n.4 (9th Cir. 2002) (summarizing fees awarded in 34 common fund settlements from 1996-2001); *id.* at 1047-48 (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); *see also In re Lorazepam*, 2003 U.S. Dist. LEXIS 12344, at *33 (30% fee award); *In re Baan Co. Sec. Litig.*, 288 F. Supp. 2d 14, 17 (D.D.C. 2003) (28% fee award). Courts in the D.C. 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) (45% fee award). In view of the typical benchmarks, class counsel's request of an award totaling 8% of the settlement fund is conservative.

The award of attorneys' fees and expenses sought herein represents 2.3 times the total of counsel's actual past fees and expenses and projected additional fees and expenses through administration of the Settlement. This multiplier is well within the range approved by courts in the D.C. Circuit and other circuits. The D.C. Circuit, for

example, approved a multiplier of 3.2 in *Swedish Hosp. Corp.*, 1 F.3d at 1263, 1272, and multipliers of up to 4 are common throughout the federal courts. *See, e.g., In re Lorazepam*, 2003 U.S. Dist. LEXIS 12344, at *32 (observing that "multiples ranging up to four are frequently awarded in common fund cases"); *Wal-Mart Stores v. VISA USA, Inc.*, 396 F.3d 96, 123 (2d Cir. 2005) (noting that "multipliers of between 3 and 4.5 have become common"); *Vizcaino*, 290 F.3d at 1051 & n.6 (approving a multiplier of 3.65 and noting that it fell within typical range for common fund cases). Further, courts have awarded fees representing significantly higher multipliers in cases with large recoveries comparable to the monetary relief obtained here. *See, e.g., In re UnitedHealth Group Inc. PLSRA Litig.*, 643 F. Supp. 2d 1094, 1106 (D. Minn. 2009) (6.5 multiplier); *In re Enron Corp. Sec. Litig.*, 586 F. Supp. 2d 732, 791 (S.D. Tex. 2008) (5.2 multiplier); *In re Cardinal Health, Inc. Sec. Litig.*, 528 F. Supp. 2d 752, 770 (S.D. Ohio 2007) (6 multiplier); *In re WorldCom, Inc. Sec. Litig.*, 388 F. Supp. 2d 319, 359 (S.D.N.Y. 2005) (4 multiplier); *In re NASDAQ Market-Makers Antitrust Litig.*, 187 F.R.D. 465, 488-89 (S.D.N.Y. 1998) (3.97 multiplier).

C. The Award of Attorneys' Fees and Costs Should be Based on the Full Amount of Monetary Relief Awardable to the Class.

Pursuant to the Settlement Agreement, counsel may seek a fee of between 4% and 8% of the full $760 million in monetary relief secured for the class, comprising a cash fund in the amount of $680 million and debt relief, the total amount of which may not exceed $80 million. Settlement Agreement at XV.B, Dkt. No. 576. As this Court has recognized, common fund awards are typically based on the total relief made available to the class, rather than on the amount ultimately claimed. *See In re Dept of Veterans Affairs Data Theft Litig.*, 653 F. Supp. 2d at 60 (noting that "the national trend, and the trend in

this Circuit, is toward awards that represent a percentage of the total common fund" rather than of the amount actually claimed). This approach ensures that counsel are compensated for the full monetary benefit made available to the class through their efforts. As the Supreme Court explained in upholding an award of attorneys' fees in *Boeing Co. v. Van Gemert*, the award of fees should be based on the total fund created, rather than the amount actually claimed, because class members' "right to share the harvest of the lawsuit . . . whether or not they exercise it, is a benefit in the fund created by the efforts of the class representatives and their counsel." 444 U.S. 472, 480 (1980); *see also Masters v. Wilhelmina Model Agency, Inc.*, 473 F.3d 423, 437 (2d Cir. 2007) (holding that because "[t]he entire Fund, and not some portion thereof, is created through the efforts of counsel at the instigation of the entire class, . . . [a]n allocation of fees by percentage should therefore be awarded on the basis of the total funds made available, whether claimed or not."); *Williams v. MGM-Pathe Cmmcn's. Co.*, 129 F.3d 1026, 1027 (9th Cir. 1997) (holding that the district court abused its discretion by basing the fee on the amount class members claimed against the fund rather than on a percentage of the entire fund). As a result, the fee award sought here is properly based on the total monetary relief made available for the class, which consists of a $680 million cash fund from which damages awards will be paid, and $80 million payable as debt relief for class members. *See, e.g.*, *Dewey*, --- F. Supp. 2d. ---, 2010 U.S. Dist. LEXIS 79304, at *108 (noting that the percentage of the fund method is appropriate "where the economic reality of the settlement is akin to a common fund"). The possibility that some portion of this monetary relief either may be disbursed to *cy pres* beneficiaries if the claims for damages do not deplete that fund, or revert to the United States if the full fund for debt relief is not

depleted, does not diminish the economic value of the relief available to the class and, therefore, should not affect the amount of attorneys' fees awarded. *See Waters v. Int'l Precious Metals Corp.*, 190 F.3d 1291, 1298 (11th Cir. 1999) (affirming award of fee based on percentage of total $40 million made available to class as cash payments and promissory notes, though only $6.5 million was actually claimed and amounts not claimed or paid as fees reverted to defendant); *Williams*, 129 F.3d at 1027 (holding that fee should be a percentage of the full settlement amount, even though the unclaimed portion reverted to defendant).

As a practical matter, however, the full economic value of the Settlement will likely inure to the benefit of the class. First, in the event that any portion of the $680 million fund is not exhausted by the end of the claims period, any remaining balance would, subject to review and approval by the Court, be payable as *cy pres* awards for the benefit of all Native American farmers and ranchers. Second, while the Agreement provides that any amount of the $80 million in debt relief funds that is unclaimed will revert to the United States, such an event is unlikely. *See* O'Brien Decl. at ¶¶ 7-8 (Ex. 2). Agricultural economist Pat O'Brien estimates that $193 million in FSA loan debt is owed by Native Americans, and based on analysis of when the underlying loans were obtained in relation to the class period, he predicts that the class would likely claim the entire $80 million in available debt relief. *Id.* at ¶¶ 3-8.

D. The Requested Fee Award Is More than Justified by the Efforts and Risks Undertaken by Counsel and the Extraordinary Results Achieved in this Case.

The efforts of class counsel and the outstanding result for the class fully support the requested fee award. In general, this Court looks to seven factors in determining the reasonableness of a requested fee award based on the percentage-of-the-fund method:

(1) the size of the fund created and the number of persons benefitted; (2) the presence or absence of substantial objections by members of the class to the settlement terms and/or to the attorneys' fees requested; (3) the skill and efficiency of the attorneys involved; (4) the complexity and duration of the litigation; (5) the risk of nonpayment; (6) the amount of time devoted to the case by plaintiffs' counsel; and (7) the awards in similar cases. *Wells*, 557 F. Supp. 2d at 6-7; *In re Lorazepam*, 2003 U.S. Dist. LEXIS 12344, at *27 (citing *Gunter*, 223 F.3d at 195 n.1); *In re Baan Co. Sec. Litig.*, 288 F. Supp. 2d at 17. A review of these factors makes clear that the fee request is reasonable.

1. Class Counsel Obtained a Substantial Benefit for the Class.

Class counsel obtained monetary relief for the class in an amount of $760 million. This represents an exceptional recovery for the class. The damage fund alone, comprised of $680 million, represents a recovery of 88% of the monetary relief that Plaintiffs could have recovered were they to prevail entirely at trial. With the addition of the $80 million made available to extinguish outstanding debt, the Settlement represents a recovery of 98% of the monetary relief that the Plaintiffs could have recovered were they to prevail entirely at trial. *See* Motion for Class Certification, Ex. 2, Dkt. No. 551-4 (Dec. 4, 2009), at 6-7. Given the risks that this Court may have denied Plaintiffs' motion to certify a class for the monetary claims, that Plaintiffs might have lost at trial, or that Plaintiffs might have prevailed on the merits but been awarded lesser damages, the sizeable settlement fund obtained by class counsel represents an extraordinary achievement.

The robust settlement fund will ensure that a substantial number of class members can benefit from the monetary relief in this Settlement. While the precise number of class members who will make claims through this Settlement is hard to predict, census counts of the number of Native Americans engaged in farming and ranching may offer

some estimate of the general order of magnitude of the likely claimant population. The 2007 Census of Agriculture reports that there were 61,000 Native Americans engaged in farming or ranching in that year alone. Because this suit extends back to 1981, there are undoubtedly many Native Americans who moved into and out of farming during the class period, such that the total number of potential claimants could exceed those whom the recent census counted as presently engaging in farming and ranching. Moreover, the programmatic relief will have a beneficial effect on most, if not all, current Native American farmers, as well as those in future generations. Similarly, even if any portion of the cash settlement fund is not claimed by class members, it will revert to a *cy pres* beneficiary approved by this Court that provides "agricultural, business assistance, or advocacy services to Native American farmers and ranchers," Settlement Agreement at II.I; IX.F.7, thus benefiting Native American farmers and ranchers generally.

Moreover, through the use of the Track A procedure, with its low threshold for obtaining relief, class counsel have negotiated a settlement that should permit the majority of the claimants to receive a substantial sum from the common fund.[12] Class members who make meritorious claims pursuant to Track A are eligible to receive an award of up to $50,000, plus an additional payment equal to 25% of the cash award to offset the tax consequences of the award. Class members who bring meritorious claims pursuant to Track B are eligible to receive their actual damages, up to $250,000. In addition, all successful claimants are eligible for debt forgiveness, as well as additional

[12] Additionally, as previously described to the Court, class counsel structured this Settlement to avoid several of the problems that arose during the claims process in the *Pigford* litigation. *See* Joint Memorandum in Further Support of Proposed Settlement, Dkt. No. 573.

payments to offset taxes on the debt forgiveness. *See* Motion for Preliminary Approval at 7-10, Dkt. No. 571. Furthermore, in recognition of the likelihood that the amount available for debt relief will be exhausted, leaving at least some class members with outstanding debt, the Settlement provides that the Secretary will offer an additional round of primary loan servicing to successful claimants who are delinquent in the re-payment of a USDA farm loan.[13] The Secretary has also established a moratorium on adverse loan actions from the date of preliminary approval of the Settlement (November 1, 2010) through the end of the claims process. Thus, individual class members stand to receive substantial value from the Settlement.

2. No Class Members Have Objected to the Fee Provision in the Settlement Agreement to Date

Notice provided to potential class members stated that class counsel would seek up to 8% of the $760 million fund in fees and expenses, as set forth in the Settlement Agreement. Class members may submit objections to the Settlement, including the proposed fee award, until February 28, 2011. Although the time for submitting an objection has not lapsed, as of this writing only one objection to the terms of the Settlement has been received since Notice was broadly given in mid-November, and that objection did not raise any concerns regarding the amount of the attorneys' fees and costs sought.[14] Additionally, class counsel have already attended several meetings with class

[13] Loan servicing options available to successful claimants include a reduction in the outstanding principal of federal loan debt, a reduction in the interest on such debt, or other servicing options.

[14] The objection only opposes the temporal limitation on the class definition, asserting that the class should encompass current farmers and ranchers who have recently experienced discrimination by the USDA. *See* Objection of Dustin Denton (attached as Ex. 10). One "Notice to Appear" has also been filed; the author does not voice any

members regarding the Settlement, *see* Status Report (Dec. 15, 2010), Dkt. No. 580, and have found that the Settlement Agreement has been well-received to date.

3. Class Counsel Demonstrated Considerable Skill and Efficiency.

Class counsel are leading practitioners in the fields of civil rights, complex federal litigation and farming and Indian law who have brought their expertise to bear on this particularly complex and protracted case. As detailed in the attached declarations, class counsel are experienced litigators at some of the nation's preeminent firms. But more important to the outcome of this case is the uniquely well-balanced composition of the class counsel team, which brought together attorneys from different firms with distinct sets of skills and experiences relevant to this action.

The team includes attorneys Anurag Varma, David Frantz, and Phillip Fraas, who litigated the *Pigford* suit on behalf of African American farmers; these attorneys brought with them knowledge of the USDA farm loan programs and direct experience in litigating the types of claims brought here. Frantz Decl. at ¶ 5 (Ex. 3); Fraas Decl. at ¶¶ 3-4 (Ex. 4); Varma Decl. at ¶ 4 (Ex. 7). Fraas also brought expertise in agricultural regulation and programs, having served as Chief Counsel of the House Committee on Agriculture and Deputy Counsel of the Senate Committee on Agriculture, Nutrition, and Forestry. Fraas Decl. at ¶3 (Ex. 4). Class counsel also includes Sarah Vogel, who previously served as a North Dakota Commissioner of Agriculture, advisor on the Equal Credit Opportunity Act at the Federal Trade Commission, counsel to a number of Native American grazing organizations, and counsel in other successful class actions against the

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objections but requests the opportunity to speak on her families' behalf at the April 28, 2011 hearing. Dkt. No. 579.

USDA. Vogel Decl. at ¶¶ 4-6 (Ex. 6). Vogel came to this case with a deep background in credit access and agricultural lending issues, as well as with strong relationships with Native American ranching communities. Vogel's location in North Dakota, close to several of the class representatives and many Native American farming and ranching communities, was also an asset. *Id*. at ¶ 4. The team is led by Joseph Sellers, Christine Webber, and other attorneys from Cohen Milstein Sellers & Toll, a class action law firm with extensive experience litigating large civil rights class actions, Sellers Decl. at ¶¶ 4-5 (Ex. 1), and includes distinguished attorneys from Jenner & Block who are experienced in class action litigation and specialize in complex federal litigation. Smith Decl. at ¶¶ 3-4 (Ex. 5). The result is a collective far greater than the sum of its parts.

Together, this team was able to move this action forward and achieve significant relief on behalf of the class. For example, even though similar cases were denied class certification, *see 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) and *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), class counsel succeeded in not only certifying a class here, but in defending certification over the course of two appeals to the D.C. Circuit and numerous requests for reconsideration.

Additionally, despite the duration of litigation and the number of different firms and attorneys who participated as class counsel over time, class counsel were able to litigate efficiently by relying on their extensive experience in civil rights class action litigation and a centralized work assignment process. Sellers Decl. at ¶¶ 6-7 (Ex. 1). In

particular, counsel pursued a tailored discovery plan, ensuring that time spent in reviewing the substantial document production and taking numerous depositions was targeted to the information needed to support certification and to prove liability and damages. *Id.*

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

Class counsel have labored on this case since 1999, and class counsel litigated this case against a skilled and determined adversary, as the Secretary mounted an aggressive and vigorous defense at every stage of the litigation. The USDA *twice* sought to overturn the Court's class certification decision, an effort that was ultimately unsuccessful but demanded substantial time and resources to rebuff. The complexity and duration of this litigation is reflected in the nearly six hundred docket entries entered in this case. As this Court has previously recognized, the parties have been in the "trenches" litigating this matter. Status Hearing Tr. at 9 (Oct. 6, 2010). All told, in addition to the millions of pages of documents exchanged in the case and approximately 100 depositions conducted, class counsel filed approximately 75 separate memoranda of law, apart from status reports and briefing before the D.C. Circuit.

Other factors such as geography and the novelty of the issues involved rendered this case particularly challenging. The class in this case is likely to be large and dispersed across the United States. Indeed, class counsel conducted approximately 800 interviews of potential class members, and took approximately 100 depositions in 13 states. Furthermore, given the age of this case—the class includes victims of discrimination dating back as far as 1981—class counsel had to clear significant hurdles in locating evidence to support discrimination claims; this issue was particularly salient

because the USDA destroyed many documents, and failed to implement a proper litigation hold, which eventually resulted in class counsel filing a Motion for an Order Governing the Means by which Plaintiffs could Establish Class Membership in the Action. Dkt. No. 529. In addition, as discussed below, class counsel grappled with extraordinarily complex legal issues in litigating this claim, which further justifies a full award of fees.

5. Class Counsel Faced Significant Risk of Non-Payment.

Class counsel undertook monumental efforts in this case without receiving any payment, and faced a significant risk that they would never receive compensation for the work they performed on behalf of the class. As evidence that class counsel faced a substantial risk that they might be denied compensation altogether, we need look no further than the fate of the cases, originally styled as class actions, brought by women and Hispanic farmers in the *Love v. Vilsack* and *Garcia v. Vilsack* cases. Class certification was denied in both cases. *See 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). The risk in this case did not end with the certification of a class for injunctive and declaratory relief: When the Settlement was announced, Plaintiffs' Motion for an Order Governing the Means by which Plaintiffs could Establish Class Membership in this Action was still pending. The premise of this motion was that due to the USDA's alleged failures to properly maintain civil rights complaints and to implement an appropriate litigation hold, Plaintiffs' access to evidence establishing class membership was limited. Had the Court denied the motion, counsel could have faced

significant difficulty in establishing membership in the class for many Native American farmers and ranchers.

Moreover, were this case to proceed to trial, Plaintiffs would inevitably confront a variety of risks that the result at trial would be less than optimal. Beyond the basic risk that the trier of fact might not accept Plaintiffs' theory of the case, there were unique challenges here created by the USDA's failure to retain records for farm loan applications denied before 1999 as well as other gaps in records resulting from the USDA's failure to implement a proper litigation hold. *See* Motion for an Order Governing the Means by which Plaintiffs could Establish Class Membership in this Action (Dkt. No. 529). Further, this lack of documentary evidence could make class claims especially dependent on the testimony of witnesses, whose memories may be affected by the passage of time. The expert testimony on which Plaintiffs would have relied substantially to establish liability, moreover, was vigorously rebutted by the USDA, further putting in question Plaintiffs' ability to establish classwide liability and to present a reliable measure of economic harm to the class.

6. Class Counsel Devoted Substantial Effort to Achieving this Settlement.

Class counsel devoted tremendous time and effort over the past eleven years to ensuring the successful resolution of this case on Plaintiffs' behalf, and counsel will continue to devote substantial time and effort over the next five years to ensure successful implementation of the Settlement. Through November 30, 2010, class counsel devoted over 40,000 hours to this case. *See supra* Section I.C.1. These hours include time spent defending against the USDA's multiple motions for judgment on the pleadings and summary judgment, substantial litigation of class certification, five years of extensive and

hard-fought discovery, briefing of two interlocutory appeals to the DC Circuit, and ten months of focused settlement negotiations. Significantly, the substantial time required to pursue this protracted hotly-contested litigation deprived class counsel of the opportunity to invest time and resources into other cases. Both the tremendous amount of time class counsel have devoted to this case without assurance of compensation, and the opportunity cost of involvement in such intensive and protracted litigation, factor in support of the fee request.

The award of attorneys' fees and costs being sought will provide the sole compensation for counsel's work on behalf of the class. In addition to class counsel's investment of time through November 30, 2010, which represents fees of $16,246,882.80, counsel has incurred $1,637,057.68 in unreimbursed expenses. *See supra* Section II.C.1. And over the prospective five-year settlement term, class counsel have agreed, among other things, to assist geographically-dispersed class members pursuing Track A claims, to implement an extensive notice plan, to monitor and consult regarding programmatic change at the USDA, and to answer questions and provide status updates to members of the large class. As described above, class counsel project they will devote approximately 1500 additional hours, valued at $650,000, to follow through on the Settlement. Counsel also project an additional $6.5 million in fees for paralegals and attorneys hired specifically to assist class members with claims, for a total of approximately $7.1 million in fees beyond those incurred through November 30, 2010. *Id.* Finally, counsel anticipate future expenses of approximately $1.5 million, which will include costs of travel and equipping the new employees. *Id.* In sum, counsel project

their total fees and expenses for litigating this case and seeing it through the implementation of the Settlement will come to over $26.5 million.[15]

7. The Award Sought in this Case Compares Favorably with Awards in Similar Cases.

The award of attorneys' fees and costs sought in this case is consistent with awards in other large common fund cases. The award, formulated as 8% of the $760 million monetary relief available to the class, amounts to $60.8 million. As noted above, counsel project their fees and expenses for litigating this case and administering the Settlement will total approximately $26.5 million. The award sought will be counsel's only compensation for these efforts and investments. As a result, the award of attorneys' fees and costs requested constitutes a multiple of 2.3 times the attorneys' fees and costs already incurred and projected during the settlement administration.[16]

As detailed above, the award of attorneys' fees and costs sought here is less than a third of the standard benchmark awarded in common fund cases, and roughly half the amount of attorneys' fees and costs commonly awarded in cases with a large common fund. *See In re Lorazepam*, 2003 U.S. Dist. LEXIS 12344, at *26 ("fees of fifteen

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[15] Summing class counsel's actual fees and expenses incurred through November 30, 2010 with the projected fees and expenses for fulfilling their Settlement obligations yields $26,533,940.48 in total fees and expenses. *See* Decl. of Sellers at ¶ 22 (Ex. 1).

[16] This total lodestar calculation reflects counsel's actual past fees and expenses and best projection of future fees and expenses. The "lodestar cross-check calculation need entail neither mathematical precision nor bean-counting," and "may rely on summaries submitted by the attorneys." *In re Rite-Aid Corp. Sec. Litig.*, 396 F.3d 294, 306-07 (3d Cir. 2005). Additionally, because the percentage of the fund award is counsel's only compensation for all past and future fees and expenses, the multiplier appropriately compares the full amount sought to the full amount that will be expended. However, even if the multiplier were calculated only with respect to *past* lodestar fees, with actual expenses and future fees taken off the top of the award at their actual amounts, the multiplier would still be well within the typical range, amounting to approximately 3.1.

percent are common" in mega-fund cases) (citing *Shaw v. Toshiba Am. Info. Sys., Inc.*, 91 F. Supp. 2d 942, 989 (E.D. Tex. 2000) (surveying cases)).

Further, fees awarded pursuant to the common fund doctrine frequently represent multiples of up to 4 times the lodestar. *See In re Lorazepam*, 2003 U.S. Dist. LEXIS 12344 at *32 (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); *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 multiple 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 (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, 770 (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, 359 (S.D.N.Y. 2005) (approving multiplier of four times lodestar in mega-fund settlement totaling $6.1 billion); *In re NASDAQ Market-Makers Antitrust Litig.*, 187 F.R.D. 465, 488-89 (S.D.N.Y. 1998) (approving lodestar multiple of

3.97 in mega-fund settlement of $1.027 billion). The multiplier of 2.3 in this case, therefore, would fall well within the typical range of such awards, and is much lower than multipliers frequently awarded in cases with large common funds.

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

IV. CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that this Court award attorneys' fees and costs from the common fund in the amount of $60.8 million.

January 14, 2011

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 14th day of January, 2011, the foregoing was served via the Court's ECF system, which will cause an electronic copy to be sent to all counsel of record in the case.

Respectfully submitted,

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