IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ROSEMARY LOVE, et al., Plaintiffs, vs. THOMAS VILSACK, SECRETARY UNITED STATES DEPARTMENT OF AGRICULTURE, Defendant.	Case Number: 1:00CV02502 Judge: Walton, J.

PLAINTIFFS' REPLY IN SUPPORT OF MOTION FOR AN AWARD OF FEES, COSTS, AND EXPENSES, AS AMENDED AND SUPPLEMENTED

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Plaintiffs and their counsel have invested 17 years and significant emotional and financial capital in their pursuit to remedy widespread gender discrimination at the hands of an agency whose failures have been well-documented. Due to the efforts of Plaintiffs and their counsel and the Court's involvement in this litigation, thousands of women farmers have finally recovered approximately $177.5 million from USDA through an administrative claims process. Plaintiffs and their counsel seek recovery of attorneys' fees, costs, and expenses under the common fund doctrine, or, in the alternative, as prevailing parties under the Equal Credit Opportunity Act ("ECOA") and the Equal Access to Justice Act ("EAJA"). Particularly following the recovery of much larger attorneys' fee amounts in the similar cases brought by African American and Native American farmers—at least $123 million and $60 million, respectively—Plaintiffs' request for fees totaling approximately $14 million, or in the alternative, approximately $6 million, is more than reasonable. None of the arguments presented in USDA's recent Response to Plaintiffs' Motion for an Award of Fees, Costs, and Expenses is persuasive.

I. PLAINTIFFS ARE ENTITLED TO RECOVER ATTORNEYS' FEES UNDER THE COMMON FUND DOCTRINE

Plaintiffs and their counsel have succeeded in "recover[ing] a common fund for the benefit of persons other than [themselves] or [their] client[s]," making common fund recovery appropriate. *Swedish Hosp. Corp. v. Shalala*, 1 F.3d 1261, 1265 (D.C. Cir. 1993). The common fund doctrine is the preferred method in the D.C. Circuit for awarding attorneys' fees when the efforts of plaintiffs and/or their attorneys have obtained or preserved recovery for a group. *See* Pls.' Mem. of Points & Authorities in Support of Mot. for an Award of Fees, Costs, & Expenses at 15-16, Doc. 198-1 (Oct. 10, 2013) (the "2013 Memorandum").

USDA argues that Plaintiffs are not "successful litigants," so they cannot recover under this doctrine. Def.'s Suppl. Resp. to Pls.' Mot. for Attorney's Fees, Costs, & Expenses at 15-16, Doc. 275 (Feb. 13, 2017) ("USDA Response"). This is simply not true. As described in Plaintiffs' previous briefs, the substantial efforts of Plaintiffs and their counsel, over a 17-year period, resulted in a large common fund being made available to thousands of women farmers. Over the many years of this litigation, Plaintiffs and their counsel pursued claims against USDA, defeated motions to dismiss, secured orders tolling the statute of limitations which ensured that thousands of women maintained viable claims, and actively participated in the formation of an administrative claims process to award recovery to claimants. 2013 Mem. at 11-14; Pls.' Amendment & Supplement to Mot. for an Award of Fees, Costs, & Expenses at 9-10, Doc. 272 (Jan. 13, 2017) ("Fees Supplement"). Plaintiffs did succeed here, and their success need not be the result of a court order finding for them on the merits of their claims for the common fund doctrine to be appropriate. *See, e.g., In re Black Farmers Discrimination Litig.*, 953 F. Supp. 2d 82, 102 (D.D.C. 2013) ("*Pigford II*") (common fund recovery awarded following settlement); *Swedish Hosp. Corp.*, 1 F.3d at 1264, 1272 (same).

USDA's additional, technical arguments against application of the common fund doctrine must fail. First, contrary to Defendant's argument, USDA Resp. at 14, Plaintiffs' claim to attorneys' fees is not barred by sovereign immunity. *See* 28 U.S.C. § 2412(b) (unless "expressly prohibited by statute," government must pay prevailing party's fees "to the same extent that any other party would be liable under the common law"); *see, e.g., Mar. Mgmt., Inc. v. United States*, 242 F.3d 1326, 1331 (11th Cir. 2001) (because of 28 U.S.C. § 2412(b), "the equitable exceptions to the American Rule apply to the federal government in the same manner as they apply to private litigants. . . . This makes an award of fees proper under common fund and common

benefit theories." (citation omitted)); *Com. of Puerto Rico v. Heckler*, 745 F.2d 709, 711 (D.C. Cir. 1984) ("this case fits comfortably in the "common fund" category: Puerto Rico's successful suit against HHS necessarily yielded health care funds for other, similarly situated, United States possessions and territories"), *abrogated on other grounds by King v. Palmer*, 950 F.2d 771 (D.C. Cir. 1991).

Second, recovery under the common fund doctrine is not prohibited due to the lack of a certified class. USDA Resp. at 16-18. As explained in Plaintiffs' previous briefing, while common fund recovery often does occur in class actions, a certified class is not a necessary prerequisite. *Sprague v. Titonic Nat'l Bank*, 307 U.S. 161, 167-68 (1939) (when "a fund is for all practical purposes created for the benefit of others, the formalities of the litigation – the absence of an avowed class suit or the creation of a fund, as it were, through stare decisis rather than through a decree – hardly touch the power of equity in doing justice as between a party and the beneficiaries of his litigation"); 2013 Mem. at 16-17 (listing cases awarding common fund recovery outside the class action context).

Finally, USDA again attempts to escape common fund recovery by raising the technical argument that no common fund was "created," because the funds earmarked for the administrative claims process were in the Judgment Fund, rather than a separate fund created specifically for the claims process. USDA Resp. at 16-17. This does not change the fact that Plaintiffs caused a large sum of money to be available to women farmers. As previously explained, Defendant's formulaic argument cannot succeed, because it would mean that the government need never pay a common fund fee award, so long as funds obtained by the opposing party came, as they so often do, from the Judgment Fund. This is simply not the case. *See, e.g.*, *Nat'l Treasury Emps. Union v. Nixon*, 521 F.2d 317, 320-21 (D.C. Cir. 1975) ("mere

technicality" that payments came from existing government appropriations not relevant; sum available was a common fund, "government accounting procedures notwithstanding"), *abrogated on other grounds by Swedish Hosp. Corp. v. Shalala*, 1 F.3d 1261 (D.C. Cir. 1993); Congressional Research Service, *The Judgment Fund: History, Administration, and Common Usage*, at Summary (Mar. 7, 2013) ("Although primarily used for the payment of principal awards, attorneys' fees and interest on awards may also be paid from the Fund."), https://fas.org/sgp/crs/misc/R42835.pdf; Pls.' Reply in Support of their Mot. for an Award of Fees, Costs, & Expenses at 2-3, Doc. 215 (Dec. 20, 2013).

II. ALTERNATIVELY, PLAINTIFFS ARE PREVAILING PARTIES ENTITLED TO RECOVERY UNDER ECOA AND EAJA

Plaintiffs alternatively seek recovery of fees and costs under ECOA, and expenses under EAJA. Under each statute, while a court has considerable discretion in determining the *amount* of an award, if a party has completed a "successful action" or is a "prevailing party," an award must be made. *See* 15 U.S.C. § 1691e(d); 28 U.S.C. § 2412(d)(1)(A); *Turner v. D.C. Bd. of Elections & Ethics*, 354 F.3d 890, 895-96 (D.C. Cir. 2004).

USDA claims that Plaintiffs are not "prevailing parties" under *Buckhannon Board & Care Home Inc. v. West Virginia Department of Health & Human Resources*, 532 U.S. 598, 604 (2001), and its progeny, as is required to recover under these statutes. USDA Resp. at 7-10. As it did in the previous round of briefing on Plaintiffs' Motion, USDA artificially limits the circumstances under which a party may be deemed to have "prevailed." *See id.* A judgment on the merits is quite clearly not required. *CRST Van Expedited, Inc. v. E.E.O.C.*, 136 S. Ct. 1642, 1651 (2016). A prevailing party need only have been awarded "*some relief* by the court," *Buckhannon*, 532 U.S. at 603 (emphasis added), and as previously described, courts have found that prevailing party status may be supported in a variety of circumstances, including court-

approved settlements, administrative hearing decisions, orders leading to agency action, and favorable jurisdictional rulings. 2013 Mem. at 22-24; Fees Supplement at 10-11.

Defendant claims that Plaintiffs did not "prevail" because they failed to "'succeed on any significant issue'" that "'achieve[d] some of the benefit . . . sought in bringing suit.'" USDA Resp. at 8 (quoting *Hensley v. Eckhart*, 461 U.S. 424, 433 (1983)). But Plaintiffs did exactly that. After staving off USDA's efforts to have their ECOA claims dismissed, Plaintiffs obtained orders tolling the applicable statutes of limitation for all similarly situated female farmers, not just the ten named Plaintiffs, even though they had not obtained class certification. This achievement cannot be understated. Without the multiple orders tolling the statute of limitation for women farmers, thousands of women would have been unable to seek relief through the administrative claims process and recover approximately $177.5 million. The tolling of the statute of limitations, which preserved the claims of thousands of individuals for many years, *is* a type of declaratory or injunctive relief awarded by the Court in response to Plaintiffs' requests, *see* 2013 Mem. at 13-14, and that relief is "'concrete,' 'irreversible,' and incapable of being diminished through later proceedings." *Keane for Congress Comm. v. Fed. Election Comm'n*, No. Civ.A. 04-0007 JDB, 2006 WL 89830, at *4 (D.D.C. Jan. 13, 2006).

USDA tries to dismiss the Court's tolling orders as simply having maintained the status quo to "facilitate the litigation process," USDA Resp. at 12-13, but these orders, entered at Plaintiffs' request, resulted in real relief for thousands of women, many of whom later recovered through the administrative claims program and could not have done so without the Court orders. Apparently well aware of the import of orders tolling the statute of limitations for all putative plaintiffs following the denial of class certification, on the same day the Court issued one of these orders in 2007, USDA moved for partial reconsideration. Def.'s Mot. for Partial

Reconsideration of the Court's Dec. 4, 2007 Order Granting Indefinite Stay, Doc. 97 (Dec. 4, 2007). USDA asked the Court to limit any tolling to a 60-day period, as it was, in USDA's view, time for individuals to either file their own lawsuits or lose their claims. Mem. in Support of Def.'s Mot. for Partial Reconsideration of the Court's Dec. 4, 2007 Order Granting Indefinite Stay at 2-3, Doc. 97 (Dec. 4, 2007). The Court promptly denied Defendant's motion, and the tolling continued for years to come. Order, Doc. 98 (Dec. 7, 2007).[1]

USDA mischaracterizes Plaintiffs' position by stating that Plaintiffs argue simply that their filing of this suit was the catalyst for the government to provide the administrative claims process. USDA Resp. at 10. To the contrary, Plaintiffs have consistently insisted that they "have not merely catalyzed a voluntary change." 2013 Mem. at 21. After the Court denied USDA's motions to dismiss Plaintiffs' ECOA claims, it encouraged the parties' settlement discussions, stayed the litigation, and entered the orders tolling the statute of limitations for all similarly situated women farmers, after which Plaintiffs engaged with USDA with respect to developing the administrative claims process. These changes in the parties' relationship were marked by the necessary "judicial imprimatur," such that Plaintiffs did more than cause USDA to take voluntary steps. *See id.* at 20-21, 25-29; Fees Supplement at 11-12.

As the D.C. Circuit previously noted, Plaintiffs in this case (and those in the parallel action brought by Hispanic farmers), would be entitled to recover attorneys' fees under ECOA if they proved lending discrimination by USDA. *Garcia v. Vilsack*, 563 F.3d 519, 524 (D.C. Cir. 2009) ("Under the ECOA, to the extent appellants can offer proof that the USDA discriminated against them in the administration of its credit programs, appellants will be entitled to recover

[1] USDA suggests that the tolling simply occurred for appeal purposes and then with USDA's consent when it announced that the administrative claims process was in development, but that announcement happened years after the previous orders tolling the limitations period and USDA's 2007 Motion seeking to end the tolling. *See* Order, Doc. 111 (July 19, 2010) (stay to remain in place during settlement negotiations).

money damages and attorneys' fees, and, as appropriate, also injunctive and declaratory relief."), *cert. denied*, 558 U.S. 1158 (2010). After fighting to preserve women farmers' discrimination claims for a decade and a half, Plaintiffs secured for many thousands of women farmers the opportunity to provide their proof of discrimination to an independent adjudicator, and over 3,000 of them successfully did just that. Plaintiffs should be deemed prevailing parties.

III. RECOVERY OF FEES, COSTS, AND EXPENSES IS NOT BARRED BY INDIVIDUAL SETTLEMENT AGREEMENTS SIGNED IN THE ADMINISTRATIVE CLAIMS PROCESS

USDA makes much of the individual settlement agreements that women farmers submitted in order to participate in the administrative claims process, USDA Resp. at 5-7, but those documents should not bar recovery of reasonable fees, costs, and expenses in connection with the efforts of Plaintiffs and their counsel over the last decade and a half.

The form settlement agreement stated that individuals would not seek attorneys' fees beyond those allowed under the Framework describing the administrative claims process, but the Framework only limited the amount of attorneys' fees *in connection with individuals' filing of administrative claims* (in most cases, the limit was $1,500). Framework § XI, Doc. 155-1. It would be unreasonable to construe the settlement agreement and Framework to limit, not only fees recoverable for work specifically performed in connection with the filing of claims in that process, but for nearly 20,000 hours of work performed in connection with this lawsuit over the course of 17 years.

As USDA states, the Court dismissed Plaintiffs' claims aimed at securing further improvements to the administrative claims process. *See* USDA Resp. at 6. The Court held that (a) it lacked authority to change the terms of the administrative claims program; and (b) there were not sufficient allegations of a discriminatory purpose on the part of USDA with respect to

Plaintiffs' equal protection claim. Order at 10-12, Doc. 269 (Nov. 14, 2016). What the Court did *not* do, however, is construe the provisions of the settlement agreements or deem that because individuals had to sign settlement agreements to participate in the claims process, no attorneys' fees can be recovered now, including for significant work performed outside of the administrative claims process. The fact that the Court dismissed Plaintiffs' claims related to attempts to improve the administrative claims process does not mean that Plaintiffs and their counsel cannot now recover fees and expenses for their efforts during the more than a decade leading up to the claims process.

Arent Fox did collect modest fees for assisting several women farmers who filed successful claims, USDA Resp. at 6-7, but the efforts of the named Plaintiffs and their counsel in this lawsuit, including attorneys at Arent Fox, made available monetary relief ultimately recovered by thousands of women farmers, not just the fewer than 50 individuals assisted by Arent Fox in filing successful claims. And as described in the Supplemental Declaration of Marc Fleischaker, Arent Fox intends to return any fees collected from individual women farmers if the Court awards Plaintiffs fees, costs, and expenses. Doc. 272-1 ¶ 16 (Jan. 13, 2017).

IV. CONCLUSION

An award of fees, costs, and expenses to Plaintiffs and their counsel is supported by the facts and the law. Plaintiffs respectfully request that the Court award them reasonable fees, costs, and expenses under the common fund doctrine, or alternatively, under ECOA and EAJA.

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Respectfully submitted,

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