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 POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR CERTIFICATION OF DAMAGES CLAIMS UNDER FEDERAL RULE OF CIVIL PROCEDURE 23(b)(3)

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INTRODUCTION

In December 2001, this Court certified the Plaintiff class under Federal Rule of Civil Procedure 23(a) ("Rule 23") and permitted the class to pursue injunctive and declaratory relief under Rule 23(b)(2). At that time, however, the Court deferred until the completion of discovery the question of whether it would certify a hybrid class that would permit Plaintiffs to pursue their claims for economic damages under Rule 23(b)(3). *See Keepseagle v. Veneman*, 2001 WL 34676944, at *6 (D.D.C. Dec. 12, 2001); *see also Keepseagle v. Johanns*, 236 F.R.D. 1, 1-2 (D.D.C. 2006). Now that factual and expert discovery in this case are complete, Plaintiffs hereby renew their request that the Court certify their claims for damages pursuant to Rule 23(b)(3). The developed record clearly demonstrates that the Court should allow the class to pursue economic remedies, as well as injunctive and declaratory relief.

Plaintiffs satisfy all the criteria for certification of their claims for damages under Rule 23(b)(3). Discovery has confirmed the Court's earlier decision that the common questions of fact and law predominate over any questions affecting only individual members. The documents and deposition testimony amassed during discovery demonstrate that a pattern or practice of discrimination against Native American farmers and ranchers ("farmers") pervaded all aspects of the United States Department of Agriculture's ("USDA") system for farm loan making and loan servicing. Throughout the class period, USDA used highly discretionary criteria to make loan and loan servicing decisions, and left the responsibility for such decisions in the hands of local USDA officials who were almost exclusively non-minority. Numerous examples of the resulting discrimination and bias against Native American farmers are well-documented in deposition testimony in this case.

Common issues also predominate in the adjudication of Plaintiffs' claims for damages. Accordingly, this action should be treated as a hybrid class under *Eubanks v. Billington,* 110 F.3d 87 (D.C. Cir. 1997), which permits a Plaintiff class to pursue claims for declaratory and injunctive relief pursuant to Rule 23(b)(2) and claims for damages pursuant to Rule 23(b)(3). *Id.* at 96. This hybrid approach is appropriate where, as here, common issues of law and fact predominate in the adjudication of the damage claims, even if amounts of damages may vary considerably among members of the class. Common features of the damage determinations that warrant their collective adjudication arise because each class member seeks the same kind of relief and relies upon a single economic formula as the common means for adjudicating their damage claims. Developed by Patrick O'Brien, an economist with 27 years of experience at USDA's Economic Research Service, Plaintiffs' proposed formula permits computation of damages for individual farmers, drawing upon publicly available objective data and allocates the awarded damages among class members commensurate with the magnitude of the harm they suffered.

Absent Plaintiffs' proposed formulaic approach to calculating damages, the individual adjudication of class members' damages claims would require thousands of hearings and consume enormous resources and time. Moreover, individual adjudications would depend largely upon recollections of loan decisions made decades earlier, without the benefit of loan applications or records of the decisions, as USDA failed to retain most of those materials. The computation of monetary relief by formula, therefore, is decidedly more reliable than efforts to reconstruct individual loan decisions in the absence of discrimination. Accordingly, adjudication of the class members' claims for damages by formula is an appropriate and reliable means of

computing and allocating monetary relief among members of the class that is superior to individual adjudications, and is fully compatible with Rule 23(b)(3).

BACKGROUND

I. Nature of Plaintiffs' Claims and Procedural Background.

In this case, Plaintiffs allege that USDA's pattern or practice of denying Native Americans equal access to opportunities to obtain credit has deprived Native American farmers of privileges afforded to other farmers, in violation of the Equal Credit Opportunity Act ("ECOA"), and has caused them substantial economic losses. *See* Eighth Amended Complaint ¶¶ 134-36, Dkt. No. 457. Plaintiffs allege discrimination under both a disparate treatment and a disparate impact theory of liability under ECOA. *Id.* ¶ 135. In particular, Plaintiffs allege that USDA has discriminated against Native American farmers by failing to provide them equal credit opportunities in its farm loan programs. Typically, this discrimination took the form of both outright denials of farm loans and loan servicing, and a widespread failure to provide Native Americans the technical and other forms of assistance that USDA itself has recognized are necessary for farmers to prepare farm loan program applications.

To put this case in the proper context, the relationship between USDA and the farmers to whom it provides loans is not a typical debtor/creditor relationship. Rather, Congress established a special mission for USDA "to foster and encourage the family farm system of agriculture in this country." 7 U.S.C. § 2266(a). Pursuant to that mission, the Farmers Home Administration ("FmHA"), succeeded by the Farm Service Agency ("FSA"), is the lender of last resort for farmers who cannot obtain credit elsewhere.[1] To fulfill this role, FSA is authorized to make at least three types of loans to farmers: (1) farm ownership loans to enable farmers to acquire,

[1] *See, e.g.*, *Moseanko v. Yeutter*, 944 F.2d 418, 421 (8th Cir. 1991); *United States v. Kimbell Foods, Inc.*, 440 U.S. 715, 735 (1979).

enlarge or improve farms; (2) operating loans for annual crop production expenses and the purchase of equipment; and (3) emergency loans to alleviate the effects of losses suffered in disasters and emergencies. *See* 7 C.F.R. § 1941.2 (2007); *id.* § 1943.2; *id.* § 1945.2.[2]

The farm loan program, however, extends well beyond the initial grant of a loan. The farm loan program is "a form of social welfare legislation"[3] that is supposed to create a long-term relationship between the farmer and USDA with the goal of graduating the farmer to commercial credit. *See id.* § 1951.902. To this end, loan servicing, which comprises an array of means offered to farmers to renegotiate the terms of their loans, is a "primary objective" of FSA and "[s]upervision and servicing are continuing processes that begin the day a farmer comes into the office." *Id.*[4] A farmer who receives a farm loan acquires not only the actual capital, but the right to apply for loan servicing if he or she has difficulty repaying debt in a given time period because of the vagaries and unexpected hardships of farming, such as animal disease or poor weather conditions.[5] *See id.* § 1951.901 *et. seq.* Moreover, federal regulations *require* FSA to send

[2] Hereinafter, all references to USDA's regulations in Title 7 of the Code of Federal Regulations are to the 2007 version.

[3] *Curry v. Block*, 541 F. Supp. 506, 511 (S.D. Ga. 1982), *aff'd*, 738 F.2d 1556 (11th Cir. 1984); *see also Coleman v. Block*, 562 F. Supp. 1353, 1364-65 (D. N.D. 1983) ("participation in FmHA programs is in large part a form of social welfare").

[4] Loan servicing, also referred to as primary loan servicing or 1951-S loan servicing, offers several different ways to assist farmers in managing the terms of their loans. Loan servicing includes consolidation of multiple loans into a single loan with more favorable terms, reduction of rates at which the monies are loaned, forgiving or settling some or all of the outstanding debt, and writing down the outstanding debt to levels that are more affordable. 7 C.F.R. § 1951.906.

[5] The right to seek and obtain loan servicing is so fundamental that courts have repeatedly recognized the borrower's right to be notified of and to apply for loan servicing. *See Curry*, 541 F. Supp. at 515-525 (finding that 7 U.S.C. § 1981a—creating a right of deferral—imposed a mandatory duty on USDA to promulgate and enforce regulations providing for notice, an opportunity to be heard, and criteria for servicing); *Matzke v. Block*, 542 F. Supp. 1107, 1114-15 (D. Kan. 1982) (same); *Allison v. Block*, 723 F.2d 631, 636-38 (8th Cir. 1983) (finding that the

notice of loan servicing programs to all borrowers: (1) who are more than 90 days delinquent; (2) who submit written requests for loan servicing information; or (3) who apply for loan servicing. *Id.* §§ 1981d, 1951.907(c). FSA also must send loan servicing notices before taking collection action against a borrower. *Id.* § 1951.907(c).

II. The Court's Previous Class Certification Decision.

On December 12, 2001, this Court issued an order certifying a class under Rule 23, which defined the class to include:

> 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 time period; and (3) filed a discrimination complaint with the USDA individually or through a representative during the time period.

Keepseagle, 2001 WL 34676944, at *6. After careful analysis, the Court held that Plaintiffs had satisfied the four prerequisites for a class action under Rule 23(a), and that the class could proceed under Rule 23(b)(2) for the pursuit of declaratory and injunctive relief. *Id.* at *7-*13. At that time, however, the Court declined to determine whether the monetary relief sought was compatible with class treatment because it lacked a "developed factual record," and deferred consideration whether Plaintiffs' claims for monetary relief warranted class treatment until discovery was complete. *Id.* at *14.

USDA sought interlocutory review of this Court's class certification decision. In October 2002, after plenary briefing and oral argument, the D.C. Circuit denied USDA's Rule 23(f) petition for review. *In re Veneman*, 309 F.3d 789 (D.C. Cir. 2002). USDA then petitioned for a writ of mandamus and sought to stay all proceedings in this action. Again, the D.C. Circuit

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FmHA was required to provide borrowers with notice of § 1981a relief, including deferrals and other alternatives to acceleration).

denied USDA's request. *See* Order Denying Writ of Mandamus, No. 04-5031 (D.C. Cir. Mar. 3, 2004) (attached as Ex. 1).

In 2005, after this Court instructed Plaintiffs to indicate whether they would request monetary damages, Plaintiffs filed a motion to certify their claim for monetary damages. *See* Dkt. No. 329; Minute Entry for Proceedings Held Before Judge Emmet G. Sullivan (Oct. 7, 2004). After a hearing at which Plaintiffs' motion was discussed briefly, the Court concluded it would benefit from a more complete record before ruling on the motion. *See* Transcript of Nov. 10, 2005 Hearing Before the Honorable Emmet G. Sullivan at 87-88, Dkt. No. 359. Accordingly, the Court denied the motion without prejudice and advised the parties that it would entertain such a request upon conclusion of discovery in this action. *Keepseagle*, 236 F.R.D. at 1-2. While postponing any action on the request to certify Plaintiffs' claims for damages, the Court soundly rejected USDA's argument that it should reconsider the class certification decision in its entirety by revisiting whether Plaintiffs "satisfy the requirements of Rule 23(a) or 23(b)," explaining that USDA "failed to present any compelling reason why the Court should reconsider its 2001 certification order[.]" *Id.* at 3-4 n.1.

ARGUMENT

A determination whether to certify a class authorized to pursue economic relief collectively under Rule 23(b)(3) requires a review of (1) evidence of common features in the discriminatory system to which members of the plaintiff class were subject, (2) the extent to which the nature of the monetary relief sought by members of the class and the means of adjudicating the claims for such relief can be adjudicated collectively, and (3) the extent to which alternative means exist for adjudicating class members' damage claims individually that would permit resolution of these claims in a more efficient and reliable manner than the means

proposed for adjudicating the claims collectively. As demonstrated below, each of these factors weighs heavily in favor of certifying Plaintiffs' claims for damages.

I. Discovery in this Case Demonstrates a Pattern or Practice of Discrimination that Fully Justifies Class Treatment for Injunctive, Declaratory, and Economic Relief.

Since the Court last considered the issue of class certification, Plaintiffs have engaged in significant discovery, which demonstrates the propriety of the Court's initial class certification decision and shows the compelling need for economic relief. The parties have taken more than 80 depositions, and each side has produced tens of thousands of pages of documents and has prepared comprehensive expert reports. This discovery process has confirmed that USDA's discriminatory system of loan making and loan servicing caused extensive economic damage to Plaintiffs. In the farm loan system, virtually all control was in the hands of non-minority local decisionmakers who were instructed by USDA to use subjective and highly discretionary criteria to make loan and loan servicing decisions. These decisions often were made based on cultural stereotypes and bias against Native Americans, and resulted in large lending disparities against Native Americans that caused net economic losses of at least $608 million from 1981 to 2007. *See* Final Expert Rebuttal Report of Patrick M. O'Brien (Nov. 2009) ("O'Brien Final"), at 2-7 (attached as Ex. 2).

In addition, discovery has shown that USDA failed to retain accurate records – or any records at all – for most farmers and ranchers who were subject to USDA's discriminatory treatment. Together this evidence demonstrates the impracticability of reconstructing the tens of thousands of decisions that local UDSA officials made throughout the country for nearly 30 years, and consequently why collective adjudication of these damage claims and allocating relief through an objective formula is plainly the superior means of resolving the class claims to

monetary relief. The record readily demonstrates that common questions of law and fact exist which justify certifying Plaintiffs' claims for damages under Rule 23(b)(3).

A. USDA's Pattern or Practice of Discrimination Was Achieved Through Use of Subjective Loan Making and Servicing Criteria.

Under the procedures employed by USDA's direct Farm Loan Programs since 1981, applicants seeking to obtain a loan must satisfy two sets of criteria: (1) "eligibility" criteria, which include citizenship, adequate training and experience, character, the operation of a family farm, and the inability to obtain sufficient credit elsewhere; and (2) "feasibility" or loan approval criteria, which address whether a loan is based on a feasible plan and whether there is adequate security for the loan. *See* Expert Report of Lynn Hayes (Feb. 20, 2009) ("Hayes"), at 4-27 (attached as Ex. 3); 7 C.F.R. §§ 1941.12, 1943.12, 1910.4(i)(1). Under USDA's procedures, an applicant's eligibility is reviewed by the local County Committee members, who are largely elected by local farmers, while the applicant's feasibility or loan approval is determined by local County Office staff. Hayes at 4-5.[6]

Myriad sources obtained in discovery—including statements by USDA officials, USDA reports, and other documents—establish that USDA's process for determining whether to grant loans and loan servicing was largely subjective, as it was predicated upon highly discretionary standards and criteria. For example, in 1998, in reaction to the "striking" fact that "95% of the complaints that were filed against FSA came out of the Farm Loan side," 05/22/09 Winningham Dep. at 23-24 (attached as Ex. 4), USDA published an extensive study intended to determine the cause of the high number of complaints against USDA's Farm Loan Programs. *See* U.S. Dept.

[6] Initially, County Committee members were appointed, but starting in 1986, USDA's regulations were modified so that two of three members are elected by local farmers and the third is appointed by the agency's state director. Hayes at 4 & n.10 (Ex. 3) (citing 51 Fed. Reg. 18,763 (1986)). In March 1999, FSA County Office staff began making eligibility decisions. *Id.* at 4 & n.11 (citing FSA Notice FLP-37, COC Decisions on Direct Loans (Mar. 11, 1999)).

of Agriculture, A Qualitative Study of Civil Rights Implications in Farm Loan Program Administration: Perceptions and Vulnerabilities (1998) ("Qualitative Study"), at 4 (attached as Ex. 5). In that report, USDA "identified nine avenues by which willful discrimination could occur by FSA personnel[,]" including "Subjectivity and Personal Judgment" and "Subjectivity in Data Usage for Loan Making." *Id.* at 21. Noting that earlier in FSA's history "the County Committee had relatively unchallenged authority," USDA concluded that "there still exist areas in [the Farm Loan Program] in which personal judgment is required" and there are "some steps in the loan making/servicing process that . . . could be tools of disparate treatment." *Id.* at 22. Those "subjective" steps that "could be manipulated to adversely affect the outcome of a request" and result in "discrimination" include: "Determinations of family sized-farm, Calculations used for the Farm and Home Plan, Interpretation of what constitutes an acceptable credit history, Valuation of security, [and] Corruption of data used for appraisals."[7] *Id.*

Based on this study, USDA found that its "regulations permit and in some situations indirectly require subjective interpretation of data," and that "the loan officer could manipulate several items on [the farm plan] to effectuate discriminatory actions." *Id.* at 24.[8] Yet according to David Winningham—the primary official responsible for the Qualitative Study and a former Director of Civil Rights for FSA—rather than using the Qualitative Study "to see whether .

[7] The "list of identified avenues which present an opportunity to discriminate" also included a number of other factors that Plaintiffs allege were responsible for discrimination against Native Americans: Stereotyping, Selectivity in Outreach Efforts, Discouraging Applicants, and Interceding in Loan Process to Delay or Deny a Loan. Qualitative Study at 21 (Ex. 5).

[8] In 2001, another USDA report that documented Native Americans' experiences also identified how subjective factors, such as the criteria for evaluating an applicant's farm management experience, can have a "disparate impact on American Indian farmers." American Indian Outreach Project: Reorientation Meeting Report (Aug. 2001), at 12 (attached as Ex. 6) (stating that an "issue of concern" is that "subjectivity in use of discretionary authority is sometimes being inappropriately or inconsistently applied by program managers in a manner than has a disparate impact on American Indian farmers").

. . there could be opportunities to mitigate or eliminate . . . the ability to discriminate" and "make improvements," USDA failed to make any changes to its system. Winningham Dep. at 30-31 (Ex. 4).

The Qualitative Study was not the first time that USDA recognized the subjective nature of its loan making and loan servicing processes. Indeed, in the late 1980s, USDA similarly acknowledged that decisions on loans and loan servicing were in fact dominated by subjective criteria. For instance, when defending its denial of a farm loan in 1987, USDA told the U.S. District Court that its "decisions on eligibility, feasibility, creditworthiness, etc. are unreviewable because they are subjective criteria, there is no law to apply, and they are wholly within FmHA discretion." Motion and Brief of the United States for Summary Judgment Affirming Agency Action, *Verlarde v. United States*, No. 85-K-2103, at 7 (D. Colo. July 8, 1987) (attached as Ex. 7). That same year, in response to a Congressional inquiry, USDA conceded that its loan approval process had suffered from high levels of subjectivity, stating that "loan approval decisions were made using a variety of *very subjective . . . techniques*, including the completion of a Farm and Home Plan." Attachment to Letter From Vance L. Clark, FmHA Administrator, to U.S. Senate Agriculture Committee Chairman Quentin N. Burdick, Sept. 17, 1987, USDA-FMHA-FRC-000324 (attached as Ex. 8) (emphasis added). Notably, the sole "very subjective technique" identified by USDA—the use of farm plans—remains in place today.

The deposition testimony of USDA officials obtained in this litigation likewise confirms that there are many areas in which subjective and highly discretionary factors play a critical role in loan making and loan servicing decisions. For example, Carolyn B. Cooksie, USDA's Deputy Administrator for Farm Loan Programs, admitted that with respect to loan making, "some of [the eligibility criteria] are clear, some of them are not," "making loans is not an exact science," and

"there are many times [the loan officer] has to use his judgment" and "can exercise [their] judgment," because "[t]here is [sic] a lot of times when there is no fast and hard rule." 02/28/06 Cooksie Dep. at 89-91 (attached as Ex. 9). In particular, the loan making areas acknowledged by Ms. Cooksie and other longtime USDA officials to be discretionary include: the training or farm experience needed to have a reasonable prospect of success,[9] an applicant's character,[10] the

[9] With respect to the requirement that an applicant have sufficient "training or farm experience . . . to assure reasonable prospects of success in the proposed farming operations," 7 U.S.C. § 1922(a)(2), James Radintz, Director of the Loan Making Division for Farm Loan Programs and USDA's designated witness on loan eligibility standards, testified that the purpose of this rule is to ensure "that someone who gets a farm loan has the knowledge, experience, training such that they would have a *reasonable* chance of succeeding." 03/08/06 Radintz Topic 6 Dep. at 55-56 (emphasis added) (attached as Ex. 10). But USDA did not adopt any procedures or regulations to interpret the term "reasonable." *Id.* at 57-58. Nor did USDA provide a "standard or set guideline" on how quickly applicants would be expected to achieve success. *Id.* at 64-65. Similarly, while applicants were required to have "some experience in making management decisions on the farm," Mr. Radintz knew of no written USDA guidance issued on *how much* experience was needed, and he explained that the amount of experience is "a matter of judgment" and "within the judgment and purview of the loan approval official making the eligibility decision based on their knowledge of the enterprises in the local area and things such as that." *Id.* at 61-63. Moreover, although USDA required consideration of "'hands on' supervision" that an individual might receive, Mr. Radintz did not know what this term meant. *Id.* at 128. Not surprisingly, there was "some concern" within USDA over the "potential lack of uniformity in the interpretation of the training and experience requirement." *Id.* at 113. Finally, Mr. Radintz conceded that County Committee members would judge the experience of applicants – and other eligibility factors – in light of their own experiences and personal knowledge of the applicants and their operations. *Id.* at 130-31.

[10] Rosalind Gray, former Director of USDA's Office of Civil Rights, explained that USDA's good character requirement "was entirely subjective," and "all depended on where you were," noting that "[b]ad character could mean whatever information [local FSA decisionmakers] wanted to consider, and the applicant need not have access to the information, or it might have just been community information, might have been reputation stuff, it might have been gossip stuff." 10/23/08 Gray Dep. at 180 (attached as Ex. 11). Ms. Gray concluded that USDA "should have [had] very clear objective standards" so that the "farmer could understand what it meant and what they had to do . . . before they actually filled out their application" and that the farmer should have received notice if their character was challenged. *Id.* at 180-81. According to Mr. Radintz, USDA linked the "character" requirement to an applicant's creditworthiness or "reputation for repaying their debts," Radintz Topic 6 Dep. at 133-34 (Ex. 10), and County Committee members would apply their personal experience as farmers in evaluating applicants' character. *Id.* at 153-54. While decisionmakers had discretion to disregard an adverse credit report "if they were aware of extenuating circumstances," there was no requirement to interview

inability to obtain credit elsewhere,[11] the operation of a family farm,[12] and the loan officer's role in preparing applications and in developing Farm and Home Plans.[13] Given that USDA has

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the applicant to ascertain such circumstances. *Id.* at 154-55. Moreover, although USDA regulations allowed a borrower to satisfy the "character" requirement if he made an "honest attempt" to meet his prior debt repayments, there was no clear guidance or communication to the field regarding the term's meaning or how it should be applied. *Id.* at 144-47. Similarly, USDA offered no examples of what type of "isolated incidents" should not be permitted to lead to an adverse credit report finding. *Id.* at 165-66. And even if "circumstances beyond [the applicant's] control" could excuse an adverse credit report, the decisionmaker still "has to make the judgment about whether he agrees with that or not." Cooksie Dep. at 89-90 (Ex. 9); *see also, e.g., id.* at 90 (explaining that it would "certainly [be] a judgment call" to decide whether a person acted in "good faith in trying to repay" a bill when the person "didn't have [health] insurance" and "had a catastrophic illness in the family").

[11] Although an applicant must show that he cannot "obtain sufficient credit elsewhere to finance [his] actual needs at reasonable rates and terms, taking into consideration prevailing private and cooperative rates and terms in the community in or near which the applicant resides for loans for similar purposes and periods of time," 7 U.S.C. § 1922(a)(4); Radintz Topic 6 Dep. at 69-70 (Ex. 10), Mr. Radintz acknowledged that USDA offered no guidance on how to define the "community" whose prevailing rates and terms should be considered. Radintz Topic 6 Dep. at 73. Moreover, in the absence of a letter from a bank denying credit to an applicant, local officials exercised discretion in determining whether an applicant could obtain sufficient credit elsewhere. *Id.* at 80-83; *see also* Cooksie Dep. at 90 (Ex. 9).

[12] Local officials had to compare the applicant's farm to similar operations locally to determine whether it qualified as a family farm, but UDSA did not offer quantitative guidance on this subject, leaving the loan officer "some leeway to figure out what is applicable for his area" and to exercise his judgment and knowledge. Cooksie Dep. at 72-74 (Ex. 9). Similarly, although a family farm had to use a "substantial" amount of the family's labor, USDA did not offer clear guidance about how much labor would be "substantial," and what is "substantial" "depends on the farming operation[.]" *Id.* at 74-78. Ultimately, the loan official would simply "have to use his judgment" based on what he knows about the farm. *Id.* at 78.

[13] Loan officers could influence the outcome of loan applications by exercising their discretion to make decisions or recommendations about a range of inputs in the Farm and Home Plans used to determine loan feasibility. *See, e.g.*, 04/20/06 Radintz Topic 7 Dep. at 61-62 (attached as Ex. 12) (discussing a loan officer's discretion to determine an applicant's operating expenses); *id.* at 59-60 (noting that in estimating family living expenses, "the loan officer would be expected to use judgment and to help the applicant develop a realistic plan"); *id.* at 44-45, 50-52 (discussing the estimation of the value of farm assets such as livestock and machinery); *id.* at 92 (agreeing that the loan officer's role in developing a Farm and Home Plan typically involves the exercise of judgment). In addition, because of the loan officer's critical role in working with applicants to develop Farm and Home Plans, an applicant's ability to obtain a loan is highly dependent on his relationship with the loan officer. *See id.* at 25, 30, 74-76 ("very few" loan applicants complete

generally applied the same standards and processes for determining the feasibility of both loan servicing and loan making, these key discretionary features in loan making also pervaded USDA's loan servicing decisions. *See* 04/20/06 Rowe Dep. at 14-16 (attached as Ex. 13).

In addition to the testimony of USDA's national officials, current and former USDA local officials likewise confirmed the high degree of discretion and the potential for manipulation in the loan making and loan servicing processes. For example, one former USDA loan officer testified that when determining the feasibility of a loan application, he was instructed by his superior that he should not use the county average yield rates for Native American applicants because "you know that Indians don't get as good yields as other people do." 03/06/09 Anderson Dep. at 10 (attached as Ex. 14); *see also id.* at 32 (stating that "the District Supervisor had me come into the office and told me that I was not supposed to use average crop yields and average weaning weights on Indian applications").[14] Current USDA local officials testified that the eligibility criteria used by the County Committee were also subjective, and that applications

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their own Farm and Home Plans, and the loan officer and applicant would meet in-person to a develop a plan in a collaborative process); *id.* at 60-61 (developing the Farm and Home Plan is a "joint process," "an interactive process" and a "joint venture" "between the loan officer and the loan applicant or borrower"); *id.* at 77-79 (if a Farm and Home Plan was not feasible, loan officers were expected to consider a wide range of alternative inputs to make it feasible, and "were expected to exercise their judgment in determining how reasonable and realistic the alternatives were"); Cooksie Dep. at 22-23 (Ex. 9) (describing how loan officers would "see if they could come up with a feasible plan of operation for the customer" and that "it required the customer and the officer to sit down and agree on the plan because they both had to sign the plan"); *cf.* Radintz Topic 7 Dep. at 48-50 (Ex. 12) (loan officers were required to provide technical assistance to applicants in completing a Farm and Home Plan, but he was unaware of any mechanism within USDA to monitor the extent of help provided locally to applicants).

[14] *See also, e.g.*, 04/30/09 Cumpton Dep. at 71 (attached as Ex. 15) (confirming that "project[ing] yields and expenses and income" involved loan officer's discretion); 05/14/09 Meredith Dep. at 117 (attached as Ex. 16) (agreeing that "a loan officer ha[s] the discretion to adjust or deviate from the state or county averages"); 05/15/09 Petty Dep. at 75-76, 81-82 (attached as Ex. 17) (describing degree of loan officer's discretion); 05/20/09 Larrick Dep. at 118-19 (attached as Ex. 18) (confirming that there is "discretion in the appraisal process in terms of valuing different equipment and land and crops and the like").

were often denied based on subjective determinations. *See* 04/29/09 Knuth Dep. at 129-30 (attached as Ex. 19).[15] And the witness USDA designated to provide testimony concerning farm loan officer training stated that there was no training to "teach the employees about how to exercise discretion or judgment." 05/19/09 Ropp Dep. at 67 (attached as Ex. 20).

Based on this and other evidence, Plaintiffs' expert Lynn Hayes, an expert in agricultural law who has counseled farm organizations and hundreds of individual farmers throughout the nation, developed an extensive report documenting the various ways USDA's standards for loan making eligibility criteria are subjective or highly discretionary, either because of the decision criteria themselves or because USDA failed to provide sufficient guidance on how to apply them and oversight to review how the criteria were applied. Hayes at 5-18 (Ex. 3). For example, USDA implemented subjective or highly discretionary standards for the eligibility criteria, requiring a determination of whether an applicant: (1) has "sufficient training or experience to assure a reasonable prospect of success in the proposed operation"; (2) has "the character" needed to receive a loan; (3) has "managerial ability"; (4) will "honestly" carry out the conditions of the loan; (5) operates a "family farm"; and (6) has creditworthiness. *Id.* In addition, Ms. Hayes concluded that the criteria for measuring the "feasibility" of a loan application were also "fraught with discretionary, subjective determinations by agency personnel." *Id.* at 19. For example, because USDA staff assisted farmers in developing, reviewing, or revising their "farm plans" before determining the plans' feasibility, USDA staff "exercised broad discretion and made subjective judgments on each of the major aspects of the plan: the amount and types of farm operating expenses, the amount and types of family living expenses, the yields and prices (to calculate the projected income) for each crop or livestock

[15] *See also, e.g.*, Cumpton Dep. at 81-82 (Ex. 15) (confirming that County Committee members could use personal knowledge of applicant in making loan eligibility determinations).

enterprise planned, and in some cases the agency debt installment amounts due during the period of the plan." *Id.* at 20.

These same discretionary standards also governed the process for loan servicing determinations, which involve assessing whether a farm plan would be feasible after application of the loan servicing options. *Id.* at 27-28. Furthermore, USDA's loan servicing process suffered from subjectivity because of how the agency implemented the requirement that such servicing only be authorized if the borrower had "acted in good faith with the Secretary in connection with the loan[.]" *Id.* at 28 (quoting 7 U.S.C. § 2001(b)(2)).

In sum, discovery in this case has amply demonstrated that USDA's process for loan making and loan servicing amounts to nothing more than an "undisciplined system of subjective decisionmaking . . . ." *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 990-91 (1988).

B. USDA Staff Who Made Loan Decisions Were Nearly All Non-Minority, Contributing to Disparities in Credit Opportunities for Native Americans.

Exacerbating the problems caused by USDA's highly subjective and discretionary criteria and processes for loan making and servicing, the staff who evaluated applicants' compliance with such criteria lacked diversity and often made biased decisions based on stereotypes of Native Americans. From 1981 to the present, USDA's local decisionmakers, including County Committee members and County office staff, have been disproportionately white and have rarely included Native American (or other minority) farmers. *See, e.g.*, USDA Office of the Inspector General, Minority Participation in Farm Service Agency's Farm Loan Programs – Phase II (1997), at 20 (attached as Ex. 21) (finding that in 1996, 98.2% of County Office Committee members were white). USDA has conceded that its local decisionmakers came nowhere close to reflecting the diversity of its customers, principally because County

Committee members were elected by local farmers and, in turn, County Committee members selected the local county executive director, who hired local staff. *See* Civil Rights Action Team, U.S. Department of Agriculture, Civil Rights at the United States Department of Agriculture (1997) ("CRAT Report"), at 18-20 (attached as Ex. 22) ("Because of the ways in which State and county committees are chosen and county offices are staffed, FSA lacks diversity in its program delivery structure. . . . Proportionate under-representation . . . is a problem throughout the Nation."); Statement of Deputy Secretary of Agriculture Rominger at a USDA Civil Rights Forum, May 14, 1996, KVL014-0296 (attached as Ex. 23) ("There's no excuse for a workforce that doesn't better reflect the people that we work for, up and down the ranks.").

USDA's process for selecting the people who made credit decisions ensured they were not representative of the general population they were charged to serve. It also suffered from another defect. As former Secretary of Agriculture Dan Glickman lamented, this system for selecting credit officers meant that local employees were often "influenced by the values of their local communities and county committees rather than by standard policies promulgated at the national level," and that adherence to such values sometimes led to "abuse of program authority and insider information to the benefit, or detriment, of certain groups." Letter From Dan Glickman, Secretary of Agriculture, to Kenneth Harden (Apr. 29, 1997), at 1 (attached as Ex. 24); *accord* CRAT Report at 18 (Ex. 22) (finding that local staff "tend to be influenced by values of their local communities and county committees rather than by standard policies promulgated a national level," making it "more difficult to hold [them] accountable").

Indeed, Rosalind Gray, a former Director of USDA's Office of Civil Rights, explained that "since the process seemed to be so subjective" and "there were White persons on the County

committee who knew White farmers," having "a minority person on the County committees who knew some minority farmers" "certainly would [have] enhance[d] their ability to deal with the subjectivity and certainly the character, moral turpitude types of interpretation that happened with the element of creditworthiness." Gray Dep. at 205 (Ex. 11). She added that as Director of Civil Rights, she had been unaware of *any* Native Americans who had served as County Committee members. *Id.* at 206; *see also* 10/01/09 Lopez Dep. at 30-36 (attached as Ex. 25) (Texas FSA State Outreach Coordinator and former County Executive Director of 28 years knew of only a single Native American farmer elected to a County Committee in Texas, occurring just two years ago).

As two well-respected experts in sociology and psychology have determined, the combination of a highly subjective process and non-diverse decisionmakers owing loyalty to white local farmers was a recipe for bias and discrimination against Native American farmers. William T. Bielby, a University of Illinois sociology professor, "determined that there are highly subjective discretionary aspects to the process and criteria used for decisions about direct loans and loan servicing," and that "social science research on stereotyping and outgroup bias provides a basis for concluding that subjectivity and discretion in the process for making direct loans and loan servicing and the lack of effective monitoring and oversight [by USDA] introduces a substantial degree of vulnerability to bias against Native Americans." Expert Report of William T. Bielby (Feb. 20, 2009), at 22, 35-36 (attached as Ex. 26). And Stephanie A. Fryberg, a University of Arizona psychology professor with expertise in stereotyping phenomena, concluded that "USDA fostered an environment that allows both cultural biases and stereotypes of Native Americans within the USDA to influence the opportunities of individual Native American farmers," and that training of and guidance for local loan officers was needed "to

overcome these stereotypes and cultural biases." Expert Report of Stephanie A. Fryberg (Feb. 20, 2009), at 21-22 (attached as Ex. 27). Moreover, since USDA's County Committees have lacked diversity, "Native American farmers are less likely to hear about programs and to receive the help and attention needed to participate in these programs." *Id.* at 22.

Drs. Bielby and Fryberg's carefully formulated opinions about how cultural stereotypes and bias infected USDA's policies and practices are consistent with the experiences of Native American farmers, ranchers, and advocates throughout the nation. For example, class member Steven Defender testified that he witnessed outright hostility by white County Committee members to Native Americans' applications, and was personally told that he "had no business being on [the County Committee]" in McLaughlin, South Dakota.[16] Named Plaintiff Luther Crasco testified that he repeatedly observed local staff in Montana demonstrate bias against and express stereotypes about Native Americans.[17] Nancy Carnley, Vice-Chief of the MaChis Lower Creek Indian tribe in New Brockton, Alabama, testified that she heard local staff state that they would not make loans to Native Americans and heard them make offensive, derogatory comments.[18] Similarly, Phil Givens, a Native American farmer and USDA consultant from

[16] While serving on a County Committee, Mr. Defender witnessed "blatant name-calling," including being called a "damn Indian" by a committee member; when Native Americans' applications were considered, a committee member would say, "not another Prairie Nigger"; and the committee often delayed decisions on such loan applications. 02/05/09 Defender Dep. at 84, 140 (attached as Ex. 28).

[17] Mr. Crasco recounted several such instances: first, a local county employee told Mr. Crasco, "You Indians are always getting free money and you don't . . . pay taxes"; second, an employee told him, "why don't you Indians just go back to [the] Fort Belknap [Reservation] and borrow money there? That's where you belong"; and third, an employee informed him that he had "only been sent here for two reasons, to protect the government's money and to sell you people out." 03/10/06 Crasco Dep. at 94-96 (attached as Ex. 29).

[18] Carnley stated that she went with her father and children to the county loan office, and they were told that no applications were available for "injuns" and were repeatedly called "injuns." At the county office, an employee made "war [w]hoop" noises with her hand in front of her

Tahlequah, Oklahoma, testified that, in his experience, "the documentation that's required to fill out [a loan] application is totally different when it comes to the white farmer versus a Native American male" and it is "a lot worse when [Native Americans] go and ask for [loan] servicing." 04/23/09 Givens Dep. at 238-39 (attached as Ex. 31).

These anecdotes are only a few examples of bias exhibited repeatedly by local USDA officials against Native American farmers and ranchers, the cumulative effects of which are evidenced by the consistent, widespread and statistically-significant disparities in loans and servicing awarded to Native Americans and other farmers and ranchers throughout the period covered by this action. O'Brien Final at 2 (Ex. 2) (finding that Native Americans "faced large, consistent, statistically significant shortfalls in loans and servicing in the overwhelming majority of the states"); CRAT Report at 21, 30 (Ex. 22) (finding that disparities exist between "nonminority loan processing and American Indian loan processing" and "[m]inority farmers have lost significant amounts of land and potential farm income as a result of discrimination by FSA programs").

In sum, discovery in this case has amply demonstrated that the "problem of subconscious stereotypes and prejudices" pervaded the USDA's system for providing loans and loan servicing to farmers and ranchers. *Watson*, 487 U.S. at 990-91.

II. USDA Failed to Retain Information on Loan and Loan Servicing Applications From Which Individual Damages Calculations Could Be Made.

Discovery in this case also has revealed USDA's failure to retain adequate documentation regarding its loan making and loan servicing decisions, which bolters the need for the collective adjudication of class members' damage claims. As demonstrated below, USDA's recordkeeping

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mouth, and another employee said "I don't have anything for you Injuns, I never will, and as long as I am in this office there is not going to be anything for you Injuns." 04/08/09 Carnley Dep. at 39-40, 45-46, 51, 62, 69 (attached as Ex. 30).

failures make it utterly impractical to litigate this case using anything but an objective formula as a basis for calculating individual damages.

First, USDA has retained virtually no data on the basis for decisions on loan applications that were denied prior to 1998, let alone the actual loan application files.[19] Thus, for nearly the entire class period, there is no reliable way to reconstruct the loan-denial decisions that were made by local USDA officials. Other than the testimony of the individuals involved, there is no evidentiary record that would show why an application was denied, whether or how the original size of the loan sought by the applicants was reduced by the loan officer, or why this occurred. And even after 1998, when USDA first began keeping data on rejected or withdrawn applications, its record retention policies required that loan files be destroyed after three years. *See* Hawkinson Decl. Attachment D (25-AS) at ¶ 84 ("Hawkinson Attachment D") (attached as Ex. 35). Thus, most of the files and other materials documenting loan denials no longer exist.

Second, USDA's recordkeeping systems have been abysmal, as Plaintiffs documented in detail in their August 18, 2009 motion to address the consequences of the USDA's failure to institute a proper litigation hold in this action and to create or retain Native Americans' civil rights complaints. *See* Dkt. No. 529 at 2-18. Even for those Plaintiffs who eventually received loans from USDA, many of their records are either missing or incomplete. For example, in

[19] *See* Def.'s 10/03/08 Stat. Rep. at 25-26, Dkt. No. 484; Expert Rebuttal Report of Patrick O'Brien (July 2009) ("O'Brien July"), at 53 (attached as Ex. 32) (stating that USDA's MAC database that provides summary statistics on the denial of loan applications "includes virtually no data for the first 16 years [1981-97] of the relevant period when . . . Native Americans faced the greatest differences in treatment by USDA" and noting that "USDA has conceded [that the available MAC data [from 1981 to 1997] is substantially incomplete, and even corrupted"); Expert Report of Gordon C. Rausser (Oct. 19, 2009), at 58-59 (attached as Ex. 33) (stating that USDA's MAC database "was not implemented until 1997, and then only partially so," and that the MAC data "pertaining to 1981-1997 is a miniscule sample of the actual number of loan applications filed with FSA during that period and cannot be relied upon to arrive at any valid conclusions."); 12/02/08 K. Miller Dep. at 12-15 (attached as Ex. 34).

discovery Plaintiffs sought a sample of so-called "borrower" files from USDA. These files are supposed to include all relevant loan application documents for borrowers. USDA was unable to find nearly one-third of the files for even the small sample requested by Plaintiffs. *Id*. at 35 (stating that when Plaintiffs requested that USDA produce borrower files for 151 members of the class, USDA could not locate almost one-third of those files). It is quite likely, therefore, that USDA may not have any documentation about the borrowing activity and/or loan servicing applications of a large portion of the class, making it extraordinarily difficult to reconstruct many of the loan decisions made during the class period, which extends back to 1981.

Third, the documentation that is kept in even the small number of "borrower files" produced by USDA is often incomplete. Many Plaintiffs who were repeatedly denied a loan before being granted one have nothing in their "borrower files" until they actually become borrowers. *See* Hawkinson Attachment D ¶ 84 (Ex. 35) (discussing the process for handling denied loan applications). And discovery revealed that there are often important items missing from a borrower's file, such as evidence that the borrower had complained of discrimination. *See, e.g.*, Dkt. No. 529 at 10 (documenting USDA's failure to record numerous civil rights complaints filed by individual class members). Moreover, these "borrower files" fail to show the informal back-and-forth interaction between borrowers and county staff, which is directly relevant to Plaintiffs' claims of discrimination.

Fourth, given USDA's complete (and conceded) failure to take its recordkeeping responsibilities seriously and implement a litigation hold in this matter for all documents relevant to this litigation until just last year, it is likely that many other documents relevant to loan making and loan servicing decisions for class members have been destroyed. USDA concedes that it did not implement any litigation hold at all for the *Keepseagle* litigation until 2002, *see*

Dkt. No. 542 at 9, and concedes that there was significant "cause for concern with respect to the scope" of that hold that was not rectified until a new litigation hold order was issued in October 2008. *Id*. With no proper litigation hold in place until 2008, relevant USDA retention policies *required* the USDA to dispose of many, if not most, of its borrower files. *See* Def.'s 10/03/08 Stat. Rep. at 18, Dkt. No. 484 (retention policies are mandatory); *see also* Snyder Decl. ¶ 5 (attached as Ex. 36) (records schedules provide "mandatory instructions for the disposition of the records . . . when they are no longer needed by the agency"); 11/20/08 Snyder Dep. at 7 (attached as Ex. 37) ("[o]nce a disposition is up, you need to destroy it"); Hawkinson Decl. Attachment B ¶ 77 (attached as Ex. 38) ("retention periods specified in the Agency records schedules . . . are: mandatory [and] not to be exceeded").[20] Had USDA implemented a proper hold when litigation was reasonably anticipated, it should have retained all borrower files that remained open as early as 1990.[21] It utterly failed to preserve these materials.

III. Plaintiffs' Expert Has Developed an Economic Model that Provides a Basis for Accurately Calculating and Distributing Class Members' Economic Losses.

Plaintiffs seek to pursue as a class the recovery of economic losses associated with USDA's discriminatory denial of credit opportunities under its farm loan programs. Accordingly, Plaintiffs seek to recover the revenues they would have received in the absence of USDA's discriminatory lending policies and practices.

[20] The only exception would be for files stored at the Federal Records Center ("FRC") from 1999 on, but as explained in detail in Plaintiffs' August 18, 2009 motion, state and county offices, which typically maintained borrower files, did not use the FRC until very recently. Dkt. No. 529 at 19-20 & n.10.

[21] As explained in Plaintiffs' motion for an evidentiary presumption, litigation was reasonably foreseeable in 1993, when USDA's general counsel stated that USDA should expect class action litigation for civil rights violations in the farm loan programs. Dkt. No. 529 at 30-33. Under governing regulations, USDA is required to retain borrower files for three years after closure. *See* Hawkinson Decl. ¶ 8 (attached as Ex. 39); Hawkinson Attachment D ¶ 84 (Ex. 35). Accordingly, USDA and FSA should have preserved *all* open borrower files dating back to 1990.

Plaintiffs have developed an objective formula for calculating the losses that class members suffered as a result of USDA's pattern or practice of discrimination. Plaintiffs' expert, Mr. O'Brien, an agricultural economist with over 27 years of experience at USDA's Economic Research Service, has developed and applied an economic model for calculating the amount of economic losses Native Americans suffered *in each state and year* due to shortfalls in loans and loan servicing they received compared to other farmers and ranchers. *See* O'Brien Final Report at 1-7 (Ex. 2); O'Brien July at 1-14 (Ex. 32); Expert Report of Patrick O'Brien (Feb. 2009) ("O'Brien Feb."), at 1-7 (attached as Ex. 40).

Mr. O'Brien's analysis reveals that Native American farmers and ranchers "faced large, consistent, statistically significant shortfalls in loans and servicing in the overwhelming majority of the states," and that nationally from 1981 to 1999 Native Americans: (1) received only half of the loans and 43% of the loan dollars they would be expected to receive in the absence of discrimination; (2) received only half to two-thirds the loan servicing they would be expected to receive in the absence of discrimination; and (3) suffered at least $584 million in aggregate net economic losses. *See* O'Brien Final 2-3, 5-7, & Appx. 1 Figures II-5 & III-1 (Ex. 2). Mr. O'Brien determined that these disparities in loans and loan servicing received by Native Americans cannot be attributable to chance, as they are "statistically significant at the 99% level." *Id.* at 2. Furthermore, while Native Americans experienced the largest disparities from 1981 to 1999, statistically significant disparities persisted in many states after the filing of this action, thereby increasing aggregate net economic losses to at least $608 million from 1981 to 2007. *Id.* at 3-4, 6-7.

This model, which draws primarily on USDA's own data to compute disparities in lending and the resulting economic losses, provides a sound basis for distributing damages among class members who were denied credit opportunities in particular years and states.

A. The Methodology for Evaluating Loan Making and Servicing.

The methodology Mr. O'Brien developed for analyzing loan making—which the Court may employ—involves four steps: (1) ascertaining how many USDA loans Native Americans reasonably would be expected to receive in the absence of discrimination for each year and state; (2) computing shortfalls in the amounts of loans and funds awarded to Native Americans compared to other farmers and ranchers for each year and state; (3) converting loan shortfalls into the amounts of working capital Native Americans were denied; and (4) computing the amounts of revenue lost by Native Americans because they received less loan funds than they should have received in the absence of discrimination. *See* O'Brien Feb. 6-21, 26-31 (Ex. 40).

First, the formula developed computes the amount and number of loans Native American farmers would have been expected to receive in the absence of discrimination by allocating to them a share of total loans and funds awarded that is proportionate to the percentage of Native Americans counted among the overall population of farm operators eligible for USDA loans. O'Brien Feb. at 7 (Ex. 40).[22] The formula derives the percentage of Native Americans eligible

[22] Reference to the population of Native American farmers and ranchers who were eligible to receive loans, rather than to the population of actual loan applicants, as a basis for determining whether Native Americans received a proportionate share of loans and funds draws upon an approach long endorsed by the courts when evidence from actual applicants is missing or unreliable. Here, USDA's failure to retain records for applicants denied loans and to maintain complete and accurate records for those to whom it awarded loans makes it impossible to statistically compare the circumstances of the actual loan applicants or reconstruct loan decisions made many years earlier. *See supra* Section II; O'Brien July at 53-54 (Ex. 32). In the absence of evidence about actual applicants and the decisions to deny their applications, courts routinely refer to general population statistics or other proxies as an appropriate substitute for that information. *See Hemmings v. Tidyman's Inc.*, 285 F.3d 1174, 1187 n.17 (9th Cir. 2004), *cert*

for USDA farm loans using the percentage of Native American farm operators counted by USDA's 2007 Census of Agriculture for each state, and controlling for a variety of factors to ensure that only operators who could qualify for USDA loans are counted. O'Brien July at 2, 14-16 (Ex. 32).[23]

Second, the formula computes loan shortfalls by comparing for each of the three categories of loans at issue in this case the number and amount of loans Native Americans would be *expected* to receive to the number and amount of loans they *actually* received in each year and state. O'Brien Feb. at 13-14 (Ex. 40). This computation is undertaken by using USDA's own data on the number and amount of loans that were awarded to Native Americans and to other farmers and ranchers in each state and year. *Id.* at 13-16.

Third, the formula converts the amounts of loan shortfalls into credit shortfalls, which represent the amount of working capital to which Native Americans were effectively denied access over the life of the loans. *Id.* at 27-28. The credit shortfalls are obtained by "using amortization schedules based on the interest rate, the negotiated term, and the actual term for the

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denied, 537 U.S. 1110 (2003); *Paige v. California*, 291 F.3d 1141, 1147 (9th Cir. 2002), *cert denied*, 537 U.S. 1189 (2003); *Forehand v. Florida State Hosp. at Chattahoochee*, 89 F.3d 1562, 1564 (11th Cir. 1996); *Berger v. Iron Workers Reinforced Rodmen Local 201*, 843 F.2d 1395, 1414-15 (D.C. Cir. 1988) (per curiam); *Catlett v. Missouri Highway & Transp. Comm'n*, 828 F.2d 1260, 1266-67 (8th Cir. 1987). Not surprisingly, then, both Plaintiffs' and USDA's experts "agree that any measure of reasonable expectations has to start by establishing Native Americans' share of the farm operator population served by the USDA program and using that share to arrive at a measure of the number of loans and loan servicing agreements that Native Americans could reasonably have expected[,]" and that the "most reliable data for establishing Native Americans' share of the farm operator pool is the 2007 Census of Agriculture." O'Brien Final at 9 (Ex. 2); *see also* Report of Gordon C. Rausser (April 9, 2009), at 11, 16-17 (attached as Ex. 41).

[23] Those factors, *inter alia*, include: (1) the targeting of ownership and operating loans to small- and medium-sized operators; (2) the targeting of emergency loans to operators who faced natural disasters; and (3) the program's emphasis on beginning and limited resource farmers. O'Brien July at 16-17; O'Brien Feb. at 8-9, 11-12.

individual ownership, operating, and emergency term[.]" *Id.* at 28; *see also* O'Brien July at 135-37 (Ex. 32).

Fourth, the formula computes for each state and year the amount of economic loss Native Americans suffered as a result of being awarded less loan funds – and a corresponding smaller amount of working capital – than would be expected in the absence of discrimination. O'Brien Feb. at 28-31 (Ex. 40). These calculations use "ratios" developed and employed by USDA's Economic Research Service to assess for each state and year how much income and asset appreciation is generated by additional capital investments. *Id.*; O'Brien July 4-5, 43-45 (Ex. 32).[24] Accordingly, the formula accounts for varying economic conditions over the period covered by this action, and aggregates the positive and negative effects of loan awards for all states and years studied. O'Brien Final at 6-7. In addition, because the formula identifies the years and states in which USDA's ratios were negative—when the award of an additional dollar of credit would have resulted in a *loss* of revenue—the formula ensures that class members denied credit in years where credit would not have resulted in additional revenue will not receive damages for those years, and that the amount and allocation of damages awarded will redress the harm actually suffered by class members to the greatest extent possible. *Id.*; O'Brien July at 4-5 (Ex. 32).

[24] The formula also determines the amount of interest rate subsidies Native Americans were denied to reflect the lower interest rates that Native American borrowers would have been charged if they had received their fair share of USDA loans. Mr. O'Brien calculates these lost subsidies by multiplying the difference between commercial interest rates and the state-weighted USDA interest rates by the credit shortfall for each state and year. O'Brien Feb. at 30 (Ex. 40); July at 44-45 (Ex. 32).

A very similar formula can be used to compute and allocate economic losses attributable to shortfalls in loan servicing.[25] First, the formula compares the amount of loan servicing Native Americans would have received had they been awarded loan servicing in amounts proportionate to their representation among the total population of USDA borrowers. O'Brien Feb. at 21-22 (Ex. 40). The formula makes this comparison for three types of loan servicing: (1) loan restructuring; (2) shared appreciation and net recovery buy-out agreements; and (3) write-off agreements. *See id.* at 21-25; O'Brien July 38-42 (Ex. 32).[26] Second, the formula converts shortfalls for each of the three types of loan servicing studied into economic losses based on the same USDA ratios used to compute economic losses for loan shortfalls, as well as other statistical techniques. O'Brien Feb. 32-36 (Ex. 40).

B. The Formula's Allocation of Damages Among Class Members.

The same formula developed by Mr. O'Brien to detect and compute shortfalls in loans and loan servicing awarded to Native Americans can also be deployed to allocate any damages awarded among members of the class. In essence, the formula would allocate damages among class members based on where and when they were denied credit opportunities. By relying upon these temporal and geographic characteristics, the formula will ensure that damages are allocated

[25] The formula developed by Mr. O'Brien relies upon USDA's own "PLAS database," which contains a range of information about individuals who successfully obtained loans from USDA—including racial demographics—and, thus, were potential applicants for loan servicing. O'Brien Feb. at 21 & Appx. A2-1 (Ex. 40).

[26] The formula captures not only the economic losses associated with lower levels of loan servicing received by Native Americans who actually obtained USDA loans and were, therefore, eligible for loan servicing, but also "the amount of loan servicing that should have been received had Native Americans received their expected level of lending." O'Brien Final at 5 (Ex. 2); *see also id*. ("Of course, Native Americans who were wrongly denied USDA loans received no servicing, but the economic value of the loans they were denied should incorporate the potential for receiving loan servicing.").

proportionate to the magnitude of harm actually suffered by farmers and ranchers in each state and time period. Damages would be distributed to Native American farmers and ranchers who submit a claim form in response to appropriate notice. Each would be expected to provide information to demonstrate membership in the class and specify the state and time period during which he or she unsuccessfully sought a loan or loan servicing. The damages allocated to each state and time period by the formula then would be distributed among these class members within each state and time period.

This method for allocating damages will help ensure they are distributed to members of the class who were harmed by the practices challenged in this action and in proportion to the magnitude of the harm each individual suffered. Accordingly, class members who sought loans and loan servicing opportunities earlier in the class period or for a longer period of time would receive larger individual awards. In addition, this process will ensure that individual awards of damages reflect the economic realities of the time and state where the farming or ranching occurred. As most of the economic loss calculations are based on USDA's ratios for farm financial performance and historical changes in asset value, which vary yearly, awards to individuals will reflect how much—and even whether—the denial of a credit opportunity impacted individual farmers in a particular state and year.

IV. The Court Should Certify That the Class May Pursue Damages.

Given the nature and extent of the violations at issue here and the available options for adjudicating Plaintiffs' claims for monetary relief, certification of the class members' damage claims under Rule 23(b)(3) and utilizing an objective formula to compute and allocate any damages awarded is clearly justified. Commenting on the kind of subjective decisionmaking challenged in this action, the Supreme Court explained that the "problem of subconscious

stereotypes and prejudices" when combined with an "undisciplined system of subjective decisionmaking has precisely the same effects as a system pervaded by impermissible intentional discrimination." *Watson*, 487 U.S. at 990-91. The pervasiveness of undisciplined and subjective decisionmaking throughout USDA's processes for loan making and loan servicing presents common questions of law and fact that warranted certification of the Plaintiff class pursuant to Rules 23(a) and 23(b)(2) to pursue declaratory and injunctive relief. *Keepseagle*, 2001 WL 34676944, at *8. This same system of undisciplined and subjective decisionmaking likewise caused significant economic damages to Plaintiffs, the redress of which should be undertaken pursuant to Rule 23(b)(3).

Discovery undertaken since the class was certified amply demonstrates that Plaintiffs were subject to a common set of challenged practices, confirming the propriety of the original class certification decision and providing the foundation for certification of Plaintiffs' claims for monetary relief. Testimony elicited from USDA's own witnesses, as well as expert analyses, demonstrates that USDA engaged in a pattern or practice of discrimination, predicated on a system of highly subjective local decisionmaking that permitted the use of stereotypes and bias against Native Americans and produced large disparities in loan making and servicing that were adverse to Native Americans. The evidence also demonstrates that Plaintiffs' claims for damages are susceptible of class treatment, as any damages that are awarded may be computed and allocated by application of a straightforward formula that draws upon objective data produced by the USDA, and thus avoids the "quagmire of hypothetical judgments" in which the parties and the Court would be embroiled were they to attempt to individually adjudicate each class member's claim. *See Segar v. Smith*, 738 F.2d 1249, 1290 (D.C. Cir. 1984) (quotation marks and citations omitted). Accordingly, common questions predominate in adjudicating

Plaintiffs' damages claims and pursuit of those claims collectively is decidedly superior to individual adjudication, making certification pursuant to Rule 23(b)(3) appropriate.

A. The D.C. Circuit Has Expressly Endorsed the Use of Hybrid Certification in Cases Involving Claims for Both Injunctive Relief and Monetary Damages.

The hybrid certification that Plaintiffs seek herein is neither novel nor unprecedented. It has been expressly adopted in this Circuit in similar circumstances. In *Eubanks v. Billington*, 110 F.3d 87 (D.C. Cir. 1997), the D.C. Circuit faced the question of what to do when a class seeks injunctive or declaratory relief along with economic damages. The Court concluded that where

> the assumption of cohesiveness for purposes of injunctive relief that justifies certification as a (b)(2) class is unjustified as to claims that individual class members may have for monetary damages . . . the court may adopt a 'hybrid' approach, certifying a (b)(2) class as to the claims for declaratory or injunctive relief, and a (b)(3) class as to the claims for monetary relief, effectively granting (b)(3) protections including the right to opt out to class members at the monetary relief stage.

Id. at 96. In other words, where all members of the class are clearly interested in obtaining the same injunctive and declaratory relief, but some individual members of the class may take issue with the means of calculating their individual share of damages once liability has been established, due process demands that these individuals be given notice and the right to opt out of the class at that stage of the proceedings. *See, e.g.*, *In re Veneman*, 309 F.3d 789, 792 (D.C. Cir. 2002) ("Because members of a class seeking substantial monetary damages may have divergent interests, due process requires that putative class members receive notice and an opportunity to opt out.").

Numerous courts in this Circuit and others have also followed the *Eubanks* hybrid certification approach. As one district court recently explained, hybrid certification "allows for the best of both worlds." *Wilson v. County of Gloucester*, 256 F.R.D. 479, 491 (D.N.J. 2009).

"Certifying the injunctive relief portion of [a] suit pursuant to (b)(2) best ensures the efficient litigation of the issue central to the parties' dispute. . . . Yet certifying the damages portion of the suit, pursuant to (b)(3), ensures notice to all class members in the event a [] violation is held to have occurred." *Id.* at 491-92. The court further stated that if liability is not found,

> the time and cost involved with the notice and opt-out requirements of (b)(3) will be avoided because no damage determinations will be required. On the other hand, if the Court does find liability, the parties will still benefit from the streamlined litigation of the damages issues, and the procedural protections of (b)(3) will be afforded to class members.

Id. at 491-92; *see also Robinson v. Metro-North Commuter R.R. Co.*, 267 F.3d 147, 167 (2d Cir. 2001) (suggesting separate certification of liability and damages issues); *Lemon v. Int'l Union of Operating Eng'rs, Local No. 139*, 216 F.3d 577, 581 (7th Cir. 2000) ("The district court could certify a Rule 23(b)(2) class for the portion of the case addressing equitable relief and a Rule 23(b)(3) class for the portion of the case addressing damages. This avoids the due process problems of certifying the entire case under Rule 23(b)(2) by introducing the Rule 23(b)(3) protections of personal notice and opportunity to opt out for the damages claims.").

Hybrid certification is appropriate whenever there is "some reason to believe that the assumption of cohesiveness underlying a subsection (b)(2) class action does not apply to the individual claims for monetary damages; for example, [where] the amounts claimed by various class members may be so disparate as to create a conflict of interest within the class." *Thomas v. Albright*, 139 F.3d 227, 235-36 (D.C. Cir. 1998); *cf. Holmes v. Continental Can Co.*, 706 F.2d 1144, 1156 (11th Cir. 1983) (noting that "in general terms, the rights and interests of class members were visualized as more likely to be homogeneous in a (b)(2) than in a (b)(3) class"). Thus, in *Bynum v. District of Columbia*, 214 F.R.D. 27 (D.D.C. 2003), the court certified a hybrid class where, if liability were proven, "the award that each individual class member is entitled to may vary significantly." *Id.* at 39. While concluding that this justified a finding that

the "assumption of cohesiveness" in the (b)(2) claims broke down as to the (b)(3) claims, the court found that this potential disparity in damages "would not preclude a finding that common questions of law and fact predominate over individual questions" for purposes of (b)(3) certification. *Id.*; *see also Barnes v. District of Columbia*, 242 F.R.D. 113, 124 (D.D.C. 2007) (certifying injunctive relief under (b)(2) and damages under (b)(3)); *Taylor v. District of Columbia Water & Sewer Authority*, 205 F.R.D. 43, 50 (D.D.C. 2002) (noting that "district courts have ample discretion to implement hybrid certification under Rule 23(d)(5), which allows them to 'make appropriate orders . . . requiring for the protection of the members of the class or otherwise for the fair conduct of the action'").[27]

In this action, the Court should certify a hybrid class, because the economic damages owed to individual Plaintiffs may "vary significantly," *Bynum*, 214 F.R.D. at 39, depending on the state and year in which they were denied credit opportunities, how frequently they sought credit opportunities, and whether they applied for loan servicing in addition to loans. *See supra* Section III.B. As in *Bynum*, these variations do "not preclude a finding that common questions of law and fact predominate over individual questions" for purposes of Rule 23(b)(3) certification. 214 F.R.D. at 39. Moreover, because this Court may allocate and distribute damages among Plaintiffs based on an objective formula that takes into account the very factors that cause damages to vary, collective adjudication of Plaintiffs' damages claims will undoubtedly be superior to

[27] In contrast, the court denied certification of a hybrid class where the "computation of damages [would] require separate mini-trials," finding that in such a case the "individualized damages determinations predominate over common issues." *Does I Through III v. District of Columbia*, 2006 WL 2864483, at *3 (D.D.C. Oct. 5, 2006). The *Does* court noted, however, that "[i]f the calculation of the damage claims were a mechanical task, the presence of individualized claims would not be a barrier to class certification." *Id.* As demonstrated herein, the calculation of Plaintiffs' damages claims will be a mechanical task; however, because there is still a potential for variance among awards of damages, the hybrid certification approach is warranted here.

individual adjudication and will be easily manageable. In the following sections, we explain why Plaintiffs satisfy the criteria for certifying their damages claims under Rule 23(b)(3).

B. Plaintiffs Amply Satisfy the Requirements of Rule 23(b)(3) to Pursue Their Damages Claims Through Collective Adjudication.

The record readily demonstrates that pursuit of Plaintiffs' damages claims collectively is fully consistent with and plainly contemplated by Rule 23(b)(3).[28] While variations exist in the amounts of damages awardable to individual class members, questions of fact and law common to the class clearly predominate, and the amount and allocation of damages may be calculated by application of a formula relying upon objective evidence produced by USDA. Moreover, pursuit of the damage claims collectively, rather than individually for each class member, is decidedly the superior method for adjudicating these claims. Indeed, Congress plainly contemplated that ECOA claims for damages advanced by multiple victims be resolved by means of class adjudication. *See* 15 U.S.C. § 1691e(a) (stating that defendants shall be liable for "damages sustained" by plaintiffs "acting either in an individual capacity or as a member of a class").

1. Common Issues of Law and Fact Predominate.

[28] The decisions in *Love v. Johanns*, 439 F.3d 723 (D.C. Cir. 2006) and *Garcia v. Johanns*, 444 F.3d 625 (D.C. Cir. 2006), in which the D.C. Circuit affirmed the denial of class certification for female and Hispanic farmers, do not affect or preclude certification of Plaintiffs' claims for damages here. Neither decision addressed whether the claims presented in those cases could satisfy the requirement of Rule 23(b), as the sole focus of those decisions was whether the plaintiffs had satisfied Rule 23(a). *See Love*, 439 F.3d at 727-28 ("we affirm without considering whether certification would also be improper under Rule 23(b)"); *Garcia*, 444 F.3d at 631 n.6 (same). Moreover, in those cases, the courts did not have the benefit of a developed record prior to addressing class certification, whereas merits discovery has largely concluded in this action. In any event, the D.C. Circuit made clear that the District Court's discretion to certify a class is sufficiently broad to permit certification of claims that may resemble other claims for which certification was denied by a different District Judge in the same District Court. *See Love*, 439 F.3d at 730 (citing *Chiang v. Veneman*, 385 F.3d 256, 265-66 (3rd Cir. 2004)). Accordingly, neither *Love* nor *Garcia* poses an obstacle to the certification of Plaintiffs' claims for damages.

Issues of law and fact common to the class clearly predominate over any issues that may vary among individual class members.

First, members of the class challenge a common set of discriminatory practices: the highly discretionary and undisciplined process by which loan and loan servicing decisions were made by USDA, the lack of oversight over officials who made loan decisions on the basis of stereotypes of Native Americans, and other forms of bias often encountered at USDA county offices. In the event members of the Plaintiff class are permitted to adjudicate their damages claims, they already will have established USDA's liability for some or all of the common practices they challenge. As such, they will have demonstrated they were subject to a common set of discriminatory practices, leaving only the questions of whether and, if so, to what extent they were harmed economically by the discriminatory practices proven at that point. *See Int'l Brotherhood of Teamsters v. United States*, 431 U.S. 324, 362-63 (1977).

This exposure to a common set of unlawful practices constitutes a set of issues of fact or law common to the class which, having been sufficient to establish liability to the class, necessarily predominates over the circumstances of individual class members. *See Brown v. Pro Football, Inc*., 146 F.R.D. 1, 3 (D.D.C. 1992) (noting that "the common question of liability" is "still relevant to the … determination of damages"); *Barnes*, 242 F.R.D. at 123 (certifying hybrid (b)(2) and (b)(3) class on basis that common issues of liability predominated over individual issues).

Second, the nature of the monetary relief sought and the evidence needed to warrant its award constitute issues of fact or law common to the class that predominate over any individual issues. All members of the class seek awards of damages reflecting the economic harm they suffered because of discrimination in USDA's farm loan program. As such, each class member

seeks to recover some measure of the revenues they would have received had they not been subject to discrimination in the farm loan program. None seek damages to compensate for emotional harm or consequential damages they may have suffered as a result of the discriminatory treatment they received,[29] and each will rely on objective information that is publicly available. *Cf. In re Monumental Life Ins. Co.*, 365 F.3d 408, 419-420 (5th Cir. 2004). The damages that Plaintiffs seek herein are thus akin to back pay awarded to victims of employment discrimination under Title VII, since the award under ECOA would represent a measure of income lost because of discrimination, and courts have long held such that claims for income lost because of discrimination are compatible with class treatment. *See id*. (citing *Pettway v. Am. Cast Iron Pipe Co*., 494 F.2d 211, 256-58 (5th Cir. 1974)); *Eubanks*, 110 F.3d at 92.[30] The nature of the monetary relief sought by members of the class, therefore, presents questions of fact or law common to the class.[31]

[29] Plaintiffs who wish to seek claims for *non-economic* damages will have the opportunity to opt out for the limited purpose of pursuing any such permissible damages under the hybrid approach to class certification urged herein.

[30] Indeed, courts consistently rely on Title VII jurisprudence to interpret ECOA. *Garcia*, 444 F.3d at 632 n.7 (holding that Title VII precedents may be followed "in cases involving ECOA," including in the class action context) (citing *Mays v. Buckeye Rural Elec. Co-op., Inc*., 277 F.3d 873, 876 (6th Cir. 2002) ("Given the similar purposes of the ECOA and Title VII, the burden-allocation system of federal employment discrimination law provides an analytical framework for claims of credit discrimination."); *Rosa v. Park W. Bank & Trust Co.*, 214 F.3d 213, 215 (1st Cir. 2000) ("In interpreting the ECOA, this court looks to Title VII case law . . . ."); *Bhandari v. First Nat'l Bank of Commerce*, 808 F.2d 1082, 1100 (5th Cir. 1987) ("The language [of ECOA] is closely related to that of Title VII of the Equal Employment Opportunity Act ("EEOA"), 42 U.S.C. § 2000e-2, and was intended to be interpreted similarly.")).

[31] The fact that there will be variation in the amounts awardable to class members does not lessen the susceptibility of these claims to class treatment. Courts have long held that "[w]hile the quantum of damages for each plaintiff may be different, that fact alone is insufficient to introduce a predominant noncommon question." *Jack Faucett Assoc. v. American Tel. & Tel.*, 1983 WL 4601, *3 (D.D.C. Mar. 18, 1983).

Third, the method for computing and allocating the monetary relief is common to all members of the class. The use of a formula to determine the amount of damages awardable to each class member presents a powerful factor favoring certification of the damages claims, as damages can be ascertained through application of the same economic model for each member of the class. *See supra* Section III (discussing the formula developed by Mr. O'Brien). Indeed, the economic model developed by Mr. O'Brien to determine the amounts of damages awardable to individual class members more than satisfies the showing needed to warrant certification of such damages claims. It is well established in this Circuit that "[a]s to whether common issues of damages predominate, the Court need only assess whether methods are *available* to prove damages on a class-wide basis." *In re Nifedipine Antitrust Litigation*, 246 F.R.D. 365, 371 (D.D.C. 2007) (internal quotation and citation omitted; emphasis added). "As a result, plaintiffs do not need to provide a precise damage formula, nor do they need to take into account or eliminate individual variations in damages." *Id.* "Instead, plaintiffs need only show that the proposed methods are not so insubstantial as to amount to no method at all." *Id.* (internal quotation and alteration omitted); *see also In re Vitamins Antitrust Litig.*, 209 F.R.D. 251, 268 (D.D.C. 2002) ("At the certification stage, the preliminary inquiry in assessing the proposed methods of proving damages is limited: The inquiry is not whether the methods are valid, but is only to assess whether the methods are available to prove damages on a class-wide basis.").

The economic model developed here is no mere concept; it is a professionally developed formula, which draws upon objective data provided by USDA, and it will enable the computation and allocation of damages among class members in a manner commensurate with the magnitude of the harm they suffered. As such, it offers a viable, concrete method for adjudicating damages for all members of the class, clearly presenting issues of fact and law common to the class.

2. Adjudication of Class Members' Damages Claims Collectively Is the Superior Method for Resolving Plaintiffs' Claims to Monetary Relief.

Certification of Plaintiffs' damages claims provides a means of resolving these claims that is clearly superior to other means of resolution.

It is well settled in this Circuit that a court need not engage in individualized inquiries where the challenged system was so widely affected by discretionary criteria that it would be nearly impossible to determine the decisions that might have been made absent the discrimination. *See Segar v. Smith*, 738 F.2d 1249, 1290-91 (D.C. Cir. 1984). Rather, a court may use a formula to calculate plaintiffs' damages. Here, given the unique features of this case and the dismal state of USDA's recordkeeping, the computation and allocation of monetary relief by formula might possibly be the *only* way that class members could recover a measure of relief to redress the pervasive discrimination to which USDA subjected them. Absent use of a formula to compute and allocate monetary relief, the Court would be forced to conduct hearings for each of the many thousands of class members in an effort to reconstruct the loan decisions that would have been made decades earlier had the USDA not engaged in a pattern or practice of discrimination in the delivery of farm loans and servicing. While the superiority of this formulaic approach should be readily evident, several reasons commending its use in this case are worth noting.

First, there can be no serious dispute that any attempt to reconstruct thousands of loan transactions with USDA over the course of three decades—including hypothetical histories about what those transactions would have been in the absence of discrimination, what farm earnings any given individual would have received had a loan been granted, and the additional amount that could have been earned in future years based on growth in farm opportunity enabled by the

loans—would, as the D.C. Circuit has long cautioned against, "drag the court into a quagmire of hypothetical judgments." *Segar*, 738 F.2d at 1290 (quotation marks and citations omitted).

In *Segar*, a federal agency was charged with engaging in a pattern or practice of discrimination involving personnel practices analogous to the lending practices challenged here. *Id*. at 1260-61. After affirming the lower court's liability determination, the D.C. Circuit strongly endorsed the approach employed by the trial court to forego individual monetary relief hearings, in favor of a formulaic approach to compute and award back pay. *Id.* at 1290-92. The court concluded that individualized hearings would require determinations based largely upon speculation about the course of class member careers in the absence of discrimination that would "drag the Court into 'a quagmire of hypothetical judgments.'" *Id.* (quoting *Thompson v. Boyle*, 499 F. Supp. 1147, 1170 (D.D.C. 1979) (quoting *Pettway*, 494 F.2d at 260))).[32] Rather than reviewing "a small number of discernible decisions," the Court explained, individualized hearings would involve "mere guesswork" to "recreate the employment histories of individual employees" that were affected by an evaluation process tainted by discrimination and "increased

[32] Other courts likewise have endorsed the use of a formula to compute back pay for individual class members where it would be difficult or impossible to determine, in the absence of discrimination, which class members would have received benefits and the amount of such benefits; where the challenged practices were highly discretionary; where there is a dearth of information to document the basis for past decisions; or where the process was so broadly tainted by discrimination that it would be very hard to reconstruct its operation in a neutral manner. *See, e.g., McClain v. Lufkin Indus.*, 519 F.3d 264, 280-81 (5th Cir. 2008); *Pettway*, 494 F.2d at 261; *Pettway v. Am. Cast Iron Pipe Co.*, 681 F.2d 1259, 1266 (11th Cir. 1982); *EEOC v. O&G Spring & Wire Forms Specialty Co.*, 38 F.3d 872, 880 n.9 (7th Cir. 1994); *Liberles v. Cook County*, 709 F.2d 1122, 1136 (7th Cir. 1983); *Pitre v. W. Elec. Co.*,843 F.2d 1262, 1274 (10th Cir. 1988); *Domingo v. New England Fish Co.*, 727 F.2d 1429, 1444-45 (9th Cir. 1984); *Hameed v. Int'l Ass'n of Bridge, Structural, and Ornamental Iron Workers, Local Union No. 396*, 637 F.2d 506, 520 (8th Cir. 1980); *Stewart v. Gen. Motors Corp.*, 542 F.2d 445, 452-53 (7th Cir. 1976); *EEOC v. Chicago Miniature Lamp Works*, 668 F. Supp. 1150, 1152 (N.D. Ill. 1987).

subjectivity in evaluations [that] gave discrimination more room to work its effects." *Id.* at 1290-92.[33]

Reconstruction of individual loan and loan servicing decisions here would be even more speculative than the employment decisions at issue in *Segar*. As the USDA failed to retain almost any documentation about the loan applications it denied prior to 1998 and thereafter only retained denied applications for three years, it would be virtually impossible to reconstruct the loan denial decisions made by local USDA officials for nearly all class members. *See supra* at Section II. Without such information, the Court would be compelled to rely entirely upon testimony from USDA officials about the details of individual credit decisions from among thousands of such decisions, made many years ago without the benefit of any records to refresh their recollections. And the broad discretion USDA afforded its officials in making loan and loan servicing decisions has, as the *Segar* court explained, permitted "discrimination more room to work its effects," making it "'not only imprecise but impractical" to reconstruct each credit decision made by USDA loan officials. *Segar*, 783 F.2d at 1290-92 (quoting *Pettway*, 494 F.2d at 262); *see also Watson*, 487 U.S. at 990-91 (unchecked subjectivity in employment decisions provides a ready mechanism for intentional discrimination to be perpetrated).

Of course, even if the Court could scrutinize individual loan decisions—which would be very difficult without contemporaneous documentary evidence—it would "have [] no way of knowing how much more favorable a particular [farmer's loan] evaluation should have been, or how a fair evaluation might have affected [the farmer's] chances for obtaining" a loan or loan servicing. *Segar*, 783 F.2d at 1290-91. Nor could the Court assess in this case the effects on

[33] Although *Segar* dealt with back pay in a Title VII employment discrimination class action, its principles apply to other types of discrimination cases, *Dougherty v. Barry*, 869 F.2d 605, 614 n.8 (D.C. Cir. 1989) (R.B. Ginsburg, J.), and can easily be applied to the instant action under ECOA. *See supra* n.30.

farm size, productivity and long-term profitability in later years of a discriminatory loan denial in earlier years any more effectively than the *Segar* Court could determine the effects on career progression in later years from an earlier promotion denial. *See id.*

Simply put, it would be extremely difficult for the Court or the parties to recreate in this litigation, for any individual class member, the circumstances behind each loan and loan servicing decision. When decisionmaking is highly discretionary and few, if any, records exist that document the bases for the challenged decisions, courts have readily concluded that computing and allocating monetary relief through use of a formula "has more basis in reality . . . than an individual-by-individual approach." *Pettway*, 494 F.2d at 263; *see also McClain v. Lufkin Indus.*, 519 F.3d 264, 280-81 (5th Cir. 2008) (holding that if "the class is large, the promotion or hiring practices are ambiguous, or the illegal practices continued over an extended period of time, a class-wide approach to the measure of back pay may be necessary" and rejecting an "individualized process of determining actual damages for each plaintiff . . . [that] would result in the 'quagmire of hypothetical judgments' that courts should avoid") (quoting *Pettway*, 494 F.2d at 260). Accordingly, the use of a formula that draws in large part upon USDA's own statistical data offers both the most appropriate and accurate way of measuring the economic losses to class members attributed to USDA's unlawful conduct.[34]

[34] The D.C. Circuit likewise has endorsed the use of a formula for allocating relief where, as here, various factors preclude a reasoned determination as to which class members should recover monetary relief. *See Dougherty*, 869 F.2d at 614 n.8. In *Dougherty*, then-Judge Ruth Bader Ginsburg wrote for the panel that a "court may impose class-wide relief for a group of individuals subjected to discrimination where it is impossible to determine *which particular individual* would have received the benefit but for the discrimination." *Id.* (emphasis added). Here, even if it were possible to determine which individual farmers and ranchers would have *qualified* for credit opportunities in the absence of discrimination, it may be impossible to determine which individuals would have actually received the credit opportunities, as the number of qualified claimants may exceed the number of loans that Native Americans were improperly denied. Having failed to retain records of dates on which individuals applied unsuccessfully for

Second, given USDA's utter failure to maintain relevant records in this case—including its failure to implement a proper litigation hold until just last year—Plaintiffs could face insurmountable obstacles if they are forced to bring their claims individually. Courts have repeatedly held that, in assessing the suitability of claims for class treatment, a putative plaintiff class should not be penalized for a defendant's failures to retain records. *See, e.g., Brown v. Nucor Corp.,* 576 F.3d 149, 155 (4th Cir. 2009) (holding that potential class members "should not be penalized because [the defendant] destroyed . . . data" and therefore allowing potential class members an "alternative" method to show the commonality requirement); *Dixon v. Shalala*, 54 F.3d 1019, 1034 (2d Cir. 1995) (holding that "[i]f records cannot be located for any class member, either because [the agency] has destroyed them pursuant to its published file retention schedules . . . or [the agency] is unable to locate them, certain rebuttable presumptions apply"). Were class members denied the opportunity to present their damages claims with appropriate evidentiary support because USDA failed to retain records of decisions denying loan applications, USDA would be rewarded for its failure to implement a timely litigation hold that could have prevented destruction of materials central to this litigation that were solely within its control.

Finally, certifying the damages claims in this manner will be far more efficient and manageable than individual adjudications. *See Barnes,* 242 F.R.D. at 123-24 ("In cases such as this, involving many extremely similar claims against the same defendant, class certification promises greater efficiency and consistency than serial litigation of nearly identical individual cases."). Here, as it is nearly impossible to reconstruct the loan decisions that might have been

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loans, the USDA has no reasoned basis to determine how to allocate among Native American farmers and ranchers those loan funds that should have been, but were not, awarded to Native Americans.

made absent discrimination—a difficulty exacerbated by USDA's failure to preserve its own records—the formula Plaintiffs have proposed for calculating and distributing monetary relief without the need for individual hearings plainly offers the most reliable and manageable means to measure the economic harm caused by the USDA's conduct. Computing monetary relief by pursuing thousands of individual hearings would constitute an enormous and unnecessary consumption of resources, would delay by years the conclusion of this action, and would rest remedial decisions on conjecture and dim memories from witnesses largely immune from cross-examination, as the USDA failed to retain the materials needed to refresh and test their recollections.

In sum, certification of the damages claims advanced by members of the Plaintiff class is decidedly superior to the adjudication of these claims individually.

Thus, Plaintiffs have met the required elements for certification of a hybrid class.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that this Court certify the Plaintiff class to pursue its claims for economic relief under Rule 23(b)(3).

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Respectfully submitted,

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