

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

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

**UNOPPOSED MOTION FOR APPROVAL OF DISTRIBUTION OF FUNDS AND
MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF**

Pursuant to Section IV.H of the Settlement Agreement in the above-captioned case (dated February 18, 2010, as revised, May 13, 2011) (“Settlement Agreement”)¹, as approved by the Court on October 27, 2011, Lead Class Counsel hereby seek approval for a payment for the benefit of the Class certified by this Court in its October 27, 2011 Order and Judgment (Docket No. 231) in the amount of \$1,202,210,312.08, as set forth in the attached Preliminary Final Accounting submitted by the Claims Administrator on August 2, 2013 pursuant to Section V.E.7 of the Settlement Agreement.² As demonstrated herein, based on this accounting performed by the Claims Administrator, there are sufficient Settlement Funds to pay each prevailing claimant the full amount of the award authorized by the Settlement Agreement.

As provided for in Section IV.H of the Settlement Agreement, the proposed Order submitted herewith would require the Secretary of the U.S. Department of Agriculture within twenty (20) days of the entry of the Order to provide the U.S. Treasury with the necessary forms and documentation to direct payment of the approved amount to the Designated Account

¹ The Settlement Agreement approved by this Court can be found in Exhibit 2 of Docket No. 170.

² A copy of the Preliminary Final Accounting is attached hereto as Exhibit A.

established by Class Counsel. As required by Section IV.H.2 of the Settlement Agreement, these funds will be used exclusively for the payment of (a) the claims that have been determined by the Court-approved Neutrals to satisfy the requirements of the Settlement Agreement, (b) the costs of the Court-appointed Ombudsman, and (c) the Settlement Implementation Costs, and (d) the Court-approved attorneys' fees.

I. The Process for Determination of Claims Satisfying the Requirements of the Settlement Agreement

As this Court is well aware, the Court's approval of the Settlement Agreement on October 27, 2011 was merely the starting point for the claim process in this case. That claim process began on November 14, 2011, and ran for six months until May 11, 2012. Docket No. 233.³ During this claim process, approximately 40,000 claim forms were submitted seeking compensation under the Settlement Agreement. Of the claimants submitting these forms, approximately 25,000 claimants received either individual in-person or phone assistance by Class Counsel, with approximately 13,000 of these individuals having their claims signed and submitted by Class Counsel. The remaining claim submitters filed their claims *pro se*.

In accordance with Section V.A.1.a of the Settlement Agreement, all claims were required to be submitted with attestation by the claimant under penalty of perjury that the statements made therein were true and correct. *See* Settlement Agreement § V.A.1.a; *see also* Settlement Agreement Ex. C (Claim Form), § 10. In addition, as required by the Claims Resolution Act ("CRA"), claims submitted by an attorney were required to include a certification by the attorney, again under penalty of perjury, that "to the best of [the attorney's] knowledge, information, and belief formed after an inquiry reasonable under the circumstances, th[e] claim

³ Certain claimants were granted an extension by the Court to the May 11, 2012 deadline because of extenuating circumstances affecting their claims. *See* Docket Nos. 304, 346.

[wa]s supported by existing law and the factual contentions ha[d] evidentiary support.” *See* CRA § 201(g)(5); Settlement Agreement, Ex. C (Claim Form), § 10.

After submittal, each claim was reviewed by the Court-approved Claims Administrator to determine whether (a) the claim was both timely and complete and (b) whether the claimant satisfied the requirements for membership in the certified Class.⁴ To qualify as a Class Member, a claimant must have (1) filed a Late-Filing Request to participate in *Pigford* between October 13, 1999 and June 18, 2008, and (2) not already received a determination on the merits of his or her claim in *Pigford*. Settlement Agreement § V.B.4. The Claims Administrator determined that of the approximately 40,000 claim forms that were submitted, 32,587 claimants filed timely and complete claims and were at least provisionally determined to be Class Members. Of these 32,587 claimants, 32,510 opted for Track A, the Settlement’s expedited claims track, and 77 opted for the more rigorous Track B.

The claims of those 32,587 claimants determined, at least provisionally, to be Class Members were then forwarded to the Court-appointed Neutral for a merits review. *See* Settlement Agreement §§ V.B.6, V.B.8. Each of the Neutrals reviewing claims was approved by the Court and took an oath administered by the Court that required the Neutral to pledge to “determine each claim faithfully, fairly, and to the best of his or her ability.” Settlement Agreement §§ II.JJ; II.RR; *see also* CRA § 201(g)(3). If the Neutral reviewing any submitted claim determined that he/she needed additional information to make a determination, he/she was authorized to request such additional information. *See* Settlement Agreement §§ V.C.4, V.D.4; *see also* CRA § 201(g)(3).

⁴ In addition to the initial review performed by the Claims Administrator at the time of claim submission, the Claims Administrator conducted a further review of all claims to ensure that no claims that had been provisionally decided by the Neutrals had been submitted on behalf of a person who had participated in the *Pigford* Settlement.

To be entitled to an award under Track A, Class Members were required to demonstrate the following elements by “substantial evidence”:

- (1) The Class Member is an African American who farmed, or attempted to farm, between January 1, 1981, and December 31, 1996;
- (2) The Class Member owned or leased, or attempted to own or lease, farm land;
- (3) The Class Member applied, or constructively applied, for a specific farm credit transaction(s) or non-credit benefit(s) at a USDA office between January 1, 1981, and December 31, 1996;
- (4) For claimants who applied – *i.e.*, not “constructively applied” – for a specific farm credit transaction(s) or non-credit benefit(s), the farm loan(s) or non-credit benefit(s) for which the Class Member applied was denied, provided late, approved for a lesser amount than requested, encumbered by a restrictive condition(s), or USDA failed to provide an appropriate loan service(s);
- (5) For claimants who “constructively applied” for a loan or non-credit benefit, the Class Member made a bona fide effort to apply for a loan or non-credit benefit *and* USDA actively discouraged the application by the Class Member;
- (6) USDA’s treatment of the loan or non-credit benefit application(s) or constructive application(s) led to economic damage to the Class Member; and
- (7) The Class Member complained of discrimination to an official of the United States Government on or before July 1, 1997, regarding USDA’s treatment of him or her in response to the application(s).

Settlement Agreement § V.C.

To be entitled to an award under Track B, Class Members were required to prove each of the elements of a Track A claim under a more rigorous “preponderance of the evidence” standard with “independent documentary evidence” in support of each claim element.

Settlement Agreement § V.D. In addition, Track B claimants were required to satisfy the added evidentiary burden of showing that the “treatment of the Class Member’s loan application(s) by

USDA was less favorable than that accorded a specifically identified similarly situated white farmer(s).” *Id.*

Applying these standards, the Neutrals made provisional determinations as to those claimants who appeared to have satisfied the requirements of the Settlement Agreement for a Track A award. The Neutrals determined that no claimants satisfied the requirements for a Track B award.

The final step in the process was for the Claims Administrator and the Neutrals to review each of the Track A claims that the Neutrals provisionally had approved in order to: (a) identify situations where multiple approved claimants had submitted claims relating to a single farming operation (so that the single award which any single farming operation could receive under the Settlement Agreement could be apportioned among such multiple approved claimants (*see* Settlement Agreement § V.A.5)); (b) identify situations where multiple approved claim submitters had submitted claims relating to a single estate (so that the single award which any estate could receive under the Settlement Agreement would be transmitted only to the claim submitter (if any) who was able to demonstrate that he/she had been appointed as the legal representative of the estate (*see* Settlement Agreement § V.A.3)); (c) identify situations where multiple approved claim submitters had submitted claims relating to a single incapacitated person (so that the single award which such an incapacitated person could receive under the Settlement Agreement would be transmitted only to the claim submitter (if any) who was able to demonstrate that he/she had been appointed as the legal representative of the incapacitated person (*see* Settlement Agreement § V.A.4)); (d) identify any approved claimants who were not Class Members because, on further review, it was determined that they had participated in the *Pigford* settlement process (*see* Settlement Agreement § V.B.4); and (e) to undertake additional

quality control measures to ensure that only claims that satisfied the requirements of the Settlement Agreement were approved (*see* Settlement Agreement §§ V.C, V.D).

Throughout the claim process, the Claims Administrator, the Neutrals, and Class Counsel have been in regular communication with the court-appointed Ombudsman and addressed various concerns raised and various suggestions provided by the Ombudsman. In addition, the Claims Administrator, the Neutrals, and Class Counsel have cooperated fully in providing information requested by the Government Accountability Office (which was tasked by Congress with “evaluating the internal controls” in the claim process, *see* CRA § 201(h)(1)), and the USDA Inspector General (who was tasked by Congress with conducting a “performance audit” on the claim process, *see* CRA § 201(h)(2)). The GAO issued its report to the pertinent congressional committees on December 7, 2012. That report concluded, *inter alia*, that “[t]he parties charged with carrying out the terms of the *Pigford II* settlement have created numerous internal control measures designed to balance various interests including accuracy, efficiency, and cost. Many of these measures serve to identify and deny fraudulent or otherwise invalid claims.”⁵ The USDA Inspector General has not yet issued its performance audit report.

II. Calculation of Payments

Based on the Claim Determination Forms that the Claims Administrator has received from the Neutrals pursuant to Sections V.C.5 and V.D.5 of the Settlement Agreement, and the additional review and quality control process described above, the Claims Administrator has determined that:

⁵ The full text of GAO’s report can be found at <http://www.gao.gov/products/GAO-13-69R>.

1. 16,973 individual claimants are entitled to receive the full amount of the Track A Liquidated Award (*i.e.*, \$50,000) and the full amount of the Track A Tax Award (*i.e.*, \$12,500) on that Liquidated Award established by the Settlement Agreement.⁶ Altogether, these awards total \$1,060,812,500.00. In addition, 5 of these prevailing claimants will receive a Track A Loan Award and a corresponding additional Track A Tax Award on this Loan Award. The sum of these additional awards is \$763,341.92.
2. 1,398 individual claimants (hereinafter, “Pro Rata Track A Award Recipients”) are entitled to receive a pro rata share of a full Track A Liquidated Award and a pro rata share of a Track A Tax Award based on the determination of the Neutrals that these Pro Rata Track A Award Recipients submitted claims with respect to a single farming operation for which one or more other prevailing claimants also filed a claim. The total number of farming operations for which these award amounts will be shared totals 638.
3. No Track B Claimants are entitled to an award.
4. 38 individual claimants are entitled to a Track A Non-Credit Award. The sum of these awards is \$114,000.00.

Taking these determinations, and in accordance with Section V.E.7 of the Settlement Agreement, the Claims Administrator has prepared and submitted to the Court, the Secretary, and Lead Class Counsel the Preliminary Final Accounting attached hereto as Exhibit A. As reflected in Exhibit A, the total amount of Track A Liquidated Awards, Track A Loan Awards, Track A Tax Awards, and Track A Non-Credit Awards for prevailing Class Members is \$1,101,950,258.58. As further reflected in Exhibit A, the Claims Administrator has calculated that the total of (a) the Implementation Costs incurred to date, (b) a good faith estimate of Implementation Costs necessary for the Claims Administrator to perform its final duties under this Agreement; (c) a good faith estimate of Implementation Costs necessary for the Neutrals to complete their work related to this Agreement; (d) the Ombudsman Costs incurred to date; (e) a good faith estimate of Ombudsman Costs necessary for the Ombudsman to perform its final

⁶ Pursuant to Section V.A.12 of the Settlement Agreement, such Track A Tax Awards will be transmitted directly to the Internal Revenue Service for the benefit of the claimant receiving the Track A Liquidated Damages Award.

duties under this Agreement, and (f) the amount of the Fee Award to be \$122,045,183.50. In addition, the Claims Administrator has calculated the amounts that the Secretary already has paid for interim Implementation Costs and Ombudsman Costs to be \$21,785,130.00.⁷

After deducting the \$122,045,183.50 in Ombudsman Costs, past and estimated future Settlement Implementation Costs, and Court-approved fees from the \$1.25 billion appropriated for the Settlement under Section 14012 of the Farm Bill (\$100 million) and Section 201 of the CRA (\$1.15 billion), there remains \$1,127,954,816.50 for the payment of claim awards. *See* Settlement Agreement Appx. § I.A.2. This amount available to pay prevailing claims is greater than the \$1,101,950,258.58 required to pay all of the Track A Liquidated Awards, Track A Loan Awards, Track A Tax Awards, and Track A Non-Credit Awards for prevailing Class Members. Accordingly, all prevailing claimants will receive the full amount of the award authorized by the Settlement Agreement. *See* Settlement Agreement Appx. § I.A.3. As a result, there was no need for the Claims Administrator to apply any percentage reductions for any prevailing claims as contemplated by Section V.E.5 and Appendix 1 of the Settlement Agreement.

III. Motion for Approval

Lead Class Counsel respectfully submit that the Preliminary Final Accounting prepared by the Claims Administrator (Exhibit A to this Motion) is a fair and accurate application of the method for calculating awards set forth in the Settlement Agreement. The thousands of claimants who have been determined to have satisfied the requirements for an award under the Settlement Agreement have been waiting many years, and in many cases decades, for their discrimination claims against USDA to be addressed. Accordingly, Lead Class Counsel urge the

⁷ This amount includes the \$399,690 for payment of Ombudsman Costs that is the subject of the Court's Order dated May 24, 2013. Docket No. 359.

Court promptly to approve the attached Proposed Order so that, at long last, the Class Members can receive appropriate compensation for their claims of discrimination.

Pursuant to Local Rule 7(m), Class Counsel have conferred with the Defendant regarding this Motion, and the Defendant has indicated that it does not oppose entry of the attached Proposed Order.

Respectfully submitted,

/s/ Henry Sanders

Henry Sanders
CHESTNUT, SANDERS, SANDERS,
PETTAWAY & CAMPBELL, L.L.C.
One Union Street
Selma, AL 36701
Tel: (334) 875-9264
Fax: (334) 875-9853

/s/ Andrew H. Marks

Andrew H. Marks
D.C. Bar No. 932269
COFFEY BURLINGTON P.L.
2699 South Bayshore Drive
Miami, FL 33133
Tel: (305) 858-2900
Fax: (305) 858-5261

/s/ Gregorio A. Francis

Gregorio A. Francis
MORGAN & MORGAN, P.A.
20 North Orange Avenue, Suite 1600
Orlando, FL 32801
Tel: (407) 420-1414

Dated: August 6, 2013

CERTIFICATE OF SERVICE

I certify that on August 6, 2013, I served a copy of the above on all counsel of record by filing a copy via the ECF system.

/s/ Andrew H. Marks

Andrew H. Marks

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[PROPOSED] ORDER

Upon consideration of Lead Class Counsel’s Motion for Approval of Distribution of Funds, and Memorandum of Points and Authorities in Support Thereof (“Motion”), as well as the entire record in this case, Class Counsel’s Motion is hereby GRANTED, and the payments detailed in the Preliminary Final Accounting prepared by the Claims Administrator and attached as Exhibit A to the Motion are APPROVED.

It is hereby ORDERED that, pursuant to Section IV.H of the Settlement Agreement, the Defendant shall within twenty (20) days of the date of this Order provide the U.S. Department of the Treasury with all necessary forms and documentation to direct a payment in the amount of \$1,202,210,312.08 to the In re Black Farmers Discrimination Litigation QSF Account at SunTrust Bank. These funds shall be distributed by the Claims Administrator in accordance with the terms of the Settlement Agreement.

SO ORDERED.

PAUL L. FRIEDMAN
United States District Judge

Date: _____