

[REDACTED]

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Privacy Act Protective Order<sup>1</sup>**

Mr. Michael Lewis, Esq.  
Chief Arbitrator  
ADR Associates  
1666 Connecticut Avenue, N.W., Suite 500  
Washington, D.C. 20009

Re: Petition of United States Department of Agriculture  
Claim No. [REDACTED]  
Arbitration No. [REDACTED]

Dear Chief Arbitrator:

The Monitor has completed review of the Petition. For the following reasons, the Monitor will not direct reexamination of the Arbitrator's Decision.

**I. PROCEDURAL POSTURE**

This is a Track B matter involving the following claims:

- underfunding of and restrictive condition (supervised bank account) placed on Emergency and Operating Loans from 1981 through 1984;
- denial of Operating Loans in 1985 and 1989.

The Arbitrator's Decision granted relief, awarding the Claimant \$[REDACTED] in damages. The United States Department of Agriculture ("USDA") has petitioned the Monitor for review.

The following issues are before the Monitor for review:

1. Whether the claim should be reexamined because of the way the Arbitrator applied the *McDonnell Douglas* framework in analyzing the Claimant's claims of race discrimination.

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<sup>1</sup> *Pigford v. Glickman*, Second Amended Supplemental Privacy Act Protective Order (D.D.C. July 14, 2000).

*The Arbitrator found the Claimant failed to prove discrimination for some of his claims, including delayed funding of Operating and Emergency Loans in 1981, attempts to apply for Farm Ownership Loans in 1981 and 1982, and denial of Operating Loans in 1990 and 1994. The Arbitrator found the Claimant had proven discrimination in the underfunding of the Claimant's Emergency Loans and Operating Loans from 1981 to 1984. The Arbitrator also found the Claimant had proven discrimination in the way USDA supervised the Claimant's loans. Finally, the Arbitrator concluded that the Claimant had proven discrimination in the denial of his applications for Operating Loans in 1985 and 1989. For each of the claims on which the Claimant prevailed, the Arbitrator found the record showed white farmers were treated more favorably by USDA, and there was no adequate explanation for the difference in treatment received by the Claimant.*

2. Whether the claim should be reexamined because the Arbitrator found USDA treated white farmers more favorably than the Claimant.

*In evaluating the Claimant's allegation that he received less than adequate funds for his operation from 1981 through 1984, the Arbitrator compared the loan amounts the Claimant from USDA with the amounts received by four specifically identified white farmers. The Arbitrator concluded that the Claimant received "a lower percentage of his minimum needs than did similarly situated white farmers." The Arbitrator found that while two of the white farmers also had supervised bank accounts, both were treated more favorably than the Claimant because they had supervised accounts for less time and they were not required to make trips to the USDA office to obtain approval for disbursements as frequently as the Claimant. Finally, the Arbitrator found that the white farmers who were similarly situated to the Claimant had received loans from USDA in 1985 and 1989, while the Claimant was denied loans. The Arbitrator noted errors in the Farm and Home Plan prepared by USDA for the Claimant in 1985 and a refusal by the County Supervisor to recalculate the Claimant's Farm and Home Plan to eliminate low yields after the Claimant's successful administrative appeal in 1989. The Arbitrator also found USDA "spent considerably more effort" revising the Farm and Home Plan of a white farmer in 1985, "presumably to make it cash flow," and noted that in 1989 two other white farmers received loans when the Claimant was denied.*

3. Whether the claim should be reexamined because of the way the Arbitrator calculated damages and awarded debt relief.

*The Arbitrator awarded the Claimant a total of \$ [REDACTED] in damages: \$ [REDACTED] in economic damages and \$ [REDACTED] in non-economic damages. In calculating economic damages, the Arbitrator accepted the analysis in the testimony of Claimant's damages expert, but reduced the amount of damages to reflect smaller yields than those used by the Claimant's damages expert. The Arbitrator also*

*refused to award damages for the years 1985-1989, when the Claimant received funding from private sources. The Arbitrator chose not to mitigate the Claimant's damages for any non-farm income during the relevant time period. The Arbitrator did not explicitly address whether the Claimant's damages should have been offset by the amount of the debt settlement he received from USDA in 1989, although the Arbitrator's award did not incorporate such an offset.*

## **II. THE RECORD FOR MONITOR REVIEW**

The record upon petitioning for Monitor review consists of:

1. The Arbitrator's Decision, [REDACTED]
2. The record before the Arbitrator;<sup>2</sup>
3. The Petition for Monitor Review, captioned, "Petition of the Defendant Ann M. Veneman, in Her Official Capacity of Secretary of the United States Department of Agriculture, for Monitor Review of the [REDACTED] Track B Arbitration" ("Petition"); and
4. The Non-Petitioning Party's Response, captioned, "Opposition of Claimant, [REDACTED] to USDA's Petition for Monitor Review" ("Petition Response").

## **III. SUBSTANTIVE STANDARD OF REVIEW**

Under the Consent Decree, it is the duty of the Monitor to:

[d]irect the [F]acilitator, [A]djudicator or [A]rbitrator to reexamine a claim where the Monitor determines that a clear and manifest error has occurred in the screening, adjudication, or arbitration of the claim and has resulted or is likely to result in a fundamental miscarriage of justice.<sup>3</sup>

The Monitor will find clear and manifest error where the Monitor, in reviewing the entire record, is left with a definite and firm conviction that a mistake has been made. If the error has resulted, or is likely to result, in a fundamental miscarriage of justice, the Monitor will direct reexamination.

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<sup>2</sup> Both USDA and the Claimant designated portions of the record for the Monitor's review. The Monitor has reviewed the designated record and the copies of the record provided by both parties. See Claimant's Designation of Record (Volume I and II); USDA Designation of Record (Tabs 1 through 16).

<sup>3</sup> *Pigford v. Glickman*, Consent Decree, ¶ 12(b)(iii) (D.D.C. April 14, 1999).

#### **IV. ANALYSIS OF CLAIMS**

##### **A. Factual Background**

[REDACTED] learned farming while growing up on his family farm.<sup>4</sup> The Claimant worked with his father to grow primarily cotton and soybeans.<sup>5</sup> After a year in college and several years working out of state, the Claimant returned to his home state in 1975 and began his own farming operation.<sup>6</sup> The Claimant leased approximately 100 acres of farmland and raised cotton and soybeans.<sup>7</sup> By 1979, his farming operation had grown to nearly 150 acres.<sup>8</sup>

##### **1. USDA Loans and Supervised Accounts from 1981 to 1984**

In 1980, flooding in the Claimant's county destroyed most of his soybean crop – approximately eighty percent of it according to USDA.<sup>9</sup> Based on this significant loss, USDA determined in early 1981 that the Claimant was eligible for an Emergency Loan in the amount of \$25,400.<sup>10</sup> The Claimant subsequently applied for USDA credit, seeking funds not only to cover his 1980 disaster losses, but also to pay for his 1981 operating expenses.<sup>11</sup> The Claimant's May 1981 application requests assistance "to refinance debts and [for] 1981 crop expenses."<sup>12</sup> At the time, the Claimant's farming operation consisted of 100 acres of cotton and 80 acres of soybeans.<sup>13</sup>

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<sup>4</sup> Direct Testimony of [REDACTED], at 1. Because the Claimant has not petitioned for Monitor review on the claims denied by the Arbitrator, the Monitor will not address the facts relating to those claims, unless they relate in some material way to the issues raised by USDA in its Petition.

<sup>5</sup> Direct Testimony of [REDACTED], at 1.

<sup>6</sup> Direct Testimony of [REDACTED], at 1.

<sup>7</sup> Direct Testimony of [REDACTED], at 1.

<sup>8</sup> Direct Testimony of [REDACTED], at 1.

<sup>9</sup> Direct Testimony of [REDACTED], at 2; USDA Ex. 3.

<sup>10</sup> Direct Testimony of [REDACTED], at 3; USDA Ex. 3. USDA's Calculation of Actual Losses form is dated February 4, 1981. USDA Ex. 3. It states that the Claimant's "losses are of sufficient magnitude to qualify this applicant for an Emergency actual loss loan." USDA Ex. 3.

<sup>11</sup> Direct Testimony of [REDACTED], at 2-3; USDA Ex. 2.

<sup>12</sup> Direct Testimony of [REDACTED], at 2-3; USDA Ex. 2. The loan application and Farm and Home Plan are both dated May 8, 1981. USDA Ex. 2, 4. According to the Claimant, USDA officials – not the Claimant – would fill out his loan applications and related Farm and Home Plans. Direct Testimony of [REDACTED] at 2-3. According to the Claimant, "[w]e were never allowed to put in any of the figures. All we do is sign our name," and if the farmer disagreed with the loan amount and refused to sign, "you didn't get the loan." Direct Testimony of [REDACTED], at 2-3. According to the County Supervisor, the Claimant "would tell me what his debts, assets, crops, living expenses, etc. were, and I wrote them down into the plan for him." The County Supervisor would talk to the Claimant about adjustments if the County Supervisor thought the information "seemed wrong to me." Direct Testimony of County Supervisor (1981-1983), at 4.

<sup>13</sup> Direct Testimony of [REDACTED] at 3; USDA Ex. 4.

In June 1981, the Claimant received two Emergency Loans – one for \$25,400 and one for \$600.<sup>14</sup> During this time USDA also agreed to subordinate its security interests in the Claimant’s 1981 crop so he could obtain a \$4,000 loan from a private lender for “crop expenses.”<sup>15</sup> USDA did not give the Claimant an Operating Loan in 1981 despite his request for that assistance.<sup>16</sup> According to the Claimant, the USDA loan funds were not “nearly enough” for him to farm the acres of cotton and soybeans he had in 1981.<sup>17</sup> USDA placed the Claimant’s Emergency Loan funds in a supervised account and, rather than disburse the funds in lump sums, USDA required the Claimant to present an invoice for each purchase to get a check from the County Office.<sup>18</sup>

Over the next three years, the Claimant received additional loans from USDA.<sup>19</sup> In 1982, the Claimant received a \$16,000 Operating Loan.<sup>20</sup> The Claimant thought this amount was inadequate for the acres he planned to farm.<sup>21</sup> In 1983, the Claimant received a \$16,000 Emergency Loan.<sup>22</sup> This too was not enough, because the year before there was another disaster and the Claimant had debts from 1982 to pay as well as production expenses in 1983.<sup>23</sup> In 1984, the Claimant applied for and received two Operating Loans – one for \$24,000 and another for \$8,530.<sup>24</sup> According to the Claimant, he needed about \$53,000 for the acres of cotton and soybeans he planted in 1984.<sup>25</sup>

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<sup>14</sup> Direct Testimony of [REDACTED], at 3-4; USDA Ex. 6, 7.

<sup>15</sup> USDA Ex. 10.

<sup>16</sup> Direct Testimony of [REDACTED], at 3-4.

<sup>17</sup> According to the Claimant, he needed another \$37,000 for 1981 production of cotton and soybeans. Direct Testimony of [REDACTED], at 4.

<sup>18</sup> Direct Testimony of [REDACTED], at 5-6; Claimant Ex. 55.

<sup>19</sup> Direct Testimony of [REDACTED], at 6-8.

<sup>20</sup> Direct Testimony of [REDACTED], at 6; USDA Ex. 15.

<sup>21</sup> The Claimant estimated he needed \$37,000 for 1982 at \$300 per acre for cotton and \$90 per acre for soybeans. Direct Testimony of [REDACTED], at 6.

<sup>22</sup> Direct Testimony of [REDACTED], at 7; USDA Ex. 24. Two Farm and Home Plans with the same date exist for the 1983 farming year. USDA Ex. 19, 20. The acreage calculations in one Farm and Home Plan are not clear. USDA Ex. 19. The legible Farm and Home Plan states that the Claimant planned to farm approximately 69 acres of cotton and approximately 52 acres of soybeans. USDA Ex. 20; Direct Testimony of [REDACTED], at 7. In addition to the 1983 Emergency Loan, USDA also agreed to subordinate its security interests in the Claimant’s farm equipment and 1983 crops to a \$2,000 operating loan from a private lender. USDA Ex. 27.

<sup>23</sup> Direct Testimony of [REDACTED], at 7.

<sup>24</sup> Direct Testimony of [REDACTED], at 7-8; USDA Ex. 34, 40. The Claimant’s first 1984 Farm and Home Plan states that the Claimant planned to farm 148 acres of cotton and 105 acres of soybeans. USDA 32; Direct Testimony of [REDACTED], at 7. The Claimant applied for a second Operating Loan in mid-1984; the purpose of this loan was so the Claimant could make an installment payment on some private debt and thereby avoid foreclosure. Direct Testimony of Assistant County Supervisor (1982-1985), at 3; USDA Ex. 36. The Farm and Home Plan for this application listed the same crop acreage

As with the Claimant's 1981 loan funds, USDA placed all of the loan funds the Claimant received from 1982 to 1984 in supervised bank accounts.<sup>26</sup> USDA also continued its practice of disbursing the Claimant's supervised funds by expense invoice, rather than in lump sums.<sup>27</sup>

## **2. Denial of Operating Loan in 1985**

By 1985, the Claimant was struggling.<sup>28</sup> According to the Claimant, his operation was suffering from years of underfunded USDA loans and generally inadequate USDA assistance, from disasters in 1980 and in 1982, and from the forced sale of his farming equipment by USDA in 1984.<sup>29</sup>

Seeking help, the Claimant applied for an Operating Loan in early 1985.<sup>30</sup> USDA denied his request, stating the Claimant had "[i]nsufficient repayment ability based on a realistic Farm and Home Plan."<sup>31</sup> The Claimant's 1985 Farm and Home Plan projected the Claimant would have \$25,577 on hand at the end of 1985 to repay a proposed Operating Loan, plus interest, in the amount of \$34,176.<sup>32</sup> This calculation rested, in part, on the assumption that the Claimant's family living expenses for 1985 would be \$17,500, an amount that was

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figures as the earlier Farm and Home Plan for 1984. USDA Ex. 37. In addition to the 1984 Operating Loans, USDA also agreed to subordinate its security interests in the Claimant's farm equipment and 1984 crops to a \$12,000 operating loan from a private lender. Direct Testimony of Assistant County Supervisor (1982-1985), at 3; USDA Ex. 1, 35.

<sup>25</sup> Direct Testimony of [REDACTED], at 8.

<sup>26</sup> Direct Testimony of [REDACTED], at 5-6; Claimant Ex. 55.

<sup>27</sup> Direct Testimony of [REDACTED], at 5-6; Claimant Ex. 55.

<sup>28</sup> Direct Testimony of [REDACTED], at 8.

<sup>29</sup> Direct Testimony of [REDACTED], at 8. The Claimant sold his farm equipment on August 2, 1984, to help with his USDA debt. USDA Ex. 39, 50. The equipment was security on the Claimant's outstanding USDA loans. USDA Ex. 39, 50. The Claimant's USDA debt at the time stood at \$107,934.67. USDA Ex. 39. The Claimant's equipment was sold for \$2,700. USDA Ex. 39, 50. According to the Claimant, USDA sold his equipment to a neighbor and friend, who later sold some of the equipment back to the Claimant. Direct Testimony of [REDACTED], at 8. The Claimant also borrowed equipment to keep farming. Direct Testimony of [REDACTED], at 8.

<sup>30</sup> USDA Ex. 49. The Claimant filed a loan application on March 11, 1985. USDA Ex. 44. The application did not state the purpose for which he sought USDA credit, *see* USDA Ex. 44, although the Claimant's testimony suggests that he sought an Operating Loan, *see* Direct Testimony of [REDACTED], at 8. The County Committee certified the Claimant as eligible for USDA credit on April 5, 1985. USDA Ex. 48.

<sup>31</sup> USDA Ex. 49.

<sup>32</sup> USDA Ex. 46; Direct Testimony of County Supervisor (1985-1991), at 3-4. Although the Claimant also had other debts, under USDA's continuation loan policy, he could have been eligible for an annual Operating Loan if he could show sufficient cash flow to repay the new loan for that year and the interest on that loan. Direct Testimony of County Supervisor (1985-1991), at 4. *See generally* FmHA AN No. 1113 (1960) (Nov. 30, 1984).

substantially higher than any previous estimate of, or actual amount paid for, the Claimant's family living expenses.<sup>33</sup>

### **3. Private Financing and Debt Settlement**

After the 1985 loan denial, the Claimant continued to farm from 1986 through 1988, first with loans from a local farmer and then with loans from a local seed and chemical company.<sup>34</sup> In November 1988, the Claimant received a Notice of Availability of Loan Servicing Programs For Delinquent Farm Borrowers from USDA.<sup>35</sup> The Claimant responded to the Notice, requesting a write off of his delinquent loans.<sup>36</sup> On February 3, 1989, the County Committee approved the Claimant's application for Settlement of Indebtedness.<sup>37</sup> As reasons for the Claimant's delinquency, USDA's Debt Settlement/Release of Liability Summary document included "[l]ow yields during disaster years," as well as "[l]ow prices" and "[m]arginal land."<sup>38</sup> By letter dated February 21, 1989, the Acting State Director informed the Claimant that his application for debt settlement was approved.<sup>39</sup> USDA cancelled the Claimant's outstanding loans in February 1989.<sup>40</sup>

### **4. Denial of Operating Loan in 1989**

Around this time, the Claimant learned he would no longer have private financing to support his farming operation and so he turned once again to USDA for assistance.<sup>41</sup> In March 1989, the Claimant signed a form listing income and expenses for 1988 to use in

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<sup>33</sup> USDA Ex. 46, Section J (listing Cash Family Living Expenses of \$17,500). For example, the Claimant's actual family living expenses in 1983 were \$6,000 according to his 1984 Farm and Home Plan. USDA Ex. 32; *see also* USDA Ex. 4 (1981 Farm and Home Plan), 13 (1982 Farm and Home Plan), 19-20 (1983 Farm and Home Plans).

<sup>34</sup> Direct Testimony of [REDACTED], at 8-10.

<sup>35</sup> USDA Ex. 51. The Notice provided information regarding USDA's primary and preservation loan servicing programs. Examples of primary loan servicing actions include: consolidation, rescheduling, and/or reamortization, deferral of principal and interest payments, reducing interest rates on loans, and write-down of debt. Examples of preservation loan servicing actions include: leaseback/buyback and homestead protection. 7 C.F.R. § 1951.901 (1989).

<sup>36</sup> The Claimant wrote on the Acknowledgement Form, "I am asking that my FmHA loan be written off." USDA Ex. 53. In 1989, the Claimant's outstanding debt totaled \$167,296.80. USDA Ex. 55.

<sup>37</sup> USDA Ex. 54.

<sup>38</sup> USDA Ex. 55.

<sup>39</sup> USDA Ex. 5. The Claimant did not receive a write-down, but instead received debt settlement. Under USDA regulations, there are four types of debt settlement. 7 C.F.R. § 1956.54(a)-(d) (1989). The Claimant received a cancellation, which is the final discharge of a debt without any payment on it. 7 C.F.R. § 1956.54(b) (1989); USDA Ex. 56.

<sup>40</sup> USDA Ex. 55, 56.

<sup>41</sup> Direct Testimony of [REDACTED], at 10-11.

connection with his application for an Operating Loan and signed a Farm and Home Plan dated March 24, 1989.<sup>42</sup>

On May 19, 1989, the County Committee found the Claimant ineligible for two reasons – “past managerial ability” and not able “to show 100% cash flow.”<sup>43</sup> The County Supervisor clarified the “cash flow” reason in a letter to the Claimant dated May 22, 1989, stating that “[y]our non-farm income and projected 1989 crop income will not repay outstanding obligations due 12/31/89. Your balance available is \$130,065 and your debt repayment is \$149,798.”<sup>44</sup>

The Claimant appealed the County Committee’s decision.<sup>45</sup> The Hearing Officer for USDA’s National Appeals Staff heard his appeal and reversed the decision.<sup>46</sup> The Hearing Officer found that the record showed the Claimant met the eligibility criteria the County Committee was authorized to review.<sup>47</sup> The Hearing Officer determined that the Claimant showed he did possess the managerial ability needed to assure reasonable prospects of success, and the County Committee should not have considered two years where the Claimant’s yields were low due to disaster conditions.<sup>48</sup>

The County Committee subsequently found the Claimant eligible for the proposed Operating Loan,<sup>49</sup> but the loan was denied by the County Supervisor based on the Farm and Home Plan, which had been prepared in March.<sup>50</sup> The Claimant never received an Operating Loan in response to his 1989 application.<sup>51</sup>

After 1989, the Claimant continued to try and farm, although his financial struggles led him to declare bankruptcy in 1992.<sup>52</sup> According to the Claimant, his dealings with USDA

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<sup>42</sup> USDA Ex. 57, 58. The Claimant’s application form is dated May 19, 1989, the same date as the County Committee’s Certification. USDA Ex. 61.

<sup>43</sup> USDA Ex. 61.

<sup>44</sup> USDA Ex. 62.

<sup>45</sup> Direct Testimony of [REDACTED], at 11; USDA Ex. 63, 64, 65.

<sup>46</sup> USDA Ex. 66, 67.

<sup>47</sup> The Hearing Officer found the County Committee should not have considered repayment ability or cash flow, because determining the repayment ability of an applicant is not the responsibility of the Committee. USDA Ex. 66.

<sup>48</sup> USDA Ex. 66, 67.

<sup>49</sup> USDA Ex. 68, 69.

<sup>50</sup> Direct Testimony of County Supervisor (1985-1991), at 5. According to the County Supervisor, no revision was made to the Farm and Home Plan because “nothing about his operation changed. All of the figures would have been exactly the same so we submitted the same plan.” Direct Testimony of County Supervisor (1985-1991), at 5; Transcript, at 199-201 (cross-examination of County Supervisor (1985-1991)).

<sup>51</sup> Direct Testimony of [REDACTED], at 11.

<sup>52</sup> Direct Testimony of [REDACTED], at 11-12.



caused him constant stress and pressure.<sup>53</sup> He suffered embarrassment and disappointment when he lost his family's farmland and when he twice lost his farming equipment.<sup>54</sup> He is still attempting to farm.<sup>55</sup>

### **B. The Arbitrator's Decision**

Following a Track B hearing on [REDACTED], the Arbitrator issued a Decision on [REDACTED], finding that the Claimant proved by a preponderance of the evidence that USDA discriminated against him on the basis of his race and that he suffered damages from that discriminatory conduct. The Arbitrator concluded that the Claimant proved discrimination with respect to USDA's: (1) underfunding of Emergency Loans and Operating Loans from 1981 to 1984; (2) use of supervised bank accounts for the Claimant's loans from 1981 to 1984; (3) denial of the Claimant's request for an Operating Loan in 1985; and (4) denial of the Claimant's request for an Operating Loan in 1989. For each of the claims, the Arbitrator credited the evidence presented by the Claimant that white farmers were treated more favorably and found no adequate explanation for the less favorable treatment of the Claimant by USDA. The Arbitrator awarded the Claimant \$ [REDACTED] in economic damages and \$ [REDACTED] in non-economic damages, for a total damages award of \$ [REDACTED]. The Arbitrator also awarded the Claimant debt relief.<sup>56</sup>

### **C. Analysis of Issues**

USDA has petitioned the Monitor for review. The Monitor has analyzed whether the claim should be reexamined under the tests for "clear and manifest error" and for "fundamental miscarriage of justice."

#### **1. Whether the claim should be reexamined because of the way the Arbitrator applied the *McDonnell Douglas* framework in analyzing the Claimant's claims of race discrimination**

In the Petition, USDA argues that the Arbitrator failed to properly apply the *McDonnell Douglas* framework in each instance where the Arbitrator found in favor of the Claimant.<sup>57</sup> USDA contends the government offered legitimate, non-discriminatory reasons for its

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<sup>53</sup> Direct Testimony of [REDACTED], at 15.

<sup>54</sup> Direct Testimony of [REDACTED], at 15.

<sup>55</sup> Direct Testimony of [REDACTED], at 15-16.

<sup>56</sup> Under the terms of the Consent Decree and the Stipulation and Order entered by the Court on February 7, 2001, the Claimant is entitled to debt relief for all debts which were identified by the Arbitrator as having been affected by the discrimination and for all subsequent debts in those loan programs. Consent Decree, ¶ 10(g)(ii); Stipulation and Order, ¶ 2 (D.D.C. February 7, 2001). Under the Arbitrator's findings, the Claimant would be entitled to debt relief for all Emergency Loans from 1981 forward and all Operating Loans from 1982 forward, as these were the first loans the Arbitrator found were affected by USDA's discrimination.

<sup>57</sup> Petition, at 3.

actions, and the Arbitrator failed to place the burden on the Claimant to prove those reasons were pretextual.<sup>58</sup> Instead, according to USDA, the Arbitrator required USDA to “prove” and “persuade,” when the *McDonnell Douglas* standard requires the Claimant to bear the burden of proof that the reasons offered by USDA were pretextual.<sup>59</sup> USDA asserts that the “Claimant offers no admissible evidence of pretext. He offers only his own opinion, based on assumption and speculation, that the actions of [the County Office] were racially motivated.”<sup>60</sup>

In the Petition Response, the Claimant argues that the Arbitrator properly applied the *McDonnell Douglas* framework.<sup>61</sup> The Claimant contends the Arbitrator accepted that USDA had articulated nondiscriminatory reasons for its actions, but then rejected those reasons as pretextual, after considering the credibility and weight of the evidence as a whole.<sup>62</sup> The Claimant asserts that the Arbitrator’s findings of fact on each claim for which the Arbitrator found discrimination were supported by record evidence, and there is no clear and manifest error in the Arbitrator’s findings that the Claimant proved the reasons proffered by USDA were not adequate, credible, or sufficient.<sup>63</sup>

*a. Clear and Manifest Error*

The Arbitrator’s Decision summarizes the legal standard set forth in the Consent Decree for Track B claims. The Consent Decree states that to prevail in a Track B claim, a claimant must demonstrate by a preponderance of the evidence that he or she was the victim of racial discrimination and suffered damages as a result.<sup>64</sup> The Arbitrator’s Decision recognizes that several means exist for proving discrimination by a preponderance of the evidence, including “the now traditional discriminatory treatment analysis set forth by the Supreme Court in *McDonnell Douglas v. Green*, 411 U.S. 792 (1973).”

The Arbitrator’s Decision describes the three-part analytical *McDonnell Douglas* framework: first, the Claimant must establish a *prima facie* case; second, if the Claimant does so, the burden shifts to the government to articulate legitimate, nondiscriminatory reasons for its actions; and third, the Claimant then has the opportunity to show that the articulated reasons are in fact a pretext for racial discrimination, because they have no basis in fact, they are not the true reasons for the government’s actions, or they are insufficient to

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<sup>58</sup> Petition, at 3-4.

<sup>59</sup> Petition, at 4-5.

<sup>60</sup> Petition, at 5.

<sup>61</sup> Petition Response, at 3-9.

<sup>62</sup> Petition Response, at 4-5 (citing *Reeves v. Sanderson Plumbing Prod., Inc.*, 530 U.S. 133 (2000) and *St. Mary’s Honor Center v. Hicks*, 509 U.S. 502 (1993)).

<sup>63</sup> Petition Response, at 5-9.

<sup>64</sup> Consent Decree, ¶ 10(g).

explain the challenged actions.<sup>65</sup> The Claimant retains the ultimate burden of persuasion to prove discrimination by a preponderance of the evidence.<sup>66</sup>

USDA does not object to the Arbitrator's use of the *McDonnell Douglas* framework in deciding Track B claims. Instead, USDA objects to how the Arbitrator applied the framework in this claim. The Monitor has reviewed the case law cited by the parties, the Arbitrator's Decision, and the record before the Arbitrator. The Arbitrator weighed the totality of the evidence and the inferences reasonably drawn from that evidence to conclude that USDA's articulated reasons: (1) were inadequate to explain the differences in funding offered to the Claimant and to white farmers in 1981-1984; (2) provided no "useful explanation" for the difference in treatment between the Claimant and white farmers in the use and management of supervised bank accounts from 1981-1984; (3) did not explain why the Claimant's 1985 Farm and Home Plan listed significantly higher family living expenses than prior years or why USDA spent considerably more effort revising a white farmer's Farm and Home Plan for 1985, presumably to make it cash flow; and (4) did not adequately explain why the County Supervisor failed to revise the Claimant's 1989 Farm and Home Plan, after a Hearing Officer found the Claimant's low yields in two previous years were due to disasters and hence should not have been used to determine his eligibility.

Although the Arbitrator's Decision does not expressly apply each step in the *McDonnell Douglas* test to the facts presented, the Monitor finds the Arbitrator applied an approach consistent with *McDonnell Douglas*. The final step in the framework requires an evaluation of the credibility or credence of USDA's proffered reasons for its treatment of the Claimant. The Arbitrator's disbelief of USDA's proffered reasons for its treatment of the Claimant, coupled with evidence establishing a *prima facie* case, is a legally sufficient basis from which to infer discrimination.<sup>67</sup>

USDA cites particular sentences in the Arbitrator's Decision, suggesting the Arbitrator did not place the burden on the Claimant to prove USDA's articulated reasons were pretextual. The Monitor has reviewed the Arbitrator's Decision, as well as the evidence in the record set forth by the Arbitrator for each of the claims on which the Claimant prevailed and finds no clear and manifest error in the conclusion that the Claimant proved USDA's reasons were pretextual.

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<sup>65</sup> *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-804 (1973).

<sup>66</sup> *See St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 507 (1993) (citing *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 252 (1981)).

<sup>67</sup> The Supreme Court has said, "The factfinder's disbelief of the reasons put forward by the defendant (particularly if disbelief is accompanied by a suspicion of mendacity) may, together with the elements of the *prima facie* case, suffice to show intentional discrimination. Thus, rejection of the defendant's proffered reasons will permit the trier of fact to infer the ultimate fact of intentional discrimination." *Reeves v. Sanderson Plumbing Prod., Inc.*, 530 U.S. 133, 147 (2000), quoting *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 511 (1993) (italics omitted).

Regarding the claim of inadequate Emergency and Operating Loans from 1981 to 1984, the Arbitrator found the Claimant received less than white farmers received for the years 1981 through 1984 and less than what USDA calculated as the minimum needed to ensure a reasonable prospect of success for his farming operation.<sup>68</sup> In documents and testimony presented to the Arbitrator, USDA articulated a reason for the amounts given to the Claimant: that they were the amounts reflected as “credit needed” on the Claimant’s Farm and Home Plans.<sup>69</sup> The Arbitrator rejected this reason as pretextual, based in part on testimony from USDA’s Farm Loan Chief concerning the average minimum costs for the farming of cotton and soybeans in the area where the Claimant farmed.<sup>70</sup> When questioned by the Arbitrator regarding the amounts the Claimant was given, the Farm Loan Chief stated, “I’m not defending what they’ve got” in the Farm and Home Plan as adequate for the size of the Claimant’s operation.<sup>71</sup>

The Arbitrator calculated the minimum cost per acre to farm cotton and soybeans and concluded the Claimant received less than the minimum per acre needed to farm the number of acres of these crops in his operation, even using the low range of costs cited by the Farm Loan Chief.<sup>72</sup> The Claimant testified that USDA loan funds were not adequate to support his operation, that he was not permitted to “put in any figures” on the Farm and Home Plan, and that if a farmer disagreed with the loan amount or refused to sign, “you didn’t get the loan.”<sup>73</sup> Based on the evidence as a whole, the Arbitrator rejected USDA’s articulated reason as insufficient to explain the amount of the Claimant’s loans from 1981 through 1984.<sup>74</sup>

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<sup>68</sup> See Direct Testimony of [REDACTED], at 3-4, 6-8, 14-15.

<sup>69</sup> Direct Testimony of Farm Loan Chief (1992-1997), at 9-12; USDA Ex. 4 (1981 Farm and Home Plan), 13 (1982 Farm and Home Plan), 19 and 20 (1983 Farm and Home Plans), 32 (1984 Farm and Home Plan).

<sup>70</sup> Transcript, at 125 (cross-examination of Farm Loan Chief (1992-1997)); Transcript, at 145-150 (Arbitrator’s examination of Farm Loan Chief (1992-1997)). The Arbitrator compared the low end costs identified by the Farm Loan Chief to the loan amounts received by the Claimant, finding he received less than the minimum amount each year. See Table 3 in the Arbitrator’s Decision.

<sup>71</sup> The Farm Loan Chief characterized the amount the Claimant received as “minimal, minimal cost.” Transcript, at 149-150 (Arbitrator’s examination of Farm Loan Chief (1992-1997)).

<sup>72</sup> The Arbitrator also compared the amounts the Claimant received to that received by white farmers and found that white farmers received funds sufficient to cover a higher percentage of their needs, compared with the percentage of need received by the Claimant. USDA also challenges this aspect of the Arbitrator’s Decision, discussed more fully below.

<sup>73</sup> Direct Testimony of [REDACTED], at 2-8.

<sup>74</sup> In its Petition, USDA asserts the Claimant was given the largest loan that would still allow his operation to cash flow. Petition, at 5. However, none of the USDA officials whose testimony is cited offer this as the reason for the amounts in the Farm and Home Plans. See Direct Testimony of Farm Loan Chief (1992-1997), at 11 (noting that the application does not show the amount requested); Direct Testimony of County Supervisor (1981-1983), at 3-4 (In a meeting with the Claimant in January 1982, “[w]e discussed

In its Petition, USDA also challenges the Arbitrator's analysis of the 1985 and 1989 loan denial claims.<sup>75</sup> USDA's articulated reason for denying the Claimant a loan in 1985 was that he did not qualify for a loan, because his Farm and Home Plan did not cash flow.<sup>76</sup> In his Petition Response, the Claimant asserts this reason was pretextual, because the USDA official who prepared his Farm and Home Plan in 1985 had substantially increased the Claimant's projected family living expenses.<sup>77</sup> The Arbitrator found this "striking increase" had the effect of transforming the Claimant's cash flow for the proposed 1985 Operating Loan from positive to negative, thereby resulting in the loan denial. Another USDA official offered a possible explanation – that the Claimant's estimated non-farm income was simply assumed to have all been used for family living expenses, but this official agreed that the Claimant needed only approximately \$9,000 to cash flow a continuation loan.<sup>78</sup> The Arbitrator found the Claimant's actual family living expenses in 1984 were only \$6,000, and rejected the generalized statement that farmers "do not use non-farm income to support their farming operations" as the reason for listing \$17,500 in family living expenses for the Claimant. The Arbitrator found the Claimant "met his burden of establishing by a preponderance of evidence that he was discriminated against" in USDA's denial of a loan in 1985.<sup>79</sup>

The Arbitrator's analysis of the Claimant's 1989 Operating Loan denial claim follows a similar pattern. The Claimant presented evidence that the Claimant was denied a loan in 1989, while USDA officials granted loans to two white farmers.<sup>80</sup> USDA's articulated

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his crop yields . . . [a]nd based on his yields, his operation would not cash flow," although the County Supervisor then approved a continuation loan in March 1982, because the Claimant could cash flow the principal and interest of the loan); Direct Testimony of Assistant County Supervisor (1982-1985), at 2-3 ("I worked with him on his 1983 farm and home plan. . . . He applied for an operating loan that year. We approved a loan for \$16,000").

<sup>75</sup> Petition, at 5.

<sup>76</sup> Petition, at 5 (citing Direct Testimony of Assistant County Supervisor (1982-1985), at 4; USDA Ex. 46).

<sup>77</sup> Petition Response, at 7-8. An Assistant County Supervisor who did not testify at the arbitration hearing completed the Claimant's Farm and Home Plan in 1985. Another USDA official, who had prepared prior Farm and Home Plans for the Claimant, did not know why the Claimant's family living expenses were projected to be \$17,500, when in 1983, the amount he had listed for family living expenses was \$3,000. Transcript, at 190 (cross-examination of Assistant County Supervisor (1982-85) *See* USDA Ex. 19-20 (1983 Farm and Home Plans).

<sup>78</sup> *See* Transcript, at 191-193 (cross-examination of Assistant County Supervisor (1982-1985)).

<sup>79</sup> The Arbitrator also compared the Claimant's treatment to that received by white farmers, who received loans in 1985. This evidence included that "someone, presumably . . . County officials, spent considerably more effort" revising a white farmer's Farm and Home Plan in 1985 to make it cash flow, while USDA officials apparently made no effort to work with the Claimant to make his Farm and Home Plan reflect his actual expenses or the use of his income. Instead, according to the Arbitrator, "[t]hey apparently made the decision for him and denied his 1985 operating loan."

<sup>80</sup> *See* Direct Testimony of [REDACTED], at 11, 14-15; Claimant Ex. 59, at 84-86 (Farmer C Operating Loan Promissory Note); Claimant Ex. 60, at 117-119 (Farmer D Operating Loan Promissory Note).

nondiscriminatory reason for the denial was that the Claimant could not show repayment ability.<sup>81</sup> In assessing whether this proffered denial reason was pretextual, the Arbitrator reviewed the way in which USDA processed the Claimant's application.

The County Committee initially found the Claimant ineligible based on "past managerial ability" and "not [able] to show 100% cash flow."<sup>82</sup> The County Supervisor's letter to the Claimant informing him of the denial contains more detail regarding the Claimant's lack of repayment ability: "Your non-farm income and projected 1989 crop income will not repay outstanding obligations due on 12/31/89. Your balance available is \$130,065 and your debt repayment is \$149,798."<sup>83</sup> A USDA Hearing Officer reversed the County Committee's decision, in part because the Hearing Officer found the Claimant had the managerial ability needed to qualify for a loan.<sup>84</sup> In the Hearing Officer's letter to the Claimant, the Hearing Officer stated the Claimant's low yields from two disaster years should not have been used to evaluate the Claimant's managerial ability to run a profitable operation in 1989.<sup>85</sup> The County Supervisor denied the Claimant a loan the same day he received the Hearing Officer's decision, without revising the Claimant's Farm and Home Plan.<sup>86</sup>

The Claimant argued the County Supervisor's failure to recalculate the Claimant's projected income was evidence of discrimination, especially because the Hearing Officer had stated the low yields due to disasters should not have been used in assessing the Claimant's eligibility.<sup>87</sup> The Arbitrator agreed, finding "[c]learly, [the County Supervisor] underestimated the value of projecting accurate yields" for the Claimant's Farm and Home Plan.

The Monitor has reviewed the record and the Arbitrator's Decision. The Monitor finds no clear and manifest error in the Arbitrator's application of the *McDonnell Douglas* analytical framework to the record evidence for the claims at issue in USDA's Petition. Based on the Monitor's review, it appears the Arbitrator did not find that USDA had failed to meet its

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<sup>81</sup> See Direct Testimony of County Supervisor (1985-1991), at 5.

<sup>82</sup> USDA Ex. 61.

<sup>83</sup> USDA Ex. 62. The balance available and debt repayment figures were taken from the Claimant's Farm and Home Plan, dated March 24, 1989. USDA Ex. 58.

<sup>84</sup> USDA Ex. 66, 67.

<sup>85</sup> USDA Ex. 66, 67. Under USDA regulations, a Farm and Home Plan, including the projected crop yields, should be based on a borrower's available 5-year production history. However, when an applicant's production history has been affected by a disaster, county average yields are to be substituted for the borrower's actual yields in the disaster years. 7 C.F.R. § 1924.57(d) (1989). Increasing the Claimant's projected yields on his Farm and Home Plan would increase his projected income, which would improve his cash flow.

<sup>86</sup> USDA Ex. 70; Transcript, at 200 (cross-examination of County Supervisor (1985-1991)).

<sup>87</sup> Transcript, at 244 (closing argument of Claimant's counsel); Transcript, at 200-201 (cross-examination of County Supervisor (1985-1991)).

burden of articulating a legitimate, non-discriminatory reason for its actions. Rather, the Arbitrator ruled in the Claimant's favor because the Arbitrator found the Claimant had proven USDA's reasons were pretextual because they had no basis in fact, were not the true reason, or were insufficient to explain the challenged conduct in light of the totality of the evidence in the record. As is required by the Consent Decree, the Claimant retained the burden of proving discrimination by a preponderance of the evidence. The Monitor finds no clear and manifest error in the Arbitrator's Decision.

*b. Fundamental Miscarriage of Justice*

An analysis of fundamental miscarriage of justice is not necessary where the Monitor makes no finding of clear and manifest error.

**2. Whether the claim should be reexamined because the Arbitrator found USDA treated white farmers more favorably than the Claimant**

In the Petition, USDA states that the Arbitrator relied on inadmissible evidence to determine that four named white farmers were similarly situated to the Claimant.<sup>88</sup> Specifically, USDA argues that the Arbitrator erred in relying on the Claimant's testimony, because the Claimant lacked personal knowledge of the white farmers' farming operations.<sup>89</sup> USDA also argues that the Arbitrator erred in failing to consider factors, such as "similar financial conditions or loan histories" to determine if the white farmers were similarly situated to the Claimant.<sup>90</sup> USDA criticizes the Arbitrator's analysis of the amount of funding received by white farmers and the comparison with the loan amounts received by the Claimant, arguing the "actual numbers show that Claimant actually received substantially more than he needed at rates less than or equal to those of the allegedly similarly situated white farmers."<sup>91</sup>

In the Petition Response, the Claimant argues that the Arbitrator did not rely on the Claimant's testimony to determine whether the white farmers were similarly situated, but instead relied on USDA loan files submitted as exhibits by the Claimant.<sup>92</sup> The Claimant contends that USDA's "shotgun argument" and "blanket assertion that similarity was not established" does not contain "a single instance of a dissimilarity between the Claimant and a white farmer that would have impacted any of the loanmaking decisions relevant to this case."<sup>93</sup> The Claimant argues that USDA's critique of the Arbitrator's comparisons between

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<sup>88</sup> Petition, at 6-7.

<sup>89</sup> Petition, at 6-7.

<sup>90</sup> Petition, at 8.

<sup>91</sup> Petition, at 8-11.

<sup>92</sup> Petition Response, at 9-10, 15-16.

<sup>93</sup> Petition Response, at 11.

the loan amounts received by the Claimant and by white farmers is misleading, and USDA's own analysis is "dubious" and based on flawed methodology.<sup>94</sup>

*a. Clear and Manifest Error*

In his direct testimony, the Claimant named four white farmers, Farmers A, B, C, and D,<sup>95</sup> who he believed received more favorable treatment from USDA than he did.<sup>96</sup> In response to a discovery request by the Claimant, USDA produced loan files for each of these white farmers.<sup>97</sup> Relevant portions of these loan files, which contain loan applications, Farm and Home Plans, Promissory Notes, and other paperwork related to the white farmers' loan histories with USDA, were admitted into evidence by the Arbitrator. Contrary to the suggestion in USDA's Petition that the Arbitrator's Decision is based on "inadmissible evidence," the Arbitrator's Decision shows clearly that findings regarding the white farmers were based on USDA's loan documents from the white farmers' loan files. The Monitor finds no clear and manifest error based on the Claimant's general testimony or the Arbitrator's consideration of USDA loan files in comparing how the Claimant and white farmers from his county were treated.

USDA's loan documents showed that white farmers received loans in the years the Claimant was denied.<sup>98</sup> The loan documents also showed that white farmers either were not subjected to supervised bank accounts or were subject to the supervised bank accounts for a shorter time period than the Claimant and were permitted to receive their funds in lump sum payments, as opposed to USDA's requirement that the Claimant undertake separate approval transactions for the payment of each expense.<sup>99</sup> Finally, the loan documents

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<sup>94</sup> Petition Response, at 12-15, 18-24.

<sup>95</sup> The Monitor uses letters rather than names to protect the privacy of the named white farmers. The letters representing white farmers names are the same as those used in the Arbitrator's Decision.

<sup>96</sup> Direct Testimony of [REDACTED], at 14-15.

<sup>97</sup> Claimant Ex. 57, 58, 59, 60.

<sup>98</sup> The record shows Farmer A received a loan in 1981, Farmer B received loans in 1981-1984, Farmer C received loans in 1981 and 1982, and Farmer D received loans in 1981-1984. Claimant Ex. 57, at 11-22 (Farmer A 1981 Emergency Loan Promissory Notes); Claimant Ex. 58, at 9-14 (Farmer B 1981 Emergency Loan Promissory Notes), 22-24 (Farmer B 1982 Operating Loan Promissory Note), 36-38 (Farmer B 1983 Emergency Loan Promissory Note), 45-47 (Farmer B 1984 Operating Loan Promissory Note); Claimant Ex. 59, at 10-12 (Farmer C 1981 Operating Loan Promissory Note), 25-27 (Farmer C 1982 Operating Loan Promissory Note); Claimant Ex. 60, at 8-16 (Farmer D 1981 Emergency Loan Promissory Notes), 27-29 (Farmer D 1982 Emergency Loan Promissory Note), 39-41 (Farmer D 1983 Emergency Loan Promissory Notes), 49-51 (Farmer D 1984 Emergency Loan Promissory Note).

<sup>99</sup> The record shows Farmers A and C had supervised accounts in one year, although Farmer A was paid his loan funds in lump sum payments of at least \$40,000 per check. Claimant Ex. 57, 25-26. Farmer C's loan was also paid in lump sum installments. Claimant Ex. 59, at 13. None of the four white farmers had a supervised account for all four years (1981-1984), as the Claimant had.



showed the amounts received by the white farmers from 1981 through 1984.<sup>100</sup> The Arbitrator used this information, along with the testimony of a USDA official, to evaluate the Claimant's allegation that USDA underfunded his operation during this time. The Arbitrator concluded that "[i]f adequacy of funding was USDA's gold standard, during the period in question Claimant [REDACTED] received nothing but brass."

USDA's Petition takes issue with the Arbitrator's analysis of the evidence of more favorable treatment of white farmers. In comparing the amount of loan funds received by the Claimant and by white farmers, USDA faults the Arbitrator's Decision for failing to discuss the cash flow, collateral, net worth, off-farm income, and land quality of the Claimant and the white farmers.<sup>101</sup> For the loan denial claims, USDA argues credit factors such as credit history, delinquent debt, and type of loan should have been considered.<sup>102</sup>

The Arbitrator's Decision analyzes some of the factors USDA says are relevant in comparing the treatment of the Claimant and Farmers A, B, C, and D. For example, in comparing Farmer B to the Claimant with respect to his 1985 Operating Loan denial claim, the Arbitrator determined that both the Claimant and Farmer B were delinquent on USDA debt at the time, both grew the same kind of crops (cotton and soybeans), and both owned little land and instead primarily leased land for their farming operation.<sup>103</sup> Regarding the 1989 loan denial, the Arbitrator's Decision analyzes Farmer C's outstanding debt and notes that Farmer C was current in payments on his non-USDA debt.

The Arbitrator's Decision compares the loan denial the Claimant received in 1985 and 1989 with the loans given to white farmers those years by finding that, unlike the Claimant, USDA officials spent time with Farmer B in 1985, working to revise his Farm and Home Plan so that he could cash flow a loan despite his delinquent debt. In 1989, the Arbitrator's Decision also relies on USDA's failure to work with the Claimant to revise his Farm and Home Plan, despite a ruling by a Hearing Officer that low yields due to disasters should not have been used to project the Claimant's repayment ability. The Monitor finds the

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<sup>100</sup> Petition, at 6-11. Claimant Ex. 57, at 11-22 (Farmer A 1981 Emergency Loan Promissory Notes); Claimant Ex. 58, at 9-14 (Farmer B 1981 Emergency Loan Promissory Notes), 22-24 (Farmer B 1982 Operating Loan Promissory Note), 36-38 (Farmer B 1983 Emergency Loan Promissory Note), 45-47 (Farmer B Operating Loan Promissory Note); Claimant Ex. 59, at 10-12 (Farmer C 1981 Operating Loan Promissory Note), 25-27 (Farmer C 1982 Operating Loan Promissory Note); Claimant Ex. 60, at 8-16 (Farmer D 1981 Emergency Loan Promissory Notes), 27-29 (Farmer D 1982 Emergency Loan Promissory Note), 39-41 (Farmer D 1983 Emergency Loan Promissory Notes), 49-51 (Farmer D 1984 Emergency Loan Promissory Note).

<sup>101</sup> Petition, at 8.

<sup>102</sup> Petition, at 8.

<sup>103</sup> In fact, according to the Claimant, Farmer B had a greater amount of delinquent debt than the Claimant, yet the Claimant was denied a loan while Farmer B received a loan. Petition Response, at 12. See Claimant Ex. 58, at 54-57 (Farmer B's 1985 Farm and Home Plan), 61-63 (Farmer B's 1985 Promissory Note for Operating Loan).

Arbitrator's failure to address all of the criteria USDA cites as relevant to determining "similarity" for loan denial claims does not constitute clear and manifest error given the facts of this claim.

In assessing the evidence of the amount of funds received by the Claimant and by white farmers in the Claimant's county from 1981 through 1984, the Arbitrator made comparisons based on the size of the loan received by each farmer and the amount USDA's Farm Loan Chief testified would be the average minimum need per acre to farm cotton and soybeans. The Arbitrator's Decision contains three charts, which in summary provide the following information about the percentage of minimum need received by the Claimant and by the white farmers:

Percentage of Minimum Need for USDA Loans

	1981	1982	1983	1984
Farmer A	>100%	-	-	-
Farmer B	>200%	>100%	>100%	>100%
Farmer C	>100%	88%	-	-
Farmer D	>100%	>200%	>300%	>100%
Claimant	88%	43%	69%	48%

USDA faults the Arbitrator for comparing some of the white farmers' loans to the Claimant's loans, because in some years the Claimant received a different loan type than some of the white farmers. For example, in 1981, Farmer C received an Operating Loan, while the Claimant received an Emergency Loan.<sup>104</sup> Also, in 1982 and 1984, Farmer D received an Emergency Loan, while the Claimant received Operating Loans in 1982 and 1984.<sup>105</sup> However, as the Claimant points out, Farmers A, B, and D all received Emergency Loans like the Claimant in 1981 and Farmers B and C received Operating Loans like the Claimant in 1982 and 1984.<sup>106</sup> Thus, the record contains evidence, for each year, showing that the Claimant received funding of a lower percentage of need than white farmers received for the same type of loan. Under these circumstances, the Monitor finds no clear

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<sup>104</sup> Petition, at 9.

<sup>105</sup> See Petition, at 9. Although Farmer D received an Emergency Loan in 1982 and 1984, Farmer D's loan applications request funds for operating purposes for those years. Claimant Ex. 60, at 17-18 (Farmer D 1982 loan application), and 42-43 (Farmer D 1984 loan application).

<sup>106</sup> Petition Response, at 13-14. The Claimant had requested funds for operating purposes in 1981. Direct Testimony of [REDACTED], at 2-3; USDA Ex. 2. See Claimant Ex. 58, at 22-24 (Farmer B 1982 Operating Loan Promissory Note) and 45-47 (Farmer B 1984 Operating Loan Promissory Note); Claimant Ex. 59, at 25-27 (Farmer C 1982 Operating Loan Promissory Note).

and manifest error in the Arbitrator's consideration of the amounts received by white farmers in evaluating the Claimant's underfunding allegations.

USDA further faults the Arbitrator for not considering the net worth of each of the white farmers, arguing that "unlike Claimant, they all had a positive net worth when they applied for emergency loans."<sup>107</sup> The Claimant maintains that USDA is wrong, Farmers A and B had negative net worth during the years at issue.<sup>108</sup> More importantly, the Monitor notes USDA fails to show how net worth differences would have affected the amount of loans received by any farmer. USDA regulations do not require a positive net worth for loan eligibility nor does USDA show how net worth affected the determination of the loan amount given to any farmer whose records were before the Arbitrator.<sup>109</sup> For these reasons, the Monitor is not left with the firm and definite conviction that the Arbitrator made a mistake in comparing the percentage of minimum need received by the Claimant and four white farmers from the Claimant's county in evaluating whether the Claimant had proved discrimination in the amount of loan funds USDA offered him from 1981 through 1984.

The Arbitrator calculated that the loan amounts given to the Claimant from 1981 to 1984 averaged sixty-two percent of the minimum cost per acre needed to farm the number of acres of cotton and soybeans he attempted to plant each year.<sup>110</sup> In contrast, the Arbitrator's calculations for the four white farmers revealed that they generally received loans in excess of the minimum per acre costs to farm their cotton and soybean crops. In its Petition, USDA presents its own comparison, suggesting the Claimant received more than he needed to farm, because the Arbitrator should have compared what the Claimant's Farm and Home Plans indicated he needed with what he received.<sup>111</sup> The Monitor finds no clear and manifest error in the Arbitrator's Decision to compare what the Claimant received with what USDA's Farm Loan Chief testified was the minimum cost for the crops the Claimant grew.<sup>112</sup> The Claimant's testimony clearly established that USDA, not the Claimant, filled

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<sup>107</sup> Petition, at 9.

<sup>108</sup> Petition Response, at 14-15.

<sup>109</sup> For example, neither the security regulations nor the eligibility regulations for Emergency Loans require a farmer to demonstrate a positive net worth. *See, e.g.*, 7 C.F.R. § 1945.69(d) (1981) (security regulations); 7 C.F.R. § 1945.62 (1981) (eligibility regulations).

<sup>110</sup> *See* USDA Ex. 4, 13, 20, 32 (Claimant's Farm and Home Plans showing crop acreage); *see also* USDA Ex. 6, 7, 15, 24, 34 (Claimant's Promissory Notes showing loan amounts).

<sup>111</sup> Petition, at 10-11.

<sup>112</sup> The Arbitrator chose this comparison based on the evidence in the record for this claim. The Monitor notes this is one of several possible ways of analyzing whether USDA discriminated by underfunding loans to a claimant. As the Arbitrator noted, a farmer receiving less than adequate funding would be caught in a "vicious cycle," because the lack of funding would force the farmer to employ substandard inputs, which would result in substandard yields, which would then control the amount the farmer would receive the next year. As the Arbitrator found, the underfunding of a farmer's operation by USDA thus can lead to "an agricultural death spiral" over which the farmer has no control.

in the amounts in the Farm and Home Plans and that the Claimant believed the amounts he received were less than what he needed to operate successfully.<sup>113</sup>

USDA argues the Arbitrator's comparisons are not valid for other reasons. USDA points out Table 1 in the Arbitrator's Decision contains a computational error.<sup>114</sup> The Claimant agrees the Arbitrator made an error in reporting Farmer B's minimum costs in Table 1, but the Claimant notes the error is not made in Table 2, the table which compares Farmer B's projected minimum costs with the actual loan amounts received by Farmer B.<sup>115</sup> USDA also maintains the Arbitrator made a "crucial mistake" in failing to compute wheat costs for Farmer D in 1983 and 1984.<sup>116</sup> The Claimant argues USDA's calculations for Farmer D's small wheat crop are "absurd."<sup>117</sup> The Arbitrator clearly recognized Farmer D produced wheat, but declined to speculate the costs of wheat production, given the lack of evidence in the record regarding such costs.<sup>118</sup> The Monitor finds no clear and manifest error in the Arbitrator's minimum cost data.

Finally, USDA argues that the Arbitrator should have "correctly calculated Claimant's complete package of financial aid" provided by USDA in 1983 and 1984.<sup>119</sup> The Claimant maintains the Arbitrator correctly used \$16,000 in loan funds for 1983,<sup>120</sup> and also correctly determined that USDA's loan to the Claimant in 1984 was for \$24,000.<sup>121</sup> The Claimant agrees the Arbitrator did not add the \$12,000 subordination USDA provided the Claimant in 1984 or an additional payment made to a private lender in September, 1984.<sup>122</sup> However, a subordination of USDA's lien position on security property is not the same benefit as a direct USDA loan. Moreover, even assuming the Arbitrator should have added additional "benefits" received by the Claimant from USDA in 1984, the Arbitrator's overall conclusion – that the Claimant received less than he needed to operate successfully – would not

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<sup>113</sup> Direct Testimony of [REDACTED], at 2-4, 6-8; Transcript, at 57-61 (re-direct examination of [REDACTED]).

<sup>114</sup> Petition, at 9.

<sup>115</sup> Petition Response, at 19-20. In Table 2, the Arbitrator correctly reports the calculation for Farmer B's minimum costs in 1983 and 1984.

<sup>116</sup> Petition, at 9.

<sup>117</sup> Petition Response, at 20-21. The Monitor notes the amount calculated by USDA for Farmer D's wheat costs in 1983 (\$17,800) greatly exceeds the amount projected as income and the amount reported as actual income in 1983 on Farmer D's Farm and Home Plan (\$6,930 and \$6,986, respectively). See Claimant Ex. 60, at 46.

<sup>118</sup> The Arbitrator's Decision states "The production costs for wheat would have had to have been quite high (\$730/acre in 1983 and \$354/acre in 1984)" to change the Arbitrator's conclusion that Farmer D received significantly more than his minimum needs in those years.

<sup>119</sup> Petition, at 9.

<sup>120</sup> Petition Response, at 21 (citing USDA Ex. 24).

<sup>121</sup> Petition Response, at 22 (citing USDA Ex. 34).

<sup>122</sup> Petition Response, at 22.

change.<sup>123</sup> The Monitor is not left with the firm and definite conviction that the Arbitrator made a mistake in assessing the amount of loan funds the Claimant received from USDA.

The Monitor has carefully reviewed the evidence and the Arbitrator's Decision. The Monitor finds no clear and manifest error in the Arbitrator's Decision comparing the treatment received by the Claimant with the treatment received by four white farmers from the Claimant's county. This evidence showed the Claimant was denied loans when white farmers received loans; the Claimant was subject to a supervised bank account for a longer period of time and in a more restrictive manner than white farmers; and the Claimant received less than his minimum needs and less per acre, on average, than the white farmers received. The Monitor finds no clear and manifest error in the Arbitrator's conclusion that the Claimant proved USDA discriminated against him, based in part on the evidence that white farmers were treated more favorably than the Claimant was treated.

*b. Fundamental Miscarriage of Justice*

An analysis of fundamental miscarriage of justice is not necessary where the Monitor makes no finding of clear and manifest error.

**3. Whether the claim should be reexamined because of the way the Arbitrator calculated damages and awarded debt relief**

In the Petition, USDA challenges both the Arbitrator's economic and non-economic damages awards.<sup>124</sup> USDA argues that a reduction of \$ [REDACTED] in the Arbitrator's economic damages award should be made to account for the debt settlement the Claimant received in 1989.<sup>125</sup> USDA also argues that the Claimant's economic damages should be reduced by an estimated \$ [REDACTED] in non-farm income the Claimant earned after he left farming.<sup>126</sup> With regard to non-economic damages, USDA asserts that while courts have held that emotional distress is an element of actual damages under the Equal Credit Opportunity Act, there is no evidence to support the \$ [REDACTED] non-economic damages award to the Claimant in this case.<sup>127</sup>

In the Petition Response, the Claimant argues that USDA presented no evidence before the Arbitrator that the Claimant's farm income damages should be offset by the amount of the

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<sup>123</sup> USDA argues in its Petition that the Claimant actually received 89% of the minimum per acre costs in 1984. Petition, at 9.

<sup>124</sup> Petition, at 12-14.

<sup>125</sup> Petition, at 13. USDA states the Claimant "is not entitled to debt forgiveness" under the Consent Decree because all of the Claimant's debt was debt settled in 1989. Petition, at 13, note 8.

<sup>126</sup> Petition, at 13.

<sup>127</sup> Petition, at 14.

1989 debt settlement.<sup>128</sup> The Claimant asserts that an offset for the 1989 debt settlement would be contrary to the Consent Decree, which permits successful claimants to recover both actual damages and the discharge of their debt.<sup>129</sup> The Claimant maintains USDA has failed to meet its burden of proof regarding mitigation of damages, and there is no evidence the Claimant left farming or earned the amount in non-farm income cited by USDA in its Petition.<sup>130</sup> Finally, the Claimant argues that there was ample evidence to support the Arbitrator's non-economic damages award.<sup>131</sup>

*a. Clear and Manifest Error*

The Claimant supported his claim for economic damages with the testimony and report of a damages expert.<sup>132</sup> USDA did not offer its own expert on damages, but cross-examined the Claimant's expert regarding damages.<sup>133</sup> After reviewing the Claimant's USDA records and USDA Economic Research Service data for crop yields, prices, and costs of production, the Claimant's damages expert calculated projected net farming income from 1981 to 2000 for the Claimant's farming operation.<sup>134</sup> The Claimant's expert concluded that absent USDA's discrimination, the Claimant would have made a total of \$ [REDACTED] in net farm income during that time period.<sup>135</sup>

While finding the methodology of the Claimant's expert to be persuasive, the Arbitrator nevertheless made some adjustments. The Claimant's expert had used county averages to determine the Claimant's likely yield from 1981 to 2000.<sup>136</sup> The Arbitrator disagreed with this approach, finding that the assumed yields for cotton "exceed those which could have been predicted" for the Claimant. Accordingly, the Arbitrator estimated the amount of farm income attributable to cotton and reduced that amount by 60%. The Arbitrator also subtracted projected income for the time period of 1985 to 1988, because in that period the Claimant received private financing. These adjustments led the Arbitrator to reduce the Claimant's economic damages to \$ [REDACTED].

The Arbitrator chose not to mitigate the Claimant's damages by the amount of his non-farm income, because the Arbitrator found this income was minimal or non-existent. The Arbitrator did not explicitly address whether the Claimant's damages should have been

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<sup>128</sup> Petition Response, at 27. The Claimant contends that his damages expert already reduced his projected income by deducting expenses for repayment of his USDA loans. Petition Response, at 27-28.

<sup>129</sup> Petition Response, at 28-29 (citing Consent Decree, ¶ 10(g)).

<sup>130</sup> Petition Response, at 29-30.

<sup>131</sup> Petition Response, at 31-32.

<sup>132</sup> See Direct Testimony of Claimant's Damages Expert; Claimant Ex. 47.

<sup>133</sup> See Transcript, at 73-87, 89-91 (cross-examination of Claimant's Damages Expert).

<sup>134</sup> Direct Testimony of Claimant's Damages Expert, at 4-7.

<sup>135</sup> Direct Testimony of Claimant's Damages Expert, at 7. See Claimant Ex. 47.

<sup>136</sup> See Claimant Ex. 47.

offset by the amount of the debt settlement he received from USDA in 1989. Adding \$ [REDACTED] [REDACTED] for non-economic damages, the Arbitrator awarded the Claimant a total of \$ [REDACTED] in damages.

USDA contends that the Arbitrator erred when he did not offset the Claimant's economic damages by the amount of the Claimant's 1989 debt settlement, which was \$ [REDACTED].<sup>137</sup> As the Claimant points out, however, USDA presented no expert testimony to support this argument nor did USDA cross-examine the Claimant's expert regarding the proposed reduction.<sup>138</sup> In calculating the Claimant's projected net farm income, the Claimant's damages expert assumed the Claimant would have received adequate loans from USDA and would have generated sufficient income to repay the amounts due on those loans each year.<sup>139</sup> In other words, as the Claimant argues in his Petition Response, no "deduction" for the amount of debt settlement the Claimant received is required, because the Claimant's expert's methodology assumed debt repayment and deducted the repayment amount as an expense from the Claimant's projected net income.<sup>140</sup> Given the evidence in the record regarding the basis for the Claimant's damages expert's net income calculations,<sup>141</sup> the Monitor finds no clear and manifest error in the Arbitrator's Decision awarding damages without making any offset for the amount of the debt settlement the Claimant received in 1989.

USDA further argues the Arbitrator erred in refusing to reduce the Claimant's lost farm income by an amount USDA estimates in its Petition the Claimant could have earned in

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<sup>137</sup> Petition, at 13.

<sup>138</sup> Petition Response, at 27.

<sup>139</sup> Petition Response, at 27-28; Claimant Ex. 47.

<sup>140</sup> In fact, the estimated USDA debt repayment expense in the expert's report appears to greatly exceed the total amount of the 1989 debt settlement. *See* Claimant Ex. 47, Tabs 1 & 2, sections 38 (FmHA Operating Loans), 39 (FmHA Intermediate Loans), and 40 (FmHA Long Term Loans).

<sup>141</sup> The Claimant also argues that USDA's suggested offset is contrary to the logic of the Consent Decree, which provides that successful Track B claimants shall receive both actual damages and debt relief for "all of the class member's outstanding debt to the Farm Service Agency that was incurred under, or affected by, the program(s) that were the subject of the claim(s) resolved in the class member's favor by the arbitrator." *See* Petition Response, at 28-29. The Monitor notes that although USDA granted the Claimant debt settlement in 1989, debt relief in the *Pigford* Consent Decree provides protection beyond eradication of debt. The Consent Decree explicitly states that "[t]he discharge of such outstanding debt shall not adversely affect the claimant's eligibility for future participation in any USDA loan or loan servicing program." Consent Decree, ¶ 10(g)(ii). Under the Arbitrator's findings for this claim, the Claimant would be entitled to debt relief for all Emergency Loans from 1981 forward and all Operating Loans from 1982 forward, as these were the first loans the Arbitrator found were affected by USDA's discrimination. *See* Stipulation and Order, ¶ 2 (D.D.C. February 7, 2001).

non-farm income jobs.<sup>142</sup> While the Claimant may have had the obligation to mitigate the damages he suffered through USDA's discrimination, USDA had the burden of proving the amount of income the Claimant earned or could have earned.<sup>143</sup>

The Claimant's damages expert offered a damages calculation that did not incorporate an offset for the Claimant's non-farm income.<sup>144</sup> USDA did not offer its own expert to rebut evidence presented by Claimant's expert. Nor did USDA offer evidence that the Claimant earned substantial sums of non-farm income from 1981 through 2000 or that he should have taken additional measures to do so. The Claimant offered un rebutted testimony that he worked as a farmer and also maintained off-farm jobs.<sup>145</sup> Thus, his farm work did not prevent him from earning off-farm income.<sup>146</sup> The Arbitrator found the Claimant's non-farm income ranged from minimal to non-existent depending on the year, and as a result determined an offset for this non-farm income was not warranted. The Monitor is not left with a firm and definite conviction that the Arbitrator made a mistake in declining to offset the Claimant's farm income damages.

USDA also challenges the Arbitrator's award of \$ [REDACTED] for non-economic damages, claiming there was no basis in the record for such an award.<sup>147</sup> Under the Equal Credit Opportunity Act, an injured party may recover damages for "mental anguish, humiliation or embarrassment."<sup>148</sup> In the Claimant's testimony, the Claimant described feeling constant "stress and pressure," as well as a loss of pride and embarrassment as a result of his financial condition, his loss of his equipment on two occasions, and the loss of his farmland.<sup>149</sup> The Claimant also testified regarding USDA's management of his supervised bank account, which required the Claimant to get an invoice or bill every time he chose to

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<sup>142</sup> Petition, at 13. USDA bases its estimate on a statement by the Claimant in his pre-hearing memorandum. USDA does not cite any testimony by the Claimant or by any other witness to support this figure. Petition, at 13.

<sup>143</sup> *Tri County Indus., Inc. v. District of Columbia*, 200 F.3d 836, 840 (D.C. Cir. 2000) ("[f]ailure to mitigate [damages] is an affirmative defense and the party asserting it bears the burden of demonstrating the opposing party's failure to act reasonably under the circumstances.")

<sup>144</sup> Claimant Ex. 47.

<sup>145</sup> Direct Testimony of [REDACTED], at 12.

<sup>146</sup> The Monitor notes that in this respect, the Claimant's experience would be typical of American farmers generally. According to USDA's Agricultural Fact Book, off-farm income represented about half of all cash income for farmers nationally throughout the late 1980's. See United States Department of Agriculture, 1990 Fact Book of Agriculture, at 29-30 (1991). By 1995, over 80 percent of the average farm operator's household income came from off-farm sources. See United States Department of Agriculture, Agriculture Fact Book 1997, at 32-35 (1997).

<sup>147</sup> Petition, at 14.

<sup>148</sup> *Anderson v. United Fin. Co.*, 666 F.2d 1274, 1277 (9th Cir. 1982).

<sup>149</sup> Direct Testimony of [REDACTED], at 15.



purchase something for his farm operation.<sup>150</sup> USDA submitted no evidence that called into question Claimant's testimony regarding these matters. The Monitor finds no clear and manifest error in the Arbitrator's Decision to award \$ [REDACTED] in non-economic damages based on the evidence in the record for this claim.

The question of damages is a particularly fact-specific inquiry. In this case, the Arbitrator found, based on the record before the Arbitrator, that the Claimant's damages expert presented a reasonable and persuasive basis for calculating lost farm income, with the exception of adjustments for the years the Claimant had private financing and adjustments to decrease the amount of income the Claimant would have earned on his cotton crop. The Arbitrator also found the Claimant had suffered non-economic damages of \$ [REDACTED].

The Monitor has reviewed the evidence in the record, the arguments in the Petition and Petition Response, and the Arbitrator's Decision. There is evidence in the record to support both the economic and non-economic damages awarded by the Arbitrator. The Arbitrator's damages award of \$ [REDACTED] is considerably less than the amount the Claimant's expert calculated, but more than what USDA argues is appropriate. The Monitor does not have a firm and definite conviction that the Arbitrator made a mistake in determining the damages award for this claim. The Monitor therefore finds no clear and manifest error in the Arbitrator's award of \$ [REDACTED] in damages to the Claimant.

*b. Fundamental Miscarriage of Justice*

An analysis of fundamental miscarriage of justice is not necessary where the Monitor makes no finding of clear and manifest error.

**V. CONCLUSION**

The Monitor makes no finding of clear and manifest error resulting or likely to result in a fundamental miscarriage of justice.

Request for Reexamination for Claim No. [REDACTED] is hereby DENIED.

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Randi Ilyse Roth  
Attorney at Law  
Monitor

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<sup>150</sup> Direct Testimony of [REDACTED], at 5-6. The Claimant testified, "If I wanted to buy seed, or a part, or a tire, I had to go get the bill first and take it in the Farmer's Home and get a check from them. They'd never advance me money for expenses." Direct Testimony of [REDACTED], at 6.