

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FILED
MAY 13 2011

Clerk, U.S. District & Bankruptcy
Courts for the District of Columbia

In re BLACK FARMERS DISCRIMINATION)
LITIGATION)
)
)
_____)

Misc. No. 08-mc-0511 (PLF)

This document relates to:)
)
)

ALL CASES)
_____)

**ORDER GRANTING PRELIMINARY
APPROVAL OF SETTLEMENT AGREEMENT, CERTIFYING A
RULE 23(b)(1)(B) SETTLEMENT CLASS, AND FOR OTHER PURPOSES**

The Court has reviewed and considered Plaintiffs' Motion for Preliminary Approval of Settlement Agreement, Certification of a Rule 23(b)(1)(B) Settlement Class, and for Other Purposes ("Motion"), including the exhibits thereto, and has reviewed and considered the terms and conditions of the Settlement Agreement dated February 18, 2010, revised as of May 13, 2011 (the "Settlement Agreement"). Upon consideration of these submissions and the entire record herein, with good cause for this Order having been shown, it is hereby

ORDERED that the terms of the Settlement Agreement are preliminarily approved, subject to further consideration thereof at the Final Approval Hearing provided for below. The Court finds that the proposed Settlement Agreement is within the range of reasonableness so that Notice of the proposed Settlement should be sent to the Class as provided in Paragraphs 16-18 of this Order.

CERTIFICATION OF THE SETTLEMENT CLASS

1. For purposes of settlement only, and pursuant to Federal Rules of Civil Procedure 23(a) and 23(b)(1)(B), the action styled as *In re Black Farmers Discrimination Litig.*, Misc. No. 08-mc-0511 (PLF) (D.D.C.), is conditionally certified as a class action on behalf of the following persons (collectively, the “Class” and each member of the Class as a “Class Member”), effective upon Final Approval of the Settlement Agreement:

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

Based on the Court’s review of the Motion and supporting materials, the Court finds that the proposed Class satisfies Rules 23(a) and 23(b)(1)(B).

2. The Court finds that the following Representative Plaintiffs will fairly and adequately protect the interests of the Class and therefore conditionally appoints them as representatives of the Class, pursuant to Federal Rule of Civil Procedure 23(a)(4):

James Copeland
3 Effingham Court
Columbus, GA 31909

Earl Moorner, on behalf of the Estate of John Moorner
292 Benton Rd.
Lowndesboro, AL 36752

Marshallene McNeil
472 Hwy 41 North
Camden, AL 36726

3. For purposes of effectuating the Settlement Agreement, the following individuals are conditionally appointed Lead Class Counsel:

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These Lead Class Counsel are responsible for carrying out the duties of Lead Class Counsel set forth in the Settlement Agreement.

4. Pursuant to Federal Rule of Civil Procedure 23(g), for purposes of effectuating the Settlement Agreement, the following individuals are conditionally appointed as Class Counsel:

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** Indicates membership on Plaintiffs' Steering Committee

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These Class Counsel are responsible for carrying out the duties of Class Counsel as set forth in the Settlement Agreement.

5. The certification of the Class, appointment of Representative Plaintiffs as representatives of the Class, and appointment of Class Counsel, Lead Class Counsel, and the Plaintiffs' Steering Committee are solely for the purposes of effectuating the Settlement Agreement. If the Settlement Agreement is terminated or is not consummated for any reason, the foregoing certification of the Class, appointment of the Representative Plaintiffs as representatives of the Class, and appointment and designation of Class Counsel, Lead Class Counsel, and the Plaintiffs' Steering Committee, shall be void and of no effect and both

Plaintiffs and the Secretary of the United States Department of Agriculture (the “Defendant”) (collectively “the Parties”) shall be returned to the status each occupied before entry of this Order without prejudice to any legal argument that any of the Parties to the Settlement Agreement might have asserted but for the Settlement Agreement.

INJUNCTION AGAINST FILING OF NEW AND AMENDED ACTIONS

6. All members of the prospective Class, and any other person, representative, or entity, are hereby barred and enjoined from: (i) filing, commencing, or intervening in any claim, lawsuit, arbitration, administrative, regulatory or other proceeding arising out of Section 14012 of the Food, Conservation, and Energy Act of 2008, Pub. L. No. 110-234 and/or 110-246, (“Section 14012”), and (ii) organizing or soliciting the participation of any members of the Settlement Class into a separate class for the purposes of pursuing a purported class action arising out of Section 14012 (including by seeking to amend a pending complaint to include class allegations, or by seeking class certification in a pending action). The Court finds that the issuance of this injunction is necessary and appropriate in aid of the Court's jurisdiction over the action and to protect and effectuate the Court's review of the Settlement.

7. All proceedings in the above-captioned Consolidated Action, other than that such as may be necessary to carry out the terms and conditions of the Settlement Agreement or the responsibilities thereto, are stayed and suspended until further Order of this Court.

APPROVAL OF THE COST CAP FOR IMPLEMENTATION COSTS

8. The “Cost Cap,” as defined in Section II.I of the Settlement Agreement, is set at \$35,000,000.

9. Class Counsel may move for the payment of up to an additional \$3,500,000 from 2008 Funds to pay for reasonable additional fees and costs above the Cost Cap incurred by the

Track A Neutrals, the Track B Neutrals, and/or the Claims Administrator arising out of the reporting requirements and/or the audit provisions of Section 201(h) of Pub. L. 111-291, 124 Stat. 3064 (Dec. 8, 2010).

APPROVAL OF CLAIMS ADMINISTRATOR AND NEUTRALS

10. Epiq Systems, Inc. is approved to serve as Claims Administrator for purposes of effectuating the Settlement Agreement and shall fulfill the roles designated for the Claims Administrator in the Settlement Agreement.

11. Upon further motion of the Parties, and prior to or concurrent with Final Approval of the Settlement Agreement, the Court will approve a Track A Neutral to fulfill the role designated for the Track A Neutral in the Settlement Agreement.

12. Upon further motion of the Parties, and prior to or concurrent with Final Approval of the Settlement Agreement, the Court will approve a Track B Neutral to fulfill the role designated for the Track B Neutral in the Settlement Agreement.

13. Each individual designated to serve as a Track A Neutral or Track B Neutral must notify Lead Class Counsel of their designation. Within ten (10) days of such notification, Lead Class Counsel shall inform the Court of the names of any individuals so designated so that the Court may administer an oath to each individual that he or she will fulfill his or her respective role faithfully, fairly, and to the best of his or her ability. No individual designated as a Track A or Track B Neutral may take any action in that role before taking the aforementioned oath administered by the Court.

14. The Claims Administrator, Track A Neutral, and Track B Neutral shall have no liability to any claimants, including both Class Members and other individuals seeking to participate in the claims program provided for in the Settlement Agreement and approved by this

Court. Accordingly, these entities, as well as their officers, employers, employees, independent contractors, vendors, subcontractors, shareholders, and agents, shall not be subject to any suits, claims, actions, or liabilities that may be asserted by any such claimants.

15. Payments to the Claims Administrator, the Track A Neutral, and the Track B Neutral are Implementation Costs that shall be paid in accordance with Sections IV.C, IV.D, IV.E, IV.F, and IV.H of the Settlement Agreement upon application of Class Counsel and approval by this Court. Such payments shall not, in total, exceed the Cost Cap.

FORM AND TIMING OF NOTICE

16. The Court finds the proposed Notice Program (Ex. 5, Att. 3 to Motion) to be appropriate for the Class, practicable under the circumstances, and designed to fairly ensure the protection of the interests of absent parties who are to be bound by it. When completed, it shall constitute due and sufficient notice of the Settlement Agreement and the Final Approval Hearing to all persons affected by and/or eligible to participate in the remedial processes set forth in the Settlement Agreement or the Final Approval Hearing, and therefore will satisfy the requirements of due process and the Federal Rules of Civil Procedure.

17. Pursuant to Federal Rule of Civil Procedure 23(e)(1), no later than thirty (30) days after entry of this Order, the Plaintiffs shall cause copies of the forms of Notice proposed in the Notice Program to be disseminated in the manner delineated in the Notice Program.

18. The costs of implementing the Notice Program shall be paid out of the “interim Implementation Costs” authorized in Sections IV.C and IV.D of the Settlement Agreement.

19. No later than twenty (20) days prior to the Final Approval Hearing, the Notice Provider shall file with the Court a declaration confirming compliance with the Notice procedures approved by this Court.

CONTINGENT ATTORNEYS' FEES

20. For purposes of effectuating the Settlement Agreement, a “Track A Individual Counsel Fee” (as defined in the Settlement Agreement) may not exceed 2% of a Class Member’s Final Track A Award.

21. For purposes of effectuating the Settlement Agreement, a “Track B Fee” (as defined in the Settlement Agreement) may not exceed 8% of a Class Member’s Final Track B Award.

PRELIMINARY APPROVAL OF THE FEE AWARD

22. The Court finds that a Fee Award (as defined in the Settlement Agreement) of between 4.1% and 7.4% of the Fee Base (as defined in the Settlement Agreement) appears to be a fair, reasonable, and adequate range for a Fee Award in this action, and this range therefore is preliminarily approved for purposes of providing Notice to the Class.

EXISTING RETAINER AGREEMENTS

23. No counsel who is designated as Class Counsel by this Order shall seek to enforce the terms of any existing contingency fee arrangements with Class Members.

24. Any counsel who is not designated as Class Counsel and who is retained by a member of the Class to represent such an individual for a Track A claim under the Settlement Agreement shall be limited to a 2% contingency fee.

25. Any counsel who is retained by a member of the Class to represent such an individual for a Track B claim under the Settlement Agreement shall be limited to an 8% contingency fee.

FINAL APPROVAL HEARING: RIGHT TO APPEAR AND OBJECT

26. A Final Approval Hearing shall take place before the Court on September 1, 2011, at 9:30 a.m. before the Honorable Paul L. Friedman, at the United States District Court for the District of Columbia, 333 Constitution Avenue, N.W., Washington, D.C. 20001 to determine whether the Settlement Agreement should be finally approved by this Court as fair, reasonable, and adequate.

27. The Court may finally approve the Settlement Agreement at or after the Final Approval Hearing with any appropriate modifications agreed to by the Parties and without further notice to the Class Members.

28. Any Class Member wishing to raise objections to the Settlement Agreement that the Court may consider before Final Approval of the Settlement Agreement must adhere to the following process for submitting such objections:

- a. Any member of the Class may present written objections explaining why the Settlement Agreement should not be approved as fair, reasonable, and adequate, or why attorneys' fees and expenses to Class Counsel should not be awarded in the amounts requested. Any Class Member who wishes to object to any aspect of the Settlement Agreement must, no later than July 18, 2011, file a written statement of the objection(s) with the Court and serve such objection(s) on Lead Class Counsel and Defendant's Counsel either by (a) ECF filing with the Court or (b) first-class mail plus fax and/or electronic mail. The written statement of the objection(s) must include (1) a statement explaining the basis for the objector's belief that he or she is a Class Member and eligible for relief under the Settlement

Agreement; (2) a detailed statement of the Class Member's objection(s), as well as the specific reasons, if any, for each objection, including any evidence and legal authority the Class Member wishes to bring to the Court's attention and any evidence the Class Member wishes to introduce in support of his or her objection(s); (3) the Class Member's name, address, and telephone number; and (4) any other supporting papers, materials, or briefs the Class Member wishes the Court to consider when reviewing the objection.

- b. Class Members may raise an objection either on their own or through an attorney hired at their own expense. If a Class Member hires an attorney to represent him or her for purposes of filing an objection, the attorney must: (1) file a notice of appearance with the Clerk of Court no later than August 2, 2011; and (2) serve a copy of the notice on Lead Class Counsel and Defendant's Counsel by (a) ECF filing with the Court or (b) first-class mail plus either fax and/or electronic mail by August 2, 2011
- c. Class Members, or their attorneys, who wish to appear at the Fairness Hearing must file with the Court and serve on Lead Class Counsel and Defendant's Counsel, by (1) ECF filing with the Court or (2) first-class mail plus either fax and/or electronic mail, by August 2, 2011 a notice of their intention to appear at the Fairness Hearing.
- d. Any Class Member who fails to comply with the provisions of the preceding subsections shall waive and forfeit any and all rights he or she may have to object to the Settlement Agreement, and shall be bound by all

the terms of this Settlement Agreement and by all proceedings, orders, and judgments in the litigation.

29. The Court may adjourn the Final Approval Hearing, or any subsequent hearings, including the consideration of the application for attorneys' fees, costs, and expenses, without any additional notice to putative Class Members other than an announcement in open court.

**ORDER REGARDING LISTS AND MATERIAL
RECEIVED FROM THE PIGFORD FACILITATOR**

30. For the purpose of allowing Lead Class Counsel to fulfill its duties under Sections VIII.A.3 and VIII.A.4 of the Settlement Agreement, the *Pigford* Facilitator is hereby directed to provide to Lead Class Counsel a current version of the *Pigford* Timely 5(g) List, the *Pigford* Participants List, and the *Pigford* Opt-Out List (collectively, the "*Pigford* Lists"), and copies of all late-filing requests and all other available information and correspondence regarding the late-filing status of Class Members, including any lists prepared by the *Pigford* Facilitator reflecting such status (collectively, "5(g) Communications").

31. The *Pigford* Lists and 5(g) Communications may be used by Class Counsel or other counsel only for the purposes set forth in the Settlement Agreement. Accordingly,

- a. Counsel other than Class Counsel may not use the *Pigford* Lists and/or 5(g) Communications to communicate with individuals unless such individuals were represented by the contacting counsel prior to disclosure of the list;
- b. Class Counsel or other counsel may use the *Pigford* Lists and/or 5(g) Communications to determine whether a particular individual is eligible to pursue a claim in the non-judicial claims process delineated in Section V of the Settlement Agreement;

- c. Upon request, Lead Class Counsel shall provide verification to a claimant under the Settlement Agreement and, if applicable, his or her counsel, that the claimant's name appears on the *Pigford* Lists;
- d. Upon request, Lead Class Counsel shall transmit to each claimant and his or her counsel within thirty (30) days of such request all 5(g) Communications regarding that claimant, provided that the claimant or his or her counsel has provided written certification in writing that he or she will comply with the terms of this Order and other protective orders entered by this Court;
- e. No information in the *Pigford* Lists and/or 5(g) Communications will be disclosed by Class Counsel or other counsel to any other person or entity, including any farmers' advocacy organizations, for recruitment, recruitment-related, or any other purposes;
- f. Lead Class Counsel shall transmit an electronic copy of the *Pigford* Lists to all Class Counsel within ten (10) days of receipt of such lists from the *Pigford* Facilitator;
- g. Each copy of the *Pigford* Lists provided to Class Counsel shall be stamped "PRODUCED SUBJECT TO PROTECTIVE ORDER;"

32. Nothing in this Order shall restrict in any way the ability of Class Counsel in *Pigford v. Glickman* to fulfill their duties as Class Counsel in that action; and

33. Nothing in this Order shall restrict in any way the Defendant's use of the *Pigford* Lists or 5(g) Communications.

34. This Court's Order on December 23, 2008, entitled "Protective Order Regarding '5(g) List'" (Docket No. 34) is hereby withdrawn.

OTHER PROVISIONS

35. The Parties are authorized to communicate with putative Class Members regarding the provisions of the Settlement Agreement so long as such communications are not inconsistent with the Settlement Agreement. The Secretary shall refer to the toll-free telephone number operated by the Claims Administrator any inquiries from putative Class Members about claims to be filed under the Settlement Agreement.

36. Neither the fact of settlement, nor the Settlement Agreement, nor any provision therein, nor any negotiations, statements, or proceedings in connection therewith, shall be construed as, or be deemed to be evidence of, an admission or concession on the part of any of the Representative Plaintiffs, Class Counsel, any putative Class Members, the Secretary, or the United States of any liability or wrongdoing by them, or that the claims and defenses that have been, or could have been, asserted in *In re Black Farmers Discrimination Litigation* were or were not meritorious.

37. Class Counsel shall promptly bring to the attention of the USDA Inspector General and the Department of Justice information that they receive relating to potential scams on claimants and/or misrepresentations being made to claimants relating to the claims process or the relief available to claimants under the Settlement Agreement.

SO ORDERED.


PAUL L. FRIEDMAN
United States District Judge

DATE: May 13, 2011