UNITED STATES DEPARTMENT OF AGRICULTURE

BEFORE THE SECRETARY OF AGRICULTURE

SOL Docket No. 09-0177

CHARLES McDONALD,

Complainant

v.

TOM VILSACK, SECRETARY,
UNITED STATES DEPARTMENT OF AGRICULTURE,

Respondent

DECISION AND ORDER

Preliminary Statement

Charles McDonald, a 72 year old black farmer from Manning, Clarendon County, South Carolina, brought this action under Section 741 of the Agriculture, Rural Development, Food and Drug Administration, and related Agencies Appropriation Act, 1999, enacted in Division A, section 101(a) of the Omnibus Consolidated and Emergency Supplemental Appropriations Act, 1999, Pub. L. 105-277, §741, 112 Stat. 2681(Oct. 21, 1998) (codified at 7 U.S.C. §2279 Historical and Statutory Notes). (Section 741).

Mr. McDonald initially joined the *Pigford v. Glickman* class action, *Pigford v. Glickman,* No. 97-1978 (D.D.C. 1997), but opted out of the class when allowed to do so. *Pigford v. Glickman,* 182 F.R.D. 341, 351 (1998). This case was referred to the United States Department of Agriculture's (USDA or the Department) Office of Administrative Law Judges on August 21, 2009 when the Department's Office of Civil Rights (OCR)

filed a letter forwarding the requests of Charles McDonald and that of another individual[1] for a hearing before an Administrative Law Judge. At the time that the letter was filed with the Hearing Clerk's Office, the Administrative Records for the cases were also provided, which in the McDonald case included two reports of investigation and nine binders of documents.[2]

The letter forwarded by OCR with their filing on August 29, 2009 was from Mr. McDonald's counsel, Ben Whaley Le Clercq, dated July 14, 2009. The letter requested immediate review by an Administrative Law Judge, noting that despite a statutory mandate that a final determination be issued within 180 days after the filing of a Section 741 Complaint, more than 10 years had elapsed in the instant case without such a determination.[3] By letter dated August 24, 2009, the Complainant's counsel was notified that the case had been docketed as SOL Docket No. 09-0177 and was being referred to the Chief Administrative Law Judge for assignment. On September 2, 2009, the case was assigned to my docket.

A pre hearing Conference was conducted on September 21, 2009 in Washington, DC. Ben Whaley Le Clercq, Esquire of Mount Pleasant, South Carolina appeared for Charles McDonald and Stephanie Moore, Esquire and Brandi Peters, Esquire, Civil

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[1] *In re: Richard Pearson*, SOL Docket No. 09-0178.

[2] The Administrative Record for the McDonald case contains thousands of pages of documents (approximately four feet of shelf space) and required five boxes to hold the contents.

[3] McDonald and Pearson had earlier sought to pursue their claims in United States District Court on the theory that their underlying complaints "have effectively been denied by USDA's unreasonable delay in making a final determination on their complaints." In his opinion, Judge Friedman granted summary judgment to USDA, declined to find constructive denial, found that despite the delay encountered by McDonald and Pearson they still were required to exhaust their administrative remedies, that exhaustion required Administrative Law Judge review and that there was no dispute that the plaintiffs had failed to seek and obtain Administrative Law Judge review. *Benoit, et al. v. United States Department of Agriculture,* 577 F. Supp. 12, 23 (D.C. 2008) Although the record contains a draft "Expedited Agency Position Statement" which found insufficient evidence of discrimination and recommended closure, no denial of the claim by OCR appears to have been made prior to referral to the Office of Administrative Law Judges. D109-112. In its brief, the Government suggests that the Complainant's decisions to join litigation in The United States District Court delayed the Department from acting on his complaint. Gov Brief at p. 3.

Rights Litigation Division, Washington, DC appeared on behalf of the Department.[4] The parties expressed willingness to attempt mediation so the case was referred to then Chief Administrative Law Judge Marc R. Hillson for mediation proceedings;[5] however, the case concurrently proceeded along the litigation path and deadlines were established for the exchange of witness and exhibit lists and for the exchange of exhibits in the event of trial. Due to the large size of the administrative record, counsel were asked to consult with each other, to prepare a Joint Appendix containing the relevant documents in the case, and to have the documents Bates™ Stamped for ease of reference during trial.[6] The matter was then set for hearing to commence on January 12, 2010 in Columbia, South Carolina. Docket Entry 4.

On December 22, 2009, the Department filed a motion with numerous attachments asking for a clarification of the issues, seeking to strike a number of the Complainant's witnesses and last, asking for clarification of the location of the hearing.[7] Docket Entry 20. Given the brief period of time prior to the commencement of the hearing and the overlay of the holiday season, the motions concerning clarification of the issues and to strike witnesses were deferred until after commencement of the hearing. Docket Entry 21. On January 6, 2010, the Department filed the Agency's Final Submission of Additional Documents and Witness List and the following day filed their

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[4] Ms. Peters' participation was confined to this appearance; Stephanie Masker, Esquire later entered her appearance as Co-Counsel for the Respondent.

[5] Mediation was conducted on November 17, 2009 in Charleston, South Carolina; however, the parties were unable to reach any resolution.

[6] Regrettably, the parties were unable to agree on what constituted the relevant documents in the case and each party independently identified and submitted their respective documents. The Complainant also submitted a binder of exhibits which were used during the hearing. As a result, there is considerable overlap and duplication of the exhibits, with many of the documents appearing both parties' binders.

[7] The Order identifying the hearing site as being in the Second Floor (Grand) Courtroom of the Historic Courthouse located at 84 Broad Street in Charleston, South Carolina had been entered on December 18, 2009, but apparently had not before received by Government counsel prior to the preparation of the Motions.

Opposition to Complainant's Motion to Supplement Exhibit and Witness Lists; Provide Information about Witnesses; Allow Certain Evidence; and Establishment of Fixed Dates for Testimony. Docket Entries 23, 24. These matters were also deferred without entry of an Order to be heard after the commencement of the hearing.

The oral hearing of this action commenced on January 12, 2010 in Charleston, South Carolina and continued from day to day, until recessed on January 15, 2010 at the conclusion of the Complainant's case. As an accommodation to Agency counsel, the location of the resumed hearing was changed to Washington, DC and the proceedings reconvened on February 22, 2010 and concluded on February 26, 2010. Fifteen witnesses testified. During the testimony of the various witnesses, references were made to both parties' documents, as well as to the Complainant's book of exhibits.[8] Concurrent briefs were directed to be filed forty-five days after the filing of the transcript of the final portion of the hearing.[9] Briefs were received from both parties and the matter is now ready for disposition.

Historical Background of Discrimination Complaints by African American Farmers against the Department of Agriculture

In 1997, three African-American farmers brought a class action against the United States Department of Agriculture alleging racial discrimination in the administration of federally funded credit and benefits programs. *Pigford v. Glickman,* No. 97-1978 (D.D.C. 1997), 182 F.R.D. 341, (1998), 185 F.R.D. 82, 88 (D.D.C. 1999); *Pigford v. Veneman,*

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[8] The Petitioner's exhibits were marked McDonald with the page number. A number of additional exhibits of the Petitioner were tabbed and included in a separate binder used at the hearings. The Department exhibits were marked D McDonald and the page number. References to the Petitioner's exhibits will be indicated as M and the page number or to PX and the numbered tab. References to the Department exhibits will be indicated as D and the page number. References to the transcript will be indicated as Tr. and the page.

[9] The Petitioner sought an extension and without objection from the Respondent, both parties were given until May 7, 2010 in which to file briefs. Docket Entry 32.

141 F.Supp 60 (D.D.C. 2001), *rev'd and remanded,* 292 F3d. 918, 325 U.S. App. D.C. 214 (2002). The Court certified the case as a class action on October 9, 1998. *Pigford v. Glickman,* 182 F.R.D. 341 (1998) The class ultimately included some 22,000 similarly situated black farmers from fifteen states.[10]

Shortly before the farmers filed suit, the Department had released a report titled *Civil Rights at the United States Department of Agriculture: A Report by the Civil Rights Action Team,* (Washington, D.C.; February 1997) (CRAT Report) which had been commissioned in December of 1996 by then Secretary Dan Glickman. That report in examining the "painful history" of the Department's dealings with African-American farmers concluded that local credit and loan agencies responsible for administering USDA programs had indeed often discriminated against the farmers. *Id.* at 6. The report went on to describe the complaints processing system as a "bureaucratic nightmare" that processed complaints slowly if at all while at the same time the agency proceeded with farm foreclosures even where discrimination may have contributed to the farmers' plight. *Id.* at 22-25.

Even before the release of the CRAT Report, the Department's Office of the Inspector General (IG) issued a report to Secretary Glickman reporting that USDA had a backlog of complaints of discrimination that had never been processed, investigated or resolved. The Report indicated that immediate action was needed, and concluded that the

[10] A second putative class action was filed the following year and included farmers after the cut off for the *Pigford* class, but before the July 7, 1998 filing date of the Complaint in the second action. *Brewington v. Glickman,* Civil Action No. 98-1698. On January 5, 1999, prior to entry of the Consent Decree, the parties moved to consolidate the *Pigford* and *Brewington* cases which motion was granted by the Court. As of February of 2005, more than 13,700 *Pigford* claimants had received compensation totaling more than $839 million. USDA/OIG-A/03601-11-AT.

complaint process at Farm Services Agency (FSA)[11] lacked "integrity, direction and accountability." *Report to the Secretary on Civil Rights Issues- Phase I: Farm Loan Programs- Civil Rights Complaint System,* USDA/OIG Report No. 50801-2 (January 27, 1997); *See*, *Pigford,* 185 F.R.D. at 88. A subsequent report from that office issued in September of 1997 found that the backlog of civil rights discrimination complaints had grown significantly since the issuance of the February report from 241 open complaints to 984.[12] This second Report suggested that while the restructured OCR might be capable of ensuring that a backlog does not appear in the future, it recommended Department take additional efforts to reduce the backlog of complaints and to correct other deficiencies found in the report. *Minority Participation in Farm Service Agency's Farm Loan Programs-Phase II,* USDA/OIG-A/50801-3-Hq; September 29, 1997, p 1-2, 8-11. A series of Departmental IG Reports were made between 1997 and March of 2000 and thereafter which were critical of OCR's operations and its failure to adequately address the backlog of civil rights complaints. A 2005 Report concluded that progress had been made in most areas, but that deficiencies still existed and that additional emphasis was needed in the area of processing minority applications, that Civil Rights Compliance Reviews were needed and that the National Outreach Program should coordinate with County Officials to reach local minority communities. *Audit Report*, *Minority Participation in farm Service Agency's Programs,* USDA/OIG-A/03601-11-AT, November 17, 2005.

Numerous reports and news accounts have since discussed the fact that many complaints of discrimination related to agency actions were filed with USDA between

[11] FmHA ceased to exist in 1994 and the farm loan functions previously performed by FmHA were assumed by FSA.
[12] Of these, 474 were attributable to FSA.

1981 and 1986, but were never processed, investigated, or forwarded to the appropriate agencies for conciliation because of "reorganizations" within USDA in the early 1980s.[13] The impact of those reorganizations and disbanding of the Office of Civil Rights at the Department in 1983 clearly was profound, resulting in effectively denying vast numbers of complainants the administrative structure to seek relief under such anti-discrimination statutes as the ECOA as the statutes of limitations expired while the complainants waited in vain for a response from USDA.

In the 1999 decision approving the Consent Decree in the *Pigford* case, United States District Judge Paul L. Friedman wrote:

> For decades, despite its promise that "no person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be otherwise subjected to discrimination under any program or activity of an applicant or recipient receiving Federal financial assistance from the Department of Agriculture," 7 C.F.R. §15.1, the Department of Agriculture and the county commissioners discriminated against African American farmers when they denied, delayed or otherwise frustrated the applications of those farmers for farm loans and other credit and benefit programs. Further complicating the problem, in 1983 the Department of Agriculture disbanded its Office of Civil Rights and stopped responding to claims of discrimination. These events were the culmination of a string of broken promises that had been made to African American farmers for well over a century. *Pigford v. Glickman,* 185 F.R.D. 82, 85 (D.D.C. 1999)

Congress sought to remedy the plight of the large number of individuals affected by the USDA reorganizations in 1998 by enacting section 741 which retroactively waived the ECOA's two year statute of limitation for all individuals who had filed "eligible complaints" with USDA.[14] That legislation afforded two alternative avenues of relief: (1)

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[13] *See,eg.,* United States Government Accounting Office Reports: *U.S. Department of Agriculture: Problems Continue to Hinder the Timely Processing of Discrimination Complaints,* GAO-99-38; and *U.S. Department of Agriculture, Management of Civil Rights Efforts Continues to be Deficient Despite Years of Attention*., GAO-08-755T

[14] The term "eligible complaint" means a non-employment related complaint that was filed with the Department of Agriculture before July 1, 1997 and alleges discrimination at any time during the period beginning January 1, 1981 and ending December 31, 1996. Section 741(e).

Complainants could file an action directly in federal court, provided they did so by October 21, 2000 (§741(a)); or (2) they could seek a determination on the merits of their complaints by USDA (§741(b)) and then obtain review in federal court if their claims were denied administratively. (§741(c)) Administrative decisions on complaints submitted under §741(b) were to be rendered within 180 days "to the maximum extent practicable." §741(b)(3).

After the Congressional intervention, the parties in the *Pigford* class action entered into a Consent Decree which was preliminarily approved on January 5, 1999. Following a hearing in March of 1999, modifications were made to the Decree and the revised terms were finally approved in the April 14, 1999 Decision.[15] *Pigford v. Glickman,* 185 F.R.D. 82, 88 (D.D.C. 1999). The high hopes generated at the time of the entry of the Consent Decree however were not to be realized as class counsel's inability to meet critical consent decree deadlines prompted severe court criticism and ultimately required further modification and litigation involving that decree.[16] *Pigford v. Veneman,* 141 F.Supp 60 (D.D.C. 2001); *rev'd and rem*, 292 F3d. 918, 325 U.S. App. D.C. 214

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[15] Judge Friedman's decision commences with "Forty acres and a mule" and eloquently narrates the history of the Freedmen's Bureau, the 1862 Congressional debate over the issue of providing land for former freed slaves, the creation of the Department of Agriculture envisioned by President Lincoln as the "people's department," and the dramatic decline in the number of African-American farmers over time, attributing much of the responsibility for the decline to the United States Department of Agriculture and the county commissioners to whom it granted so much power. The decision included the plaintiffs' estimate that the settlement in the consolidated class action cases could reach the sum of $2.25 billion making it the largest civil rights settlement in the history of the country. *Pigford,* 185 F.R.D. at 95.

[16] The *Pigford* Consent Decree established a two track dispute resolution process. Those with little or no documentary evidence would receive a virtually automatic cash payment of $50,000 and forgiveness of debt owed to USDA (Track A), while those who believed that they could proved greater damages could prove their cases with documentary or other evidence by a preponderance of proof under the traditional burden of proof and receive an award without any cap consistent with the damages proved. (Track B). Both types of cases were presented to an adjudicator whose decision was final, except in cases of clear and manifest error. Those choosing neither option could opt out of the class and pursue their individual remedies in court or administratively. Mr. McDonald chose the third option.

(2002). Even today, many of the class members are still awaiting Congressional action which would facilitate resolution of their claims.[17]

This case, heard now more than twenty years after the initial claim of discrimination, well illustrates both the procedural obstacles faced by a claimant as well as the evidentiary difficulties occasioned by the passage of time in presenting a claim.

Discrimination Claims under ECOA

ECOA creates a private right of action against a creditor who discriminates against an applicant "with respect to race, color, religion, national origin, sex, marital status, or age…." 15 U.S.C. §1691. As the statute defines creditor to include the "government or governmental subdivision or agency," it has been construed to constitute a waiver of the United States' sovereign immunity. 19 U.S.C. §1691a(f); *Moore v. USDA,* 55 F.3d 991, 994-995 (5th Cir. 1995); *Williams v. Conner,* 522 F. Supp 2d. 92, 99 (D.D.C. 2007). Although ECOA requires that actions be brought within two years of the date of the violation, the statute of limitations is extended for this case under Section 741, 7 U.S.C. §2279, note.

A credit applicant may prove unlawful discrimination under ECOA under one or more of three theories: (1) direct evidence of discrimination; (2) disparate impact analysis; and (3) disparate treatment analysis. *See, Faulkner v. Glickman,* 172 F. Supp.2d 732,737 (D. Md. 2001); *AB & S Auto Service, Inc. v. South Shore Bank of Chicago,* 962 F.Supp 1056, 1060 (N.D. Ill. 1997); *Shiplet v. Veneman,* 602 F. Supp. 1203, 1223 (D Mont. 2009).

[17] *See*, Krissah Thompson, *Q & A with Agriculture Secretary Tom Vilsack,* Washington Post, February 16, 2010; Carey Johnson, *U.S. approves settlement for black farmers,* Washington Post, February 19, 2010; and Krissah Thompson, *Hope, worry about bias suit with black farmers; Agreement gives other minorities optimism, but funds….*, Washington Post, February 26, 2010.

Direct evidence is that evidence which establishes the existence of discriminatory intent without any inference or presumption. *Standard v. Sterling Bank, A.B.E.L. Servs, Inc.,* 161 F.3d 1318, 1330 (11th Cir. 1998). In the *Standard* case, the Court wrote "only the most blatant remarks, whose intent could be nothing other than to discriminate on the protected classification are direct evidence of discrimination." *Id.* at 1330.

Where there is no direct evidence of discrimination, a claimant may prove his or her case by first meeting the burden of making a *prima facie* showing of circumstantial evidence of racial discrimination. *See, Arthur Young & Co. v. Sutherland,* 631 A.2d 354, 361 (D.C. 1993). Disparate impact and treatment claims are evaluated under the framework of analysis established in *McDonnell Douglas Corp. v. Green,* 411 U.S. 792 (1973).[18]

To establish a *prima facie* showing of circumstantial evidence of discrimination, a claimant must prove: (1) that he or she is a member of a class protected by the statute; (2) that he or she applied for and was qualified to receive a credit benefit; (3) that despite his or her qualification for a credit benefit, it was denied or withheld from him or her; and (4) that he was treated less favorably than other similarly situated individuals who were not members of his or her protected class. *McDonnell Douglas,* 411 U.S. at 802. The elements must be established and not merely incanted and failure to prove any element results in a failure to make a *prima facie* showing. *Coco v. Elmwood Care, Inc.,* 128 F.3d 1177, 1178 (7th Cir. 1992); *Rowe v. Union Planters Bank,* 289 F.3d 533 (8th Cir. (2002); *Peele v. Country Mut. Ins. Co.,* 288 F.3d 319, 331 (7th Cir. 2002).

Once the claimant makes a *prima facie* showing, the burden shifts to the creditor to articulate a legitimate, non-discriminatory reason for the rejection. *McDonnell*

[18] *See, Chiang v. Veneman,* 385 F.3d 256 (3d Cir. 2004) for a collection of such cases.

Douglas, 411 U.S. at 802-803; *see also, Texas Dep't of Community Affairs v. Burdine,* 450 U.S. 248, 254 (1981). Should the creditor satisfy its burden, the claimant is then given an opportunity to prove by a preponderance of the evidence that the legitimate reasons offered by the creditor were not its true reasons, but rather were a pretext for discrimination. The creditor need not persuade the court that it was actually motivated by the proffered reasons, but is sufficient if the creditor's evidence raises a genuine issue of fact as to whether it discriminated against the claimant. *Burdine* at 248.

Discussion

Charles McDonald asserts that the USDA violated the Equal Credit Opportunity Act, 15 U.S.C. §1691, *et seq.* (ECOA) by discriminating against him because of his race in connection with certain of the USDA's credit and non-credit benefits programs for farmers.[19] Charles McDonald is an award winning corn-producing farmer, who has been recognized by the Palmetto Corn Club, an organization that annually honors top crop producers.[20] In years prior to 1985 McDonald and his brother Richard Miller farmed well over 1,000 acres; however, as a result of credit denials, delayed and untimely loans and servicing decisions by FmHA, he alleged that he was forced into foreclosure and bankruptcy and ultimately forced to reduce the size of his farming operation to only approximately 300 acres, suffering a corresponding loss of income and wealth. Tr. 237, 361-364, 378.

[19] These programs were originally administered by Farmers Home Administration (FmHA). FmHA ceased to exist in 1994 and responsibility for its farm programs and those of the former Agricultural Soil and Conservation Service (ASCS) was assumed by Farm Services Agency.

[20] The Palmetto Corn Club and Contest was sponsored by the Cooperative Extension Service of Clemson University for the Pee Dee, Savannah, and Midland/Piedmont Extension Districts. Charles McDonald was a 200 bushel per acre Corn Club member in 1992, with a yield of 205.71 bushels per acre, and was recognized for his production in 1994. PX-53. McDonald was also recognized at the 1997 Ag Expo in Columbia, South Carolina was a first place county winner having produced 203.48 bushels of corn per acre. PX-58A.

Actions brought under ECOA are required by the Act to be brought not later than two years after the occurrence of the violation (15 U.S.C. §1691e(f)); however, Congress passed Section 741to toll ECOA's statute of limitations so that USDA claimants who had previously filed administrative claims of credit discrimination would not be penalized because the Agency had failed to take action on those pending claims. As with any consent to be sued, the grant of jurisdiction must be strictly construed and cannot be enlarged beyond the language of the waiver.

The record documents that Mr. McDonald complained of discrimination on at least three separate occasions that were regarded as "accepted complaints." The first instance was in the form of a letter from Mr. McDonald dated October 9, 1984 to Senator Strom Thurmond requesting assistance in connection with his application for a loan (the 1984 applications).[21] D34. The second instance was made in person by Mr. McDonald at a meeting with Farm Services Agency County Executive Director William W. Rowe on May 16, 1996 and documented in a letter to Mr. McDonald written on the same date by Mr. Rowe.[22] D47,48. An acknowledgment letter from OCR indicates that a third

[21] Although the Investigative Report for Docket No. 1183 makes note of the 1984 complaint, it appears that no action was taken to process, investigate or to resolve it as a discrimination complaint until after the second complaint was filed in 1996. McDonald's letter of October 9, 1984 was only the first of several letters and other contacts made by the McDonalds to Senator Thurmond and other Congressional Representatives and their staffs. *See,* D36, 40-45, 49, 52-53.

[22] The initial Investigative Report (Case Number 970401) was drafted by Autry Slay, an employee of Direct Data, Inc., a contractor hired by OCR and appeared to be limited to McDonald's inability to get his established corn crop yield increased. D394-406, Tabs 61-63. A second and more comprehensive Investigative Report bears Docket Number 1183. It was dated January 9, 2003 and was prepared by Philip L. Newby and Ruihong Guo. It cites May 16, 1996 as the date of complaint; however, in the Introduction the history of three complaints is noted and the report addresses the allegations contained in all three complaints. D1-16. Only excerpts from the two Investigative Reports were contained in the trial exhibits, but both reports in their entirety with all attachments are in the materials identified in footnote 2. A Fact-Finding Inquiry prepared by the Program Complaints Inquiry Branch in Montgomery, Alabama was less inclusive in scope. D17-25.

complaint was filed on April 1, 1997 which presumably was in written form; it was assigned Case Number 970401-504.[23] D-3, 50-51, 58-59.

As no evidence was introduced which met the blatant remark standard evincing intent which could be nothing other than to discriminate, an analysis must be made of the circumstantial evidence which was introduced.

Petitioner's Allegations of Discrimination

Charles McDonald raises thirteen allegations of discrimination in his Post Hearing Brief:

> 1. Charging McDonald a higher interest rate on a 1980 loan than that to which he was entitled…
> 2. Failing to disburse loan funds in a timely manner once approved, and disbursing less funds than Petitioner was approved for or for which the Petitioner was eligible under USDA programs:
> 3. Failing to advise McDonald about and failing to make available to McDonald introductory farmer, limited resource, and/or socially disadvantaged farmer programs to which he was eligible.
> 4. Terminating an interest credit agreement (lowering McDonald's interest rate and monthly payments on his home loan) in 1983 prior to its expiration.
> 5. Wrongfully denying McDonald, Mrs. McDonald and/or McDonald's half brother Richard Miller access to USDA loan programs (includ[ing] FO, OL, and EE) in 1984, after initially approving loans.
> 6. Wrongfully and arbitrarily denying McDonald, Mrs. McDonald, and/or McDonald and his half brother Richard Miller's 1984 partnership loan application based on the inaccurate conclusion that the Small Business Administration (SBA) would not subordinate a loan to McDonald and Miller.
> 7. Not extending emergency, farm ownership, and farm operating loans for which he and his wife qualified in 1984, 1985, and 1986, when similarly situated white farmers were extended such loans. Mrs. McDonald's applications were entitled to "new farmer" loan processing in 1984-1986, but did not receive them.
> 8. Wrongfully processing McDonald's loan applications in a slow and dilatory fashion, when similarly situated white farmers got loans and assistance in a timely fashion.

[23] Although the initial Investigative Report dated April 24, 1998 contains the Case Number 970401, no Investigative Report has been located for Case Number 970401-504. The record does contain a letter dated April 1, 1997 from Fred Broughton written to Leonard Hardy, Jr., Deputy Administrator for Operations and Management on Charles McDonald's behalf which is consistent with the issues mentioned in the acknowledgment letter. *See,* D54.

9. Failing to advise McDonald of and/or failing to make available to McDonald numerous USDA loan and Rural Housing programs, including the "Continuation Policy," the Reagan "debt set aside" program, and other refinancing, loan forgiveness, loan moratorium, interest reduction/abatement, and other programs of a similar nature.
10. Wrongfully and intentionally altering loan documents on McDonald and his wife's verification of employment (VOE) so that McDonald and his wife would appear not to qualify for low income farming programs, when in fact the opposite was true, in order to deny McDonald and his wife access to such programs.
11. Failing to adequately respond to numerous complaints lodged by McDonald complaining of mistreatment by USDA.
12. Failing to assign an appropriate established yield on McDonald's crops in the period 1981-1998, despite McDonald's continuing and at least annual requests for the same, despite the fact that McDonald was an award winning corn producer, when similarly situated white farmers such as Vikki Brogdon were able to increase their established yields.
13. Failing to advise McDonald of his rights of appeal in the actions cited above. Petitioners Post Hearing Brief, p. 9-10.

The Agency Position

In addition to asserting that some of the Complainant's allegations are time barred, the Agency position is that it did not discriminate against the Complainant and that the Complainant failed to produce evidence that the Federal Government discriminated against him on any basis.

The Eligible Complaints of Discrimination

Given the limited scope of the waiver of the statute of limitations contained in Section 741, only "the discrimination alleged in an eligible complaint" can be considered as not barred by the statute of limitations. Section 741(a). The term "eligible complaint" is further defined by statutory and regulatory provisions and is confined to those complaints filed before July 1, 1997 and which allege discrimination at any time between the period beginning on January 1, 1981 and ending on December 31, 1996. [24] Section 741(e). Accordingly, even though the record may support a finding of discrimination as

[24] *See,* Footnote 14, *supra.*

to other matters which were not previously alleged in an eligible complaint, without establishing some enabling jurisdictional basis for doing so, only those allegations previously filed during the specified period will be considered in this Decision. Similarly, Petitioner's claims for relief under the Fifth and Fourteenth Amendment to the Constitution and the Civil Rights Act of 1964 fall outside my limited jurisdictional authority as an Administrative Law Judge.

Identification of the specific allegations of discrimination reachable under Section 741 which were made during the pertinent time frame and which the Agency accepted for examination and investigation record can be discerned by examining the two Reports of Investigation contained in the record. While the findings and conclusions contained in the two reports are in no way binding upon either the fact finder or the Secretary, they nonetheless do provide a helpful analysis of the complaints made on two different occasions by individuals charged by OCR with the responsibility of investigating and making findings and recommendations concerning the allegations of discrimination.

Autry Slay, an employee of Direct Data, Inc., a contractor for the Office of Civil Rights conducted the first investigation on April 16-18, 1998. Investigative Report, Case Number 970401, April 24, 1998 (Slay Report); D393-406; PX70-71.[25] The Slay Report focused upon whether discrimination was involved in the setting of McDonald's established corn crop yields which are used by USDA in evaluating loan eligibility, disaster payments, deficiency payments and other program benefits. McDonald had actual corn production history of over 100 bushels per acre between 1989 through

[25] The full Investigative Report for Case Number 970401 in its original form contained tabs A-I and A-F and is found in the Administrative Record. The material previously contained in Tabs G and H has been removed and was not included. It appears that parts, but not all of the full report were introduced by the parties during the oral hearing.D393-404 and PX70-71 are found at Tab E in the original report.

1993:[26] however, his established corn crop yield was only 57 bushels per acre, despite his continued efforts to have it increased to a level consistent with his actual production. D405. Statistics and a graph contained in the report compared the average established yields of nine black and nine white corn producers. D406. That study revealed that the average established yield for the black farmers was 58 bushels of corn per acre while the average for the white farmers was almost twice as much at 101 bushels of corn per acre.[27] Without examining the mechanics of how established yields are set, the Slay Report concluded there was merit to the complaint of discrimination and noted that there were many cases where blacks and small farmers went out of business because of inappropriately low yields. D400. It also recommended that McDonald's established yield for his corn crop be increased from 57 bushels per acre to 155 bushels per acre and that he be compensated for a loss of income for a ten year period. D404, PX71.

The second report identified as Docket 1183 was prepared by Philip Newby and Ruihong Guo[28] (Newby/Guo Report) was initiated on October 9, 2002 and completed on January 9, 2003. The Newby/Guo Report identified four allegations of discrimination:

> Allegation 1. Whether the complainant was denied EM, FO and OL Loans.
> Allegation 2. Whether the complainant's loan applications were delayed.
> Allegation 3. Whether the complainant was improperly assigned a low crop yield, which allegedly affected his ability to receive disaster payments and loans.
> Allegation 4. Whether the complainant was treated less favorably than White farmers in crop yield assessment. D3, PX-79, p. 3-4

[26] The chart of McDonald's actual production history reflected production of a low of 90 bushels in 1989 experienced after severe losses from Hurricane Hugo to a high of 137 bushels in 1992, with an average of 108 bushels between 1989 and 1993. Tab E3A, D405.
[27] Tab E3B, D406, PX69.
[28] At the time the Newby/Guo Report was prepared, both Philip Newby and Dr. Ruihong Guo were USDA employees assigned to the Office of Civil Rights. Tr. 756, 973-974. Newby still works in that office; Dr. Guo now is the Director of Enforcement, Compliance and Enforcement Division, for the National Organic Program in the Agricultural Marketing Service, USDA. Tr. 970, 973.

With only minor exceptions, the Newby/Guo Report concluded either that evidence existed that McDonald had been discriminated against or the Agency had failed to meet its burden of proving that there was a legitimate business reason for their action. D13-16, PX-79, p. 13-15. Because of the use of a 1996 version of the regulation (7 C.F.R. §1945.163), the Report erroneously concluded that the February 1984 EM loan denial was improper because the 1996 version, unlike the provisions in effect in 1984, required calculations to be rounded to the nearest whole number. D13-14. It also found that FSA had failed to provide documentation of Mrs. Miller's salary amount and as required by the regulation that governed the county committee's approval authority for outside (non-farm) income for February 1984 OL and FO loans. D14, PX-79 at p.13-14. As to the May 1984 Loan Application and the 1985 Loan Application, the Newby/Guo Report noted that the files provided did not contain documentation of official notice or correspondence explaining why the May 1984 Loan Application was cancelled after being initially approved and no documentation or official notices were provided giving any reason for the denial of the 1985 Loan Application. D14, PX-79 at p.14.

With respect to the allegation that McDonald's loan applications were delayed, the Newby/Guo Report concluded that while the February 1984 application for services was acted upon in a timely manner, action on the 1985 and 1986 applications were delayed.[29] D15-16, PX-79 at 15-16. Similar to the Slay Report, the Newby/Guo Report,

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[29] Delay in processing loan applications of black farmers was noted in the CRAT Report which found that in several Southeast States, it took three times as long on average to process African-American loan applications as it did for nonminority applications. CRAT, p.21. The Report also noted that "[b]y the the processing is completed, even when the loan is approved, planting season has already passed and the farmer either has not been able to plant at all, or has obtained limited credit on the basis of an expected FSA loan to plant a small crop, usually without the fertilizer and other supplies for the best yields. *Id.* at 15. Similarly, the Inspector General's Report, *Minority Participation in Farm Service Agency's Farm Loan Programs-Phase II*, September 1997 using FSA's APPL Data Base reflected processing times of an

without examining the process by which established yield were set, concluded that McDonald had been assigned an improperly low established corn crop yield. D16, PX-79, p. 16. Consistent with the prior allegation, it also concluded that McDonald was treated less favorably than white farmers in the assignment of established corn crop yield. D16.

Member of a Protected Class

The Agency has conceded that the Petitioner as an African-American or black farmer is a member of a protected class. Agency Post Hearing Brief, p. 19.

The 1984 Emergency (EM) Loan

On February 13, 1984, Charles McDonald and his brother Richard Miller applied for, but were denied an EM loan. D437, PX-17. To be eligible to qualify for such a loan, the applicant must have: (1) been a United States citizen; (2) been an established farmer; (3) been farming in a designated disaster area; (4) have suffered a 30% production loss; (5) possessed legal capacity; and (6) intended to keep farming. 7 C.F.R. §1945.163(2)(v)(1984); D1742.

The application for the McDonald/Miller EM loan was denied on the grounds that McDonald and Miller had not sustained a 30% production loss. Two calculations were made of the production loss sustained by McDonald and Miller. D153-157, 418, PX-13. Although both were signed, the first Form FmHA 1945-26, Calculation of Actual Loss dated February 13, 1984 appears to have been superseded by the second which computed the loss at 29.61% and was dated March 15, 1984.[30] *Id.* The provisions of 7 C.F.R.

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average of 40 days for White farmer applications, but 56 for African-American farmers. USDA/OIG-A/508-1-3-Hq, p.27.

[30] The Newby/Guo Report concluded that the computation should have been rounded to the closest whole number based upon a 1996 version of the regulation. Had that provision been in effect, based upon the

§1945.163 in effect during 1984 established three prioritized alternative methods for making the Calculation of Actual Loss with reliable actual production records using the best four of the prior five years immediately preceding the disaster year being given first priority. 7 C.F.R. §1945-163(a)(1)(i), Tr. 1146, D1740. The second priority was given to established yields and the third and last priority was the use of County or State crop yield/acre averages. 7 C.F.R. §1945.163(a)(1)(ii-iii), D1740. Although a FmHA Form 1945-22 was completed in connection with the application, only entries for the disaster year were made rather than completing the entire form as is provided in the regulation.[31] Tr. 1146, 1619, D149, 1739-1746. Examination of the FmHA Form 1945-26 and the testimony given during the hearing reflects that a county average of 85.4 bushels per acre was used rather than the farm's actual production yields for the best four of the five years prior to the disaster year.[32] Tr. 1150, D153-154, D156-157, 418. The use of the county average of 85.4 bushels of corn per acre clearly was more favorable to McDonald and Miller than a use of their established yield of only 57 bushels of corn per acre would have been in making the calculation; however, the failure to use the actual production yields of over 100 bushels of corn per acre for the farm, if such proof existed,[33] even after deduction for program payments or disaster payments, potentially denied McDonald and his brother the EM loan for which they had applied. In denying the loan, the Agency

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computation as made, the EM loan should have been approved. No rounding up provision language was found in the 1984 version of the regulation.

[31] No running record entry explains the incompleteness of the form. Sidney M. Brown, Jr. testified that in the 1980s, actual production yields should have been used. Tr. 1619. He also testified that it was his duty to help applicants complete the forms. Tr. 1645-1646.

[32] No specific testimony was given as to McDonald's actual corn crop yields for the years 1979 through 1983.

[33] *See,* Tr. 236; however, McDonald conceded that there were a number of hot dry years in the early 80s, so actual production yields for the average of the best four of five years prior to the disaster year could have been less than the 100 bushel per acre average McDonald suggested. In 1984, USDA calculated his corn yield at 125.8 bushels per acre. PX-28.

articulated a legitimate non-discriminatory reason for the denial of the EM loan which was consistent with the permissible alternatives set forth in the regulation.[34] Tr. 1239-1240. One may speculate whether a more favorable result would have resulted from the use of actual corn production yields or whether the county officials charged with helping him during the application process failed to explain to McDonald because of his race the option of using or proving his actual corn production yields for the prior years during a period when he was eligible to do so; however, the record falls far short of establishing either.[35] Accordingly, the Petitioner failed in his burden to establish that he was eligible for the loan or that the reasons advanced for the denial were pretextual.

The February 1984 Operating (OL) and Farm Ownership (FO) Loans

On February 13, 1984, Charles McDonald signed a FmHA Form 410-1 Application for FmHA Services on behalf of himself and wife Edna McDonald. D134-135, M136-137, PX-12. On the same day, his brother Richard Miller also signed one on his own behalf and that of his wife Madgelene Miller. D413-414, D429-430, PX-15. McDonald and Miller also signed a third FmHA Form 410-1 as partners. D136-137, M134-135, PX-10. The running record entry for that date acknowledges that both individual and the partnership applications were submitted. D129, 1325. For reasons that are not documented, FmHA took no action on the individual applications and the County Committee made an adverse determination only as to the **partnership's** eligibility for operating (OL) and farm ownership (FO) loans.[36]D158, 447-448, PX-17. As part of the

[34] Although the use of the county average was the third alternative method, it nonetheless was a permissible figure to use and was more favorable than McDonald's established yield. *See,* 7 C.F.R. §1945.163(a)(1)(i-iii).

[35] Mr. McDonald's testimony only indicated that the county officials completed the forms and computed the loss. Tr. 275-276, 488-489.

[36] The running record noted that the land was separately titled. D129,1325.

application process, McDonald and Miller executed a FmHA Form 431-2, Farm and Home Plan for the partnership.[37] D145-148, PX-11. Section J, Line 10 on the fourth page of the Plan lists Non-Farm Income as being $26,400.00. D148. A Verification of Employment form returned by Edna McDonald's employer indicated that her income for the past year had been $15,949.00 and that her salary for 1984 would be $17,052.00. D139, M1934, PX-13. Although no Verification of Employment form appears to be in the record for Mrs. Miller, the separate application submitted by the Millers dated February 13, 1984 indicated that Mrs. Miller was employed by Campbell Soup Co. and that her estimated salary was $11,800.00. D413, PX-15. As the income limit for such loans in Clarendon County had been set by the County Committee at $18,000.00, even if there had been no farm income, the income of the two wives exceeded that amount and the County Committee properly determined that under the partnership application, McDonald and his brother were not eligible for the loans.[38] D158, 447-448, PX-17.

While FmHA's actions resulting in an adverse determination are initially entitled to a presumption that the actions taken were done in good faith and strictly on the basis of the numbers themselves without considering any other motivation,[39] the disinclination to

[37] Although McDonald and Miller provided information for the form, the testimony established that FmHA filled the form out. Tr. 275-276, 1617.

[38] The County Committee was required by 7 C.F.R. §1943.12(a)(4)(ii)(1984) to estimate typical income for successful residents in the area. No evidence was introduced as to whether the limit set for Clarendon County was consistent with or differed from surrounding counties in South Carolina.

[39] Although the majority of Clarendon County's population is Black or African-American (http://en.wkipedia.org/wiki/Clarendon_County,_South_Carolina), the number of black farmers has declined dramatically. Hezekiah Gibson testified that when he was in high school, there were as many as 250 black farmers; however, by 1979, that number had declined to about 100 and by 2010 was only around 10. Tr. 645. Gibson also commented on the financial pogrom practice of white farmers "putting the squeeze" on black farmers and indicated that the general attitude toward black farmers was that if you [as a black farmer] had a piece of land that was producing good, they would come after it. Tr. 646, 654. The CRAT Report also noted this decline, indicating that in 1920, there were 950,000 minority farmers, but only 60,000 in 1992 and documented the commonly held perception that USDA was a partner in the taking of minority farm land. CRAT Report at 14-16. Clarendon County's history also includes being the location involved in *Briggs v. Elliott,* the first filed of the four cases combined and decided as *Brown v. Board of*

effectively assist McDonald and his brother amounted to discrimination which can be inferred where there is no indication in the record that County officials ever suggested that the applicants would meet the eligibility requirements if they dissolved the partnership and applied separately as individuals as was suggested or required elsewhere by FmHA in granting loans to white farmers.[40] *See, In re Robert A. Schwerdtfeger,* 67 Agric. Dec. 244, 249 (2008). Taking into account the totality of the evidence and finding evidence of a pattern of discrimination which was not rebutted, I find that the Petitioner has met his burden concerning this allegation.

The [May] 1984 Farm Ownership (FO) Loan

Although the record is unclear as to the date of the application, Charles McDonald applied a second time for a Farm Ownership (FO) loan in 1984.[41] An FmHA loan in the amount of $45,500.00 was approved by the County Committee on May 16, 1984 and the funds were obligated on May 24, 1984.[42] M140, PX-19-20. Undated Closing Instructions were sent to W.C. Coffey, Jr. referencing his preliminary title opinion dated June 20, 1984. M-1901-1902, PX-23. A Notification of Loan Closing dated July 18, 1984 was sent to McDonald; however, when he went on the scheduled date to the lawyer's office for the

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Education of Topeka, 347 U.S. 483 (1954). McDonald testified that "a few, not all, a few who were in charge---would do something…they destroy a lot of black families. Tr. 365-366.

[40] Although USDA employees routinely filled out forms and testified that they considered it their duty to assist applicants, the assistance provided to Charles McDonald appears to have been perfunctory. *See,* Tr. 275-276, 1617, 1645-1646.

[41] In the Agency's Post Hearing Brief, the Agency suggests that this application was made in 1985; however, the Newby/Guo Report made reference to a FmHA Form 440-2 dated May 16, 1984 indicating that McDonald was eligible for a FO loan and concluded that because of the lack of documentation in the agency records of any 1985 application that "It is highly possible that this refers to the "previously submitted loan application" mentioned in FmHA's letter to Senator Thurmond on October 29, 1984. PX-79, p 9. Clarence Ropp testified that his examination of the file did not reflect a 1985 application and that to the best of his recollection the application was made in 1984. Tr. 1157-1158.

[42] The amount approved of $45,500.00 is a significant reduction from the $285,500.00 of needed capital set forth in the 1885 Farm and Home Plan. Tr. 275-276, PX-10. The Certification Approval indicated joint participation by FmHA with South Carolina Rural Rehabilitation (SCRR) with that entity providing an additional $50,000.00. SCRR was to have the first lien and FmHA the second. PX-20. The running record account note date June 4, 1984 indicated that SBA would maintain third lien priority. PX-21.

closing, he was informed that the loan had been cancelled, the loan check was cancelled and had already been picked up by the County office and the loan was not extended during 1984. Tr. 286, M1903, PX-25.

Notwithstanding these events, it is clear that enhanced Congressional interest and continued scrutiny by both Senator Strom Thurmond (then the President Pro Tempore of the Senate) and Congressman Robin Tallon of South Carolina both of whom contacted Farmers Home on McDonald's behalf,[43] in October of 1984, the loan application was reactivated and McDonald was sent a letter telling him to make an appointment with the Acting County Supervisor to discuss his loan application. D38. On April 1, 1985, Mr. McDonald was advised that his loan application had been favorably considered. PX-32. A letter to Congressman Tallon dated April 4, 1985 from FmHA's State Director verified McDonald's statement that the Small Business Administration (SBA) had verbally agreed to subordinate in January of 1985, but indicated that FmHA could not process the loan until they had their agreement "in writing."[44] D39, M1907, PX-33. In writing to Mr. McDonald on April 10, 1985, Congressman Tallon indicated that he would request that SBA issue the letter of subordination and would forward it when received. D40, M1906. In the meantime, McDonald had been told that the FmHA office was busy processing the applications of other farmers and they didn't know when they could get to his. Tr. 293. As the file reflects no subsequent action, it is unclear what transpired after April 10,

[43] McDonald wrote Senator Thurmond on October 9, 1984 concerning the recall of the loan. D34, PX-29. A letter from the State Director to the Senator dated October 26, 1984 indicated that the Clarendon County Supervisor would be contacting Mr. McDonald in an effort to work something out. D37 PX-29, p. 4. McDonald again contacted the Senator in June of 1985 indicating that SBA had agreed to subordinate their lien, but that the loan still had not closed even though it was six months into the planting season because the County Office was busy with other farm loans. D41-42, M1908-1909, PX-33.

[44] Although Clarence Ropp testified that FmHA had no responsibility to secure the subordination, typically the closing attorney would have taken care of this for the borrower if that were a requirement for closing. *See,* Tr. 1161 The record documents that SBA was willing to subordinate and no reference has been made to any contrary position. D39, 41-42, M1907-1909, PX-33.

1985; however, it is clear that despite FmHA's assurances, the loan was never made and McDonald was experienced a significant farm loss for 1985. Tr. 290-293. PX-29A. White farmers however did receive loans. Tr. 293.

In looking at FmHA's actions concerning this loan, I have considered (1) the lengthy delay on the part of FmHA of better than a year after initially advising the Petitioner of his eligibility for the loan; (2) FmHA's assurances giving the applicant repeated reason to believe that the much needed loan would be made; (3) FmHA's patently unacceptable excuse that they were busy with other farm loans; (4) the documented willingness of another government entity to subordinate their lien position to FmHA; and (5) the concurrent other adverse actions taken against McDonald.[45] The evidence persuades me that county officials were intentionally seeking to esuriently compromise Charles McDonald's financial condition and that each of the four elements of a *prima facie* showing of discrimination concerning this loan was established. The Agency's explanation of the reason(s) for denial in this instance is unworthy of credence and cannot be accepted as a benign race neutral denial based upon legitimate program practices. As a result, I will find that the Petitioner has met his burden concerning this allegation.

<u>The 1986 Application of Edna McDonald</u>

Even assuming *pro arguendo* that the Petitioner has standing to allege discrimination on his wife's behalf (*See, e.g., Dow Chemical Co. v. Schaefer Salt & Chemical Co.* 1992 WL 672289 *17 (.N.J. July 21, 1992)), the record amply reflects that

[45] Two weeks after meeting with William Duncan, in June of 1984, McDonald' interest credit benefit which had been expected to run for two years was reviewed and terminated the following month. PX-22, 24. During the hearing, the Agency witness, Michael Feinburg, conceded that the regulation was not properly followed. Tr. 1559.

Mrs. McDonald's was not eligible for a farm loan as she was a full time teacher not actively engaged in farming, was unacquainted with the farm's finances, and failed to complete the application process. Tr. 1267-1270; *See,* 7 C.F.R. §1910.4(a)(1984).

The Established Crop Yield

Charles McDonald's established corn crop yield was addressed in both Investigative Reports[46] and is relevant to his eligibility for the EM loan. Examination of this allegation requires review of both the method of assigning established crop yields and whether, as applied, the method used resulted in discriminatory treatment of black or other minority farmers. D1-16, 393-406, PX-70-71. At the hearing, Agency witnesses testified that established yields were established initially by the County Committee and approved by the ASCS District Director. Tr. 1660. The testimony indicated that the "established yield" was the result of a calculation that took into account the year in which an individual began farming, the historical production of the farm, and a comparison of that farm with three similar farms in the same county with an averaging of the existing yields for five years for the same crop on those three farms. Tr. 1658-1659, D1840-1844, 1851. In cases (such as McDonald's) where the property was inherited, any previously established yield passed to the individual inheriting the property.[47] Tr. 465, 1689; D66, 70. Once an established yield was assigned to a tract of land, it became tied to the land so that subsequent owners had the same established crop yield unless the farmer

[46] The established corn crop yield was the sole issue in the Slay Report and is addressed in the last two of the four allegations in the Newby/Guo Report.

[47] Charles McDonald inherited his yield of 57 bushels per acre when he inherited the land from his father. As corn crop yields improved dramatically over time, the use of historical production data while facially affecting all farmers disproportionately adversely affected black farmers who inherited their land and must be regarded as a major factor in the declining number of farms owned by black farmers.

proactively seeks to have his or her yield increased during a window of time in which increases are allowed. Tr. 1663.

The testimony introduced during the hearing established that farmers were permitted during limited windows of time as set forth in specified “Farm Bills” to provide documentation to ASCS (later FSA) to demonstrate that their actual yields were higher than their established yields by submitting five years of weight tickets, other proof of production, or ASCS forms 578 and 658 within established deadlines. The Agricultural Adjustment Act of 1980 allowed producers to prove their yields from 1981-1985. Tr. 1664, D1869, 1918-1928. In similar fashion, the 2002 Farm Bill allowed producers to prove their yields for 2003. Tr. 1671, 1676, D1824-1832. McDonald testified that he had supplied the Agency with the requisite weight tickets to increase his yields during the period when the Farm Bill did permit yield changes, but the Agency claimed to have no records of him having done so and his established yield remains at a level well below his actual product even today despite Agency awareness of his actual yields being considerably higher than his established yield. Tr. 466-469. The evidence before me further indicates that while a number of white farmers succeeded in increasing their yields, no black farmer was identified as having increased his or her established yield. Tr. 128, 139, 647-649. Clearly, the Agency could have presented evidence of Clarendon County black farmers having successfully increased their established crop yields from appropriate ASCS records; however, the failure to do so lends additional credence to the validity of this allegation.

Despite the blithe Agency aeolian assurances that the procedures for assigning established crop yields are completely race neutral provisions which result in all farmers

being treated equally, the comparison of the established corn crop yields of black and white farmers appearing in the record before me reflects that in practice despite the facial neutrality of the provisions black farmers were assigned established yields of roughly only half of those assigned to white farmers. Tr. 633-634, 644, PX-69. Without addressing the question of whether the method of computing established yields had any rational relationship to its intended purpose or whether proffered records were intentionally misplaced, lost or destroyed, given the ability of an all white County Committee to select the three comparable farms in the same county used in making the computation, it is clear that an established yield for a farm could be manipulated either up or down by the Committee without significant risk of detection by the ASCS Director during his review. The impact magnitude of the disparity is significant and in the absence of a persuasive explanation or comprehensive analysis of the established corn yields of all farmers in Clarendon County, South Carolina to account for such a difference, the conclusion that race was the predominant differentiating factor in creating a disparate impact upon black farmers including the Petitioner cannot be escaped.

Difficulties Confronting the Petitioner

Although the alleged violations in this case occurred as early as 1984 and subsequent years, more than twenty years have elapsed before it proceeded to a point when it could be heard. In that period with the passage of time, memories fade, witnesses retire, move, disappear, become infirm or expire, and if available, are likely to have diminished endurance for extended examination or cross examination during a hearing.

More importantly, documentary evidence which might have existed near that time of any alleged violation may become unavailable.[48]

As noted earlier, the Petitioner has the burden of establishing a *prima facie* showing of discrimination. In doing so, Petitioners, including McDonald, start at a severe disadvantage as there is no provision for the use of discovery through subpoena power under the Rules of Practice applicable to these proceedings. I relied upon Agency counsel to act in good faith in the various document exchanges, but it is not clear that Petitioners were provided with copies of the entire administrative record in the possession of Agency Counsel. Although the administrative record in this case is voluminous,[49] it is also obvious that documents in existence at the time of the alleged violations and at the time of the respective investigations are no longer included in the Investigative Reports appearing in the administrative record even though they once were included and referenced in certain of the narrative portions. Preparation of a case of this type is difficult enough when virtually all of the records required remain in the exclusive control of the Government. Some records which may have been of some significant benefit to the Petitioner were routinely disposed of by the Agency in the ordinary course of business after the passage of what was considered the requisite period of time.[50]

The purpose of a hearing in cases such as this is to determine the truth and to achieve Justice, with both sides aggressively representing their respective clients within

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[48] During his testimony, Clarence Ropp commented that the files that he had reviewed were very incomplete and documents which normally would be included were not there. Tr. 1139-1144. He also indicated that the files should have been maintained "forever." Tr. 1202.

[49] Due to the parties' inability to agree upon a joint record, unnecessary duplication, triplication and even quadruplication of some exhibits occurred as some exhibits appear in each of those tendered by the Petitioner in their volumes of exhibits, the Petitioner's tabbed volume intended for use during the hearing and the Government's volumes.

[50] Clarence Ropp testified that there was no way to tell whether any documents had been added or taken out. Tr. 1198. He did indicate that the files were very incomplete and that retention policies should have precluded them from being destroyed. Tr. 1139, 1202.

the structure provided. Differences of opinion are always to be expected and Agency counsel are required and expected to aggressively defend their client. In so doing, they may strike hard blows; however, as noted by the Supreme Court, they may not be foul ones. *United States v. Berger,* 295 U.S. 78, 88 (1935). In avoiding any approach to that line, it is helpful, if not essential, to constantly maintain focus on the purpose of the hearing rather than seeking to achieve some procedural or tactical advantage at any cost. This sense of judicial fairness is particularly applicable given the limited financial resources of individuals such as the Petitioner who have to compete against the enormous resources of the United States Government. While permitted under the applicable Rules of Practice, but considering the Petitioner's onerous burden of persuasion: (1) the extensive record, but now incomplete, record already generated in the prior investigations of the discrimination allegations; (2) the filing of the type of prehearing motions in this case (some of which were filed in rapid succession without the normally allotted time to allow the Petitioner to reply) seeking prehearing discovery; (3) objections to extensions of time sought by the Petitioner to identify witnesses; (4) motions to limit the scope of the hearing; and (5) motions to preclude the testimony of certain witnesses on technical and procedural grounds,[51] served more to adding to the difficult burden faced by Petitioner and his counsel than for any other purpose.

Of particular concern in this regard was the thinly disguised intimidating oral Motion by Government Counsel on January 14, 2010 objecting to the testimony of Hezekiah Gibson, made in his presence, on the proffered basis that his testimony would somehow violate the terms of the *Pigford* Consent Decree and that counsel would be

[51] In one Pre Hearing Motion, Government Counsel objected to the testimony of Petitioner's wife and to the authors of the Newby/Guo Report. Docket Entry 20.

required to report him to the Department of Justice.[52] Tr. 612-620. My reading of the identified paragraph of the Consent Decision failed to discern any such prohibition and to Mr. Gibson's credit, he remained undeterred and testified.[53] Tr. 612-751.

Over the course of the hearing, although it certainly could have done so, the Agency made no effort to provide an objective overview of the operation of the Clarendon County, South Carolina FmHA and ASCS Offices showing the number of borrowers or program participants, the type of loans or programs, the race of the recipients or participants, the processing times for the respective applications and similar information to establish competent and material evidence that equitable treatment of all applicants had been provided. Such information being beyond the reach of the Petitioner without subpoena power, it was readily apparent that witnesses for the Agency were given only selective access to the Petitioner's file upon which to base their testimony. While it is possible that their review included all necessary and relevant documents, selective disclosure of records showing some, but not all of the facts, can easily have altered or distorted the opinions that were ultimately given.

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[52] Paragraph 20 of the Consent Decree reads:

20. No Admission of Liability Neither this Consent Decree nor any order approving this Consent decree is or shall be construed as an admission by the defendant of the truth of any allegation or the validity of any claim asserted in the complaint, or of the defendant's liability therefore, nor as a concession or an admission of any fault or omission of any act or failure to act, or of any statement, written document, or report heretofore issued, filed or made by the defendant, not shall this Consent Decree nor any confidential papers related hereto and created for settlement purposes only, nor the terms of either, be offered or received as evidence of discrimination in any civil, criminal, or administrative action or proceeding, nor shall they be construed by anyone for any purpose whatsoever as an admission or resumption of any wrongdoing on the part of the defendant, not as an admission by any party to this Consent decree that the consideration to be given hereunder represents the relief that could be recovered after trial. However, nothing herein shall be construed to preclude the use of this Consent Decree in order to effectuate the consummation, enforcement, or modification of its terms. D1627-1628.

[53] Mr. Gibson's testimony described the delay experienced by black farmers when they visited the County Office, the dramatic decrease in the number of black farmers in the county from the 1980s to present and provided an account of the Clarendon County Office's retaliatory action being taken against him when he publicly made comments critical of them. Tr. 693. Not surprisingly, the official identified by Mr. Gibson also has entries appearing in the McDonald file.

Damages

7 C.F.R. §15f.24 provides where an Administrative Law Judge makes a proposed finding of discrimination, he or she will recommend an award of such relief as would be afforded under the applicable statute under which the eligible complaint was filed. Section 706(a) and (b) and 702(g) of the ECOA provide that creditors that violate the Act or the regulation are subject to civil liability for actual damages suffered by the individual. 15 U.S.C. §1691e. Actual (not punitive) damages are compensation to the injured party for losses sustained as a direct result of the injury suffered and are intended "to make persons whole for injuries sustained on account of unlawful discrimination." *Albemarle Paper Co. v. Moody,* 405 U.S. 405, 418 (1975).

As discussed by Administrative Law Judge Constance T. O'Bryant in *In re: Will Sylvester Warren*, there are two categories of actual or compensatory damages: tangible and intangible. Tangible damages include economic loss. Intangible damages include compensation for other less quantifiable elements of damage, including emotional distress; pain and suffering; injury to personal and professional reputation; injury to credit reputation; mental anguish, humiliation or embarrassment; impairment of reputation or standing in the community, personal humiliation, and mental anguish and suffering; and intentional infliction of emotional distress. *Warren,* USDA Docket 1194, HUDALJ No. 00-19-NA, December 19, 2002 *Slip Opinion* at 22-23; Tab 40, Agency Post Hearing Brief (citations omitted).

As a result of USDA's discrimination against him, Charles McDonald suffered a loss of income from his farming operations. Following the discriminatory treatment by USDA, he was foreclosed upon, title to land that had been in his family for over 100

years was lost,[54] his equipment was sold at a forced sale, and he never was able to resume farming on the scale previously done, with a corresponding loss of income. Tr. 232, 363, 369, 374-375, 378.

Although testimony calculating Charles McDonald's tangible economic damages was provided by economic experts from both sides, the opinion of neither expert can be fully accepted without modification. As might have been predictable, the opinions of the experts differed significantly, with a large damages figure provided by the Petitioner's expert and a relatively small negative figure advanced by the Agency.

Charles W. King,[55] who testified on behalf of Charles McDonald, prepared both an initial report dated February 15, 2000 and a shorter supplemental report dated December 30, 2009. In the first report, using McDonald's 1985 Farm Plan as a starting point and extrapolating its anticipated profitability over future years with certain adjustments, he estimated McDonald's past economic damages as being $2,349,479 and his future economic damages, reflecting the loss of future income earning capacity, as $1,001,036, which he then translated to $3,350,515 in year 2000 dollars. PX-68, M34-50. In the later report, King extended his projection of damages through the year 2016 based upon McDonald's statistical life expectancy with a variety of other factors substantially increasing the estimate of McDonald's economic loss. PX-80. In calculating the damages after 1998, King assumed that the level of damages since 1998 would track the overall profitability of South Carolina farmers up to the most recent year for which data was available. The 1998 figure was based upon an average of the five preceding years. To

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[54] McDonald was able to purchase approximately 40 acres of inherited land which had been owned by his brother; however, title to the tract that he had inherited was lost. Tr. 232, 374-375, 378.

[55] The February 15, 2000 Economic Damage Summary was prepared by Mr. King when he was the President of the economic consulting firm of Snavely King Majoros O'Connor & Lee, Inc. located in Washington, D.C.

develop a projection of the future damages, King averaged his damages for the five years 2004-2008 to be a forecast of the 2009 damages which were increased by compounding the Congressional Budget Office's projections of Gross Domestic Product Price Deflators. Further factors used by the Office of Management and Budget were then applied for computing the present value of the economic damages. Using those factors, King indicated the present value of McDonald's tangible economic damages were $7,574,495. PX-80.

John E. Jinkins, the economic expert testifying for the Agency has better than twenty years of experience as an economist with USDA and holds a Ph.D. in Agricultural Economics from Texas A. & M. Tr. 1981, 1985-1986. He testified that in his opinion the King analysis very much overstated the earnings that McDonald's operation could have been expected to produce and that the report contained numerous errors of analysis throughout its content. Tr. 1994. Jinkins testified that much of the overstatement was the result of a number of adjustments which were made in the King Report. Tr. 1996. According to his review, the King Report started with publicly available crop yields and increased them based upon assumptions made in two Farm and Home Plans (December of 1984 and January of 1985). Tr. 1998-1999. Using the potential yields for 1985 that never happened (due to the discrimination that I have found) or were ever proved, the report adjusted the yield projected for the McDonald farm upward from that point on by a factor of 12 to 15 percent,[56] a decision which Jinkins considered very arbitrary. Tr. 2004-2005, 2014. Jinkins also faulted the use of the Five Year Moving Average which had the effect of smoothing out the lowest of the lows and the highest of the highs. Tr. 2018. Dr.

[56] Oats were increased by 227%. Tr. 2016. Oats were however not considered a significant factor in the McDonald operation. Tr. 2016-2017. King attempted to justify the multiplier based upon the fact that McDonald was a better than average farmer.

Jinkins found that the assumption that profit would be achieved in each year was not typical of any farm growing crops, particularly during a period which he characterized as the worst economic conditions in American agriculture since the 1930s.[57] Tr. 2023, 2072.

In addition to the overstatement of income,[58] Jinkins also criticized the expense projections as failing to include additional labor costs which should be incurred in the transition from a partnership to a sole proprietorship, failing to include provisions for the repayment of indebtedness, and failing to address or understating other expenses which he felt should have been included. Tr. 2047, 2049, 2055, 2058-2063, 2066-2069. His calculation based upon methodology of gauging profitability over the years using USDA data including average production costs and average yields, prices and government program payments included assumptions including an amortization of debt of nearly $400,000 weighted heavily in the first ten year period and inserting an allowance for machinery replacement concluded that the McDonald farming operation would have lost $42,579.07 through 2009.[59] D1592-1593.

In light of the available data before me including those available tax returns and the listing of his actual earnings which appears in the King Report, USDA's more conservative approach projecting some losses has some degree of validity, but in light of assumptions made by Dr. Jinkins, it cannot be fully accepted as an accurate projection of

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[57] Examination of PX-68, M44, and Charles McDonald's available tax returns lends some credence to the testimony as McDonald did experience significant losses during a number of the later years even farming on a reduced scale.

[58] Although Jinkins generally criticized the report as overstating income, he made note of its failure to include any income from government programs during the years in which the payments would have been available. That omission in his view "demonstrated to us that perhaps they didn't have a very fundamental understanding of agriculture in that period." Tr. 2064.

[59] This same methodology was rejected in the *Warren* decision. *Warren, supra*, *Slip opinion* at 26.

McDonald's farm operation's income generation for years after the initial 1985.[60] USDA expert's computation and projection of expenses becomes less appropriate with its use of front loading of debt service in excess of the required annual payments and the inappropriate inclusion of principal in the computation both of which served to present an overly pessimistic picture. Further, USDA's reliance on model averages for equipment replacement and land rental rates while consistent with the rest of their methodology is misplaced as the expenditures for those categories can vary significantly based upon personal practices and the relationship between the lessor and the lessee.[61]

To the extent that the two damage estimates can be reconciled, the schedules of both reflect some level of income over budgeted expenses. As I will confine the tangible portion of my award only to past economic damages, without the adjustment suggested by Charles King for what otherwise would amount to prejudgment interest, I find that Charles McDonald sustained a loss of income of seven hundred seventy-five thousand dollars ($775,000.00).[62] *See, Moore v. USDA,* 55 F.3d 991 (5th Cir. 1995)

Neither economist addressed the intangible damage inflicted by the loss of McDonald's interest in the approximately 483 acres of family land and the equipment that was foreclosed upon and lost as a result of the Petitioner's inability to timely secure necessary credit due to FmHA's discriminatory conduct.[63]Tr. 371. It is clear that while Charles McDonald continues to be well regarded in the community, the testimony amply

[60] The 1985 projection while possibly optimistic was prepared with FmHA's collaboration and will be accepted for the purpose of calculation.

[61] The judge in the *Warren* summarily rejected the average model methodology to project income and expenses. *Warren, supra* at 26.

[62] Rather than attempting a detailed independent calculation, the figure represents a balance between the two extremes advanced by the experts.

[63] Charles McDonald was able to purchase approximately 40 acres of the land formerly owned by his brother. Tr. 378. The desirability of the land can be inferred from the exceptional yields achieved by McDonald during certain years and from Charles McDonald's testimony that white farmers owned all of the land around him. Tr. 220, 239.

established that as a result of the discrimination, he suffered significant emotional loss and distress, personal humiliation, the adverse stigma of having taken bankruptcy, and the loss of self esteem and pride by being forced to be dependent upon his wife's income for living expenses and to raise his family. Tr. 61-62, 66-67, 77-79, 81-84, 182, 346-348, 363-367, 369-371, 501-502, 514-515. Both Charles and Edna McDonald were credible witnesses. That Mr. McDonald continued to persevere as a farmer despite the obstacles placed in his path while most others quit and at the same time raised the type of upstanding sons that the record establishes[64] reflects a strength of character that lends additional credibility to his testimony and that of his wife concerning the effect that the discriminatory treatment had upon him.

In similar cases, judges have used two methods to calculate intangible damages. In one method, the judge will assign values to specific components of intangible damages, with so much for loss of reputation and another figure for emotional distress and so on. The preferable method, which I will adopt, is to apply a multiplier to the amount of the tangible damages to arrive at an appropriate figure for the intangible damages. In the recent case of *In re Wilbur Wilkinson, ex rel. Ernest and Mollie Wilkinson,* 67 Agric. Dec. 241 (2008), Judge Victor W. Palmer, a former Chief Judge for the Department, followed that approach and applied a multiplier of two and a half to the amount of tangible damage award.[65] *Wilkinson,* at 244. Given the facts in this case, I feel that a multiplier of two and a half is also appropriate in this case rather than the factor of four to five which is routinely suggested in other cases. Accordingly, I recommend an

[64] The McDonald's son Charles is a Marine and has served in Iraq. M1870.
[65] Judge Palmer had been urged to use a factor of 4.687; however, he rejected that as excessive. Judge Palmer's decision was reversed by the then Assistant Secretary for Civil Rights Margo McKay on other grounds. 68 Agric. Dec. ____ (2009) Wilkinson's subsequent Petition for Writ of Mandamus was dismissed without prejudice. *Wilkinson v. Vilsack,* 666 F. Supp 2d 118 (D.D.C. 2009).

award of one million, nine hundred thirty-seven thousand five hundred dollars for intangible damages, or a total of two million, seven hundred twelve thousand, five hundred dollars for both tangible and intangible damages.

Based upon the testimony of the witnesses testifying at the hearing and upon the entire record before me, the following Findings of Fact, Conclusions of Law and Order will be entered.

FINDINGS OF FACT

1. The Petitioner in this case, Charles McDonald, is a black farmer who resides with his wife Edna McDonald in Manning, Clarendon County, South Carolina. Tr. 32, 233.

2. On February 13, 1984, McDonald and his brother Richard Miller each made both an individual and a partnership application (FmHA Forms 410-1) for FmHA services by applying to the FmHA County Office in Clarendon County, South Carolina for Operating, Farm Ownership and Emergency loans. D134-137, 423-414, 429-430, M134-137, PX-10,12,15.

3. As part of the application process, the applicants and their wives provided the information necessary to complete FmHA Form 431-2 Farm and Home Plan and Verification of Employment forms were sent to their wives' employers. In Section J, line 10 of the Farm and Home Plan, the non-farm income was filled in as $26,400.00. D148.

4. The Verification of Income form completed on February 22, 1984 by the Clarendon School District indicated that Edna McDonald's base pay for the coming year was $17,052.00 and that her income for the past year was $15,949.00. D139, M1934, PX-13.

5. The separate application completed by Richard Miller and Madgelene Miller, his wife estimated her income from Campbell Soup Co. at $11,800.00. The file no longer contains a Verification of Employment form for Mrs. Miller.D413, PX-15.

6. The Clarendon County Committee had established $18,000.00 as the amount of income which could not be exceeded in order to be eligible for FO and OL loans for 1984. D158, 447-448, PX-17.

7. Based upon the information contained in the applications, the County Committee denied the partnership application of McDonald and Miller for FO and OL loans on the basis that the combined income of their wives exceeded the $18,000.00 limitation set for such loans. FmHA did not process the individual applications or offer or suggest to McDonald and Miller the option of dividing the partnership even though as individuals they would have come within the eligibility threshold and that option and suggestion was given to white applicants elsewhere.

8. The application process for EM loans requires completion of FmHA Forms 1945-22 and 1945-26. FmHA form 1945-22 allows for entries to be made for the production yield during the disaster year and for actual production yields in each the five preceding years. D149. The FmHA Form 1945-26 is used for the computation of the actual loss which is expressed as a percentage. D156-157, 418.

9. In completing the FmHA Form 1945-26, the regulation governing its completion established three prioritized types of yields that could be used for the purpose of the computation, including reliable actual production yields over a five year period dropping the lowest year’s production, the established yield set by the ASCS Office, or the County or State averages. 7 C.F.R. §1945.163(a)(1)(i-iii), D1740.

10. In making the calculation of Charles McDonald's loss, only entries for the production yield for the disaster year were entered on the FmHA Form 1945-22 and in completing the FmHA Form 1945-26, the average County yield of 85.4 bushels of corn per acre was used which was higher than McDonald's established yield of 57 bushels of corn per acre. D149, 156-157.

11. Two FmHA Forms 1945-26 appear in the record, with the later calculation appearing to have superseded the first which was made at an earlier date. The resulting calculated percentage was 29.61% which was less than the qualifying threshold of 30% or more. D153-154, 156-157.

12. As the computed percentage disaster loss was less than 30%, the County Committee determined that McDonald and Miller were ineligible to receive an EM loan. D158.

13. Subsequent to February of 1984 and believed to be sometime in May of 1984, Charles McDonald made application the Clarendon County Office of FmHA for a FO loan. Tr. 1157-1158.

14. The County Committee for Clarendon County approved McDonald as being eligible for a FO loan in the amount of $46,500.00 on May 16, 1984 and the funds for the loan were obligated on May 24, 1984. Undated Closing Instructions were sent to W.C. Coffey, an attorney who was to handle the closing which referenced his preliminary title opinion dated June 20, 1984. A Notification of Loan Closing was sent to McDonald which was dated July 18, 1984. M1901-1902, PX-19, 20, 23, 28.

15. On August 9, 1984, the loan check was cancelled and recalled by the County Supervisor, according to FmHA because of SBA's failure to subordinate their lien position. M1903.

16. At the behest of McDonald and others on his behalf, Senator Strom Thurmond and Congressman Robin Tallon contacted FmHA officials during 1984 and 1985 expressing interest in Mr. McDonald's case. Senator Thurmond was advised that the County Supervisor would be contacting Mr. McDonald in an effort to work things out. PX-29.

17. McDonald again wrote Senator Thurmond advising him that SBA had agreed to subordinate their lien in January of 1985 and on April 1, 1985, McDonald was sent a letter indicating that his loan application had been favorably considered and Congressman Tallon was advised that SBA had agreed to subordinate their lien to that of FmHA by letter dated April 4, 1985. Congressman Tallon indicated that he would contact SBA personally and forward their letter of commitment so that the loan could go forward. D41-42, M1908-1909, PX-33.

18. Despite SBA's documented willingness to subordinate their lien, the loan based on the May 1984 application was never made. In light of the existing record, FmHA's explanation that the loan was not made because of legitimate reasons including SBA's refusal to subordinate is pretextual, disingenuous and not credible or worthy of belief.

19. The ACSC County Committee assigned Charles McDonald an established corn crop yield of 57 bushels of corn per acre sometime after he inherited the land from his father in 1973. He was considered a model or exceptional farmer and termed by a white farm neighbor as "one of the best farmers I know." Tr. 150-151, 182-183, 195. On a

regular basis in subsequent years, he achieved corn crop yields of over 100 bushels of corn, and in the 1990's was recognized in the county as a prize winning corn farmer for having produced over 200 bushels of corn. D405, PX-53, 69

20. Despite his regular and repeated efforts to get his established yields increased consistent with his actual production, his established corn crop yield has remained unchanged. Although USDA officials were aware of McDonald's efforts to get his established yields increased, no corrective action was ever taken by them even during periods that the established yield could have been adjusted. Tr. 191, 195, 648, D106, M70, 1890, PX 58A, 59.

21. A comparison of nine white farmers and nine black farms in Clarendon County, South Carolina appearing in the Slay Report reflects that the established yields of the white farmers was 108 bushels per acre and that of the black farmers was only 58. While the method of setting established yields is facially race neutral, in practice, the computation of established yields was based upon a subjective selection of the yield of comparable farms by a racially non-representative group of individuals and was susceptible to manipulation on the basis of race, the impact of which adversely operated to the detriment of black farmers in denying them program benefits to which they otherwise would qualify for. D105-106, PX-69

22. The pattern of discrimination found to exist against black and other minority group farmers in the United States by the Civil Rights Action Team in their report farmers published in February of 1997 included a litany of neglect, racial bias, unfair lending practices and discrimination by county officials. The Southeast in particular was singled out where discrimination in USDA programs was cited as the primary reason for

the loss of land and farm income. While that report and subsequent USDA Inspector General Reports post date Charles McDonald's complaints, their findings of specific discriminatory conduct are consistent with some of the testimony before me and are indicative of long standing practices of discrimination by FmHA in South Carolina and the rest of the Southeast. Tr. 196, 352-353, 646, 654, 662-664, 671-672, 678, 686, 693,737, PX-62

23. During 1984 and 1985, McDonald and other black farmers were treated less favorably than farmers who were not black. Black farmers including McDonald were subjected to longer waits than white farmers experienced when visiting the office. Processing time for application of loans were longer for black farmers than white farmers and disbursements of loan funds for black farmers were frequently delayed or reduced in amount. Protests were either ignored, or in certain cases subjected to retaliatory action by credit denial. Options available to white farmers were not suggested or offered to them. Tr. 196, 352-353, 662-664, 671-672, 678, 686, 693, *In re Robert A. Schwerdtfeger,* 67 Agric. Dec. 244, 249 (2008).

24. In 1986, Edna McDonald made application to the Clarendon County Office of FmHA for an unspecified farm loan.

25. The record lacks documentation as whether the above application was withdrawn or denied, however, Edna McDonald was a school teacher not actively engaged in farming, was unacquainted with the farm finances and she failed to provide all information required to process the application.

26. In 1986 following the denial of loans by FmHA, foreclosure proceedings were brought against McDonald by Production Credit Association which proceedings were

settled by McDonald's conveyance of the farm that he had inherited to the creditor and by the forced sale of his equipment. Tr. 363, 369, M2-23, PX-31A, 36.

27. On December 17, 1986 McDonald filed a voluntary Chapter 7 petition in bankruptcy in the United States Bankruptcy Court for the District of South Carolina. Tr. 369-370, PX-35.

28. Beginning as early as 1984, Charles McDonald filed complaints of discrimination against him on account of his race on at least three occasions which were accepted by USDA and later investigated by OCR. D3, 34, 47-48, 50-51, 58-59.

29. The Slay Report and the Newby/Guo Report, both of which were initiated by OCR each concluded after their respective investigation that discrimination had in fact occurred. D1-16, 394-406.

30. Notwithstanding the conclusions of the Investigative Reports, the Agency position was and remains that no discrimination occurred or that the Petitioner failed in his burden to establish a *prima facie* showing of discrimination.

31. No final action was taken by OCR to deny McDonald's claims of discrimination despite the fact that the Investigations were completed in April of 1998 in the case of the Slay Report and January of 2003 in the case of the Newby/Guo Report.

32. The denial of credit and other program benefits to and for which Charles McDonald was eligible by FmHA was a proximate cause in his loss of title to land which he had inherited from his father and which had been in his family for over one hundred years. Tr. 220, 239, 369-371.

33. The actions of FmHA were also the proximate cause of Charles McDonald being unable to employ the best farming practices, forced him to discontinue farming on his

previous scale of over one thousand acres, requiring him to farm on a much reduced scale. The direct result was loss of income which I calculate to be $775,000.00 through 2009.

34. The actions of FmHA also were also the proximate cause of Charles McDonald suffering intangible damage, including significant emotional loss and distress, personal humiliation, the adverse stigma of having taken bankruptcy, and the loss of self esteem and pride by being forced to be dependent upon his wife's income for living expenses and to raise his family. Tr. 61-62, 66-67, 77-79, 81-84, 346-348, 363-367, 369-371, 501-502, 514-515.

Conclusions of Law

1. Charles McDonald is both an African-American and black farmer and as such is a member of a class protected by ECOA.

2. On February 13, 1984, Charles McDonald applied to the FmHA County Office in Clarendon County, South Carolina for credit benefits for which he was eligible, including OL and FO loans.

3. Despite his eligibility to receive the credit benefits, his February of 1984 applications were denied.

4. In denying him credit benefits, Charles McDonald was treated less favorably than other similarly situated individual who were not members of his protected class.

5. FmHA (now FSA) violated ECOA by failing to process Charles McDonald's individual February 13, 1984 application for OL and FO loans for which he would have been eligible and instead considered only the partnership application which he and his brother had made.

6. While the partnership application was properly denied for exceeding the established income threshold of $18,000.00 due to the brothers' wives combined non-farm income, the failure to facilitate McDonald's individual application was discriminatory particularly when the land was already separately owned and resulted in less favorable treatment than was afforded white farmers elsewhere in the country.

7. FmHA (now FSA) violated ECOA by failing to close in 1985 a subsequent 1984 FO loan application which had been approved by the County Committee as being a loan for which he was eligible, funds had been committed, and the agreement of the Small Business Administration (SBA) to subordinate their lien had been secured.

8. FmHA's explanation for failing to close the loan on the basis that SBA had refused to subordinate their loan is contrary to the evidence in the record and resulted in McDonald being treated less favorably than others who were not members of his protected class.

9. Charles McDonald was treated less favorably than others who were not members of his protected class by USDA's utilization of a method of assigning established corn crop yields which in practice resulted in black farmers having established yields of approximately only half of those enjoyed by white farmers in the same county. Tr. 196, PX-62, 69.

10. In light of the finding of discrimination, an award of compensatory damages is indicated, with both tangible and intangible damages being appropriate.

Order

1. Within ten days of the date on which this Order becomes final, USDA shall pay damages in the amount of $2,712,500.00 to Charles McDonald for his injuries suffered as a result of discrimination.

2. USDA shall discharge all of Charles McDonald's debts to the FSA and shall thereafter hold him harmless for such debt. The discharge of his debt shall not adversely affect his eligibility for future participation in any USDA loan or loan servicing program, and shall not act to trigger the statutory provisions of Section 648 of the Federal Agricultural Improvement and Reform Act of 1996 that preclude an individual who has received debt forgiveness from obtaining future loans from USDA, or otherwise be used in any negative manner in conjunction with Mr. McDonald's applications for, or participation in, any USDA program, benefit or activity.

3. In addition, pursuant to 15 U.S.C. §1691e(d), the Petitioner is awarded the costs of this action, together with a reasonable attorney's fee as shall be determined by the Administrative Law Judge. Counsel for the Petitioner shall file an application with the Hearing Clerk, setting forth an itemization of the costs, justification for the same as well as an itemization of the hours spent in representing the Petitioner, with a description of how the time was spent.

4. This Decision and Order shall become final 35 days after issuance unless reviewed within that time by the Department's Assistant Secretary for Civil Rights (ASCR), either upon the ASCR's own initiative or pursuant to request by the Petitioner. *See,* 7 C.F.R. §15f.24.

Copies of this Decision and Order shall be served on the parties by the Hearing Clerk.

Done at Washington, D.C.
July 8, 2010

____
PETER M. DAVENPORT
Chief Administrative Law Judge

Copies to: Ben Whaley Le Clercq, Esquire
Michael W. Beasley, Esquire
Stephanie R. Moore, Esquire
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Applicable Statutory and Regulatory Provisions

Section 1691 of the ECOA provides:

(a) Activities constituting discrimination

It shall be unlawful for any creditor to discriminate against any applicant with respect to any aspect of a credit transaction-

(1) on the basis of race, color, religion, national origin, sex or marital status, or age…." 15 U.S.C. §1691(a).

The term "creditor" is defined as follows:

(e) The term "creditor" means any person who regularly extends, renews, or continues credit; any person who regularly arranges for the extension, renewal, or continuation of credit; or any assignee of an original creditor who participates in the decision to extend, renew, or continue credit. 15 U.S.C. §1691a(e)

The term person is defined:

(f) The term "person" means a natural person, a corporation, government or governmental subdivision or agency, trust, estate, partnership, cooperative, or association. 15 U.S.C. §1691a(f)

Civil liability is imposed for discrimination in connection with credit transactions:

§1691e. Civil liability

(a) Individual or class action for actual damages[66]

Any creditor who fails to comply with any requirement imposed under this subchapter shall be liable to the aggrieved applicant for any actual damages sustained by such applicant acting either in an individual capacity or as a member of a class. 15 U.S.C. §1691e.

In the event of successful actions, cost of the action and attorney fees shall be added to the damage award:

[66] Punitive damages may be asserted against creditors other than a government or governmental subdivision or agency. 15 U.S.C. §1691e(b).

(d) Recovery of costs and attorney fees

In the case of any successful action, under subsection (a), (b), or (c) of this section, the costs of the action, together with a reasonable attorney's fee as determined by the court, shall be added to any damages awarded by the court under such subsection. 15 U.S.C. §1691e(d).

Jurisdiction for such actions as originally enacted provided:

(f) Jurisdiction of courts; time for maintenance of action; exceptions

Any action under this section may be brought in the appropriate United States district court without regard to the amount in controversy, or in any other court of competent jurisdiction. No such action shall be brought later than two years from the date of the occurrence of the violation except that- …. 15 U.S.C. §1691e(f).

The two year statute of limitations was modified by a limited waiver contained in Section 741:

Waiver of Statute of Limitations.

(a) To the extent permitted by the Constitution, any action to obtain relief with respect to the discrimination alleged in any eligible complaint, if commenced no later than 2 years after the enactment of this Act, shall not be barred by any statute of limitations.

(b) The complainant may, in lieu of filing a civil action, seek a determination on the merits of the eligible complaint by the Department of Agriculture if such complaint was filed not later than 2 years after the date of enactment of this Act [Oct. 21, 1998]. The Department of Agriculture shall –

(1) provide the complainant an opportunity for a hearing on the record before making that determination;
(2) award the complainant such relief as would be afforded under the applicable statute from which the eligible complaint arose notwithstanding any statute of limitations; and
(3) to the maximum extent practicable within 180 days after the date a determination of an eligible complaint is sought under this subsection conduct an investigation, issue a written determination and propose a resolution in accordance with this subsection.

(c) Notwithstanding subsections (a) and (b), if an eligible claim is denied administratively, the claimant shall have at least 180 days to commence a cause of

action in a Federal court of competent jurisdiction seeking a review of such denial.

(d)The United States Court of Federal Claims and the United States District Court shall have exclusive original jurisdiction over –

(1) any cause of action arising out of a complaint with respect to which this section waives the statute of limitations; and
(2) any civil action for judicial review of a determination in an administrative proceeding in the Department of Agriculture under this section.

(e) As used in this section, the term 'eligible complaint' means a nonemployment related complaint that was filed with the Department of Agriculture before July 1, 1997 and alleges discrimination at any time during the period beginning on January 1, 1981 and ending December 31, 1996 –

(1) in violation of the Equal Credit Opportunity Act (15 U.S.C. 1691 et seq.) in administering –
(A) a farm ownership, farm operating, or emergency loan funded from the Agricultural Credit Insurance Program Account; or
(B) a housing program established under title V of the Housing Act of 1949 [42 U.S.C. 1471 et seq.]; or
(2) in the administration of a commodity program or a disaster assistance program.

(f) This section shall apply in fiscal year 1999 and thereafter.

(g) The standard of review for judicial review of an agency action with respect to an eligible complaint is de novo review. Chapter 5 of title 5 of the United States

Code shall apply with respect to an agency action under this section with respect to an eligible complaint, without regard to section 554(a)(1) of that title.

Section 741, 7 U.S.C. §2279 (Historical and Statutory Notes).