UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

CLASS COUNSEL'S MOTION FOR AN AWARD OF ATTORNEYS' FEES AND EXPENSES

On May 13, 2011, this Court preliminarily approved the Settlement Agreement in the above-captioned case between a Class of late-filing *Pigford* claimants and the Defendant, the Secretary of the U.S. Department of Agriculture (collectively, the "Parties"). Docket No. 172.[1] As part of its Preliminary Approval Order, this Court found that "a Fee Award (as defined in the Settlement Agreement) of between 4.1% and 7.4% of the Fee Base (as defined in the Settlement Agreement) appears to be a fair, reasonable, and adequate range for a Fee Award in this action." *Id.* at ¶ 22. On this basis, the Court preliminarily approved this range of fees for purposes of Notice to the Class. *See id*.[2]

Pursuant to Federal Rules of Civil Procedure 23(h) and 54(d)(2)(A) and Section X.B of the Settlement Agreement,[3] Class Counsel hereby move for the approval of a Fee Award equal to 7.4% of the Fee Base. As demonstrated in the attached Memorandum of Points and Authorities

[1] The Settlement Agreement is attached as Exhibit 2 to Docket No. 170.

[2] The "Fee Award" is defined in Section II.N of the Settlement Agreement as "the total amount approved by the Court for the payment of Common Benefit Fees and Track B Fees." The "Fee Base" is defined in section II.O as "the sum of the 2008 Funds [($100 million)] plus any 2010 Funds [($1.15 billion)] minus $22,500,000 [(which represents a good faith estimate of implementation costs)]."

[3] Section X.B provides that "[n]o later than sixty (60) days after the Claim Deadline, Class Counsel will move the Court to set the amount of the Fee Award, except that the amount of the Fee Award shall be at least 4.1% and not more than 7.4% of the Fee Base."

("Memorandum"), and the accompanying Declaration of Professor Theodore Eisenberg, a "percentage-of-the fund" approach to an award of fees in this case is the most appropriate method for determining fees in a case of this nature and is both consistent with the law of this Circuit and with the intent of the Parties as reflected in the Settlement Agreement. Moreover, an award of 7.4% of the Fee Base is manifestly reasonable and fully justified by, *inter alia*, the extraordinary benefits Class Counsel have achieved for the Class, the skill and efficiency of Class Counsel's work, the complexity and duration of this litigation, the significant risk of non-payment faced by Class Counsel, the substantial work already undertaken by Class Counsel (more than 40,000 attorney hours and more than 60,000 paralegal hours to date), and the ongoing commitment by Class Counsel to support the implementation of the Settlement.

In addition, for the reasons set forth in the attached Memorandum, Class Counsel ask the Court to direct the payment of the Fee Award to Lead Class Counsel for allocation among Class Counsel on the basis of the Counsel Participation Agreement that is attached as Exhibit A to the Memorandum.

Respectfully submitted,

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Dated: August 8, 2011

CERTIFICATE OF SERVICE

I certify that on August 8, 2011, I served this Motion and the associated Memorandum of Points and Authorities on all counsel of record by filing a copy via the ECF system.

/s/
Michael W. Lieberman

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

TABLE OF CONTENTS

I. INTRODUCTION AND BACKGROUND

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

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

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

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

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

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

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

II. THE LITIGATION AND SETTLEMENT AGREEMENT

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

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

A. *Pigford v. Glickman*

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

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

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

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

B. Section 14012 of the 2008 Farm Bill

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

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

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

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

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

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

[6] 31 U.S.C. § 1304.

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

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

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

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

C. Litigation of Section 14012 Claims

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

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

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

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

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

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

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

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

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

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

D. February 18, 2010 Settlement Agreement

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

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

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

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

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

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

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

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

E. The Claims Resolution Act of 2010

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

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

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

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

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

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

F. The Efforts of Class Counsel

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

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

1. Amount of Class Counsel's Work to Date

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

2. Amount of Future Work

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

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

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

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

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

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

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

III. ARGUMENT

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

2. Class Counsel Have Demonstrated Considerable Skill and Efficiency.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

IV. CONCLUSION

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

Respectfully submitted,

/s/
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Dated: August 8, 2011

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

[PROPOSED] ORDER ON CLASS COUNSEL'S MOTION FOR AN AWARD OF ATTORNEYS' FEES AND EXPENSES

Upon consideration of Class Counsel's Motion for an Award of Attorney's Fees and Expenses, the Memorandum of Points and Authorities in Support thereof, and the entire record herein, it is hereby

ORDERED that Class Counsel's Motion is GRANTED; and it is

FURTHER ORDERED that the Fee Award (as set forth in the Settlement Agreement dated February 18, 2010 (as Revised and Executed as of May 13, 2011) ("Settlement Agreement")) shall be 7.4% of the Fee Base (as set forth in the Settlement Agreement); and it is

FURTHER ORDERED that the calculation and distribution of Common Benefit Fees shall be in accordance with the terms of the Settlement Agreement.

FURTHER ORDERED that Common Benefit Fees shall be directed to Lead Class Counsel – Andrew H. Marks, Henry Sanders, and Gregorio A. Francis – who shall be responsible for the allocation of such Common Benefit Fees among Class Counsel in accordance with the terms of the Counsel Participation Agreement attached as Exhibit A to Class Counsel's Motion.

SO ORDERED this _____ day of _____, 2011.

_____
PAUL L. FRIEDMAN
United States District Judge

EXHIBIT A

COUNSEL PARTICIPATION AGREEMENT

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

COUNSEL PARTICIPATION AGREEMENT

WHEREAS, the Food, Conservation, and Energy Act of 2008, Pub. L. No. 110-246, (hereinafter the "Farm Act") was enacted to provide a remedy to the issue caused by the unexpectedly large number of black farmers who sought relief under the *Pigford v. Glickman* Consent Decree ("Consent Decree") but whose claims were denied as untimely;

WHEREAS, Section 14012 of the Farm Act provides that, "[a]ny *Pigford* claimant who has not previously obtained a determination on the merits of a *Pigford* claim may, in a civil action brought in the United States District Court for the District of Columbia, obtain that determination;"

WHEREAS, over 27,000 individual cases have been filed by represented plaintiffs in the United States District Court for the District of Columbia (the "Court") seeking a determination on the merits of a *Pigford* claim as authorized by Section 14012 of the Farm Act;

WHEREAS, many other individuals have retained counsel to assist them in filing a Section 14012 claim but have not yet filed suit;

WHEREAS, in order to further the administration of the more than 27,000 cases on file and the potentially thousands of more cases that could be filed, the Court has consolidated all actions asserting Section 14012 claims into the above captioned case, In Re Black Farmers Discrimination Litigation, Mis. No. 08-mc-0511 (PLF) (hereinafter, the "Black Farmers Litigation");

WHEREAS, there is currently pending before the Court a Motion for Class Certification whereby class action status is being sought for all of those eligible to received compensation under Section 14012 of the Farm Act;

WHEREAS, the United States Government and counsel for individuals who have filed or could file Section 14012 claims in the Black Farmers Litigation have entered into settlement negotiations, with such settlement negotiations contemplating that the parties will request the Court to certify a settlement class pursuant to Federal Rule of Civil Procedure 23;

WHEREAS, the undersigned lawyers and law firms acting as counsel for individuals who have filed or could file Section 14012 claims in the Black Farmers Litigation (hereinafter "Plaintiffs' Counsel") believe that entering into a settlement with the Government is in the best interests of their respective clients and in the best interests of any putative class members, whether actual or potential Section 14012 claimants;

WHEREAS, Plaintiffs' Counsel have established attorney-client relationships with many actual and potential Section 14012 claimants through various contingency fee contracts;

WHEREAS, Plaintiffs' Counsel are willing, able, and well suited to represent putative class members with whom they do not have an existing attorney-client relationship should a settlement class be certified pursuant to Federal Rule of Civil Procedure 23;

WHEREAS, Plaintiffs' Counsel believe that combining their collective experience and resources would best serve the interests of their clients and the putative class members of any settlement class;

WHEREAS, Plaintiffs' Counsel recognize the inequity that could result from Section 14012 claimants with contingency-fee contracts having to pay for the services of their counsel while those same counsel provided beneficial and necessary representation to putative Section 14012 claimants with whom those counsel do not have a contractual relationship by virtue of acting as Class Counsel;

WHEREAS, Plaintiffs' Counsel recognize that there are disputes and confusion among some of them with respect to which lawyers and law firms represent which specific Section 14012 Claimants;

WHEREAS, Plaintiffs' Counsel do not wish to engage in ancillary disputes over contingency fee contracts or entitlement to attorneys fees whether by way of contingency fee contracts or common benefit work performed;

WHEREAS, Plaintiffs' Counsel believe that by working together as Class Counsel, acting on behalf of all Section 14012 claimants, they can provide better and more effective representation than if working individually and without cooperation; and

WHEREAS, Plaintiffs' Counsel desire to expedite the delivery of any settlement proceeds to deserving Section 14102 claimants while preventing and discouraging the

submission of fraudulent claims, especially by those who do not currently have representation.

NOW THEREFORE, undersigned Plaintiffs' Counsel, and each of them, hereby enter into this Participation Agreement, with the goal of maximizing the efficiencies that can be realized by pooling their collective experience and resources, and so as to fairly allocate work to those best equipped whether through relevant experience, size, or otherwise to handle it, and to avoid unnecessary disagreements and misunderstandings as to entitlement to attorneys fees for valuable work performed, and agree as follows:

I. AGREEMENT TO ACT AS RULE 23 "CLASS COUNSEL" AND DIVISION OF WORK

A. Plaintiffs' Counsel agree that each of them, after the execution of a comprehensive settlement agreement with the Government regarding relief to be provided to Section 14102 claimants ("Settlement Agreement"), shall support a motion to certify a settlement class under Federal Rule of Civil Procedure 23 in furtherance of such a Settlement Agreement. Plaintiffs' Counsel further agree that any motion to certify a settlement class shall seek the appointment of each of the undersigned lawyers and law firms to act collectively as "Class Counsel" as that term is defined by Rule 23 and to act in the various capacities detailed in the Settlement Agreement and this Participation Agreement.

B. The following lawyers and law firms agree to act in the capacity of "Lead Counsel" as that term is defined in the Settlement Agreement and agree to discharge the responsibilities required of that position as detailed in the Settlement Agreement. These responsibilities include:

1. Lead Class Counsel shall be generally responsible for coordinating and directing the activities of all other class counsel and shall.

a) Determine, after consultation with Liaison Counsel and members of Plaintiff's Steering Committee, and thereafter present to the Court or to opposing parties (through briefs, oral argument, letter, or in any other fashion as may appropriate, whether personally or by a designee) the position of the Class on any matters arising during Court proceedings, including any proceedings relating to class certification and the approval and implementation of this Agreement or the entry of Judgment or post-judgment proceedings necessary to defend, effectuate, or enforce the Settlement;

b) Retain and dismiss appropriate individuals or entities to carry out the tasks and responsibilities outlined in this Agreement, including hiring, directing and overseeing the work of the Claims Administrator and the Track A and B

Neutrals, and retaining agricultural experts and coordinating with Class Counsel regarding the experts' role in assisting with the preparation of Track B claims;

c) Coordinate and direct the efforts of all counsel acting on behalf of Class Members so as to (i) assist Class Members with completing Claim Packages, (ii) provide the most accurate and timely information to Class Members; and (iii) ensure that two groups of law firms described in sections IV.D.i and IV.D.ii are each able to perform the percentage of work it has agreed to perform, as provided in section IV.B.

d) Direct and oversee the implementation and dissemination of Notice to Class Members, and control or direct all communications with Class Members subject to approval and oversight by the Court if required by Rule 23;

e) Develop the content of a settlement website and ensure its proper use and administration;

f) Plan, develop and conduct any meetings or seminars designed to provide notice or assistance to Class Members regarding the Settlement;

g) Coordinate the initiation and conduct of any confirmatory discovery, if necessary, on behalf of Class Members consistent with the requirements of the Federal Rules of Civil Procedure, including the preparation of joint interrogatories and requests for the production of documents and the examination of witnesses in depositions;

h) Conduct additional or supplemental settlement negotiations on behalf of the Class (but only in consultation with Liason Counsel and the Plaintiffs' Steering Committee), if necessary;

i) Delegate specific tasks to other counsel or committees of counsel in a manner to ensure the Settlement terms are effectuated and adequate notice and assistance with the submission of claims is provided to Class Members;

j) Enter into stipulations with opposing counsel as necessary for the conduct of the Settlement or any additional pretrial proceedings as may be necessary to effectuate this Settlement and its approval and implementation under Rule 23;

k) Prepare and distribute periodic status reports and any accountings required by this Agreement to the Court, to Class Members, or to opposing parties, as appropriate;

l) Maintain adequate time and disbursement records covering services as lead counsel and develop and enforce time reporting requirements for all other counsel acting on behalf of the class;

m) Monitor and redirect the activities of class counsel to ensure that schedules are met and unnecessary expenditures of time and funds are avoided;

n) Develop procedures and methods to provide Class Members with answers to frequently asked questions, to assist with the claims process and the distribution of Settlement Proceeds, and to wind up of the administration of the Settlement when appropriate, and;

o) Perform other such duties as may be incidental to proper coordination of the Settlement or Plaintiffs' pretrial activities or as authorized by order of the Court.

2. The lawyers and firms designated to act as "Lead Counsel" are:

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1001 Pennsylvania Avenue, N.W.
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Gregorio Francis, Esquire
Morgan & Morgan, P.A.
20 North Orange Avenue, Suite 1600
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Fax: (407) 425-8171

C. The following lawyers and law firms agree to act in the capacity of "Liaison Counsel" as that term is defined in the Settlement Agreement and agree to discharge the responsibilities required of that position as detailed in the Settlement Agreement. These responsibilities include:

1. Liaison Counsel shall assist Lead Class Counsel in their performance of the duties described above, and in so doing shall:

a) Coordinate all communications between various counsel acting on behalf of the Class, including Lead Class Counsel and members of the Plaintiffs' Steering Committee;

b) Assist in planning and conducting any meetings between counsel acting on behalf of the class;

c) Assist in the oversight and direction of the efforts of any individuals or entities retained by Class Counsel to perform various functions or tasks required by this Settlement such as the Claims Administrator and Track A and B Neutrals;

d) Maintain a database regarding the claims administration process, including the number of claims filed, the identity of claimants, the status and ultimate disposition of each claim, the amounts awarded to each class member, and the status of payments to be made to successful class members;

e) Assist Lead Class Counsel in developing and enforcing time reporting requirements for all other counsel acting on behalf of the class and maintain a database of all reported time and expenses by counsel acting on behalf of the class;

f) Assisting Class Counsel in complying with any accounting requirements imposed by this Settlement Agreement;

g) Assist in planning and conducting of any meetings or seminars designed to provide notice or assistance to Class Members regarding the Settlement; and

h) Perform other such duties as may be incidental to proper coordination of the Settlement or Plaintiffs' pretrial activities as authorized by Lead Class Counsel or order of the Court.

2. The lawyers and firms designated to act as "Liaison Counsel" are:

Laurel Malson, Esquire
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Washington, D.C. 20004
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Harris L. Pogust, Esquire
Pogust Braslow & Millrood
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Conshohocken, PA 19428
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(F): (610) 941-4245

D. The following lawyers and law firms each agree to act as members of the "Plaintiffs Steering Committee" as that term is defined in the Settlement Agreement and agree to discharge the responsibilities required of that position as detailed in the Settlement Agreement. These responsibilities include:

1. Members of the Plaintiffs' Steering Committee shall assist Class Counsel and Liaison Counsel in the performance of the duties described above, and in so doing shall perform such tasks as directed by Class Counsel or Liaison Counsel such as:

a) Assisting Lead Counsel in performing any duties Lead Counsel delegates to members of the Plaintiffs' Steering Committee either individually or a part of a subcommittee;

b) Overseeing the allocation of work among Class Counsel on behalf of individual class members;

c) Overseeing the quality and allocation of work to advance the commons interests of the Class;

d) Administering the Common Benefit Fund, as that term is defined in the Settlement Agreement;

e) Overseeing the provision of notice to class members through meetings, seminars, or individual face to face meetings;

f) Developing, implementing and overseeing procedures for answering Class Member questions whether in person, on the phone, or through other means;

g) Developing, implementing and overseeing procedures for assisting Class Members with the gathering of information and evidence necessary to support a claim;

h) Developing, implementing and overseeing procedures for assisting Class Members with completing and submitting Claims Packages;

i) Developing, implementing and overseeing procedures for

providing information to Class Members regarding the status of claims processing or the distribution of settlement proceeds; and,

j) Performing other such duties as may be incidental to proper coordination of the Settlement or Plaintiffs' pretrial activities as authorized by Class Counsel, Liason Counsel, or order of the Court.

2. The lawyers and firms designated to be members of the Plaintiffs Steering Committee are:

Rose Sanders, Esquire
Chestnut, Sanders, Sanders, Pettaway & Campbell, LLC
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(F) 803-252-4801

Scott William Weinstein, Esq.

Morgan & Morgan, P.A.
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(F) 239-433-6836

E. The following additional firms and lawyers each agree to act as "Class Counsel" as that term is defined in the Settlement Agreement and agree to discharge the responsibilities required of that position as detailed in the Settlement Agreement. These responsibilities include:

1. In addition to any obligations imposed on Class Counsel serving as Lead Class Counsel, Liaison Class Counsel or as a member of the Plaintiffs' Steering Committee, all Class Counsel shall assist Lead Counsel, Liaison Counsel and the Plaintiffs' Steering Committee with the performance of their duties described above and shall perform such tasks as directed by Lead Class Counsel, Liaison Counsel, or members of the Plaintiffs' Steering Committee such as:

a) Providing notice to class members though meetings, seminars, or individual face to face meetings;

b) Answering Class Member questions in person, on the phone, or through other means;

c) Assisting Class Members with the gathering of information and evidence necessary to support a claim;

d) Assisting Class Members with completing and submitting Claims Packages;

e) Providing information to Class Members regarding the status of claims processing or the distribution of settlement proceeds; and,

f) Performing other such duties as may be incidental to proper coordination of the Settlement or Plaintiffs' pretrial activities as authorized by Class Counsel, Liason Counsel, or order of the Court.

2. In addition to the lawyers and firms listed above, the following firms are designated to be Class Counsel:

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P.O. Box 7316
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(T) 662-690-9842
(F) 662-690-9826

F. Upon Plaintiffs' Counsel's appointment as "Class Counsel," as that term is defined in Rule 23, and to the various capacities set forth above, each agree that each will assume the roles and responsibilities assigned to them and shall fully represent all putative Section 14012 class members. Each of the undersigned lawyers and law firms agree that they shall faithfully discharge the responsibilities assigned to them by the Settlement Agreement and this Participation Agreement and at all times shall act in the best interests of their clients and the putative class members.

G. Notwithstanding any fee contract each of the undersigned lawyers or law firms may have with any individual claimant, each of the undersigned agree to represent the interests of all putative class members and agree to be bound by and honor the obligations and responsibilities of Class Counsel as defined by Federal Rule of Civil Procedure 23 and case law interpreting that Rule.

H. Lead Counsel shall be responsible for overseeing the efforts of each Plaintiffs' Counsel, and should Lead Counsel determine that any Plaintiffs' Counsel has engaged in malfeasance or continuing misfeasance, Lead Counsel shall petition the Court to remove such Plaintiffs' Counsel as "Class Counsel." If the Court removes such Plaintiffs' Counsel from its role as "Class Counsel," that Plaintiffs' Counsel shall forfeit any and all rights to costs reimbursements and attorneys' fees under this Participation Agreement.

I.

II. AGREEMENT TO SEEK COMMON BENEFIT FEES

A. Each and every Plaintiffs' Counsel with an individual contingency fee contract with a putative Section 14102 class member agrees to forego any attorneys' fee recovery payable under such a contingency fee contract and instead agrees that any and all attorneys' fees payable to any Plaintiffs' Counsel shall be only as awarded by the Court and as governed by the Settlement Agreement and this Participation Agreement.

B. Each and every Plaintiffs' Counsel agrees that Lead Counsel shall prepare and file with the Court a motion for attorneys' fees and costs as contemplated by Federal Rule of Civil Procedure 23(h). Each and every Plaintiffs' Counsel agree that any motion for attorneys' fees and costs shall be made on behalf of all Plaintiffs' Counsel and shall seek an award of fees and costs for work performed by all Plaintiffs' Counsel on behalf of their individual clients and all putative Section 14102 Class Members. Plaintiffs' Counsel agree to provide to Lead Counsel any and all information necessary to support any motion for attorneys' fees and costs. In addition to a motion for fees and costs under Federal Rule of Civil Procedure 23(h), Lead Counsel may also file a motion for an interim award of attorneys' fees and costs or any other supplemental or additional motions for attorneys' fees and costs as required by Rule 23(h), by the Court, or as circumstances, in Lead Counsel's determination, may require.

C. Plaintiffs' Counsel agree to keep contemporaneous time records concerning any work they perform on behalf of the Class and agree to provide copies of such time records to Liaison Counsel from time to time as required by Lead Counsel.

D. Any attorney's fee award shall be deposited in the Common Benefit Fund, as that term is defined in the Settlement Agreement. The amounts deposited in the Common Benefit Fund for attorneys' fees shall be distributed by Lead Counsel only in accordance with any orders of the Court and with the provisions of the Settlement Agreement and this Participation Agreement which are not inconsistent with any such Court orders.

III. ADVANCEMENT AND REIMBURSEMENT OF COSTS

A. Each and every Plaintiffs' Counsel with an individual contingency fee contract with a putative Section 14102 class member agrees to forego seeking any cost reimbursement under such a contingency fee contract and instead agrees that any and all

costs expended or advanced by Plaintiffs' Counsel shall be reimbursed only pursuant to the Settlement Agreement and this Participation Agreement.

B. Lead Counsel shall be responsible for maintaining and distributing any funds provided by the Settlement Agreement for the purpose of reimbursing Plaintiffs' Counsel for costs associated with preparing and/or submitting claims on behalf of individual Claimants or incurred in providing services that benefit generally the Class and its Members but do not otherwise qualify as Implementation Costs (hereinafter "Claims Administration Costs").

C. During the administration of the settlement, Plaintiffs' Counsel may request Lead Counsel to pre-authorize the advancement of Claims Administration Costs. Lead Counsel shall determine whether such costs are indeed proper and necessary Claims Administration Costs and whether to pre-authorize such costs. Plaintiffs' Counsel understand and agree that such pre-authorization is not a guarantee that such costs will be reimbursed but rather an advance determination that Lead Counsel shall request the Court to authorize the reimbursement of such costs.

D. Plaintiffs' Counsel may also submit itemized receipts to Lead Counsel regarding any Claims Administration Costs advanced by Plaintiffs' Counsel. Lead Counsel shall periodically review such itemized receipts and determine whether such items are proper and necessary Claims Administration Costs for which it will seek Court approval for reimbursement. Lead Counsel shall periodically notify Plaintiffs' Counsel of its determination of whether it will seek reimbursement for such items.

E. Plaintiffs' Counsel understand and agree that Lead Counsel shall have complete discretion to determine whether any particular cost expenditure is a proper and necessary Claims Administration Cost for which it will seek Court authorization for reimbursement. Plaintiffs' Counsel understand and agree that there is no right of appeal nor any other remedy should Lead Counsel determine that a particular cost is not a proper and necessary Claims Administration Cost.

F. Each and every Plaintiffs' Counsel agrees to waive any and all rights it may have to seek reimbursement for cost expenditures other than to seek reimbursement from Lead Counsel as provided by this Participation Agreement. Each and every Plaintiffs' Counsel agrees to be solely responsible for the payment of any costs incurred by it and agrees to hold every other Plaintiffs' Counsel harmless for the payment of such costs. Each and every Plaintiffs' Counsel agrees that if Lead Counsel decline to seek reimbursement of any cost then that cost shall be the sole responsibility of the Plaintiffs' Counsel incurring the cost.

G. Each and every Plaintiffs' Counsel agrees any motion for attorneys' fees and costs prepared by Lead Counsel, as provided in Section II.B. above, may include a request that the court allow reimbursement of Claims Administration Costs authorized or approved by Lead Counsel. Plaintiffs' Counsel agree to provide to Lead Counsel any and all information necessary to support a request for costs reimbursement. Lead Counsel

may file any supplemental or additional requests for reimbursement of costs as required by Rule 23(h), the Court, or as circumstances, in Lead Counsel's determination, may require.

H. Any amounts awarded by the Court for the reimbursement of costs shall be deposited into the Common Benefit Fund, as that term is defined in the Settlement Agreement. The amounts deposited in Common Benefit Fund shall be distributed by Lead Counsel only in accordance with any orders of the Court and with the provisions of the Settlement Agreement and this Participation Agreement which are not inconsistent with any such Court orders.

I. Lead Counsel shall pay to each Plaintiffs' Counsel any Claims Administration Cost reimbursement amounts which the Court has allowed. If the Court disallows any cost reimbursement request, then Lead Counsel shall not reimburse such amount and it shall be treated as if Lead Counsel had not authorized it as a Claims Administration Cost in the first instance.

J. Lead Counsel shall pay all Claims Administration Cost reimbursement amounts which the Court has allowed from the Common Benefit Fund prior to calculating and paying any Attorneys' Fees.

IV. DIVISION OF FEES

A. Plaintiffs' Counsel agree that any attorneys' fees awarded to Class Counsel shall be divided among them based upon the provisions of the Participation Agreement. Plaintiffs' Counsel each agree that any request for attorneys' fees made to the Court shall be governed by and shall be consistent with this Participation Agreement. Plaintiffs' Counsel agree that any motion or petition for attorneys' fees to the Court shall be contained in a request to be presented by Lead Counsel, and that none of Plaintiffs' Counsel will separately petition the Court for an award of fees.

B. The guiding principal of the division of attorney's fees set forth in this Participation Agreement shall be that the share of each lawyer's or law firm's portion of the overall attorneys' fee award shall be proportionate to the amount of work performed by that lawyer or law firm on behalf of the putative Class Members pursuant to the terms of the Settlement Agreement and this Participation Agreement. To implement that principle, the group of law firms listed in clause i of subsection D, under the direction of Lead Counsel and the assistance of the Plaintiffs Steering Committee, shall undertake to perform Seventy-five Percent (75%) of all work performed on behalf of the putative Class Members pursuant to the terms of the Settlement Agreement and this Participation Agreement, and the group of law firms listed in clause ii of subsection D, under the direction of Lead Counsel and the assistance of the Plaintiffs Steering Committee, shall undertake to perform Twenty-five Percent (25%) of all such work. Lead Counsel and the Plaintiffs Steering Committee shall ensure that each such group has full opportunity to perform the share of the work specified for it in the previous sentence. Plaintiffs' Counsel each agree that no lawyer or law firm shall be entitled to a greater proportion of the

overall attorneys' fee award than set forth in the below Schedule of Fee Distribution under subsection D unless otherwise specifically provided by this Participation Agreement in Section VI.

C. Plaintiffs' Counsel agree that only work performed to date on behalf of the class and work to be performed in the future pursuant to the Settlement Agreement and this Participation Agreement shall be considered as work performed on behalf of the putative Class Members and thus compensable under this Participation Agreement. Similarly, Plaintiffs' Counsel agree that work performed but not authorized by Lead Counsel shall not be considered as work performed on behalf of the putative Class Members and thus shall not be compensable under this Participation Agreement.

D. The division of fees among Plaintiffs' Counsel shall be as set forth in the following Schedule of Fee Distribution:

i. Subject to Clause D. iii below, the following law firms will be entitled to Seventy-five Percent (75%) of all fees distributed: [1]

Crowell & Moring LLP
1001 Pennsylvania Avenue, N.W.
Washington, D.C. 20004

Chestnut, Sanders, Sanders, Pettaway & Campbell, LLC
One Union Street
Selma, AL 36701

Pogust Braslow & Millrood
161 Washington Street, Suite 1520
Conshohocken, PA 19428

Stinson Morrison Hecker LLP
1150 18th Street NW #800
Washington, DC 20036-3816

Conlon, Frantz & Phelan, LLP
1818 N Street, N.W., Suite 400
Washington, DC 20036

Law Offices of James Scott Farrin
280 S. Mangum St. Suite 400
Durham, NC 27701

McEachin & Gee LLP
4719 Nine Mile Road
Richmond, VA 23223

[1] The division of the 75% will be set forth in a separate document which will be made a part hereof.

Law Offices of Calton & Calton
226 East Broad Street
Eufaula, AL 36027

Henninger, Garrison & Davis LLC
PO Box 11310
2224 1st Avenue North
Birmingham, AL 35202

ii. Subject to Clause D, iii, below, the following law firms will be entitled to Twenty-five Percent (25%) of all fees distributed:[2]

Morgan & Morgan, P.A.
12800 University Drive, Suite 600
Fort Myers, FL 33907

Mike Espy, PLLC
317 E. Capitol Street, #101
Jackson, MS 39201

The Mason Law Firm LLP
1225 19th Street NW, #500
Washington, DC 20036

Cross & Kearney, PLLC
1022 W. 6th Avenue
Pine Bluff, AR 71601

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Gowan Law Office, PLLC
P.O. Box 38
McAdams, MS 39107

Gleason & McHenry
P.O. Box 7316
Tupelco, MS 38802

[2] The division of the 25% will be set forth in a separate document which will be made a part hereof.

Strom Law Firm LLC
2110 N. Beltline Boulevard
Columbia, SC 29204

iii. If during the course of the administration of the Settlement Agreement, Lead Counsel determines that any Plaintiffs' Counsel is not performing work which they agreed to do to administer these claims, Lead Counsel shall notify such counsel and allow counsel an opportunity to perform work in accordance with the percentages set forth above. If after thirty (30) days of receiving such notice Counsel does not perform the work as agreed, the percentages set out in clauses i and ii above for the two groups of law firms can be adjusted by agreement of all three Lead Counsel to reflect actual percentages of total work performed by each such group.

V. DISCLOSURE TO COURT AND ABSENT CLASS MEMBERS

A. Plaintiffs' Counsel understand and agree that the contents of this Participation Agreement shall be fully disclosed to the Court and be made available to all putative Section 14012 class members.

B. Plaintiffs' Counsel agree that the specific method of disclosure of this Participation Agreement to the Court and putative Section 14012 class members will be determined by Lead Counsel and the Court.

VI. POST-HOC ADJUSTMENT OF FEE DISTRIBUTION AND DISPUTE RESOLUTION

A. Plaintiffs' Counsel each agree that should any disagreement arise regarding the amount of attorneys' fees to be paid to a specific Plaintiffs' Counsel or regarding the allocation of attorneys' fees among them, such disagreement shall be governed and resolved solely by the provisions of this Participation Agreement.

B. If any Plaintiffs' Counsel has been relieved of its responsibility as Class Counsel by the Court due to malfeasance or misfeasance, the portion of attorneys' fees payable to that Plaintiffs' Counsel shall be distributed to all other remaining Plaintiff Counsel in on a pro rata basis.

C. Any dispute concerning any aspect of this Participation Agreement regarding the amount of attorneys' fees to be paid to a specific Plaintiffs' Counsel or regarding the allocation of attorneys' fees among them shall be resolved by private, binding arbitration. Any such dispute shall be submitted to a panel of three (3) arbitrators. The Party disputing the amount of attorneys' fees to paid it or the allocation of fees among Plaintiffs' Counsel shall nominate one (1) arbitrator (if more than one Party is disputing fees paid to it or the fee allocation, then all such parties shall agree to nominate this one (1) arbitrator). Lead Counsel shall nominate one (1) arbitrator, and the two arbitrators so nominated shall select the third arbitrator. The Arbitrators shall first

convene in Washington D.C., or at such other site as the Panel may prescribe, at a time of their choosing and shall at their first convening set the rules of procedure for the conduct of the arbitration, including the choice of law which will govern disputes between the parties. All decisions by the arbitrators shall be final and binding and their final decision shall be enrollable and enforceable as a judgment. The parties shall bear the cost of such arbitration equally. In the event that the parties are unable for any reason to proceed as set forth herein, or this arbitration provision cannot be performed according to its terms, then the parties agree that such dispute shall be submitted to the American Arbitration Association for arbitration under its commercial rules. Such decision by the arbitrators shall be final and binding and shall be enrollable and enforceable as a judgment.

VII. INTEGRATION

This Participation Agreement and the two separate documents referenced in footnotes 1 and 2 above constitute the entire agreement of the Parties, and no prior statement, representation, agreement, or understanding, oral or written, that is not contained herein, will have any force or effect.

VIII. MODIFICATION

This Participation Agreement may be modified only with the written agreement of all the Parties hereto.

IX. DUTIES CONSISTENT WITH LAW AND APPLICABLE BAR REGULATIONS

Each Plaintiffs' Counsel understands and agrees that it is solely responsible for complying with any and all State Bar rules or regulations that may apply to it by virtue of it being a party to this Participation Agreement. Each Plaintiffs' Counsel represents and warrants to the others that it shall comply with any such State Bar rules or regulations. In the event that any provision of this Participation Agreement shall be determined not in compliance with any applicable ethical or State Bar rule, regulation or code provision, it is the intent of the parties that such provision be reformed to give life to the intent of the parties, and to assure compliance with such code, rule or regulation. To the extent that any provision may not be reformed, it is the intent of the parties that the remainder of this Agreement shall be enforceable according to its terms

X. SEVERABILITY

Should any provision of this Participation Agreement be found by a court to be invalid or unenforceable, in whole or in part, then (1) the validity of other provisions of this Agreement shall not be affected or impaired, and (2) such provisions shall be enforced to the maximum extent possible.

XI. NON-ASSIGNABLE

Neither this Participation Agreement nor any obligation or right under this Participation Agreement, including but not limited to the obligation of performance by any party of any provision of this Participation Agreement or any rights to fees or costs reimbursements set out herein, may be delegated nor assigned without the written agreement of all parties.

XII. HEADINGS

The headings in this Agreement are for the convenience of the Parties only and shall not limit, expand, modify, or aid in the interpretation or construction of this Agreement.

XIII. COUNTERPARTS

This Agreement may be executed in counterparts. All executed counterparts and each of them shall be deemed to be one and the same instrument.

XIV. AGREEMENT VOIDABLE

If for any reason Plaintiffs' Counsel and the United States Government are unable to enter into a Settlement Agreement or if the Court fails to approve a motion to certify a settlement class under Federal Rule of Civil Procedure 23, then this Participation Agreement shall be voidable by any Party thereto.

XV. EFFECTIVE DATE

This Participation Agreement shall be effective as of the date the last of the Parties executes it.

Crowell & Moring LLP
1001 Pennsylvania Avenue, N.W.
Washington, D.C. 20004
Date:_____

Pogust Braslow & Millrood
161 Washington Street, Suite 1520
Conshohocken, PA 19428
Date:_____

Chestnut, Sanders, Sanders, Pettaway & Campbell, LLC
One Union Street
Selma, AL 36701
Date:_____

Stinson Morrison Hecker LLP
1150 18th Street NW #800
Washington, DC 20036-3816
Date:_____

reimbursements set out herein, may be delegated nor assigned without the written agreement of all Parties.

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1150 18th Street NW #800
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1818 N Street, N.W., Suite 400
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12800 University Drive, Suite 600
Fort Myers, FL 33907
Date:_____

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280 S. Mangum St. Suite 400
Durham, NC 27701
Date: 1/15/2010

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317 E. Capitol Street, #101
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Date:_____

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Date:_____

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1225 19th Street NW, #500
Washington, DC 20036
Date:_____

Conlon, Frantz & Phelan, LLP
1818 N Street, N.W., Suite 400
Washington, DC 20036
Date: February 22, 2010

Walter B. Calton
Attorney At Law
312 East Broad Street
Eufaula, Alabama 36027
Date:_____

Law Offices of James Scott Farrin
280 S. Mangum St. Suite 400
Durham, NC 27701
Date:_____

Rutland & Jankiewicz
128 N. Orange Ave.
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Patton Boggs, PLLC
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Washington, DC 20037
Date: 2-18-10

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Lexington, MS 39095
Date:_____

Gowan Law Office, PLLC
P.O. Box 38
McAdams, MS 39107
Date:_____

Gleason & McHenry
P.O. Box 7316
Tupelo, MS 38802
Date:_____

Cross & Kearney, PLLC
1022 W. 6th Avenue
Pine Bluff, AR 71601
Date:_____

Strom Law Firm LLC
2110 N. Beltline Boulevard
Columbia, SC 29204
Date:_____

Patton Boggs, PLLC
2550 M Street, NW
Washington, DC 20037
Date:_____

Marc Boutwell

The Law Offices of Marc Boutwell, PLLC
P.O. Box 956
Lexington, MS 39095
Date: 2-18-2010

Gowan Law Office, PLLC
P.O. Box 38
McAdams, MS 39107
Date: 2-18-2010

Gleason & McHenry
P.O. Box 7316
Tupelo, MS 38802
Date:_____

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Gleason & McHenry, PLLC
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Date: 2/18/10

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Cross & Kearney, PLLC
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Pine Bluff, AR 71601
Date: _____

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2110 N. Beltline Boulevard
Columbia, SC 29204
Date: 2/15/10

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2550 M Street, NW
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Gowan Law Office, PLLC
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Date: _____

Gleason & McHenry
P.O. Box 7316
Tupelo, MS 38802
Date: _____

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

FEE ALLOCATION AGREEMENT

The parties executing this Fee Allocation Agreement hereby agree:

1) This Fee Allocation Agreement is entered into pursuant to a Participation Agreement executed by all of the parties hereto, and constitutes the separate writing referenced in Footnote 2 of that Participation Agreement.

2) The purpose of this Fee Allocation Agreement is to memorialize the specific percentages of attorneys' fees each of the parties hereto have agreed to accept for their work as class counsel in the above captioned case.

a) As class counsel under this Fee Allocation Agreement, the following firms agree to perform 100% of the future class action work allocated to the undersigned firms pursuant to Section IV of the Participation Agreement for the fee set forth paragraph 5 of the this Fee Allocation Agreement: Morgan & Morgan, P.A.; Mike Espy, PLLC, and The Mason Law Firm, LLP.

b) As class counsel under this Fee Allocation Agreement, the following firms will continue to represent their individually retained clients and for work completed to date for the fee percentage listed in paragraph 5 of this agreement: Cross & Kearney, PLLC; Patton Boggs LLP; The Law Offices of Marc Boutwell; Gowan Law Office, PLLC; Gleason & McHenry; and Strom Law Firm, LLC.

c) Any disputes under this Fee Allocation Agreement shall be resolved pursuant to the Section VI of the Participation Agreement.

3) As detailed in the Participation Agreement, the parties hereto have agreed to share among themselves twenty-five percent (25%) of the total of any attorneys' fees awarded by the Court pursuant to the settlement entered into by the parties in the above captioned case. Of that twenty-five percent fee allocation, the parties to this Fee Allocation Agreement agree to the distribution of that fee as set forth herein. The percentages set forth in this Fee Allocation Agreement represent the percentage of the entire fee which a specific firm has agreed to accept and do not represent a pro rata share of the twenty-five percent allocated to them as a whole.

Where more than one firm is designated to receive a certain allocation, it shall be left to those firms as to how to divide the allocation between them.

4) The parties to this Fee Allocation Agreement agree and represent that the allocation percentages set forth in this Fee Allocation Agreement represent a fair and equitable distribution of the fee, taking into account the parties contributions to date and the expected contributions set forth in paragraph 2 above in representing the class in the above captioned case.

5) The fee allocation shall be as follows:

Fifteen Percent (15%) of the total fee award to the following three firms:

Morgan & Morgan, P.A.
12800 University Drive, Suite 600
Fort Myers, FL 33907

Mike Espy, PLLC
317 E. Capitol Street, #101
Jackson, MS 39201

The Mason Law Firm LLP
1225 19th Street NW, #500
Washington, DC 20036

Two and one half (2.5%) of the total fee award to the following two firms:

Cross & Kearney, PLLC
1022 W. 6th Avenue
Pine Bluff, AR 71601

Patton Boggs LLP
2550 M Street, NW
Washington, DC 20037

Two and one half (2.5%) of the total fee award to the following two firms:

The Law Offices of Marc Boutwell, PLLC
P.O. Box 956
Lexington, MS 39095

Gowan Law Office, PLLC
P.O. Box 38
McAdams, MS 39107

Two and one half (2.5%) of the total fee award to the following firm:

Gleason & McHenry
P.O. Box 7316
Tupelco, MS 38802

Two and one half (2.5%) of the total fee award to the following firm:
Strom Law Firm LLC
2110 N. Beltline Boulevard
Columbia, SC 29204

6) This Fee Allocation Agreement may be modified only with the written agreement of all the Parties hereto, provided, however, that the parties understand and agree the Court may modify the allocation set forth in this agreement and any such modifications by the Court shall be given full force and effect as though originally set forth in this Fee Allocation Agreement.

7) Each of the undersigned firms understands and agrees that it is solely responsible for complying with any and all State Bar rules or regulations that may apply to it by virtue of it being a party to this Fee Allocation Agreement. Each of the undersigned firms represents and warrants to the others that it shall comply with any such State Bar rules or regulations. In the event that any provision of this Fee Allocation Agreement shall be determined not in compliance with any applicable ethical or State Bar rule, regulation or code provision, it is the intent of the parties that such provision be reformed to give life to the intent of the parties, and to assure compliance with such code, rule or regulation. To the extent that any provision may not be reformed, it is the intent of the parties that the remainder of this Fee Allocation Agreement shall be enforceable according to its terms.

8) Should any provision of this Fee Allocation Agreement be found by a court to be invalid or unenforceable, in whole or in part, then (a) the validity of other provisions of this Agreement shall not be affected or impaired, and (b) such provisions shall be enforced to the maximum extent possible.

9) Neither this Fee Allocation Agreement nor any obligation or right under this Fee Allocation Agreement, including but not limited to the obligation of performance by any party of any provision of this Fee Allocation Agreement or any rights to fees or costs reimbursements set out herein, may be delegated nor assigned without the written agreement of all parties.

10) This Fee Allocation Agreement may be executed in counterparts. All executed counterparts and each of them shall be deemed to be one and the same instrument.

11) This Fee Allocation Agreement shall be effective as of the date the last of the Parties executes it.

Morgan & Morgan, P.A.

12800 University Drive, Suite 600
Fort Myers, FL 33907
Date: 1/19/10

Gowan Law Office, PLLC
P.O. Box 38
McAdams, MS 39107
Date:_____

Mike Espy, PLLC
317 E. Capitol Street, #101
Jackson, MS 39201
Date:_____

Gleason & McHenry
P.O. Box 7316
Tupelo, MS 38802
Date:_____

The Mason Law Firm LLP
1225 19th Street NW, #500
Washington, DC 20036
Date:_____

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Patton Boggs
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Lexington, MS 39095
Date:_____

The Law Offices of Marc Boutwell, PLLC
P.O. Box 956
Lexington, MS 39095
Date:_____

_____ for Gowan Law Office PLLC
Gowan Law Office, PLLC
P.O. Box 38
McAdams, MS 39107
Date: Jan 18, 2010

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Gleason & McHenry
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Tupelo, MS 38802
Date:_____

_____
Strom Law Firm LLC
2110 N. Beltline Boulevard
Columbia, SC 29204
Date:_____

JOINT REPRESENTATION AGREEMENT RE BLACK FARMERS LITIGATION *(PIGFORD II)*

WHEREAS, the Law Offices of Chestnut, Sanders & Sanders, Conlon, Frantz & Phelan, LLP, and the Law Office of Phillip L. Fraas (hereafter "CFF"), the Law Offices of James Scott Farrin ("JSF"), McEachin & Gee LLP ("MG") and Pogust, Braslow & Millrood, LLC ("PBM") each have been retained by numerous Black Farmers to file claims on their behalf, pursuant to Section 14012 of the Food, Conservation and Energy Act of 2008, against the United States Department of Agriculture; and

WHEREAS, the four Law Offices ("The Four Firms") have determined that their mutual interests, and those of their clients, are best served by pooling the resources of the Four Firms, and the law firms with which each has affiliated, for purposes of prosecuting these claims, and acting jointly on behalf of all farmers represented by CFF, JSF, MG or PBM;

CFF, JSF, MG and PBM agree as follows:

I. Representation of Black Farmers: All farmers (or their legal representatives) who retained CFF, JSF, MG, or PBM prior to execution of this Agreement will be advised that a Joint Representation Agreement between the Four Firms exists and, and as required by law, will be given the option to execute a new Joint Retainer Agreement [pursuant to which they will be represented jointly by the Four Firms and their affiliated counsel] to replace the agreements previously signed with one of the above Four Firms.

The new Joint Retainer Agreements will in no case provide a less favorable fee arrangement for the farmer than the retainer agreement previously executed by the farmer. All farmers who henceforth retain any of The Four Law Firms either directly or indirectly through affiliate law firms, will be represented jointly by CFF, JSF, MG, and PBM (and lawyers working with them), and will be advised of the existence of a Joint Representation Agreement, including a fee sharing arrangement, among counsel.

All farmers who retain counsel pursuant to this Agreement will be advised that the undersigned counsel have agreed upon a division of fees, but that such division will not affect the farmers' recovery. CFF, JSF, MG, and PBM will work jointly to advance all claims by farmers who retain counsel pursuant to this Agreement, and all fees earned from the representation of such clients will be allocated pursuant to paragraph IV, below.

II. Management of Black Farmers Litigation: *Agee, et al. v. Schafer*, Civ. A. No. 08-0882; *Kimbrough, et al. v. Schafer*, Civ. A. No. 08-0901; *Adams, et al. v. Schafer*, Civ. A. No. 08-0919; *National Black Farmers Association, et al. v. Schafer*, Civ. A. No. 08-0940; *Bennett, et al. v. Schafer*, Civ. A. No. 08-0962; *McKinney, et al. v. Schafer*, Civ A. No. 08-1062, *Bolton, et al. v. Schafer*, Civ A. No. 08-1070, and any additional cases filed by CFF, JSF, MG, PBM, or affiliate law firms working with them, will be managed by a three-person Steering Committee, composed of a representative of each of CFF, JSF, and PBM. The Steering Committee will manage all litigation (including settlement) and legislative strategy, develop a claims processing and client communications strategy, approve shared costs and expenditures for these cases, and attempt to resolve any other matters arising under this Agreement.

III. Affiliate Law Firms: All representations of Black Farmers by any of The Four Law Firms through other lawyers or law firms with which they have affiliated, and fees generated through those representations, will be subject to the terms of this Joint Representation Agreement.

IV. Fee Allocation: The allocation of attorneys' fees, after payment first of shared costs (see Exh. "A" to this Agreement), shall be as follows: Of the first One Hundred Million Dollars ($100,000,000) in gross attorneys' fees, fifty-seven and one half percent (57.5%) shall go to JSF, twenty-five Percent (25%) shall go to CFF, and seventeen and one half percent (17.5%) shall go to PBM. For gross attorneys' fees exceeding One Hundred Million Dollars ($100,000,000), sixty percent (60%) shall go to JSF; twenty percent (20%) shall go to CSS; and twenty percent (20%) shall go to PBM.

V. Certain Costs: JSF agrees to pay the attorneys' fees and expenses of Crowell & Moring LLP, out of its share of the fees. Costs in excess of $5,000 must be approved unanimously by the Steering Committee before being charged as a "shared cost." All costs or other financial obligations incurred prior to the effective date of this Agreement shall be born by the individual Law Firm(s) which incurred such costs or obligations.

VI. Lead Counsel: J.L. Chestnut and Crowell & Moring LLP will serve as Co-Lead Counsel for all cases encompassed by this Agreement, including any new cases filed pursuant to this Agreement.

VII. Liaison Counsel: Crowell & Moring LLP will serve in the administrative role of Liaison Counsel for these cases, to facilitate communications among the Court and counsel, and with opposing counsel, and otherwise to provide for the efficient progress of this litigation.

VIII. Dispute Resolution Clause: This Agreement shall be governed by and construed in accordance with the laws of the District of Columbia, without regard to choice of law rules and principles. The parties agree to resolve any dispute by arbitration according to the terms of the American Arbitration Association.

IX. Any changes to this Agreement must be by unanimous consent of the Steering Committee.

Dated: July 9, 2008

Henry Sanders

J. L. Chestnut, Jr.
Henry Sanders
Rose M. Sanders
CHESTNUT, SANDERS, SANDERS,
PETTAWAY & CAMPBELL, L.L.C.
One Union Street
Selma, Al 36702
Tel: 334-875-9264
Fax: 334-875-9853

Attorneys for Plaintiffs in Case No. 08-0901

Dated: July 9, 2008

David J Frantz

David J. Frantz
Brian P. Phelan
Michael J. Conlon
CONLON, FRANTZ & PHELAN, LLP
1818 N Street, N.W., Suite 400
Washington, DC 20036
Phone: 202-331-7050
Fax: 202-331-9306

Attorneys for Plaintiffs in Case No. 08-0901

Dated: July 9, 2008

Phillip L. Fraas
LAW OFFICE OF PHILLIP L. FRAAS
818 Connecticut Ave., N.W., 12th floor
Washington, DC 20006
Phone: 202-223-1499
Fax: 202-223-1699

Attorneys for Plaintiffs in Case No. 08-0901

Dated: July 9, 2008

James Scott Farrin
LAW OFFICES OF JAMES SCOTT FARRIN
4819 Emperor Boulevard, Suite 200
Durham NC, 27703
Phone: 919-688-4991
Fax: 919-688-4468

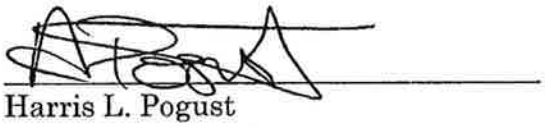
Attorney for Plaintiffs in Case Nos. 08-0940 and 08-1062

Dated: July 9, 2008

Donald McEachin /JSF
Donald McEachin
Donald J. Gee
MCEACHIN & GEE LLP
4719 Nine Mile Road
Richmond, VA 23223
Phone: 804-226-4111
Fax: 804-226-8888

Attorneys for Plaintiffs in Case Nos. 08-0940 and 08-1062

Dated: July 9, 2008



Harris L. Pogust
Tobias L. Millrood
Derek T. Braslow
POGUST, BRASLOW & MILLROOD, LLC
161 Washington Street, Suite 1520
Conshohocken, PA 19428
Tel: 610-941-4204
Fax: 610-941-4245

Attorney for the Plaintiffs in Case
Nos. 08-0882, 08-0919 and 08-0962

Exhibit A to the JRA

The following costs are to be shared among the Four Firms in proportion to their respective fee allocations reflected in Section IV above:

- Legal or other professional/para professional fees and costs associated with completing individual claims of Black Farmers, including, but not limited to field work, postage and printing.
- Legislative/lobbying fees
- Public relations fees and costs(direct mail fees/investigation)
- Claims adjudication fees/costs (both professional and administrative)

Administrative fees associated with the Farrin Firm's internal operations associated with this litigation, such as the hiring of individuals to input data into various databases, are not costs to be shared among the Four Firms.

EXHIBIT B

DECLARATION OF PROFESSOR THEODORE EISENBERG

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

In re BLACK FARMERS DISCRIMINATION LITIGATION

No. 08-mc-511-PLF

Declaration of Theodore Eisenberg

I. Background and Qualifications

1. My name is Theodore Eisenberg and I am the Henry Allen Mark Professor of Law and Adjunct Professor of Statistical Sciences at Cornell University. I also regularly teach in a Ph.D. program on Institutions, Economics, and Law ("IEL") in Turin, Italy. I have previously taught at UCLA Law School, Harvard Law School, Stanford Law School, NYU School of Law, and at the Centre for Advanced Legal Studies at Tel-Aviv University. My C.V. is attached as Exhibit 1 and I will describe herein primarily my activities that most directly relate to this Declaration.

2. I have taught a seminar on empirical methods and their relation to the legal system at Cornell Law School for many years. I taught a similar seminar: (1) at NYU School of Law in the fall of 2007, and (2) at the Fondazione Collegio Carlo Alberto as part of the IEL program in 2006, 2007, 2008, 2009, 2010, and 2011. I taught a similar course at the Centre for Advanced Legal Studies at Tel-Aviv University in 2009, at the 2010 meeting of the Southeastern Association of Law Schools (and am scheduled to do so in July 2011), and at

the Institutum Jurisprudentiae of Academia Sinica in Taipei, Taiwan in June 2011. I have also taught courses on civil rights many times.

3. As indicated on my C.V., I am the author of many empirical studies, including several empirical studies relating to attorney fees and class actions.[1] Such studies or analyses span more than two decades and include: *Attorney Fees and Expenses in Class Action Settlements: 1993-2008*, 7 J. EMPIRICAL LEGAL STUD. 248 (2010) (with G. Miller); *A New Look at Judicial Impact: Attorneys' Fees in Securities Class Actions After* Goldberger v. Integrated Resources, Inc., 29 WASH. U. J. LAW & POLICY 5 (2009) (with M. Perino & G. Miller); *Arbitration's Summer Soldiers: An Empirical Study of Arbitration Clauses in Consumer and Nonconsumer Contracts*, 41 U. MICH J. L. REFORM 871 (2008) (with G. Miller & E. Sherwin), reprinted in 4 ICFAI UNIVERSITY J. OF ALTERNATIVE DISPUTE RESOLUTION 51 (2008); *CAFA Judicata: A Tale of Waste and Politics*, 156 U. PA. L. REV. 1553 (2008) (with K. Clermont); *Comment, Evidence of the Need for Aggregate Litigation*, 163 J. INSTITUTIONAL & THEORETICAL ECONOMICS 158 (2007); *Incentive Awards to Class Action Plaintiffs: An Empirical Study*, 53 UCLA L. REV. 1303 (2006) (with G. Miller); *The Role of Opt-Outs and Objectors in Class Action Litigation: Theoretical and Empirical Issues*, 57 VANDERBILT L. REV. 1529 (2004) (with G. Miller); *Attorney Fees in Class Action Settlements: An Empirical Study*, 1 J. EMPIRICAL LEGAL STUD. 27 (2004) (with G. Miller); *Differing Perceptions of Attorney Fees in Bankruptcy Cases*, 72 WASH. U.L.Q. 979 (1994); *Explaining Constitutional Tort Litigation: The Influence of the Attorney Fees Statute and*

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[1] For convenience, I refer to "my" empirical studies. Such reference of course includes the contributions made by co-authors to the studies.

the Government as Defendant, 73 CORNELL L. REV. 719 (1988) (with S. Schwab); *The Reality of Constitutional Tort Litigation*, 72 CORNELL L. REV. 641 (1987) (with S. Schwab); *The Reality of Constitutional Tort Litigation*, in CIVIL RIGHTS AND ATTORNEY FEES ANNUAL HANDBOOK 3 (J. Lobel & B. Wolvovitz eds. 1987) (with S. Schwab) (preliminary, condensed version of above Cornell article).

4. I have filed affidavits or declarations in previous actions relating to attorney fees in class action cases and relating to non-attorney-fee empirical aspects of civil rights litigation.

5. My empirical scholarship has been funded by the National Science Foundation, Guy Carpenter, the South Carolina Death Penalty Resource Center, Project '87 (a joint project of the American Historical Association and the American Political Science Association), and the American Bar Foundation. A current empirical project in which I am participating is funded by the Australian Research Council. The Council, a statutory authority within the Australian Government, "supports the highest-quality fundamental and applied research and research training through national competition across all disciplines, with the exception of clinical medicine and dentistry." See http://www.arc.gov.au/. A proposal that relies in part on my empirical expertise with respect to attorney fees is pending before the Israel Science Foundation.

6. I am a Fellow of the American Academy of Arts and Sciences, a Fellow of the Royal Statistical Society, and I received a Cornell University Provost's Award for Distinguished Scholarship. I presented (with Professor S. Johnson) the endowed Rosenthal lectures at Northwestern University in the fall of 2010, and have been the keynote speaker

at the Society for Empirical Legal Studies annual meeting in Los Angeles in 2009 and the Asian Law and Economics Association annual meeting in Beijing in 2010. I am scheduled to be a keynote speaker at the Italian Society for Law and Economics annual meeting in 2011.

7. As indicated by the list of publications on my C.V., my empirical studies of the legal system have appeared in leading law reviews and in peer-reviewed journals in several disciplines. The student-edited law reviews include HARVARD LAW REVIEW, STANFORD LAW REVIEW, CORNELL LAW REVIEW, UCLA LAW REVIEW, UNIVERSITY OF PENNSYLVANIA LAW REVIEW, and the UNIVERSITY OF CHICAGO LAW REVIEW. The peer-reviewed journals include the JOURNAL OF THE ROYAL STATISTICAL SOCIETY, the JOURNAL OF THE AMERICAN STATISTICAL ASSOCIATION, the JOURNAL OF FINANCIAL ECONOMICS, the RAND JOURNAL OF ECONOMICS, the JOURNAL OF LEGAL STUDIES, the JOURNAL OF LEGAL ANALYSIS, the AMERICAN LAW AND ECONOMICS REVIEW, LAW AND SOCIAL INQUIRY, the JOURNAL OF THE AMERICAN ACADEMY OF PSYCHIATRY & THE LAW, JUDICATURE, and FUTURE CARDIOLOGY. As indicated on my C.V., I have served as a referee for many publishers and peer-reviewed journals that publish empirical scholarship.

8. My empirical studies have been the subject of stories in major media, including the New York Times, the Wall Street Journal, the Atlantic Monthly, and others. I have testified about law-related empirical matters before federal and state legislatures.

9. For over 20 years, Justices of the United States Supreme Court have cited and relied on empirical studies authored or co-authored by me. Opinions of Supreme Court Justices referring to my empirical work include the majority opinion in *Exxon Shipping Co.*

v. Baker, 128 S.Ct. 2605 (2008); *Kennedy v. Louisiana*, 128 S.Ct. 2641 (2008); *Schriro v. Summerlin*, 542 U.S. 348 (2004); *Ramdass v. Angelone*, 530 U.S. 156 (2000); *O'Dell v. Netherland*, 521 U.S. 151 (1997); *Simmons v. South Carolina*, 512 U.S. 154 (1994); *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989); and *Brisco v. LaHue*, 460 U.S. 325 (1983). Some of these cases are section1983 or section 1981 civil rights cases.

10. My empirical analyses have also been relied on by many federal courts of appeal judges, federal district court judges, state court judges, and testifying experts. Opinions relating to class action attorney fee awards or incentive awards that use or refer to my work include *In re Trans Union Corp. Privacy Litigation*, 629 F.3d 741 (7th Cir. 2011) (noting special master's reliance on our work); *Rodriguez v. West Publishing Co.*, 563 F.3d 948, 958 (9th Cir. 2009); *Allapattah Services, Inc. v. Exxon Corp.*, 362 F.3d 739, 760 (11th Cir. 2004) (Judges Tjoflat and Birch, dissenting from denial of en banc review); *In re A T & T Mobility Wireless Data Servs. Sales Tax Litigation,* 2011 WL 2173746, at *4 (N.D. Ill. 2011); *Velez v. Novartis Pharmaceuticals Corp.*, 2010 WL 4877852, at *21 (S.D.N.Y. 2010); *Kay Co. v. Equitable Production Co.*, 2010 WL 4501572, at *7 (S.D.W.Va. 2010); *In re Vioxx Products Liability Litigation*, 2010 WL 5576193, at *8 (E.D. La. 2010); *Klein v. O'Neal, Inc.*, 705 F.Supp.2d 632, 675, 2010 WL 1435161, at *35 (N.D. Tex. 2010); *Braud v. Transport Service Co. of Illinois*, 2010 WL 3283398, at *9 (E.D. La. 2010); *In re Lawnmower Engine Horsepower Marketing & Sales Practices*, 2010 WL 3310264, at *13 (E.D. Wis. 2010) ("In my view, however, the best indicator of what the market would pay class counsel for their services is the data contained in a recently updated study, Theodore Eisenberg & Geoffrey P. Miller . . ."); *Fiala v. Metropolitan Life Ins. Co. Inc.*, 2010 WL

716176, at *8 (Sup. Ct. N.Y. 2010); *In re Metlife Demutualization Litigation*, 689 F.Supp.2d 297, 359, 2010 WL 517389, at *55 (E.D.N.Y. 2010); *In re Marsh ERISA Litigation*, 265 F.R.D. 128, 149 (S.D.N.Y. 2010); *Strawn v. Farmers Ins. Co. of Oregon*, 226 P.3d 86, 99 (Or. App. 2010); *In re Trans Union Corp. Privacy Litigation*, 2009 WL 4799954, at *12-14, 17 (N.D. Ill. 2009); *Hall v. Children's Place Retail Stores, Inc.*, 669 F.Supp.2d 399, 403 n.35 (S.D.N.Y. 2009); *Loudermilk Services, Inc. v. Marathon Petroleum Co. LLC*, 623 F.Supp.2d 713, 724 (S.D. W. Va. 2009) ("Because the Eisenberg and Miller study was a far more comprehensive analysis of similar cases than this Court could hope to achieve in a reasonable time, the Court accepts their results as a benchmark on which to judge a reasonable fee in this case."); *Allapattah Services, Inc. v. Exxon Corp.*, 454 F.Supp.2d 1185, 1209, 1211 (S.D. Fla. 2006); *In re OCA, Inc. Securities and Derivative Litigation*, 2009 WL 512081, at *20 (E.D. La. 2009); *In re Enron Corp. Securities, Derivative & ERISA Litigation*, 586 F.Supp.2d 732, 800 (S.D. Tex. 2008); *In re Cardinal Health Inc. Securities Litigations*, 528 F.Supp.2d 752, 755 n.2 (S.D. Ohio 2007); *In re Tyco Intern., Ltd. Multidistrict Litigation*, 535 F.Supp.2d 249, 269 (D.N.H. 2007); *Acosta v. Trans Union, LLC*, 243 F.R.D. 377, 388 (C.D. Cal. 2007); *Turner v. Murphy Oil USA, Inc.*, 472 F.Supp.2d 830, 853, 862-64, 866, 870 (E.D. La. 2007); *In re Cabletron Systems, Inc. Securities Litigation*, 239 F.R.D. 30, 38, 42 (D.N.H. 2006); *In re Educational Testing Service Praxis Principles of Learning and Teaching: Grades 7-12 Litigation*, 447 F.Supp.2d 612, 629-32 (E.D. La. 2006); *Hicks v. Stanley*, 2005 WL 2757792, at *9 (S.D.N.Y. 2005); *In re Relafen Antitrust Litigation*, 231 F.R.D. 52, 80-81 (D. Mass. 2005), 221 F.R.D. 260, 286 (D. Mass. 2004); *In re Lupron Marketing and Sales Practices Litigation*, 2005 WL 2006833, at *5 (D.

Mass. 2005); *In re HPL Technologies, Inc. Securities Litigation*, 366 F.Supp.2d 912, 914 (N.D. Cal. 2005).

11. I have presented my empirical analysis of attorney fees to federal MDL judges at the 42nd Transferee Judges' Conference, held in West Palm Beach, Florida, on October 26-28, 2009.

12. I have substantial experience in the study of civil rights and discrimination litigation. I am the author of CIVIL RIGHTS LEGISLATION (LexisNexis 5th ed. 2004 (with a 6th edition under contract)). The casebook includes hundreds of pages on civil rights litigation in general and covers in particular actions under Title VI of the Civil Rights Act of 1964. Empirical studies by me that include analysis of civil rights and discrimination claims include: *What Is the Settlement Rate and Why Should We Care?*, 6 J. EMPIRICAL LEGAL STUD. 111 (2009) (with C. Lanvers); *Summary Judgment Rates Over Time, Across Case Categories, and Across Districts: An Empirical Study of Three Large Federal Districts* (with C. Lanvers), in EMPIRICAL STUDIES OF JUDICIAL SYSTEMS 2008 (K.C. Huang ed., Institutum Jurisprudentiae, Tapei 2009); *Employment Arbitration and Litigation: An Empirical Comparison*, in ADR & THE LAW 8 (20th ed. 2006) (with E. Hill); *Appeal Rates and Outcomes in Tried and Non-Tried Cases*, 1 J. EMPIRICAL LEGAL STUD. 659 (2004); *The Government as Litigant: Further Tests of the Case Selection Model*, 5 AM. L. & ECON. REV. 94 (2003) (with H. Farber); *Litigation Realities*, 88 Cornell L. Rev. 119 (2002) (with K. Clermont); *Plaintiphobia in the Appellate Courts: Civil Rights Really Do Differ from Negotiable Instruments*, 2002 ILLINOIS L. REV. 947 (with K. Clermont); *Trial Outcomes and Demographics: Is There A Bronx Effect?*, 80 TEXAS L. REV. 1839 (2002) (with M. Wells);

The Litigious Plaintiff Hypothesis: Case Selection and Resolution, 28 RAND J. OF ECONOMICS S92 (1997) (with H. Farber); *Politics and the Judiciary: The Influence of Judicial Background on Case Outcomes*, 24 J. LEGAL STUDIES 257 (1995) (with A. Ashenfelter and S. Schwab); *The Effects of Intent: Do We Know How Legal Standards Work?*, 76 CORNELL L. REV. 1151 (1991) (with S. Johnson); *The Relationship Between Plaintiff Success Rates Before Trial and At Trial*, 154, Part 1, JOURNAL OF THE ROYAL STATISTICAL SOCIETY, Series A 111 (1991); *What Shapes Perceptions of the Federal Court System?*, 56 U. CHICAGO L. REV. 501 (1989) (with S. Schwab); *Litigation Models and Trial Outcomes in Civil Rights and Prisoner Cases*, 77 GEORGETOWN L.J. 15672 (1989); *The Importance of Section 1981*, 73 CORNELL L. REV. 596 (1988) (with S. Schwab); *Explaining Constitutional Tort Litigation: The Influence of the Attorney Fees Statute and the Government as Defendant*, 73 CORNELL L. REV. 719 (1988) (with S. Schwab); *The Reality of Constitutional Tort Litigation*, 72 CORNELL L. REV. 641 (1987) (with S. Schwab).

13. I have served as a court-appointed mediator in major federal bankruptcy litigation, as assistant to the Special Master in voting rights litigation involving statistical matters, and as assistant to the Special Masters in the litigation arising out of the rescue, recovery, and/or debris removal operations and activities relating to the World Trade Center events of September 11, 2001.

14. I am the founder and editor of the JOURNAL OF EMPIRICAL LEGAL STUDIES, published by Wiley-Blackwell. The Journal is the official journal of the Society for Empirical Legal Studies. I also serve on the editorial board of the AMERICAN LAW AND ECONOMICS REVIEW, and as an academic adviser to the National Center for State Courts.

I have served as Chair of the Law and Social Science Section of the Association of American Law Schools (1996-97), and am the current Chair of the Research Committee of the Association of American Law Schools.

15. I serve on the board of directors and am the Secretary-Treasurer of the Society for Empirical Legal Studies. I served on the organizing committees for the first four Conferences on Empirical Legal Studies. I have also helped organize international conferences on empirical legal studies in Taiwan, Germany, and Israel. I have served on the board of directors of the American Law and Economics Association. I have been invited to speak about empirical legal studies or to report the results of my own studies on over one hundred occasions. I was commissioned by the Bureau of Justice Statistics to write and present a statistically-related paper, *The Need for a National Civil Justice Survey of Incidence and Claiming Behavior*, presented at Bureau of Justice Statistics Users Meeting, February 12, 2008, in Washington, D.C., and published this year in the FORDHAM URBAN LAW JOURNAL. In connection with the pending revision of the Federal Judicial Center's REFERENCE MANUAL ON SCIENTIFIC EVIDENCE, I was invited to speak on statistical issues to the Committee on the Evaluation of the Reference Manual on Scientific Evidence. Committee on Science, Technology, and Law, The National Academies (presentation in December 2006).

16. In my capacity as a faculty member at Cornell University, I regularly provide statistical expertise to law professors with and without social science training. These professors include those with doctoral degrees in economics, policy, and psychology.

17. I have been asked by attorneys for Plaintiffs in this case to opine about the

reasonableness of the attorney fees requested in Plaintiffs' Motion for An Award of Attorneys' Fees and Expenses and the accompanying Memorandum of Law in Support of Plaintiffs' Motion for An Award of Attorneys' Fees and Expenses (the "Fee Motion").

II. Documents Reviewed

18. In preparing this Declaration, I have reviewed:

(1) the Amended Class Action Complaint to Determine Merits and Damages Pursuant to § 14012 of the Food, Conservation and Energy Act of 2008, As Amended, doc. #163 in Case 1:08-mc-00511, filed 04/05/11, *James Copeland, et al. v. Vilsack*, No. 08-cv-1188-PLF, D.D.C.;

(2) the Order in eight actions ordering consolidation of all actions filed under the Food, Conservation and Energy Act of 2008, doc. #1 in *In re Black Farmers Discrimination Litigation*, Case 1:08-mc-00511, filed 08/08/08, D.D.C;

(3) the Settlement Agreement, February 18, 2010 (Revised and Executed as of March 23, 2011), in *In re Black Farmers Discrimination Litigation*, doc. #161-3 in Case 1:08-mc-00511, filed 3/30/11;

(4) the Settlement Agreement, February 18, 2010 (Revised and Executed as of May 13, 2011), in *In re Black Farmers Discrimination Litigation*, doc. #170-2 in Case 1:08-mc-00511, filed 5/13/11;

(5) the docket sheet, as of July 9, 2011, in *James Copeland, et al. v. Vilsack*, No. 08-cv-1188-PLF, D.D.C.;

(6) the docket sheet, as of August 7, 2011 in *In re Black Farmers Discrimination Litigation*,

in Case 1:08-mc-00511, D.D.C.;

(7) the Claims Resolution Act of 2010, Pub. L. No. 111-291 (Dec. 8, 2010), 124 Stat. 3064;

(8) the Memorandum of Points and Authorities in Support of Plaintiffs' Motion for Preliminary Approval of Settlement, Certification of a Rule 23(b)(1)(B) Settlement Class, and for Other Purposes in *In re Black Farmers Discrimination Litigation*, doc. #161-1 in Case 1:08-mc-00511, D.D.C., filed 3/30/11;

(9) the Order Granting Preliminary Approval of Settlement Agreement, Certifying a Rule 23(b)(1)(B) Settlement Class, and for Other Purposes, in *In re Black Farmers Discrimination Litigation*, doc. #172 in Case 1:08-mc-00511, filed 5/13/11;

(10) the Order (amending Order Granting Preliminary Approval of Settlement Agreement, etc.), in *In re Black Farmers Discrimination Litigation*, doc. #174 in Case 1:08-mc-00511, filed 5/20/11;

(11) Plaintiffs' Revised Proposed Order Granting Preliminary Approval of Settlement Agreement, Certifying a Rule 23(b)(1)(B) Settlement Class, and for Other Purposes, in *In re Black Farmers Discrimination Litigation*, doc. #170-1 in Case 1:08-mc-00511, filed 5/13/11;

(12) the Pigford Claim Retainer Agreement, dated December 1, 2008, between Wilhelmina Hill and Morgan & Morgan, P.A.®, and Mike Espy, PLLC;

(13) the McEachin & Gee, Attorneys at Law LLP, Contingent Fee Agreement (Pigford Claims Remedy Act of 2007 Litigation S. 515 and H.R. 899) with Jerome Cliatt, signed August 6, 2007;

(14) a blank form Retainer Agreement used by McEachin & Gee, P.C. and the Law Offices

of James Scott Farrin;

(15) a revised blank form Retainer Agreement used by McEachin & Gee, P.C. and the Law Offices of James Scott Farrin;

(16) the Black Farmers Litigation Retainer Agreement, dated March 2, 2010, between Anita Walker (Client) and Chestnut, Sanders, Sanders, Pettaway & Campbell, L.L.C.; the Law Offices of James Scott Farrin; McEachin & Gee LLP; Pogust, Braslow & Millrood, LLC; Conlon, Frantz & Phelan, LLP; and the Law Office of Phillip L. Fraas;

(17) Section 14012 of the Food, Conservation, and Energy Act of 2008, Pub. L. 110-246, 122 Stat. 2209;

(18) Memorandum of Law in Support of Plaintiffs' Motion for an Award of Attorneys' Fees and Expenses, in *In re Black Farmers Discrimination Litigation*, Case 1:08-mc-00511, D.D.C.;

(19) the docket sheet, as of July 11, 2011 in *Pigford et al. v. Veneman et al.,* Case 97-cv-1978, D.D.C.;

(20) the Consent Decree in *Pigford et al. v. Glickman*, Case 97-cv-1978, D.D.C. (docketed 4/14/99);

(21) the Laffey Matrix relating to attorney fees prepared by the Civil Division of the U.S. Attorney's Office for the District of Columbia, for use in statutory fee shifting cases, available at .http://www.justice.gov/usao/dc/divisions/civil_Laffey_Matrix_2003-2012.pdf;

(22) the Motion for Leave to be Added as a Plaintiff or Class Member in the Black Farmers Discrimination Litigation, filed by Mable W. Howard, pro se, *Pigford v. Veneman*, No. 97-1978, D.D.C., dated July 25, 2011;

(23) the Motion for Leave to be Added as a Plaintiff or Class Member in the Black Farmers Discrimination Litigation, filed by Mable L. Taite, pro se, *Pigford v. Veneman*, No. 97-1978, D.D.C., dated July 25, 2011;

(24) correspondence dated June 28, 2011, tracking # 58876-00, from Bernice C. Atchison, President, Black Farmers of Chilton County, to the Court Representative in case 1:08-mc-0511-PLF in the matter of The Black Farmers litigation;

(25) the Order on Plaintiffs' Motion for Final Approval of Settlement, Motion for Approval of Class Representative Service Awards, and Motion for an Award of Attorneys' Fees and Expenses, in *Keepseagle v. Vilsack*, doc. #606, Case No. 99-3119, D.D.C., filed 4/28/11;

(26) the Memorandum of Law in Support of Motion for Preliminary Approval of Settlement, and an Order Certifying Settlement Class and Approving Certain Provisions in Settlement Agreement, in *Keepseagle v. Vilsack*, doc. #571-1, Case No. 99-3119, D.D.C., filed 10/22/10;

(27) the Memorandum of Law in Support of Plaintiffs' Motion for an Award of Attorneys' Fees and Expenses, in *Keepseagle v. Vilsack*, doc. #581-1, Case No. 99-3119, D.D.C., filed 1/14/11; and

(28) the Order on Motion for Preliminary Approval of Settlement, and an Order Certifying Settlement Class and Approving Certain Provisions in Settlement Agreement, in *Keepseagle v. Vilsack*, doc. #577, Case No. 99-3119, D.D.C., filed 11/01/10.

III. Summary of Case Background

A. The *Pigford* Litigation and Related Subsequent Events

19. The activity that led to the filing and settlement of this case is summarized in the Recitals section and other portions of the Settlement Agreement, February 18, 2010 (Revised and Executed as of May 13, 2011), in *In re Black Farmers Discrimination Litigation*, doc. #170-2 in Case 1:08-mc-00511, filed 5/13/11 (the "Settlement Agreement"). The instant litigation derives from a class action, *Pigford v. Glickman*, No. 97-1978 (D.D.C.), brought by African-American farmers against the U.S. Department of Agriculture ("USDA") alleging discrimination. The Court in *Pigford* certified a class of African-American farmers who sought credit or benefits from the USDA and who believed they were victims of race discrimination by the USDA. The class covered farmers who farmed or attempted to farm between January 1, 1981 and December 31, 1996, who applied to the USDA during that time period for participation in a federal farm credit or benefit program and believe who believed they were discriminated against, and who filed a discrimination complaint on or before July 1, 1997 regarding USDA's treatment of such farm credit or benefit application. Settlement Agreement ¶ I.B.

20. On April 14, 1999, the Court approved a Consent Decree (the "*Pigford* Consent Decree") which provided class members with a choice of two non-judicial processes for resolving their discrimination claims. Under Track A, class members were eligible to receive a cash payment of $50,000, forgiveness of certain debt owed to the USDA, and a tax payment to offset the tax consequences of the liquidated and debt awards. *Pigford* Consent Decree ¶ 9(a)(iii)(B), (C). The Track B option required an arbitration hearing with proof by a preponderance of the evidence, but allowed for uncapped damages and other relief. *Id.* ¶ 10. Similar options are made available to Class Members in this case by the Settlement

Agreement. Settlement Agreement §§ II.E, V.C, V.D.

21. The *Pigford* Consent Decree gave class members 180 days to submit completed claim packages, ¶ 5(c), with an extension stated to be until September 15, 2000 where late filing was to due "extraordinary circumstances" beyond the class member's control. *Id.* ¶ 5(g); Settlement Agreement § II.BB. Approximately 20,000 individuals filed claims under the *Pigford* Consent Decree within the 180-day deadline.

22. After the Consent Decree deadline, and on or before September 15, 2000, approximately 2,700 additional individuals were deemed to have satisfied the extraordinary circumstances requirement but tens of thousands of other claimants were denied participation under the *Pigford* Consent Decree. On May 22, 2008, and again on June 18, 2008, Congress created a new cause of action in Section 14012 of the Food, Conservation, and Energy Act of 2008, Pub. L. 110-246, 122 Stat. 2209, for such individuals. Section 14012(b) provides late-filing *Pigford* claimants the right to bring a civil action in this Court to resolve their *Pigford* claims on the merits. Congress appropriated $100 million under the 2008 Act to pay successful claims authorized by it.

23. The Claims Resolution Act of 2010, Pub. L. No. 111-291 (Dec. 8, 2010), 124 Stat. 3064, provided an additional $1.15 billion to pay successful claims under Section 4012. These funds and funds appropriated by the 2008 Act will be available to fund the Settlement Agreement.

24. As of January 1, 2011, more than 40,000 plaintiffs have filed complaints under Section 14012 in 23 complaints in this Court. These *Pigford*-related actions have been consolidated.

B. The Settlement Agreement

25. The Settlement Agreement makes available a Track A and Track B option to Class Members. Settlement Agreement § V. In addition, under the Settlement Agreement, the Secretary of Agriculture agrees to refrain from accelerating or foreclosing a Farm Service Agency Farm Loan Program loan held by a Class Member that originated during the class period until a Class Member is determined to be ineligible for Track A or Track B relief is determined. *Id.* § VII.A. I review here the portions of the Settlement Agreement relating to Class Counsel's duties and fees.

C. Class Counsel's Post-Settlement Agreement Duties

26. Class Counsel have an obligation to assist all Class Members who want their assistance in preparing claims. Given the number of Class Members, this obligates Class Counsel to provide representation to tens of thousands of individuals. Representing a Class Member requires, inter alia, assisting the Class Member in making the detailed showings set forth in § V.C. of the Settlement Agreement. Claimants may be represented by Class Counsel at no additional charge by Class Counsel. Settlement Agreement §§ V.A.2, VIII.A.2. Section IV.H.3 of the Settlement Agreement requires Class Counsel to file written quarterly reports related to the expenditure of funds authorized by the Agreement. Section V.A.1 of the Settlement Agreement requires a Claimant to submit a Complete Claim Package (set forth in § V.A.1.a to e).

27. Class Counsel have extensive other duties to implement and coordinate the terms

of the Settlement Agreement. Settlement Agreement § VIII. Class Counsel must coordinate with the Claims Administrator, Epiq Systems, Inc. (formerly Poorman-Douglas), which has maintained lists of the status of Class Members with respect to the *Pigford* litigation and provide Claimants or their counsel with verification of Claimants' status with respect to the *Pigford* litigation (and hence with respect to their status in this litigation). *Id.* § VIII.A.3-4; Order Granting Preliminary Approval of Settlement Agreement, Certifying a Rule 23(b)(1)(B) Settlement Class, and for Other Purposes ¶ 10, in *In re Black Farmers Discrimination Litigation*, doc. #172 in Case 1:08-mc-00511, filed 5/13/11. Class Counsel must respond to Class Member questions, respond to issues raised by the Court-appointed Ombudsman, and provide Class Members with information regarding the status of claims or the distribution of funds. Settlement Agreement § VIII.A.6-7.

28. After approval of the Settlement Agreement, Lead Class Counsel (specific counsel designated from among Class Counsel) must perform substantial administrative, coordination, information, negotiation, legal, and monitoring duties. *Id.* § VIII.B. These duties include:

(1) hiring a "Track A Neutral" to determine the merits of claims submitted under Track A. *Id.* §§ II.JJ, VIII.B.5;

(2) hiring a "Track B Neutral" to determine the merits of claims submitted under Track B. *Id.* §§ II.RR, VIII.B.5;

(3) overseeing and receiving reports from the Claims Administrator and the Track A and B Neutrals. *Id.* §§ V.A.15, V.E., V.F, VIII.B.5; and

(4) retaining and dismissing other vendors to assist in implementing the

Settlement Agreement. *Id.* VIII.B.6.

Class Counsel have already begun to perform some of these duties. Fee Motion.

D. Attorney Fees Under the Settlement Agreement

29. Section II.N of the Settlement Agreement defines the Fee Award to be the "total amount approved by the Court for the payment of Common Benefit Fees and Track B Fees." Section II.G of the Settlement Agreement defines "Common Benefit Fees" to be "reasonable attorneys' fees, expenses, and costs for the work Class Counsel perform on behalf of the Class as a whole both before and after execution of" the Settlement Agreement. It excludes Track B Fees and certain other amounts. Section X.E states that Class Counsel shall be paid Common Benefit Fees for their reasonable and compensable work on behalf of the Class. It also states that the Common Benefit Fees shall equal the Fee Award minus the sum of Track B Fees the Claims Administrator causes to be paid. Section II.QQ of the Settlement Agreement defines a Track B Fee to be a fee negotiated between a Claimant and his or her counsel, subject to an 8 percent cap. The amount of Common Benefit Fees that will be available to compensate Class Counsel for all of the non-Track B work in the case is to be reduced by the amount of Track B Fees that are payable.

30. Sections X.B of the Settlement Agreement provides that Class Counsel will move the Court to authorize a Fee Award, for purposes of notice to the Class, of between 4.1 percent and 7.4 percent of the Fee Base. Section II.O of the Settlement Agreement states that the Fee Base is the sum of the 2008 Funds ($100 million—Settlement Agreement § II.A) plus any 2010 Funds ($1.15 billion—Settlement Agreement § II.B) minus $22,500,000. The

Fee Base is thus $1,227,500,000. For purposes of my analysis, I treat this amount as the class recovery amount.

31. If funds remain after claimants have been paid, Class Counsel may move to have the funds paid to non-profit organizations, legal services entities, or education institutions that satisfy specified criteria. Settlement Agreement § V.E.13.

32. Counsel have requested a fee in the amount of 7.4 percent of the Fee Base, which is $90,835,000.

IV. Assessment of Reasonableness of the Fee Request

I first provide an overview of fee award standards in class actions and then address the reasonableness of the requested fee in this case.

A. Overview of Fee Award Standards

33. Trials courts awarding attorney fees "have a duty to ensure that claims for attorneys' fees are reasonable." *Swedish Hosp. Corp. v. Shalala,* 1 F.3d 1261, 1265 (D.C.Cir.1993). Courts use different methodologies in assessing fees. At one time, the most common method was to consider multiple factors, including the time and labor required, the customary fee, whether the fee is fixed or contingent, the amount involved and the results obtained, the experience, reputation, and ability of the attorneys, awards in similar cases, the nature and length of the professional relationship with the client, the time limitations imposed by the client or the circumstances, the preclusion of other employment by the attorney due to acceptance of the case, the novelty and difficulty of the questions, the skill

needed to perform the legal services, and the "undesirability" of the case. The leading precedent outlining this multi-factor approach is *Johnson v. Georgia Highway Express*, 488 F.2d 714, 717–19 (5th Cir. 1974).

34. More recently, many courts, without necessarily repudiating the multi-factor approach, have adopted two methodologies for determining fees that appear more objective and quantifiable: the lodestar and percentage methods. Under the lodestar method, courts multiply the reasonable number of hours expended by counsel by a reasonable hourly rate and then adjust the product for various factors. The lodestar method is widely recognized as having flaws. Courts cannot easily determine either the reasonable hours or the reasonable hourly rate; there are few protections against counsel exaggerating either or both; the calculation involves the courts in time-consuming counting and risks transforming the fee determination into a collateral lawsuit; standards for determining any multiplier for the lodestar are unclear and potentially arbitrary; and the method creates a perverse incentive to counsel to waste time to increase the billable once a recovery of some sort appears reasonably certain.

35. The percentage fee fares better along these dimensions. Under this method, which resembles the contingency fee in individual tort cases, the court multiplies the amount recovered on behalf of the class by a percentage factor. The percentage method is easy to calculate, does not involve the court in fee audits, and does not create incentives to waste time. Although generally preferable to the lodestar method in cases where it can be used, the percentage method is also imperfect. In some cases (e.g., actions for injunctive relief or cases involving nonpecuniary relief such as hard-to-value coupons), the amount recovered may

be difficult or impossible to quantify. Determining an appropriate percentage may be difficult, especially when the case is unusual in dimension (very large or very small) or especially difficult or risky.

36. Perhaps in recognition that both the lodestar and percentage methods are imperfect, some courts have adopted a blended approach that "checks" the percentage method for reasonableness against a lodestar calculation. This mixed approach may have value in correcting extreme cases in which the percentage approach alone would generate a windfall for class counsel, but it too is imperfect. Usually, when courts discuss lodestar check, they do so with a view toward adjusting downward if the percentage approach alone results in an excessive fee. Thus, while it may be appropriate for cases in which counsel would receive an exceptionally high hourly rate under the percentage method alone, the lodestar check does not usually adjust for cases in which counsel would receive an unusually low hourly rate. Thus, it may result in counsel being under compensated on an aggregate basis. Further, because the lodestar check requires the lodestar calculation, it does not eliminate the burden on courts, the perverse incentive to run up hours, and the dangers of mini-trials.

37. Regardless of the methodology employed, the essential inquiry in all cases is the same: courts seek to determine a reasonable fee for counsel's efforts in the case. Because no fee determination method is perfect, and without foregoing their duty to actively review fees, courts tend to be receptive to arm's length negotiated fee amounts.

38. In this Circuit, in class action cases in which plaintiffs recover benefits from a common fund, "the favored method of calculating attorneys' fees is to award a percentage

of the fund." *Swedish Hosp.,* 1 F.3d at 1267–71; *Radosti v. Envision EMI, LLC*, 760 F.Supp.2d 73,77 (D.D.C. 2011). "Such awards are favored because they directly align the interests of the class and its counsel and provide a powerful incentive for the efficient prosecution and early resolution of litigation." *Radosti*, 760 F.Supp.2d at 77. *Accord, Wells v. Allstate Ins. Co.,* 557 F.Supp. 2d 1, 6 (D.D.C. 2008).

39. In addition to the usual sources of authority for a trial court to evaluate the reasonableness of attorney fees, Section 201(g)(4)(A) of the Claims Resolution Act of 2010, Pub. L. No. 111-291 (Dec. 8, 2010), 124 Stat. 3064, 3072, states that the Court, subject to the terms of the Settlement Agreement, "shall make any determination as to the amount of attorneys' fees, expenses and costs in accordance with controlling law . . .." This provision also expressly provides that the court's determination of attorneys' fees shall be subject to "the provisions of the Settlement Agreement regarding . . . maximum and minimum percentages for awards of attorneys fees."

40. In this District, it has been noted that "fee awards in common fund cases may range from fifteen to forty-five percent," *In re Lorazepam & Clorazepate Antitrust Litig.,* No. MDL 1290, 2003 WL 22037741, *8 (D.D.C. June 16, 2003) and that awards of between twenty and thirty percent of the common fund, and sometimes more, have been deemed reasonable. *Swedish Hosp.,* 1 F.3d at 1272; *Radosti*, 760 F.Supp.2d at 77; *Wells,* 557 F.Supp. 2d at 6 (approving a 45% award). Even in cases that are not true common fund cases (in that the attorney fees were negotiated separately and the fees would not come from the class recovery fund) courts in this District use the percentage of the fund method. "That approach has been followed by courts in this district based on this circuit's stated preference for

percentage-of-common-fund fee awards." *Radosti*, 760 F.Supp.2d at 77. *See also In re Lorazepam*, 2003 WL 22037741, *4; *In re Vitamins Antitrust Litig.*, Misc. Action No. 99–197, 2001 WL 34312839, at *4–6 (D.D.C. July 16, 2001).

41. In evaluating fee requests under the percentage method, courts in this District have examined the following factors: (1) the size of the fund created and the number of persons benefitted; (2) the presence or absence of substantial objections by class members to the settlement terms and/or fees requested by counsel; (3) the skill and efficiency of the attorneys involved; (4) the complexity and duration of the litigation; (5) the risk of nonpayment; (6) the amount of time devoted to the case by class counsel; and (7) the award in similar cases. *Radosti*, 760 F.Supp.2d at 78; *Cohen v. Chilcott,* 522 F.Supp.2d 105, 122 (D.D.C. 2007); *In re Lorazepam,* 2003 WL 22037741, at *8.

B. Assessment of the Fee Request in This Case

42. My assessment of whether the 7.4 percent fee request in this case is reasonable is based on three components, which I first summarize and then discuss in more detail. After discussing these three components, I describe other factors that courts in this District consider in awarding common fund fees, factors that bear on each of the components of my estimate.

43. The first component of my assessment of the fee request is based on the relation between attorney fees and the benefit obtained for the class in common fund cases. The benefit obtained for the class, as measured by the settlement fund, supports a 7.4 percent fee in this case.

44. The second component of my assessment of the fee request is based on a lodestar analysis. That assessment also supports the reasonableness of a 7.4 percent fee.

45. The third component of my assessment is the tendency of courts to deem reasonable fee amounts agreed to between attorneys and clients. The many retainer agreements signed early in this litigation, as well as after congressional action related to this litigation, support the reasonableness of a 7.4 percent fee.

1. Assessing Fees Based on the Value Obtained for the Class

46. Before discussing the first component of my analysis, based on the value obtained for the class, it is helpful to describe in more detail the data I rely on for this portion of my opinion. The data consist of over 600 class action decisions analyzed by me and Professor Geoffrey Miller of New York University School of Law. That analysis of class action/common fund cases explores the relation between attorney fees and class recoveries in class action cases. As noted above, many courts have cited or relied on this analysis.

47. Professor Miller and I have published two articles empirically assessing common fund class action fee awards. The first article covered cases from 1993 to 2002. Eisenberg & Miller, *supra*, 1 J. EMPIRICAL LEGAL STUD. 27 (2004). The second article extended that study to the years 2003 to 2008. Theodore Eisenberg & Geoffrey P. Miller, *Attorney Fees and Expenses in Class Action Settlements: 1993-2008*, 7 J. EMPIRICAL LEGAL STUD. 248 (2010) ("JELS II"). As reported in the 2004 published article, we initially searched in the WESTLAW™ "AllCases" data base using the search "settlement & 'class action' & attorney! w/2 fee! & date(=[1993-2002])." This search's results were checked against a

search of the LEXIS™ "Mega" data base using equivalent search terms. We also compiled lists of citations in the cases found by these search requests and included any additional cases meeting the basic search criteria. We further checked the list against the CCH Federal Securities and Trade Regulation Reporters. Once cases had been identified by this method, we sometimes gathered additional information about case characteristics from other sources— for example, information on the Internet or docket entries in the U.S. Courts PACER system. For the period 2003 to 2008, we replicated the WESTLAW search and checked the results, in many cases, against information available in PACER. Our searches and exclusion criteria yielded recovery and fee information for a total sample of 689 common fund cases. Relatively more cases come from the later period (301 cases for six years from 2003 to 2008 compared with 388 cases for the preceding ten years). This was due to the significantly expanded coverage of the PACER system in the later period and to our inclusion of cases in which fee-shifting statutes could have been applied but the fee was not determined by formally applying the fee-shifting statute.[2]

48. The core finding in the articles by Professor Miller and me is that court-approved fees in common fund cases can be largely explained by the relation between two variables, the class recovery and the attorney fee. The class recovery largely explains the pattern of

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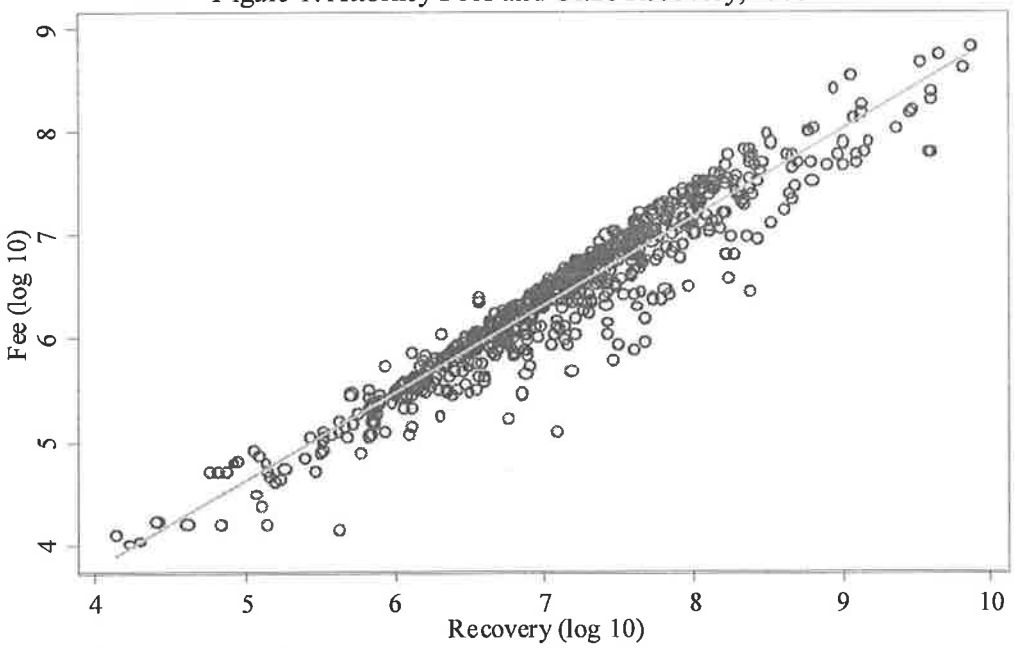
[2] In additional to being published in the JOURNAL OF EMPIRICAL LEGAL STUDIES, the results of our second empirical study of class action settlements were presented at conferences at Tel Aviv University in the spring of 2009, at the 42nd federal Transferee Judges' Conference, held in West Palm Beach, Florida, on October 26-28, 2009, and at an international legal conference held at the University of Turin, Italy, in December 2009. Our empirical results are consistent with other data relating to class action attorney fees. Brian T. Fitzpatrick, *An Empirical Study of Class Action Settlements and Their Fee Awards*, 7 J. EMPIRICAL LEGAL STUD. 811 (2010).

fee awards. In assessing the relation between two such continuous variables, the proper starting point is usually a graph. As stated in the FEDERAL JUDICIAL CENTER, REFERENCE MANUAL ON SCIENTIFIC EVIDENCE 134 (2d ed. 2000) (hereinafter "REFERENCE MANUAL"), "The relationship between two variables can be graphed in a scatter diagram."

49. To demonstrate the strong relation between class action/common fund attorney fees and the class recovery, Figure 1 reproduces a scatter diagram figure from Eisenberg-Miller JELS II, *supra*, which shows the relation between the attorney fee (the y-axis) and the class recovery (the x-axis) for over 600 common fund cases. Each data point in the figure represents a class recovery and the accompanying attorney fee award in the case.

Figure 1. Attorney Fees and Class Recovery, 1993-2008



Source: Eisenberg & Miller, 7 J. Empirical Legal Stud. at 254 (fig 1c)

50. Figure 1 shows a strong linear relation between attorneys fees and class recoveries. In fact, the class recovery, standing alone, explains 92 percent of the variation in the amount of attorneys fees. Eisenberg & Miller, 7 JELS II, *supra*, at 278 (tbl. 18, model 1). So regardless of the methodology courts use in assessing class action fee awards, the recovery amount for the class tends to explain the amount of the fee award.

51. I will now address how our empirical findings inform my assessment of the reasonableness of the fee request based on the results achieved in this case. For purposes of this Declaration, I analyzed the relation between the attorney fee and the class recovery in the data analyzed in the Eisenberg-Miller JELS articles. Given the large size of the class recovery in this case, I focused on cases with class recoveries of at least $100 million. Courts often refer to class actions with common funds in excess of $100 million as "megafund" cases. *See, e.g.*, *In re AT & T Mobility Wireless Data Services Sales Tax Litigation*, 2011 WL 2173746, at *3 (N.D. Ill. June 2, 2011); *Wal–Mart Stores, Inc. v. Visa U.S.A., Inc.*, 396 F.3d 96, 123 (2d Cir.2005); *Holman v. Student Loan Xpress, Inc.*, 2011 WL 940240, at *11 n. 8 (M.D.Fla. Mar.17, 2011); *Stop & Shop Supermarket Co. v. SmithKline Beecham Corp.*, No. 03–CV–4578, 2005 WL 1213926, at *9 (E.D.Pa. May 19, 2005); *In re HPL Techs., Inc. Secs. Litig.*, 366 F.Supp.2d 912, 925 (N.D.Cal.2005); *In re NASDAQ Mkt.-Makers Antitrust Litig.*, 187 F.R.D. 465, 486 (S.D.N.Y.1998).

52. Good reason exists to focus on megafund cases for purposes of this case both because of the size of the class recovery and because the data consistently show that the attorney fee as a percent of the class recovery declines as the size of the class recovery

increases. So a 25 percent fee award that might be suitable in a case with a class recovery of, for example, about $5 million would not necessarily be a suitable percent in a case with a class recovery of over $100 million. For example, Eisenberg & Miller, JELS II, *supra*, at 265 (tbl. 7) shows that the mean attorney fee in cases with class recoveries exceeding $175.5 million is 12.0 percent.

53. To summarize the results flowing from the analysis of megafund cases that follows, I find that the 7.4 percent fee request in this case is fully supported by the range of fee awards in the megafund case data. As shown below, those data support a fee of $98,871,934, which would correspond to a fee of 8.1 percent in this case.[3]

54. Table 1 presents basic information about the relation between the class recovery and attorney fees. For purposes of this table, I divided the 109 megafund class recoveries in the Eisenberg-Miller data into deciles of about 11 cases each. The table and subsequent tables and figures in this Declaration use dollar amounts adjusted for inflation to 2010 using the Bureau of Labor Statistics consumer price inflation index.

55. Table 1's first column shows the bounds on the deciles, starting with the lowest decile of class recoveries. Thus, the table's first numerical row includes cases with class recoveries in the first decile of megafund cases, those recoveries less than or equal to $111.7 million (but greater than the $100 million floor that defines megafund cases). The table's last row includes cases in the highest decile, those cases with recoveries greater than $2.279

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[3] In addition to the analysis described in detail in this Declaration, I also analyzed the 21 cases in our data with class recoveries of at least $1 billion. My analysis of those cases indicates that an attorney fee of $109,100,000 would be in the middle of the range of fee awards in that smaller sample.

billion. The table's columns show, within each decile range, the mean, median, and standard deviation of the fee percent for the row decile. Thus, for the 11 cases with class recoveries of less than $111.7 million, the mean fee percent award was 20.2 percent, the median fee percent award was 19.9 percent, and the standard deviation was 6.5 percent. Although there is some fluctuation in the scale effect trend across the deciles, the overall trend is clear with the highest decile (last row) having about one-third of the median and mean percentage fee than the lowest decile (first row).[4]

Table 1. Mean, Median, and Standard Deviation of Fee Percent, Controlling for Class Recovery Amount, 1993-2008, Megafund Cases

Range of class recovery (millions) decile	Mean	Median	Standard deviation	N
Recovery <=111.7	20.2	19.9	6.5	11
Recovery >111.7 <=132.4	20.7	23.4	7.2	11
Recovery >132.4 <=159.9	19.6	21.6	8.2	11
Recovery >159.9 <=189.0	14.3	10.2	11.6	11
Recovery >189.0 <=233.8	15.4	13.0	8.8	11
Recovery >233.8<=282.8	14.6	14.8	7.9	11
Recovery >282.8 <=479.3	12.4	9.9	8.9	11
Recovery >479.3 <=1011.8	12.4	9.4	8.1	10
Recovery >1011.8 <=2279.3	10.5	9.8	7.4	12
Recovery >2279.3	7.0	6.0	4.2	10

Sources: Westlaw, LexisNexis, PACER.

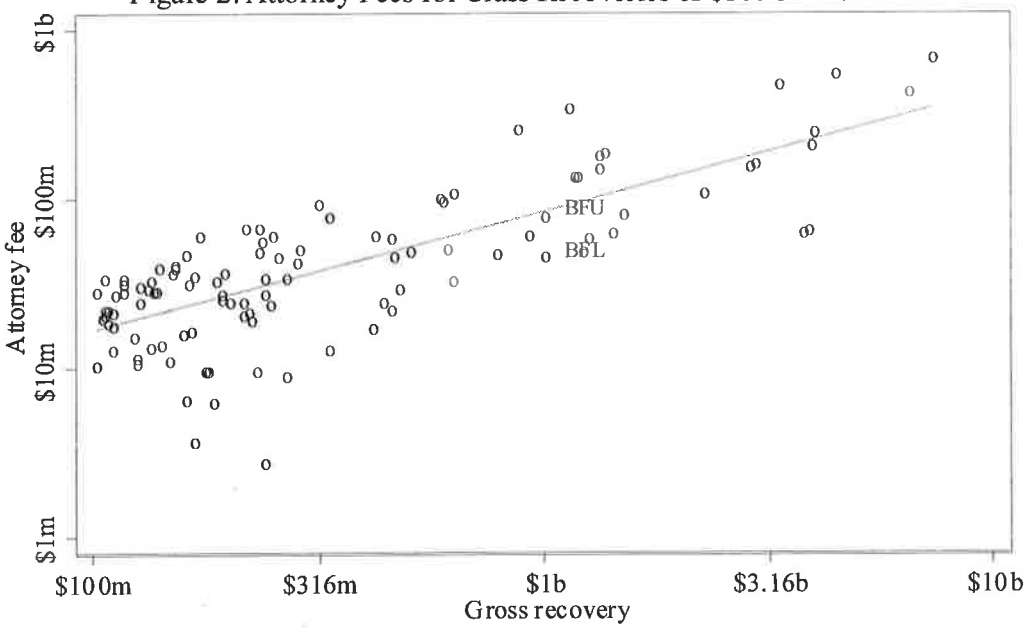
56. With respect to this case, the most directly applicable entry in Table 1 is the next-to-last row. It shows that, for common fund cases with class recoveries between $1.011 and $2.279 billion, the mean attorney fee award was 10.5 percent and the median fee award was 9.8 percent. Thus, this simple analysis indicates that the 7.4 percent fee request is reasonable

[4] Note that the range of class recoveries in Table 1's deciles increases as the class recovery increases. For example, the second row in the table encompasses class recoveries spanning about $37 million. The next-to-last row spans class recoveries of over $1 billion. This increasing range as one moves down the table is attributable to the data becoming "thinner" as class recoveries increase.

in light of other megafund cases, and at the lower range of awards for cases of analogous size.

57. To more precisely assess the appropriate fee award, I employed standard graphical and statistical techniques to analyze the 109 megafund cases. The relation between the attorney fee and the class recovery in the 109 megafund cases in the Eisenberg-Miller data is visually summarized in the scatter diagram in Figure 2. Each circle in the figure represents a case, with the class recovery in the case indicated on the x-axis and the attorney fee in the case indicated on the y-axis. Figure 2 thus shows the association between fee and class recovery in the class actions. The line in the figure is the best-fitting regression line, discussed below, which shows the line that best represents the relation between attorney fees and class recoveries..

Figure 2. Attorney Fees for Class Recoveries of $100 Million or More



Note: m=million; b=billion.
Source: Eisenberg & Miller, 7 J. Empirical Legal Stud. at 254 (fig. 1d)

58. In addition to the megafund case data shown in the figure, I added to the figure two data points that represent the upper and lower range, 7.4 percent and 4.1 percent, of the allowable attorney fee request in this case's Settlement Agreement. Those two data points are labeled "BFU" (which stands for Black Farmers Upper limit) and "BFL" (which stands for Black Farmers Lower limit).

59. Visual inspection of the scatter diagram shows that, in megafund cases as in the larger population of class action cases, a strong linear relation exists between the class recovery and the attorney fee.[5] Figure 2's presentation of the upper and lower fee percents

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[5] Figure 2 (as well as Figure 1 above) uses logarithmic scales. This is because preliminary inspection of the data using a scatter diagram in non-logarithmic scales suggested the need to use such scales. "In regression problems with one predictor and one response, the scatterplot of the response versus the predictor is the starting point for regression analysis." Sanford Weisberg, APPLIED LINEAR REGRESSION 1 (3d ed. 2005). A preliminary scatter diagram of the punitive and compensatory award for the same data as presented in Figure 3 was not helpful in exploring the relation between fee and class recovery amounts. The data points visible in Figure _ are less discernable in a figure that fails to properly transform the data to a logarithmic scale. Such a pattern "indicates [to the statistical analyst] immediately that some sort of transformation is required." Sanford Weisberg, APPLIED LINEAR REGRESSION 130 (1980). Because of the variation in the fee and recovery amounts, "log transformations are obvious candidates." *Id.*

Such transformations have been consistently used by me and others in prior analyses of attorney fees and other quantitative aspects of the legal system, such as punitive damages, that have been published in both peer-reviewed and student-edited journals. *E.g.*, David A. Hyman, Bernard Black, Kathryn Zeiler, Charles Silver, and William M. Sage, *Do Defendants Pay What Juries Award? Post-Verdict Haircuts in Texas Medical Malpractice Cases*, 1988-2003, 4 J. EMPIRICAL LEGAL STUD. 3, 25 (2007) (tbl. 6 model 2); Jonathan M. Karpoff & John R. Lott, Jr., *On the Determinants and Importance of Punitive Damage Awards*, 42 J. L. & ECON. 527, 543 (1999); Erik K. Moller, Nicholas M. Pace & Stephen J. Carroll, *Punitive Damages in Financial Injury Jury Verdicts*, 28 J. LEGAL STUD. 283, 300 n.52 (1999); Margo Schlanger, *Inmate Litigation*, 116 HARV. L. REV. 1555, 1605 & n.136 (2003); Catherine M. Sharkey, *Dissecting Damages: An Empirical Exploration of Sexual Harassment Awards*, 3 J. EMPIRICAL LEGAL STUD. 1 (2006); Theodore Eisenberg & Martin T. Wells, *The Predictability of Punitive Damages Awards in Published Opinions, the Impact*

in the Settlement Agreement in this case suggests that the upper limit of 7.4 percent (BFU) is noticeably closer to the line that best represents the relation between fee and class recovery than is the lower limit of 4.1 percent (BFL). A 7.4 percent fee appears quite close to the best-fitting regression line and any lower percent would be more distant from that line.

60. While the basic visual relation between attorney fee and class recovery is displayed by the scatter diagram in Figure 2,[6] the relation is confirmed by statistical analysis. Such statistical analysis was used to generate the sloping straight line in Figure 2 and applies widely accepted regression techniques. Regression analysis is widely used in statistical analysis, is often relied on by courts, and is substantially discussed in the REFERENCE MANUAL. As summarized in the REFERENCE MANUAL:

> A regression model attempts to combine the values of certain variables (the independent variables [the class recovery variable in the context of this case]) in order to get expected values for another variable (the dependent variable [the fee amount in the context of this case]). The model can be expressed in the form of a regression equation. A simple regression equation has only one

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of BMW v. Gore *on Punitive Damages Awards, and Forecasting Which Punitive Awards Will Be Reduced*, 7 SUPREME CT. ECON. REV. 59, 70 (1999).

[6] For purposes of analysis, I used a transformation of dollar amounts to base 10 logarithms. The logarithmic transformation used associates each amount of fee and class recovery with the logarithm in base 10 of the amount. For example, an award of $10 can be written as 10^1 (which is read as "10 to the first power"). The logarithm of 10^1 is 1. An award of $100 can be written as 10^2, with an associated logarithm of 2. An award of $1,000,000 can be written as 10^6, with an associated logarithm of 6 and an award of $10,000,000 is associated with a logarithm of 7. The statistical results reported here are independent of the choice of which base to use for the logarithms. For convenience, the labels indicating amounts on the axes in Figure 2 are reported in untransformed dollars ("m"=million; "b"=billion) rather than as powers of 10.

independent variable; a multiple regression equation has several independent variables. Coefficients in the equation will often be interpreted as showing the effects of changing the corresponding variables. REFERENCE MANUAL at 144.

61. Regression analysis allows one to account statistically for what Figures 1 and 2 account for graphically— the attorney fee as a function of class recovery. Table 2 reports the results of the regression model underlying the straight line in Figure 2. In regression terminology, the amount being explained is the "dependent variable" and the variables used to explain the dependent variable are the explanatory variables. The numbers associated with the explanatory variables often are referred to as coefficients. Thus, Table 2 indicates the coefficient for the "Class recovery" variable in the model in Table 2 is 0.701. Regression models usually include a term, known as the "Constant" or intercept, see REFERENCE MANUAL at 166, which does not vary. In this case, the constant is 1.626. See also REFERENCE MANUAL at 218 (discussion of interpreting regression output from computer programs). Taken together, the coefficient and the constant provide, respectively, the slope and intercept necessary to specify the line shown in Figure 2.

Table 2. Regression Model of Fee Amount as a Function of Class Recovery Amount
Megafund Class Action Cases in the Eisenberg-Miller Data

	dependent variable = Fee
	amount (log10)
Class recovery (log(10))	0.701
	(12.4)***
Constant	1.626
	(3.36)
Number of observations	109
R-squared	0.59

Absolute value of t statistics in parentheses; *** significant at p<=0.001

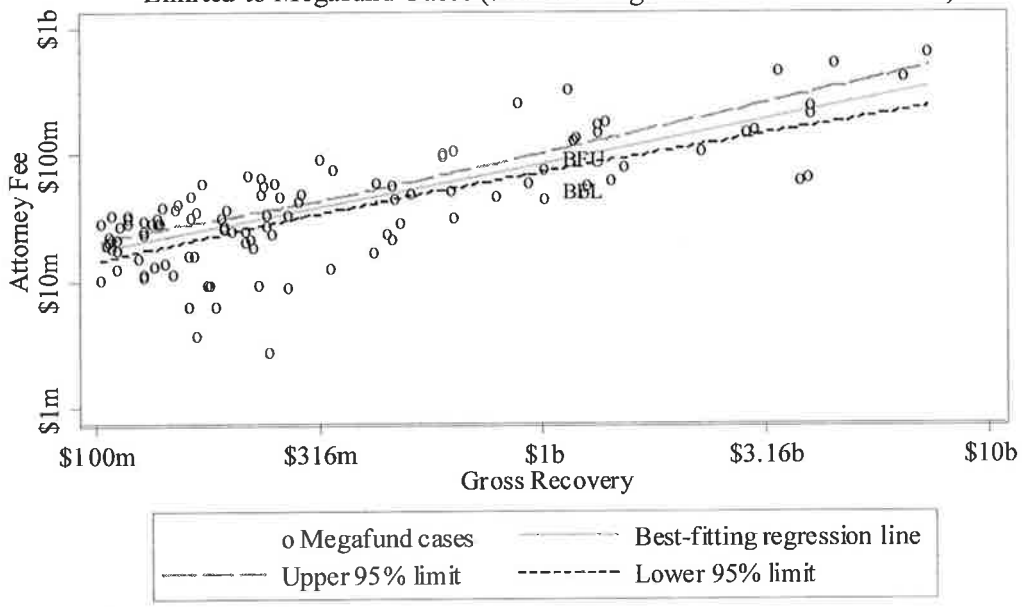
62. The regression methodology used to produce the straight line in Figure 2, as reported in Table 2, produces an estimate, as do the results of any inferential statistical procedure. It is an estimate because it is based on a sample of cases and not the universe of all possibly relevant cases. It is appropriate to account for the uncertainty in the estimate. To complete the class recovery-based analysis of the fee request, I therefore account for the uncertainty in the estimate using standard techniques to compute a fee range supported by the data.

63. To account for the uncertainty in the estimate, it is helpful to show the Figure 2 data in a manner that displays the uncertainty. Figure 3 uses the same megafund data as Figure 2 but includes two additional lines. These lines are the upper and lower bounds on the 95 percent confidence interval of the regression estimate represented by the straight line in Figure 2.[7] The upper and lower bounds reflect the uncertainty in the

[7] The statistic used to generate the 95 percent confidence interval can be thought of as the standard error of the predicted expected value, also often referred to as the standard error of the fitted value. StataCorp. 2009. Stata: Release 11. Statistical Software. College Station , TX: StataCorp LP. Base Reference Manual at 1382.

estimate by providing the range of values into which the regression line would be expected to fall if repeated samples were drawn from the universe of cases of interest, and each of those samples were analyzed. One expects the estimated line to be in the range of the confidence interval for 95 percent of the samples.[8]

Figure 3. Attorney Fee & Class Recovery
Limited to Megafund Cases (and Showing 95% Confidence Interval)



Note: m=million; b=billion.
Data source: Megafund cases in data used in Eisenberg-Miller JELS articles.

[8] It is customary in statistical analysis to usually use the 95 percent confidence interval, but different confidence levels can be used. The lower the confidence interval the broader the range of values supported by the estimate. For example, if one used a 90 percent confidence interval, the upper bound on the estimated fee in this case would be higher and the lower bound on the estimated fee would be lower.

64. Based on Table 2's regression model,[9] the mean estimated fee in a case with this case's class recovery is $98,871,934. This corresponds to a fee of 8.1 percent. The 95% confidence interval associated with the estimate, the range of fees suggested by megafund cases, given a class recovery of $1.2275 billion, is from a high of approximately $118 million to a low of approximately $81 million.[10] These correspond to fee percents of 9.6 and 6.6, respectively. The fee request in this case, 7.4 percent, is well below the estimated fee

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[9] A regression model's value of the dependent variable (fee amount) for the value of the explanatory variable (the class recovery) can be computed using the coefficients reported in Table 2. *See, e.g.*, the illustrations of computing the dependent variable from the independent variables in the REFERENCE MANUAL at 146-47, 210-11. For the model in Table 2, for any value of the class recovery, the fee amount computed from the regression model equals the number resulting from the following equation:

fee amount (in log10 units) = (0.701 × class recovery (in log10 units)) +1.626.

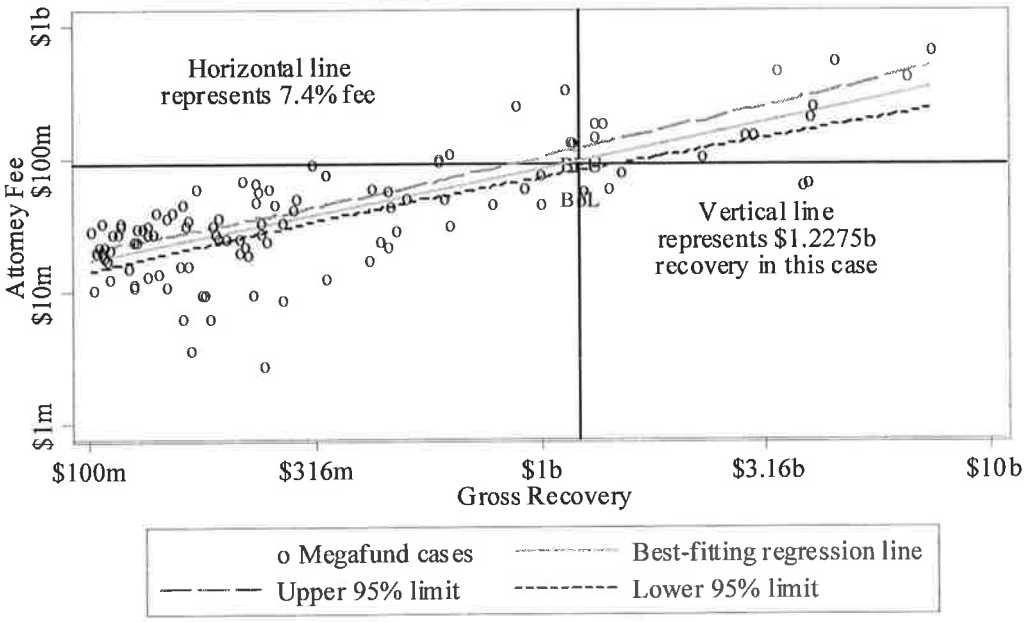
[10] In statistical analysis, including regression analysis, it is common to report the probability that an observed result could occur by chance. In the context of the analysis reported here, the probability is computed based on what is referred to as a t-statistic. As explained in the REFERENCE MANUAL at 148, the t-statistics reported in Table 2 are computed from a quantity known as the standard error. The standard error measures the likely difference between the estimate of the coefficient and the unknown parameter represented by the coefficient. *Id.* The t-statistic reported in Table 2 is obtained by dividing the estimate of a coefficient by its standard error. *Id.* As stated in the REFERENCE MANUAL, "Under the null hypothesis that [a parameter = 0], there is only about a 5 percent chance that the absolute value of t (denoted |t|) is greater than 2. A value of t greater than 2 would therefore demonstrate statistical significance." *Id.* As shown by the numbers in parentheses in Table 2, the t-statistics in the regression model reported in the Table substantially exceeds 2. The probability of observing such a large t-statistic if a parameter equals zero is small and beyond the threshold for labeling results statistically significant. It would be customary to state that the coefficient in the model is highly statistically significant; it is unlikely to have occurred by chance. This is confirmed by the strong visual relation between the sloping line in Figure 3 and the scatter diagram aspect of the figure showing the individual fee and recovery amounts.

The range of fees reported is based on the awards in actual cases with class recovery amounts near the class recovery in this case.

of 8.1 percent, and is closer to the lower limit on the confidence interval than to the upper limit.

65. To complete the visual approach to presenting the analysis of the relation between class recovery amount and attorney fee, Figure 4 reproduces Figure 3 but adds a horizontal line to show the 7.4 percent fee request in this case, and a vertical line to show the $1.2275 billion class recovery in this case. As the figure shows, the point where those two lines intersect (designated in the figure by "BFU") is within the 95 percent confidence interval resulting from analysis of megafund cases. Note that the low range of fee award under the Settlement Agreement, 4.1 percent (designed in the figure by "BFL"), is well out of the 95 percent confidence interval and is, therefore, atypically low for class recoveries of the size of this case.

Figure 4. Attorney Fee & Class Recovery, from Eisenberg-Miller JELS Articles Limited to Megafund Cases with 95% Confidence Interval



66. I explored two alternative regression models for estimating the fee in this case. Both yielded fee estimates higher than that described above. In one model, I estimated the fee percent as the dependent variable rather than the attorney fee. This model yielded an estimated 10.2 percent of the class recovery as a fee. In the second alternative model, I employed a transformation of fee percent (the logit transformation) commonly employed when the dependent variable is a percent or proportion. This model yielded an estimated 8.3 percent of the class recovery as a fee. Each alternative estimate suggests that the 7.4 percent fee request is reasonable.

67. Moreover, the monetary size of the settlement fund understates the overall benefit of the Settlement Agreement to Class Members. This is because, in addition to substantial monetary recoveries, Class Members may benefit from the Settlement Agreement's moratorium on loan accelerations and foreclosures during the pendency of the claims process. Settlement Agreement § VII.A. This moratorium is more readily available than that in Section 14012(h)(2) of the Claims Resolution Act, which required a prima facie showing that the acceleration or foreclosure is related to a *Pigford* claim. Counsel also achieved the important benefit of lowering, for purposes of the claims process, the legal requirements applicable to their clients' claims. Under the *Pigford* Consent Decree, § 9(a)(i)(C) a Track A claimant had to demonstrate that his or her treatment "was less favorable than that accorded specifically identified, similarly situated white farmers," a significant evidentiary burden. Under the Settlement Agreement, in contrast, Class Members need not satisfy this evidentiary requirement. Settlement Agreement § V.C.1. Although these benefits are not readily quantifiable, they suggest that a purely mathematical approach to assessing the benefit of the Settlement to Class Members understates the total benefit conferred on the class by Class Counsel.

68. In addition to the fee request's reasonableness in relation to over 100 other megafund class action cases analyzed above, the request is also reasonable in relation to an analogous case against the USDA recently resolved in this District. In *Keepseagle v. Vilsack*, Case No. 99-3119, D.D.C., plaintiff Keepseagle and others filed suit against the USDA alleging that the USDA discriminated against Native Americans in its Farm Loan Program. Memorandum of Law in Support of Plaintiffs' Motion for an Award of Attorneys'

Fees and Expenses, in *Keepseagle v. Vilsack*, doc. #581-1, Case No. 99-3119, D.D.C., filed 1/14/11. That USDA discrimination case settled and yielded a class recovery of $760,000,000. Judge Emmet G. Sullivan approved an attorney fee equal to 8 percent of the $760,000,000 recovery. Order on Plaintiffs' Motion for Final Approval of Settlement, Motion for Approval of Class Representative Service Awards, and Motion for an Award of Attorneys' Fees and Expenses ¶ 8, in *Keepseagle v. Vilsack*, doc. #606, Case No. 99-3119, D.D.C., filed 4/28/11. The lower percentage request in this case is reasonable in light of the percentage award and recovery in *Keepseagle*.

2. Lodestar Amount

69. I have been advised by Andrew H. Marks, one of the Lead Class Counsel in this case, that the hours reported to him by Class Counsel through the end of May 2011 exceed 40,000 attorney hours and 60,000 paralegal hours. I do not have information about the experience and hourly rate of each attorney whose work is included in the 40,000 hour estimate. I have been additionally advised by Mr. Marks, however, that the vast majority of work on this case has been performed by attorneys with more than 11 years of experience.

70. To estimate the value of the professional time expended in connection with this litigation, one can employ the current "Laffey Matrix." As stated in a publicly available Department of Justice document,[11] the matrix was prepared by the Civil Division of the United States Attorney's Office for the District of Columbia. This matrix contains hourly rates for attorneys of varying experience levels, as well as for paralegals and law clerks.

[11] http://www.justice.gov/usao/dc/divisions/civil_Laffey_Matrix_2003-2012.pdf.

The document containing the matrix states that the matrix is intended to be used in cases in which a "fee-shifting" statute permits the prevailing party to recover "reasonable" attorney's fees.[12] Since the Laffey Matrix is intended to provide a measure of the reasonable value of hourly-based legal services, I believe it is reasonable to use it to estimate the lodestar, hourly-based value of such services in the absence of specific information about the experience and hourly rate of attorneys who performed those services.

71. The Laffey Matrix reports a $495/hour rate for lawyers with more than 11 years of experience and a $140/hour rate for paralegals and law clerks. Based on these hourly rates and the hours stated above, Class Counsel's estimate of the lodestar value of time already expended in connection with this case exceeds $28.2 million because the most recent time periods are not included in the estimated hours. Even if Class Counsel had no further obligations under the Settlement Agreement, therefore, the the 7.4 percent fee request ($90,835,000 given the Fee Base) would correspond to a multiplier of 3.22. To evaluate the reasonableness of this multiplier, I used the data in Eisenberg-Miller JELS II to analyze multipliers in common fund cases for which multipliers were available from the courts' opinions.

72. There were 70 megafund cases in the data with information about multipliers. Of these 70 cases, 20 (28.6 percent) had multipliers greater than 3.22. The 3.22 multiplier implicit in the requested 7.4 percent fee thus corresponds to approximately the 29th percentile of multipliers in megafund cases. The relative rank of the requested multiplier is shown graphically in the histogram in Figure 5, which shows the distribution of multipliers

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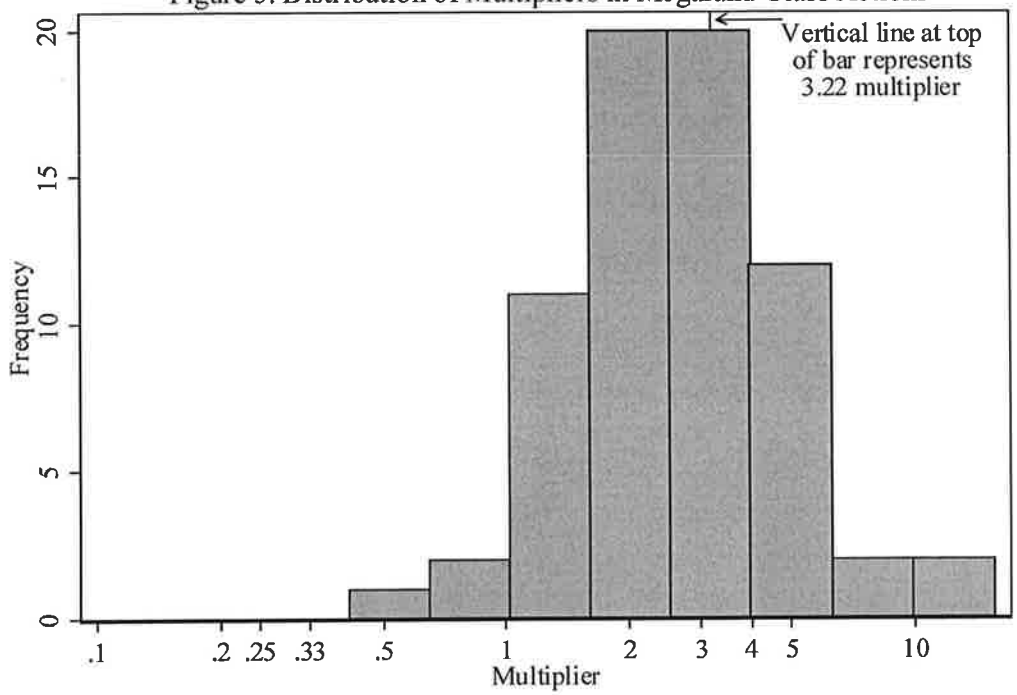
[12] *Id.*

in the 70 megafund common fund cases. As suggested by the 3.22 multiplier being in the 29th percentile of multipliers, the figure shows the multiplier is well within the distribution of multipliers in megafund cases.[13]

Figure 5. Distribution of Multipliers in Megafund Class Actions



73. This assessment of the lodestar overstates the actual multiplier in this case because of: (a) the many hours of additional time that Class Counsel is committed to

[13] Due to the skewness of the distribution of multipliers, a logarithmic scale is used in the histogram to display the data.

provide to conduct the many meetings throughout the United States needed to assist tens of thousands of Class Members prepare their claims, and (b) Class Counsel's other responsibilities under the Settlement Agreement, as described above. The likely actual multiplier is thus expected to be less than 3.0, which corresponds to a multiplier below the 33rd percentile of multipliers in megafund cases.

3. The Fees in Retainer Agreements Suggest the Fee Request is Reasonable

74. Courts tend to honor agreements voluntarily entered into between attorneys and clients, and to view fee requests consistent with those agreements as reasonable. In most class actions, no arm's-length client exists with whom class counsel has negotiated a fee. No retainer agreement exists embodying a client's consent to a particular fee. The court reviewing a settlement for fairness in such cases provides the only realistic check on possible fee-related conflicts of interest between counsel and the class.

75. In this case, however, substantial evidence exists as to the fee arrangement actual clients agreed to. As reported by Class Counsel, before the Settlement Agreement many class member clients signed retainer agreements under which counsel agreed to work on a contingent basis and advance all moneys for expenses. *E.g.*, the Pigford Claim Retainer Agreement, dated December 1, 2008, between Wilhelmina Hill and Morgan & Morgan, P.A.®, and Mike Espy, PLLC. Exhibit 2. These actual clients agreed that counsel would be entitled to attorney fees of not less than 20 percent, or, in earlier retainer agreements, fees of 33 percent. *E.g.*, McEachin & Gee, Attorneys at Law LLP, Contingent Fee Agreement

(Pigford Claims Remedy Act of 2007 Litigation S. 515 and H.R. 899) with Jerome Cliatt, signed August 6, 2007. Exhibit 3.

76. In reviewing a fee's reasonableness, it is appropriate for a court to rely in part on an arm's length contract between counsel and client. *See Allapattah Services, Inc. v. Exxon Corp.*, 454 F.Supp.2d 1185, 1209 (S.D. Fla. 2006), where the court quoted approvingly an expert witness's statement that, "A total fee of one-third of the total class recovery is in line with the expectations of the class, as apparently reflected in the individual retainer agreements of the class representatives." *See also Vizcaino v. Microsoft Corp.*, 290 F.3d 1043, 1049 (9th Cir. 2002) (although not binding on the class, district court did not abuse discretion in crediting "class counsel's evidence showing that the retainer agreements reflected the standard contingency fee for similar cases").

4. Other Factors that Influence the Fee Assessment

77. I now review the other attorney fee factors considered in this District in class action cases. As noted above, the list of factors is: (1) the size of the fund created and the number of persons benefitted; (2) the presence or absence of substantial objections by class members to the settlement terms and/or fees requested by counsel; (3) the skill and efficiency of the attorneys involved; (4) the complexity and duration of the litigation; (5) the risk of nonpayment; (6) the amount of time devoted to the case by class counsel; and (7) the award in similar cases. *E.g.*, *Radosti*, 760 F.Supp.2d at 78. The preceding subsections address factors (1) (size of the fund), (6) (the amount of time used to compute the lodestar), and (7) (awards in similar (megafund) cases). This subsection addresses the number of

persons benefitted, objections, the skill and efficiency of the attorneys, the complexity and duration of the litigation, and the risk of nonpayment.

78. *Persons Benefitted.* As noted in the Fee Motion and supporting documentation, tens of thousands of class members will benefit from Class Counsel's efforts. That is both a large class in an absolute sense, and unusually large given the substantial amount of money available to each class member under Track A or Track B. Large class actions usually average much smaller payments to class members. Theodore Eisenberg & Geoffrey P. Miller, *Incentive Awards to Class Action Plaintiffs: An Empirical Study*, 53 UCLA L. REV. 1303, 1327 (2006) (tbl. 3) (showing the mean and median recoveries per class member to be not more than $3,000).

79. *Skill and Efficiency of the Attorneys.* The skill, efficiency, and experience of the attorneys involved seems apparent, as related in the Fee Motion and supporting documentation. I note that the Plaintiffs' litigation team is an extraordinary combination of firms that often represent plaintiffs on a contingency fee basis, together with firms that generally bill on an hourly basis for large clients, as well as firms and counsel with substantial experience in the *Pigford* litigation itself. The legal and other skills necessary to litigate and settle this case and to promote the legislation required to provide more than 90 percent of the funding for the Settlement were unquestionably present given the results obtained.

80. *Complexity and Duration of the Litigation.* For nearly three years, Plaintiffs' counsel have vigorously pursued this matter. Counsel's efforts led to a Settlement Agreement on February 18, 2010, Fee Motion § II.D, a revised version of which is the

Settlement Agreement referred to herein. That settlement would have likely been massively underfunded absent further efforts. Counsel worked on behalf of the class to help secure meaningful funding for the settlement by substantial advocacy through briefings and discussions with Members of Congress and their staffs. *Id.* § II.E. Class Counsel's successful negotiation of the 2010 Settlement Agreement was key to Congress's appropriating the additional $1.15 billion contained in the Claims Resolution Act of 2010. That funding is expressly conditioned on final court approval of the Settlement Agreement. Claims Resolution Act of 2010 §§ 201(a), 201(b).

81. *Risk.* Representing Class Members in this case posed significant risks to Class Counsel. As some of the retainer agreements referred to above show, these cases were originally taken on a contingency fee basis. Fee Motion § III.B.5. Yet several counsel had to work on cases without adequate information to determine whether their clients were eligible as late *Pigford* claim filers. *Id.* The evidentiary requirement, under the *Pigford* Consent Decree, § 9(a)(i)(C), of establishing treatment that "was less favorable than that accorded specifically identified, similarly situated white farmers," posed a substantial risk of loss. The relevant information was often difficult to find or non-existent. Fee Motion § III.B.5. The recovery of substantial funds, out of which counsel might be paid, was also uncertain. The $100 million in Section 14012 funding was plainly inadequate to substantially compensate Class Members and yield an appropriate fee. The 2010 legislation alleviated this risk only after many thousands of hours had been devoted to the case. There was, of course, a substantial risk that Congress would not allocate these funds, especially given concerns about budgetary matters in recent years.

82. *Class Certification Risk.* Cases like this tend to be economically viable only if they achieve class status. Class action status against the USDA has been denied in similar cases. In *Love v. Veneman*, 224 F.R.D. 240 (D.D.C 2004), *aff'd sub nom Love v. Johanns*, 439 F.3d 723 (D.C.Cir. 2006), class certification was denied for female plaintiff farmers who sued the USDA. The grounds of denial included the conclusion that there was insufficient evidence of a common national policy of discrimination. Similar problems affected the efforts of Hispanic farmer efforts to obtain redress for discrimination. *Garcia v. Veneman*, 224 F.R.D. 8 (D.D.C 2004), *aff'd sub nom Garcia v. Johanns*, 444 F.3d 625 (D.C. Cir. 2006).

83. *Risk of Open-Ended Commitment.* The risk to Class Counsel in this case is further supported by Class Counsel's open-ended commitment to provide professional services. This duty to provide services is not accompanied by any mechanism through which counsel can seek additional attorney fees from Defendant or from the class, above and beyond those in the Settlement Agreement. This open-ended commitment introduces substantial non-traditional risk and uncertainty into counsel's compensation.

84. The substantial risks to Class Counsel further support the reasonableness of a 7.4 percent fee in this case.

85. Based on the above considerations, it is my opinion that a 7.4 percent fee award in this case is reasonable.

V. Other Matters

86. In the past four years, I have served as a testifying witness in: (1) The Bank of New York and Montana Board of Investments, High Court of Justice, Chancery Division, London, United Kingdom (testified in July 2008), and (2) Richard Fresco, et al., v. R.L Polk & Company & Acxiom Corporation, Case No.:07-60695-Civ-Martinez/Brown, United States District Court, Southern District of Florida (testified in December 2010).

87. I reserve the right to supplement this Report as additional information is made available to me.

88. My compensation for this case is expected to be $650 per hour plus expenses.

Ithaca, NY

August 8, 2011

Theodore Eisenberg

EXHIBIT B-1

C.V.
Theodore Eisenberg
Henry Allen Mark Professor of Law &
Adjunct Professor of Statistical Sciences
Cornell University
As of May 31, 2011

Academic Employment

Professor & Henry Allen Mark Professor of Law, Cornell University, 1981—
Adjunct Professor of Statistical Sciences, Cornell University, 2008—
Prof., Ph.D. program: Institutions, Econ. & Law, Fondazione Collegio Carlo Alberto, Turin, 2006—
Southeastern Association of Law Schools, minicourse for law professors on empirical legal analysis, 2010, 2011 (scheduled)
Center for Advanced Legal Studies, Tel-Aviv University (Spring 2009)
Visiting Professor of Law, NYU School of Law (Fall 2007)
Bruce W. Nichols Visiting Prof. of Law, Harvard Law School (Fall 2004)
Visiting Prof. of Law, Stanford Law School (Spring 1987)
Visiting Prof. of Law, Harvard Law School (1984-85)
Prof., Univ. San Diego's 1983 Oxford summer program (Comparative Civil Liberties)
Prof. & Acting Prof. of Law, UCLA (1977-81)

Prior Employment & Education

Law Clerk to Chief Justice Earl Warren, retired (1973)
Law Clerk, U.S. Court of Appeals for the D.C. Circuit (1972-73)
Debevoise & Plimpton (1974-77)
J.D., University of Pennsylvania Law School, 1972
B.A., Swarthmore College, 1969

Professional Memberships

Law & Soc'y Assoc.; Am. Law & Econ. Assoc.; Soc'y for Empirical Legal Studies; Am. Bankruptcy Inst.; AAUP; Admitted, N.Y. Bar; Admitted, PA Bar (inactive status); Admitted, CA Bar (inactive status); Am. Bar Assoc.; Assoc. of the Bar of the City of NY

Fellowships, Grants, Awards, Endowed Lectures, Keynote Speeches

Fellow, American Academy of Arts and Sciences
Fellow, Klebnikov Foundation Rule of Law Project
Keynote Speaker, Italian Society of Law and Economics 2011 (scheduled)
Keynote Speaker, Asian Law and Economics Association Conference 2010
Rosenthal Endowed Lectures, Northwestern University School of Law School 2010
Keynote Speaker, Conference on Empirical Legal Studies 2009
Fellow, Royal Statistical Society
Cornell Provost's Award for Distinguished Scholarship
Nat'l Science Found'n, 6/1985 to 12/1987 (Study of Civil Rights Cases)
Guy Carpenter (reinsur. co.) (empirical study of employment discrimination litigation)
South Carolina Death Penalty Resource Ctr., 1992 (Study of Jurors in Capital Cases)
Project '87 (joint project American Historical Association, American Political Science Association) (empirical study of civil rights litigation in the Central Dist. of Calif.)
American Bar Found'n (expand above study in the Central Dist. of CA and the Eastern Dist. of PA)

Editorial Boards and Outside Committees

Editor, Journal of Empirical Legal Studies
Editorial Board, American Bankruptcy Law Journal
Editorial Board, American Law and Economics Review
Advisory Board, Social Science Research Network, Litigation & Procedure Abstracts
Advisory Board, Social Science Research Network, Negotiation & Dispute Resolution Abstracts
Board of Directors, Society for Empirical Legal Studies
Board of Directors, American Law and Economics Association (2004-2006)
Member, Administrative Office of the U.S. Courts, Additional Stakeholders Functional Requirements Group (ASFRG) (evaluating PACER eand CM/ECF system)
AALS representative to Consortium of Social Science Associations
AALS Research Committee, Chair
Harvard Kennedy School Executive Session on State Courts, 2009-2011
Investment Policy Oversight Group, Law School Admission Council (past service)
Academic Advisor, National Center for State Courts
Chair, Law and Social Science Section, Association of American Law Schools (1996-97)
Editorial Board, Law and Society Review (past service)
Editorial Board, Justice System Journal (past service)
Nominating Committee, Law and Society Association, 2007, 2008
Program Committee, Law and Society Association, 2002 Annual Meeting, Vancouver
ACLU National Committee on Alternative Dispute Resolution (past service)
Provost's Comm. of Preliminary Inquiry Concerning Computer Worm Launched on National Computer Network, 1988-89
April to September 1986, Chair, Planning Committee, Workshop on Civil Rights, Association of American Law Schools
Board of Editors, Commercial Damages (Matthew Bender)
Chair, University Review Board, 1997-1999

Referee/Reviewer

Am. Econ. Rev., NSF, Law & Soc'y Rev., Justice System J., Rev. of Econ. & Statistics, Econ. Inquiry, Oxford Univ. Press, Harvard Univ. Press, Cornell Univ. Press, Yale Univ. Press, Alfred P. Sloan Found'n; Social Science & Medicine; J. Legal Studies, Internat'l Rev. Law & Econ., The Rockefeller Found'n, Social Sciences & Humanities Research Council of Canada, J. Law & Econ., Smith Richardson Found'n, Univ. of Chicago Press, NeuroToxicology, RAND Institute for Civil Justice; Louisiana Board of Regents; Harvard Law Review; Harvard School of Public Health; Law & Social Inquiry; American Political Science Review; Political Research Quarterly; Law & Society Review; Am. Law & Econ. Review, Archives of Internal Medicine, Stanford Law Review; Israel Science Foundation, Review of Law and Economics

Books or Chapters in Books

Editor-in-Chief, Debtor-Creditor Law (Matthew Bender's 13 volume treatise)
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1986 Supplement to Debtor-Creditor Law (1st ed.)

Commercial and Debtor-Creditor Law: Selected Statutes (Foundation Press 1984) (also annual editions 1986-2010) (Co-editor with D. Baird & T. Jackson)

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Courses Taught

Business Reorganizations Under the Bankruptcy Code
Civil Rights Legislation/Constitutional Remedies
Constitutional Law
Corporate Taxation
Bankruptcy & Debtor-Creditor Law
Federal Income Taxation
Empirical Studies of the Legal System (courses and seminar)
International and Comparative Insolvency Law
Employment Discrimination Seminar

EXHIBIT B-2

MORGAN & MORGAN, P.A.®

PIGFORD CLAIM RETAINER AGREEMENT

THIS AGREEMENT dated this 01 day of December, 2008, by and between Wilhelmina Hill hereinafter referred to as "Client," and MORGAN & MORGAN, P.A.®, and MIKE ESPY, PLLC, hereinafter collectively referred to as "Law Firm," shall govern the rights and responsibilities of each party.

Client has agreed to retain the services of Law Firm in connection with a Pigford claim. Client agrees either to serve as a class representative in an action to be brought on behalf of Black farmers who meet certain criteria, or otherwise to be represented by Law Firm as a member of the Proposed Class of Black Farmers or individually, as may be determined at the discretion of Law Firm, pursuant to legislation permitting determination of certain previously unresolved Pigford claims.

I. Duties of Client

A. A class representative volunteers to represent many other people with similar claims and damages, because he/she believes that a class lawsuit will save time, money and effort and will benefit all parties

B. In order for Law Firm to effectively advocate Client's interests as class representative, Client's assistance and cooperation is required. Client agrees to accept the duty to assist and cooperate with Law Firm as fully as possible during the pendency of the class action. Client agrees and understands the duties as class representative, and agrees to:

1. promptly furnish Law Firm with all information and documents in Client's possession or control when requested;

2. be fully candid and truthful regarding all information and documents provided to Law firm;

3. represent the interests of all members of the class;

4. always consider the interests of the class just as he/she would consider his/her own interests;

5. participate actively in the lawsuit, such as by testifying at deposition and trial, answering written interrogatories and by keeping generally aware of the status and progress of the lawsuit;

6. recognize and accept that any resolution of the lawsuit, such as by settlement or dismissal, is subject to court approval and must be structured in the best interest of the class as a whole; and

7. be generally knowledgeable with respect to the subject matter and progress of the lawsuit.

C. Client further understands that Law Firm may seek Court approval to appoint Client, possibly in conjunction with others, as class representative in the action which Law Firm proposes to file on Client's behalf, or in connection with subsequently filed actions. Client further understands that Law Firm may determine that it is in the best interest of the class as a whole that others (either alone, together with Client, or possibly in conjunction with others who may make similar requests) - serve as the class representative in the class action or in other related actions that may be commenced.

II. Scope of Services/Law Firm's Duties

A. Scope of Services

Law Firm will perform the following legal services, if necessary or appropriate, with respect to the claims described above:

1. investigation of claim(s);
2. determining responsible parties;
3. represent Client in connection with any meetings and necessary filings with all appropriate governmental agencies;
4. preparing and filing a lawsuit if warranted;
5. settlement procedures and negotiations;
6. prosecution of viable claim(s) by arbitration or legal action until settlement, award, or judgment is obtained;
7. if judgment is obtained in Client's favor, opposing an opposing party's motion for new trial (if any); and
8. keeping Client reasonably informed of the status of this matter.

III. Services Excluded From This Engagement

This Agreement does not cover other related claims that may arise and may require legal services. This Agreement does not cover any legal advice or other counseling with respect to the investment, or other application, of any monetary recovery that may be obtained by Client by virtue of any class action filed pursuant to this Agreement.

IV. No Guarantee as to Result

Client acknowledges that Law Firm has made no guarantees as to the outcome or the amounts recoverable in connection with Client's claim(s).

V. Law Firm's Right to Withdraw

It is agreed that if Law Firm determines in its sole judgment that Client's claim(s) are being presented for any improper purpose; are not warranted by existing law or by a non-frivolous argument for the extension, modification, or reversal of existing law or the establishment of new law; do not have or are not likely to have evidentiary support; or it is not feasible to prosecute Client's claim(s), Law Firm is permitted to cease all work on the Client's claim(s) and is authorized to discontinue the investigation/prosecution of such claim(s), upon written notice to Client at Client's last known address by regular mail.

It is further agreed that Law Firm reserves the right to withdraw from the engagement and from the representation of Client, if Client fails to cooperate, including but not limited to failure to perform Client's duties as described above, if Client misrepresents material facts, if Client fails to follow the advice of Law Firm, (other than with respect to settlement, which is solely for the Client to decide), or if Client requests Law Firm to take any position or action that in Law Firm' good faith opinion requires or permits our withdrawal because of professional duties imposed upon us by the applicable Code of Professional Responsibility.

Law Firm's right to withdraw will be subject to the ethical restrictions imposed upon Law Firm by the applicable Code(s) of Professional Responsibility. Law Firm and Client agree that upon such withdrawal, Law Firm shall cease to be Client's counsel, and Client will have the right to seek new counsel.

VI. Attorneys' Fees and Costs

A. Pursuant to this retainer, Law Firm agrees to represent you and other class members in this litigation on a fully contingent basis. **Law Firm will seek to and will make best efforts to collect its Attorneys' fees and costs directly from the Government**, and, if successful, Law Firm's efforts in this case will be paid from an award that may be granted us by the Court; that fee award might include payment for other firms with whom we may work on the matter or who may file similar litigations, and the amounts that might be awarded among the various firms presently cannot be determined. Only if Law Firm is unable to obtain its fees and costs from the Government, or if such fees shall be less than 20% of the recovery, then Law Firm shall be entitled to a total fee of not more than 20% of any recovery I obtain for individual claims plus the reimbursement of expenses incurred by Law Firm in the prosecution, whether by litigation or settlement, of each claim. **Any fee and cost reimbursement which may be owed by Client shall be reduced by any amount paid as Fees and Costs to Law Firm by the Government. The intent of this fee provision is to provide that Law Firms will first look to the Government for payment of fees and costs, and, if the Government in fact pays at least 20% of the recovery plus costs, Client's recovery will not be reduced and Client will receive 100% of his/her recovery.**

B. Client understands and agrees that in the event that Law Firm is discharged, Law Firm will receive from any Attorney Fee approved and awarded by the Court the reasonable and fair value of the services provided by Law Firm prior to such discharge, as determined by the Court.

VII. Construction

A. In case any provision contained in this Agreement shall for any reason be held to be invalid, illegal, and/or unenforceable in any respect, such invalidity, illegality and/or unenforceability shall not affect the validity and/or enforceability of any other provision or portion thereof, and this Agreement shall be construed as if such invalid, illegal and/or unenforceable provision or portion thereof was never contained herein.

VIII. Binding Agreement; Client's Acknowledgment of Terms

This Agreement represents the entire agreement between Client and Law Firm. No change or waiver of any of the provisions of this Agreement shall be binding on Client or on Law Firm unless the change is in writing and signed by both Client and Law Firm. By signing below, Client acknowledges that this Agreement has been carefully read and reviewed and its contents understood and that Client agrees to be bound by all of its terms and conditions. Client acknowledges that Law Firm has made no representations to Client regarding the outcome of the matter for which Law Firm has been engaged hereunder. Client acknowledges that Client has received a copy of this Agreement upon execution thereof.

MORGAN & MORGAN, P.A.

By:_____

By: Wilhelmina Hill
Client/Class Representative

MIKE ESPY, PLLC

By:_____

EXHIBIT B-3

Tracking Number 20496-00

MCEACHIN & GEE, ATTORNEYS AT LAW LLP
CONTINGENT FEE AGREEMENT
(PIGFORD CLAIMS REMEDY ACT OF 2007 LITIGATION
S. 515 and H.R. 899)

I, the undersigned (CLIENT), retain, appoint, and employ MCEACHIN & GEE, ATTORNEYS AT LAW LLP (hereinafter referred to as ATTORNEY), 5905 West Broad Street, Richmond, Virginia 23230, as attorney at law and in fact, to investigate, prepare and prosecute any claim or suit for discrimination suffered by me and to perform the legal services set forth in paragraph 1 below. The ATTORNEY agrees to perform these services faithfully and with due diligence.

1. The ATTORNEY is hereby authorized to bring suit and/or make claim on behalf of CLIENT as permitted by the Pigford Claims Remedy Act of 2007 or substantially similar legislation ("Pigford") against the United States Department of Agriculture for discrimination pursuant to the Equal Credit Opportunity Act, 15 U.S.C. Sec 1691 e(d) as amended; the Equal Access to Justice Act, as amended; APA 28 USC 2412 (d), as appropriate; the Civil Rights Act 42 U.S.C Sec. 1988 and to prosecute said claim by negotiation and/or suit through all courts having jurisdiction of the same.

2. ATTORNEY, and any associated counsel shall request attorney's fees and expenses pursuant to the Equal Credit Opportunity Act, 15 U.S.C. Sec 1691 e (d) as amended; the Equal Access to Justice Act, as amended; APA 28 USC 2412 (d), as appropriate; the Civil Rights Act 42 U.S.C Sec. 1988, as amended for any cost of this suit and any applicable interests that are generated with the filing of this action and the implementation of a Consent Decree, if any.

3. If allowable under Pigford, in the event attorneys' fees are not granted pursuant to the above-mentioned Acts ATTORNEY shall receive as a contingency fee a percentage of any gross amounts recovered on behalf of the Client. The contingency upon which compensation is to be paid is the recovery of monies from the negligent or liable party or parties for the injuries, damages and/or losses which the CLIENT sustained as a result of the incident referred to and set forth in paragraph (1), above. The CLIENT agrees to pay the ATTORNEY, including any associated co-counsel, **THIRTY-THREE PERCENT (33%)** of any and all amounts collected relative to the CLIENT'S above-referenced claim, said percentage to be calculated on the total amount collected without any prior deductions (GROSS AMOUNT). The GROSS AMOUNT includes specially awarded attorneys' fees and costs awarded to the CLIENT; however, if such specially awarded attorneys' fees are awarded due to Defendants' failure to abide by procedural requirements or are awarded to compensate the ATTORNEY or the CLIENT for additional work required of the ATTORNEY due to Defendants' actions, said amounts shall be paid directly to the ATTORNEY. If settlement of this case is made by structured settlement, ATTORNEY's fees under this paragraph will be computed on the basis of the appropriate above referenced percentage of the total settlement. ATTORNEY's fees under this paragraph shall be paid out of the initial payment at the time of the signing of the settlement agreement.

4. If in the ATTORNEY's opinion, the defendant makes a fair and reasonable settlement offer, and CLIENT rejects same, CLIENT agrees to immediately reimburse ATTORNEY for all costs, advances and expenses incurred through that time.

5. The CLIENT hereby authorizes the ATTORNEY to receive all monies recovered as a result of the claim, controversy, or other matter described in paragraph (1) from which ATTORNEY's fees and expenses (costs) may be deducted, if allowed. If for any reason, the settlement or award proceeds are sent directly to the CLIENT, the CLIENT agrees to immediately bring the funds to the ATTORNEY'S office for disbursement to the CLIENT and ATTORNEY in accordance with this fee agreement.

6. The CLIENT shall keep the ATTORNEY advised of the client's whereabouts and shall appear on reasonable notice. The CLIENT shall comply with all reasonable requests of the ATTORNEY in connection with the preparation and presentation of the claim. The ATTORNEY reserves the right to withdraw from representation if the CLIENT fails to cooperate and/or maintain reasonable contact with the ATTORNEY'S office.

7. CLIENT agrees that the ATTORNEY retains the right at any time following investigation, discovery, or legal research, to release themselves from this contract and withdraw from my representation if it appears to the ATTORNEY that circumstances have developed which hinder continued effective representation/litigation of the case, that continued representation/ litigation would not be cost effective, would not result in a sustainable or collectable judgment, or if CLIENT engages in conduct which renders it unreasonably difficult for the ATTORNEYS to carry out the employment effectively. In the event of such withdrawal, CLIENT understands that the ATTORNEYS may retain a lien on CLIENT's case including, but not limited to expenses and costs that have been advanced on CLIENT's behalf.

8. The CLIENT understands and gives approval for MCEACHIN & GEE, ATTORNEYS AT LAW LLP to work with other attorneys to assist in the handling of my case. Those other attorneys are called co-counsel. ATTORNEY and co-counsel will divide the legal fees as mutually agreed.

9. The Client understands that under any co-counsel arrangement the total amount of ATTORNEY's fee will not exceed the amount contracted for in paragraphs 2 and 3 above. CLIENT authorizes this sharing of attorneys' fees. Any allowable out-of-pocket costs and expenses incurred by co-counsel in representing CLIENT will be paid from the total recovery just as if ATTORNEY had incurred them. CLIENT further understands that the terms "MCEACHIN & GEE, ATTORNEYS AT LAW LLP"; "ATTORNEY"

or "ATTORNEYS", as used in this fee agreement refers to both MCEACHIN & GEE, ATTORNEYS AT LAW LLP and co-counsel or co-counsels.

10. This agreement shall be construed in accordance with the laws of the State Virginia, and all obligations of the parties are performed in Henrico County, Virginia.

11. This agreement shall be binding upon and inure to the benefit of the parties and their respective heirs, executors, administrators, legal representative, successors, and assigns.

SIGNED AND AGREED ON August 16, **2007.**

McEachin & Gee, Attorneys at Law LLP

Mr. Jerome Cliatt
Printed Client Name

Jerome Cliatt
Signature of Client

344 Meadow Circle
Client Address

Eufaula, AL 36027
City, State, Zip Code

(334) 687-9407
Home Phone

Work Phone

Cell Phone

Email Address