

No. 02-2915

IN THE UNITED STATES COURT OF APPEALS  
FOR THE EIGHTH CIRCUIT

CLARICE A. STAHL, et al.,

Plaintiffs-Appellants,

v.

UNITED STATES DEPARTMENT OF AGRICULTURE,

Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF NORTH DAKOTA

**BRIEF OF THE PLAINTIFFS/APPELLANTS\***

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\* Corrected for certain typographical errors on September 27, 2002.

## SUMMARY OF THE CASE

Appellants are 108 family farmers who brought a declaratory judgment action in the United States District Court for the District of North Dakota to interpret a Shared Appreciation Agreement that each of them had entered with the United States Department of Agriculture (USDA). Plaintiffs alleged five causes of action that (1) challenged USDA's determination that the Shared Appreciation Agreements "matured" on the date they expired; (2) challenged USDA's determination that an amount could be recaptured even if the borrower did not cease farming or sell the land; (3) challenged USDA's calculation of the maximum amount collectible under the Shared Appreciation Agreement; (4) claimed USDA had violated Plaintiffs' substantive and procedural due process rights; and (5) claimed that USDA impaired Plaintiffs' contract rights.

USDA filed a motion to dismiss the complaint against some Plaintiffs under Rule 12(b)(1) and against all Plaintiffs under Rule 12(b)(6) for failure to state a claim upon which relief can be granted. The district court entered a Memorandum and Order dated May 20, 2001, granting Defendant's Motion to Dismiss under Rule 12(b)(6) for failure to state a claim upon which relief can be granted. The Court did not rule on the Rule 12(b)(1) motion.

Appellants request that oral arguments be held and that each side be allotted thirty minutes.

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## **JURISDICTIONAL STATEMENT**

The district court had jurisdiction of this declaratory judgment class action under 28 U.S.C. §1331(a). This Court has jurisdiction under 28 U.S.C. § 1291 over this appeal from the district court's judgment dismissing all Plaintiffs' causes of action.

The district court's Memorandum and Order granting Defendant's Motion to Dismiss for failure to state a claim upon which relief can be granted was entered on May 20, 2001. Judgment was entered May 21, 2002. Plaintiffs timely filed their notice of appeal pursuant to Fed. R. App. P. 4 (a) on July 16, 2002.

## STATEMENT OF THE ISSUES

- I. Whether the district court committed reversible error in considering matters outside the pleadings and failing to convert the motion to dismiss for failure to state a claim to a motion for summary judgment.

Fed.R.Civ. P. Rule 12 (b)(6)

Carter v. Stanton, 405 U.S. 669, 92 S.Ct. 1232 (1972)

Woods v. Dugan, 660 F.2d 379 (8<sup>th</sup> Cir. 1981)

Court v. Hall County, 725 F.2d 1170 (8<sup>th</sup> Cir. 1984)

- II. Whether the district court's failure to convert the motion to dismiss to a motion for summary judgment was harmless error.

Fed.R.Civ. P. Rule 12 (b)(6)

Gibb v. Scott, 958 F.2d 814 (8<sup>th</sup> Cir. 1992)

Scheuer v. Rhodes, 416 U.S. 232 (1974)

Country Club Estates, L.L.C. v. Town of Loma Linda, 213 F.3d 1001 (8<sup>th</sup> Cir. 2000)

U.S. v. Seckinger, 397 U.S. 203 (1970)

- III. Whether the district court committed reversible error by failing to correctly apply the standards for a Rule 12 (b)(6) motion to dismiss.

Conley v. Gibson, 355 U.S. 41 (1957)

Scheuer v. Rhodes, 416 U.S. 232 (1974)

Neitzke v. Williams, 490 U.S. 319 (1989)

Parnes v. Gateway 2000, Inc., 122 F.3d 539 (8<sup>th</sup> Cir. 1997)

## STATEMENT OF THE CASE

This case centers on the proper interpretation of a contract entered into between farmers and USDA. On June 28, 2001, 109 Plaintiffs filed a Class Action Complaint for Declaratory, Injunctive and Other Relief challenging USDA's interpretation of a contract each Plaintiff had entered with USDA. The Complaint alleged five separate causes of action: (1) challenging USDA's declaration that the Shared Appreciation Agreements "matured" on the date they expired; (2) challenging USDA's determination that an amount could be recaptured under the Shared Appreciation Agreements even if the borrower did not cease farming or sell the land; (3) challenging USDA's calculation of the maximum amount collectible under the Shared Appreciation Agreement; (4) claiming USDA had violated Plaintiffs' substantive and procedural due process rights; and (5) claiming that USDA had impaired Plaintiffs' contract rights.

Attached to the Complaint are two exhibits that are integral to the issues addressed in the Complaint: Exhibit A is the Shared Appreciation Agreement form<sup>1</sup> and Exhibit B is the form captioned "Noncash Credit for Farmer Program Loan When Establishing Recapture Receivable."<sup>2</sup>

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<sup>1</sup> Exhibit D to 7 C.F.R. Part 1951, Subpart S (1989).

<sup>2</sup> Exhibit B to 7 C.F.R. Part 1951, Subpart S (1989).

Plaintiffs filed an Amended Class Action Complaint for Declaratory, Injunctive and Other Relief on August 8, 2001, which – apart from several minor modifications - paralleled the allegations and claims of the original complaint.

Simultaneously with filing the original Complaint, Plaintiffs filed a Motion for a Preliminary Injunction that was supported by a Brief in Support of Preliminary Injunction to Suspend Collection of Amounts Claimed Due under Shared Appreciation Agreements. This motion was also supported by affidavits of Plaintiffs detailing the circumstances under which they had entered into the Shared Appreciation Agreement and establishing the irreparable harm that they were suffering. A bench hearing was held on the preliminary injunction motion on August 17, 2001. The district court denied Plaintiffs' Motion for a Preliminary Injunction on August 22, 2001.

Plaintiffs filed a Motion to Certify Class and a supporting brief on July 30, 2001. In response to a motion to stay by USDA, the district court stayed any action on class certification on August 10, 2001. The district court denied the motion for class certification as moot in its Memorandum and Order (hereinafter "Order") dismissing the Complaint entered on May 20, 2002.

On August 10, 2001, USDA filed a Motion to Dismiss and In Opposition to Plaintiffs' Motion for a Preliminary Injunction. USDA's motion to dismiss rested on two subparts of Fed.R.Civ.P. Rule 12(b). The first basis for dismissal pertained

to only 24 Plaintiffs and was made under Rule 12(b)(1) for an alleged failure to exhaust administrative remedies. Defendant's Rule 12(b)(1) motion was not addressed by the district court and is not an issue in this appeal. The second part of the motion to dismiss was for dismissal of all claims of all Plaintiffs for failure to state a claim upon which relief can be granted under Rule 12(b)(6).

USDA's motion to dismiss was supported by a Memorandum in Support of Motion to Dismiss and In Opposition to Plaintiffs' Motion for a Preliminary Injunction (Defendant's Brief). USDA attached the following exhibits to Defendant's Brief: Exhibit 1 - the Shared Appreciation Agreement form; Exhibit 2 - the "Notice of the Availability of Loan Service Programs for Delinquent Farm Borrowers"; Exhibit 3 - Declaration of Arthur V. Hall; Exhibit 4 - 7 C.F.R. § 1951.914 (1989 edition); Exhibit 5 - the "Noncash Credit for Farmer Program Loan When Establishing Recapture Receivable" (Exhibit B); and Exhibit 6 - FmHA AN No. 1934 (1951), an unpublished internal administrative announcement issued to field staff on June 7, 1989. The motion to dismiss was also supported by Defendant's Statement of Material Facts Not in Dispute. This Statement addressed facts relevant to the 24 Plaintiffs' alleged failure to exhaust administrative remedies and to the preliminary injunction motion.

On August 28, 2001, Plaintiffs moved for leave to conduct limited discovery and for an extension of time to respond to USDA's motion to dismiss until at least

30 days after they could depose Chester Bailey (an official of USDA who had publicly stated that his understanding of the original interpretation of the Shared Appreciation Agreement was the same as Plaintiffs' interpretation). The district court granted Plaintiffs an extension of time to respond to the motion to dismiss on September 10, 2001, but denied Plaintiffs' motion to conduct discovery. The district court stated in its Order entered on September 10, 2001: "The Rule 12(b)(6) motion before the Court is intended to test the legal sufficiency of the claims, and the law accords heavy presumptions in favor of plaintiffs' position in such a motion. Therefore, any discovery before the Court ultimately rules on the motion to dismiss would be inappropriate."

The district court on May 20, 2002, granted USDA's motion to dismiss all claims of all Plaintiffs pursuant to Rule 12(b)(6).

Judgment was entered on May 21, 2002. Plaintiffs filed a timely notice of appeal on July 17, 2002.

## **STATEMENT OF THE FACTS**

### **Introduction**

Plaintiffs are 108 family farmers who filed an action for a declaratory judgment and injunctive relief against USDA regarding the proper interpretation and application for a two-page contract called the Shared Appreciation Agreement. Plaintiffs contended in their complaint that USDA was not honoring the terms of the contracts that Plaintiffs signed and was collecting and seeking to collect amounts from Plaintiffs that were not due. App. at pp. 35-36.

### **Background**

In 1988 Congress passed the Agricultural Credit Act of 1987 (1987 ACA) authorizing USDA to provide a variety of loan servicing programs to delinquent farm borrowers. App. at pp. 41, 42. The purpose of the 1987 ACA was to prevent mass foreclosures on the thousands of farmers and ranchers who were delinquent and to prevent the overwhelming losses to the federal treasury that would ensue from a collapse of the rural economy. App. at p. 42. The 1987 ACA directed USDA to restructure loans, to write off debt, and to take other steps to keep farmers on the land, if such action would prevent foreclosures and reduce overall losses to the federal government. App. at p. 42. The intent of Congress in passing the 1987 ACA, as expressed in Congressional hearings, was to provide a better deal to the farmer under debt restructuring than the farmer would obtain by taking

a Chapter 12 bankruptcy. App. at pp. 42-43. The 1987 ACA required USDA to use forms and notices designed to be readable and understandable by the borrower. App. at p. 44.

Among the programs authorized by the 1987 ACA were debt set-asides and loan writedowns. App. at p. 43. In order to qualify for these programs, the farmers were determined by USDA to be delinquent in their loan obligations through no fault of their own, have acted in good faith in relationship to USDA, and be able to service the debt remaining after the writedown, debt set-aside, or other loan restructuring. App. at p. 46. A further condition of the debt restructuring was that the loan, if restructured, must result in a net recovery to the federal government, during the term of the loan as restructured, that would be more than or equal to the net recovery to the federal government from an involuntary liquidation or foreclosure on the property securing the loan. 7 C.F.R. Part 1951, Subpart S (1989) Appendix of Not Readily Accessible Documents No. 9, Docket No. 3. The statute allowed, but did not require, USDA to require farmers receiving loan writedowns and debt set-asides to sign a shared appreciation arrangement that could last no longer than ten years. App. at pp. 43-44.

To implement the provisions of the 1987 ACA, USDA, after public notice and comment, published interim final regulations in the Federal Register on September 14, 1988 (53 Fed. Reg. 35,638-35,798). App. at p. 22. These

regulations were codified at 7 C.F.R. Part 1951, Subpart S (1989). App. at p. 22. In accordance with the federal regulations, delinquent farmers were sent a Notice of the Availability of Loan Service Programs for Delinquent Farm Borrowers which had been published as Exhibit A to 7 C.F.R. Part 1951, Subpart S (1989). App. at p. 62. After receiving this information, the farmer had 45 days to apply for loan service programs, and USDA then had 60 days to determine if the farmer qualified for any of the loan servicing programs and, if so, for which programs the farmer qualified. App. at p. 62.

All Plaintiffs qualified for and were provided debt writedown under the provisions of the 1987 ACA and the federal regulations codified at 7 C.F.R. Part 1951, Subpart S (1989). App. at p. 46. As part of the writedown, Plaintiffs each signed a Shared Appreciation Agreement. App. at p. 46. The Shared Appreciation Agreement signed by each Plaintiff is in the form published in the federal regulations as Exhibit D to 7 C.F.R. Part 1951, Subpart S (1989). App. at p. 46.

At the time Plaintiffs signed their Shared Appreciation Agreements, USDA regulations provided in 7 C.F.R. § 1965.3 that a borrower's responsibility for repaying principal and interest on farm program loans from USDA is based on the borrower's loan documents. App. at p. 41. The Shared Appreciation Agreement is a "loan document." App. at p. 46. The Shared Appreciation Agreement did not

incorporate or reference 1987 ACA or any other statute or any current or future federal regulations. App. at pp. 57-58.

### The Shared Appreciation Agreement

The Shared Appreciation Agreement is a contract Plaintiffs were required to enter with USDA as consideration for receiving a write down of debt they owed to USDA. App. at p. 46. The contract form was promulgated as part of a federal regulation and was published as Exhibit D to 7 C.F.R. Part 1951, Subpart S (1989). App. at p. 39. Both USDA and the borrower signed the Shared Appreciation Agreement. App. at p. 58.

The Shared Appreciation Agreements were completed by USDA county supervisors. App. at p. 59. The county supervisors uniformly explained to Plaintiffs before Plaintiffs signed the Shared Appreciation Agreement that if they sold any of their land or quit farming or paid off their loans completely within the ten-year term of the Shared Appreciation Agreement they would owe USDA either 75 or 50 percent of the amount the land had appreciated. If they did not do any of these three things, at the end of ten years the Shared Appreciation Agreement would expire and they would not owe anything under it. Affidavits of Plaintiffs, Docket Nos. 6, 9.

The Shared Appreciation Agreement lists the following four amounts at the bottom of the second page directly above the farmer's and USDA's signatures:

Market value of the property securing loan(s)	\$ _____ .
Net recovery value of property securing loan(s)	\$ _____ .
Amount of write-down	\$ _____ .
Amount of Account Equity	\$ _____ .

App. at p.57.

The Noncash Credit for Farmer Program Loan When Establishing  
Recapture Receivable Form and Instructions

The federal regulations in effect at the time each Plaintiff signed the Shared Appreciation Agreement required the county supervisor to prepare a form entitled “Noncash Credit for Farmer Program Loan When Establishing Recapture Receivable” at the same time he completed the Shared Appreciation Agreement.

App. at p. 50. (Addendum (Add.) at p. A26). This form was published in the federal regulations as Exhibit B to 7 C.F.R. Part 1951, Subpart S (1989), App. at pp. 50, 59-60, and included detailed instructions to calculate the “Market Value,” the “Net Recovery Value,” the Write Down Amount,” and the “Equity Recapture Account Amount.” App. at pp. 58-59.

The amount of debt writedown was limited to the amount of existing loan balance less the amount USDA could recover through liquidation of the property securing the loans. App. at p. 50. This meant that a writedown would not occur if the restructured loan would not result in the federal government receiving as much or more through repayment of the restructured loan than it would receive through an involuntary liquidation of the property securing the delinquent loans. 7 C.F.R.

Part 1951, Subpart S (1989) Appendix of Not Readily Accessible Documents No. 9, Docket No. 3. The original of the Noncash Credit for Farmer Program Loan When Establishing Recapture Receivable form was required to be attached to the promissory note signed by the farmer, a copy was to be given to the farmer, a copy sent to the state director, and a copy kept in a temporary file for processing in the field office terminal system. App. at p. 59-60. The regulations in effect at the time each Plaintiff executed the Shared Appreciation Agreement required the county office to input into the terminal system an equity receivable account in the amount shown on the Noncash Credit for Farmer Program Loan When Establishing Recapture Receivable form. 7 C.F.R. § 1951.914 (1989), Appendix of Not Readily Accessible Documents No. 9, Docket No. 3 (Add. at p. A27).

Schedule for Remittance Form

The regulations required the county office to issue a Form FmHA 451-2 “Schedule of Remittance” for all payments received under the Shared Appreciation Agreement. 7 C.F.R. § 1951.914 (1989), Appendix of Not Readily Accessible Documents No. 9, Docket No. 3 (Add. at p. A27). This form required completion of the following statements when processing payments from farmers:

Amount of Original Equity Recapture Established \$\_\_\_\_\_.

Less: Amount of Equity Recapture Collected to Date \$\_\_\_\_\_.

Equals: Remaining Equity Recapture to be collected \$\_\_\_\_\_.

(Add. at p. A27).

USDA instructed county supervisors to quit using the Noncash Credit for Farmer Program Loan When Establishing Recapture Receivable form on June 7, 1989, through issuance of an internal unpublished administrative notice to field staff, FmHA AN. No. 1934 (1951). App. at p. 81. The federal regulations were not amended to delete the requirement that county supervisors complete and utilize the Noncash Credit for Farmer Program Loan When Establishing Recapture Receivable form until September 1992. Appendix of Not Readily Accessible Documents No. 13, Docket No. 3.

#### 1992 Office of Inspector General Audit Report

In 1992, the USDA Office of Inspector General (OIG) conducted an audit of USDA's implementation of the Shared Appreciation Agreements. App. at pp. 98-124. It referred to the four items on the bottom of the Shared Appreciation Agreement and stated that the fourth amount to be entered on the Shared Appreciation Agreement [the "amount of account equity"] was the "potential recapture amount." App. at p. 107. (Add. at p. A31). The calculations by the OIG shown on Exhibit C to the Audit Report show that the OIG used the Equity Recapture Account Amount as the "Potential Recapture Amount." App. at pp. 115-116. (Add. at pp. A34-A35).

## The Complaint

Plaintiffs' Complaint was filed as a class action requesting declaratory judgment and injunctive relief. App. at pp. 35-36. The Complaint alleged five causes of action. App. at pp. 35-36. The first two causes of action allege that USDA is misinterpreting the Shared Appreciation Agreements to require at the expiration of the Shared Appreciation Agreement payment of a percentage of the amount the real estate securing the loans appreciated in value during the ten-year term of the Shared Appreciation Agreement even if the farmer did not sell the land, quit farming, or pay off the underlying loan during the ten-year term. App. at pp. 48-49. The third cause of action alleges that USDA is misinterpreting the maximum amount collectible under the Shared Appreciation Agreement and has failed to follow its own regulations. App. at pp. 49-51. Plaintiffs' fourth and fifth causes of actions allege that USDA is violating Plaintiffs' constitutional rights in its administration of the Shared Appreciation Agreements and in its activities in enforcing the agreements. App. at pp. 51-52.

Plaintiffs attached two exhibits to their Complaint and Amended Complaint - the Shared Appreciation Agreement form published in the federal regulations as Exhibit D to 7 C.F.R. Part 1951, Subpart S (1989) and the form "Noncash Credit for Farmer Program Loan When Establishing Recapture Receivable" (including instructions) that was published in the federal regulations

as Exhibit B to 7 CFR Part 1951, Subpart S (1989). App. at pp. 56-60. The Complaints and their exhibits are the only pleadings filed in this case at the district court level. App. at pp. 1-8.

### Motion to Dismiss

USDA did not file an answer in the case, but rather filed a Motion to Dismiss and in Opposition to Plaintiffs' Motion for a Preliminary Injunction. This motion raised both a Rule 12(b)(1) claim of lack of subject matter jurisdiction over 24 Plaintiffs due to their alleged failure to exhaust administrative remedies and a Rule 12 (b)(6) claim that the Complaint as a whole failed to state any claim for which relief can be granted. App. at p. 3. In support of its motion, USDA filed a brief to which it attached the following six exhibits. Exhibit 1 - the Shared Appreciation Agreement form, App. at p. 4; Exhibit 2 - the "Notice of the Availability of Loan Service Programs for Delinquent Farm Borrowers," App. at p. 62; Exhibit 3 - Declaration of Arthur V. Hall, App. at p. 76; Exhibit 4 – 7 C.F.R. § 1951.914 (1989). App. at p. 81; Exhibit 5 – the Noncash Credit for Farmer Program Loan When Establishing Recapture Receivable form, App. at p. 4; and Exhibit 6 – FmHA AN No. 1934 (1951), an internal unpublished administrative announcement issued to field staff on June 7, 1989. App. at p.81.

### Plaintiffs' Request to Conduct Limited Discovery

On July 23, 2001, counsel for Plaintiffs received a copy of an e-mail from Chester Bailey, a high level USDA official, stating that “those involved with the rule writing believed that it was intended that the Shared Appreciation Agreement would terminate at the end of the 10 years. Borrower would have fulfilled their agreement if they owned and were farming the FmHA real estate security property after the 10 year.” App. at p. 147. (Add. at p. A30). Based on this, Plaintiffs moved for leave to take Chester Bailey’s deposition and issue a subpoena duces tecum to Mr. Bailey to require production of training materials, internal communications, and other documents relevant to the drafters’ intent and the agency’s original interpretation of the Shared Appreciation Agreement and the regulations. App. at p. 144. (Add. at p. A28).

Plaintiffs also moved for an extension of time in which to respond to Defendant’s Motion to Dismiss until after they had an opportunity to depose Mr. Bailey and obtain documents from the proposed Subpoena Duces Tecum. App. at p. 142.

The district court denied Plaintiffs’ motions to conduct any discovery on the basis that allowing discovery would be inappropriate prior to its ruling on the motion to dismiss for failure to state a claim upon which relief can be granted. App. at p. 170.

### The District Court's Order Dismissing Plaintiffs' Claims

The district court did not rule on Defendant's Rule 12(b)(1) motion to dismiss for lack of subject matter jurisdiction. App. at pp. 172-173. (Add. at p. A2). However, after considering "the parties submissions and the entire file," the district court dismissed the Complaint on the basis that Plaintiffs had failed to state a claim upon which relief can be granted. App. at p. 172. (Add. at p. A1). In this Order, the district court concluded the Shared Appreciation Agreement was "poorly drafted and confusing." App. at p. 180. (Add. at p. A9).

### The "Entire File" In This Case

The "entire file" in this case at the time the district court entered its order dismissing Plaintiffs' Complaint on the grounds that it failed to state a claim upon which relief can be granted was voluminous. App. at pp. 1-5. It included two large binders of affidavits of Plaintiffs submitted in support of Plaintiffs' Motion for Preliminary Injunction. App. at p. 1. Many of the affidavits have as attachments Hearing Officer Appeal Determinations from the administrative appeals taken from USDA actions in relation to the Shared Appreciation Agreements stating the farmers had been advised prior to signing the Shared Appreciation Agreement that no recapture would be due under the agreement as long as the farmer did not quit farming, or sell the property, or pay the loan off within 10 years of signing the agreement. Plaintiffs' Affidavits Docket Nos. 6, 9.

Also included in the file was a letter from Peter K. Scott, Acting Chief Counsel, Internal Revenue Service, to Chet Bailey, USDA dated May 22, 1989, which USDA had submitted to the court during the preliminary injunction hearing on August 17, 2001. Defendant's Reply Memorandum In Support of Motion to Dismiss p. 9, Docket No. 53. The file also contained a bound volume entitled Appendix of Not Readily Accessible Documents submitted by Plaintiffs in support of their preliminary injunction motion. This appendix contained among other things, portions of the Congressional history of 1987 ACA. Appendix of Not Readily Accessible Documents, Docket No. 3.

## **SUMMARY OF THE ARGUMENT**

The district court's consideration of material outside the pleadings that were presented by USDA in support of its Rule 12(b)(6) motion and the "entire file" in ruling on USDA's motion to dismiss for failure to state a claim without converting the motion to a motion for summary judgment was reversible error. *See* pp. 21-27, *infra*.

The district court's error in failing to convert the motion to a motion for summary judgment after consideration of "the entire file" was not harmless. Plaintiffs were not notified of an intent to convert, and, in fact, the district court assured Plaintiffs that it would restrict its review to the adequacy of the pleadings. Plaintiffs had no opportunity to present evidence and material made pertinent to a Rule 56 motion for summary judgment. Indeed, Plaintiffs had requested an opportunity to conduct limited discovery to respond to the motion to dismiss. The district court's denial of this request precluded any possibility for Plaintiffs to significantly oppose a summary judgment motion. *See* pp. 27-31, 48-49, *infra*.

USDA is not entitled to summary judgment as a matter of law because contract ambiguities drafted by the federal government must be construed against the drafter. U.S. v. Seckinger, 397 U.S. 203, 216 (1970). *See* pp. 31-35, *infra*.

The district court's failure to apply the stringent rules applicable to motions to dismiss for failure to state a claim upon which relief can be granted requires

reversal. The district court accepted as true allegations of fact made by USDA in matters outside the pleadings and rejected allegations of fact in the Complaint. Further, after weighing the evidence, the district court based its dismissal of Plaintiffs' third cause of action on Plaintiffs failure to submit sufficient evidence to support its claim. *See pp. 49-58, infra.*

## ARGUMENT

### **I. THE DISTRICT COURT COMMITTED REVERSIBLE ERROR IN CONSIDERING MATTERS OUTSIDE THE PLEADINGS AND FAILING TO CONVERT THE MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM TO A MOTION FOR SUMMARY JUDGMENT.**

#### A. Standard of Review.

The court of appeals reviews the grant of a dismissal under F.R.Civ.P. Rule 12(b)(6) *de novo*. Stone Motor Co. v. General Motors Corp., 293 F.3d 456 (8<sup>th</sup> Cir. 2002).

#### B. The District Court Considered Matters Outside the Pleadings in Ruling on the Rule 12 (b)(6) Motion to Dismiss.

The final clause of Rule 12(b)(6) provides:

. . . If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

The Court of Appeals for the Eighth Circuit broadly interprets the phrase “matters outside the pleadings,” the consideration of which will automatically trigger a conversion.

“Most courts ... view ‘matters outside the pleading’ as including any written or oral evidence in support of or in opposition to the pleading that provides some substantiation for and does not merely reiterate what is

said in the pleadings.” . . . We believe this interpretation of “matters outside the pleading” to be appropriate in light of our prior decisions indicating a 12(b)(6) motion will succeed or fail based upon the allegations contained in the face of the complaint. . . . A broad interpretation of “matters outside the pleading” will necessarily restrict a district court’s consideration of a 12(b)(6) motion to matters contained in the pleading.

Gibb v. Scott, 958 F.2d 814, 816 (8<sup>th</sup> Cir. 1992)(internal citations omitted). An affidavit is a “matter outside the pleadings.” Court v. Hall County, 725 F.2d 1170, 1172 (8<sup>th</sup> Cir. 1984).

The district court did not limit its review to the face of the Complaint and its attachments. Rather, the district court specifically stated the motion to dismiss was granted “upon consideration of the parties’ submissions and the entire file.” Order, p. 1.

USDA presented at least three significant matters outside the pleadings to the district court in connection with its motion to dismiss under Rule 12(b)(6). These matters outside the pleadings were not excluded by the district court and, in fact, the district court relied upon them in granting the motion to dismiss.

First, USDA attached as Exhibit 3 to Defendant’s Brief, an affidavit entitled the Declaration of Arthur V. Hall. (Hall is the Director of Farm Loan Servicing and Property Management Division of the Farm Service Agency.) USDA relied on Paragraph 2 of the affidavit as authority for its claim that USDA had uniformly used the write-down amount as the maximum amount potentially collectible under

the Shared Appreciation Agreement. *See*, Defendant’s Brief, p. 23 (“In calculating the amount that plaintiffs owed pursuant to the SAAs, FSA officials used the total amount written down as the maximum amount collectible under the SAA. *See*, Hall Decl., Ex.3 hereto, Par. 2.”) The district court accepted USDA’s arguments on this point. Order, p. 18.

Second, USDA attached as Exhibit 6 to Defendant’s Brief Administrative Announcement (FmHA AN No. 1934) from Neil Sox Johnson, Acting FmHA Administrator. This unpublished internal document issued on June 27, 1989, instructed the field offices to disregard the various requirements contained in 7 C.F.R. Part 1951 regarding the use of Exhibit B to 7 C.F.R. Part 1951, Subpart S (1989), the “Noncash Credit for Farmer Program Loan When Establishing Recapture Receivable” form. The district court placed considerable reliance on AN No. 1934. Order, at pp. 16-18. The district court concluded that “it is not entirely clear what the function of the equity recapture account amount was.” However, instead of accepting Plaintiffs’ factual allegations regarding the function of the equity recapture account amount, the district court simply stated: “the Court accepts USDA’s arguments.” Order, p. 18.

The third matter outside the pleadings USDA presented to the district court in support of its Rule 12(b)(6) motion is an advisory letter from Peter K. Scott, Acting Chief Counsel, Internal Revenue Service, to Chet (Chester) Bailey, dated

May 22, 1989. Defendant’s Brief at pp. 9-10. USDA used the Scott letter to support its argument that the borrower would owe the amount of write down at the expiration of the Shared Appreciation Agreement, even though USDA reported the written down amount to the IRS as “income” in the year of the write-down.<sup>3</sup>

These three documents are clearly “matters outside the pleading,” which were not only presented by USDA in support of its Rule 12 (b)(6) motion but were considered by the district court in granting the motion to dismiss for failure to state a claim. Although the district court did not explicitly refer to either the Hall affidavit or the Scott letter, it explicitly stated it accepted USDA’s arguments which were based on these documents and explicitly stated the decision was based on the “entire file.”

C. Failure to Convert a Rule 12(b)(6) Motion to a Motion for Summary Judgment when Matters Outside the Pleadings Are Considered Is Reversible Error.

In this Circuit, a motion to dismiss pursuant to Rule 12(b)(6) “must be treated as a motion for summary judgment when matters outside the pleadings are presented and not excluded by the district court.” Woods v. Dugan, 660 F.2d 379, 380 (8<sup>th</sup> Cir. 1981) (per curiam). If matters outside the pleading are considered, the

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<sup>3</sup> *But see, Lawinger v. Commissioner of Internal Revenue*, 103 T.C. 428, 431 (1994) in which the court found, based on stipulations by the government, that “[if] the contingencies do not occur within the time periods designated under the agreement, the shared appreciation agreement ends, and petitioner’s only continuing obligation to the FmHA is the repayment of the new [restructured] note.”

court must provide the nonmoving party with notice of the conversion to a Rule 56 summary judgment motion and an opportunity to provide all pertinent materials.

Court v. Hall County, 725 F.2d 1170 (8<sup>th</sup> Cir. 1984).

As stated by the Advisory Committee Notes to the 1946 amendments to F.R.Civ.P. 12(b)(6), the purpose of the final clause of Rule 12(b)(6) is to give each party reasonable opportunity to present affidavits and other proof and to prevent surprise.

The general rule in the Eighth Circuit is that “strict compliance” with the Rule 56 notice requirement, incorporated into a Rule 12(b)(6) motion where matters outside the pleadings are presented and not excluded by the court, is required. Country Club Estates, L.L.C. v. Town of Loma Linda, 213 F.3d 1001, 1005 (8<sup>th</sup> Cir. 2000).

D. The District Court Did Not Convert the Motion to Dismiss for Failure to State a Claim Upon Which Relief Can Be Granted to a Motion for Summary Judgment Thereby Committing Reversible Error.

As stated by the Supreme Court in Carter v. Stanton, 405 U.S. 669, 671 (1971), where matters outside the pleading were presented to and not excluded by the court, the court was “required by Rule 12(b) of the Federal Rules of Civil Procedure to treat the motion to dismiss as one for summary judgment and to dispose of it as provided in Rule 56. Under Rule 56, summary judgment cannot be granted unless there is no genuine issue as to any material fact and the moving

party is entitled to judgment as a matter of law.” Here, the district court did not convert the Rule 12(b)(6) motion to a Rule 56 motion, did not give notice of a conversion, and did not afford Plaintiffs any opportunity to conduct discovery or present countervailing affidavits or other pertinent material.

In Gibb v. Scott, this Court stated: “The district court’s failure to treat the motions as motions for summary judgment and to provide the parties with notice and an opportunity to provide further materials requires reversal unless the failure constituted harmless error.” 958 F.2d at 816. Because this Court was unable to determine that all of the factual issues raised by the plaintiffs were irrelevant to the question of law presented, the Court reversed the case and remanded with instructions that the district court notify the parties that the motion to dismiss would be converted to a motion for summary judgment and that the parties be “given the opportunity to take appropriate steps (including if necessary, conducting discovery) to support or resist [the motion].” 958 F.2d at 816-817.

In this case no such notice or opportunity was provided. The district court referred solely to Rule 12(b)(6) as the basis for its decision. Order, pp. 3-4. Not only did Plaintiffs not have notice that the district court would consider matters outside the pleadings, the district court affirmed its intention to consider the motion to dismiss giving Plaintiffs all presumptions and reading all allegations in Plaintiffs’ favor. The district court further affirmatively stated its intent not to

consider any factual materials in considering the motion to dismiss. *See* Transcript of Teleconference Hearing at pp. 6-16. (App. pp. 157-167.) Reversal is proper when the district court does not give proper notice of conversion and the plaintiffs assert on appeal in their briefs or at oral argument that they could have produced countervailing affidavits. Country Club Estates, 213 F.3d 1001.

## **II. THE DISTRICT COURT’S FAILURE TO CONVERT THE MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM TO A MOTION FOR SUMMARY JUDGMENT WAS NOT HARMLESS ERROR.**

### **A. Standard of Review.**

If the district court has converted a Rule 12(b)(6) motion to a motion for summary judgment, the court of appeals will review the dismissal *de novo* under summary judgment standards. Woods v. Dugan, 660 F.2d 379 (8<sup>th</sup> Cir. 1981).

“Under Rule 56, summary judgment cannot be granted unless there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law.” Carter v. Stanton, 405 U.S. at 671.

### **B. The Harmless Error Standard.**

In Gibb v. Scott, this Court determined that a failure to convert a Rule 12 (b)(6) motion to a motion for summary judgment, give notice, and allow the parties to provide further materials is not harmless if the nonmoving party did not have an adequate opportunity to respond and material facts were either disputed or missing from the record. 958 F.2d at 816-17. Even if the parties were aware that the

motion to dismiss should be converted, the failure to convert with proper notice and opportunity to present further evidence is not harmless if the record is insufficient to support summary judgment. *Id.* See also, Country Club Estates, 213 F.3d 1001.

C. Material Facts Are Disputed or Missing From the Record.

1. The meaning of an ambiguous contract is a question of fact precluding summary judgment. Maurice Sunderland Architecture, Inc. v. Simon, 5 F.3d 334, 337 (8<sup>th</sup> Cir. 1993). The Shared Appreciation Agreement is ambiguous. The district court stated that the Shared Appreciation Agreement was “poorly drafted and confusing,” Order, p. 9. In a dialogue with USDA counsel at the preliminary injunction hearing the court remarked that the Shared Appreciation Agreement was confusing and pointed out that the third paragraph of the agreement is “not consistent with the idea that the debt is due at the end of the ten year or the recapture is due at the end of ten years.” Transcript of August 17, 2001 Hearing, pp. 3-4. The judge further stated: “I’m trained in this stuff. I’ve been there. ... I know the good and the bad of agricultural law and this thing [the shared appreciation agreement] confuses me. Why should I expect more of the farmer? I think they were deceived here.” Transcript at p. 7. Even USDA stated that “the SAA and Exhibit B do not clearly state what the maximum collectible [under the Shared Appreciation Agreement] would be.” Defendant’s Brief, p. 25. Neither

USDA nor the district court has offered any explanation as to why the “amount of account equity” is placed on the Shared Appreciation Agreement just above the borrower’s and USDA’s signatures or how the “amount of account equity” is to be calculated, if it is not calculated by use of the formula contained in the instructions for the “recapture receivable account amount.” Nor does either the district court or USDA offer any explanation of why, if Exhibit B was just an “internal accounting mechanism,” a completed copy was to be provided to the farmer along with a copy of the signed Shared Appreciation Agreement. Both the meaning of the “amount of account equity” on the Shared Appreciation Agreement and the manner in which it is to be calculated are material questions of fact.

2. The agency’s interpretation of its regulations in the time frame Plaintiffs signed their Shared Appreciation Agreements is another genuine issue of material fact that is disputed. USDA filed no answer in this case. Notwithstanding the district court’s conclusion that USDA had “always” interpreted the agreement consistently, the record reflects inconsistent interpretations by USDA of the Shared Appreciation Agreement over the years. *See e.g.*, E-mail of Chet Bailey (Add. at p. A30); OIG Audit Report. (Add. at pp. A32-35). To the extent a government agency gives inconsistent statements or interpretations, a question of fact may be created. *See, Heart of America Grain Inspection Services, Inc. v. Missouri Dep’t of Agriculture*, 123 F.3d 1098, 1005 (8<sup>th</sup> Cir. 1997). *See also, Wilson v. USDA*,

991 F.2d 1211, 1217 (5<sup>th</sup> Cir. 1993) (no deference due to agency interpretation when agency “has put forth two positions that are at loggerheads with each other”).

D. Plaintiffs Did Not Have Adequate Opportunity to Respond.

Plaintiffs did not have an adequate opportunity to respond because they were flatly denied the opportunity to gather evidence which might have supported their claims. Plaintiffs should have been allowed to present - through affidavits, deposition testimony, or documentary evidence - facts that contradict the statements and arguments of USDA in its motion to dismiss. Included among the evidence that Plaintiffs should have been allowed to discover and have considered in any determination of summary judgment is evidence that USDA agents were instructed to advise the farmers when they signed the SAA’s that the agreements would “go away” on their expiration date if the farmer had not sold the property, ceased farming or paid the loan during the ten-year term of the agreement.

Other evidence Plaintiffs should have been allowed to develop and introduce includes:

(1) how the USDA Office Inspector General came to its conclusion that the “amount of account equity” on the Shared Appreciation Agreements was the “potential recapture amount” under the agreement;

(2) the background and formulation of the Forms Manual Insert for Form FmHA 451-2 which established the equity recapture account amount as the

maximum equity recapture to be collected under a Shared Appreciation Agreement;

(3) the circumstances surrounding the issuance of AN No. 1934, which instructed field staff to quit using the form;

(4) the purpose and intent of placing the “Amount of account equity” on the Shared Appreciation Agreement; and

(5) the basis for USDA’s decision to omit from the Shared Appreciation Agreement a formula for calculating an amount of recapture due at the expiration of the agreement.

Each of these areas of inquiry may well lead to evidence supporting Plaintiffs’ claims. Had Plaintiffs been granted proper notice and the right to conduct discovery, they would have been able to develop evidence supporting their claims.

E. USDA Is Not Entitled to Summary Judgment as a Matter of Law.

1. Significant unresolved issues of law exist that preclude summary judgment for USDA.

In order to meet the second prong of the summary judgment test which is used in a Rule 12(b)(6) motion where matters outside the pleadings are considered, movants must show that they are entitled to judgment as a matter of law. Carter v. Stanton; Woods v. Dugan. The following six issues of law have not been, and cannot be, resolved in USDA’s favor, as a matter of law on the existing record:

- a) Whether the Shared Appreciation Agreements “expire” in ten years or “mature” in ten years;
- b) Whether a farmer who has neither conveyed the property, nor ceased farming during the ten-year term of the Shared Appreciation Agreements owes *any* amount to USDA under the Shared Appreciation Agreement;
- c) Whether USDA acted unlawfully in discontinuing the use of the “Noncash Credit for Farmer Program Loan When Establishing Recapture Receivable” form prior to an appropriate amendment of its regulations;
- d) Whether USDA has used and is using the proper method of calculating the maximum amount collectible under the Shared Appreciation Agreement;
- e) Whether USDA has violated Plaintiffs’ constitutional rights by applying subsequently promulgated inconsistent regulations to Plaintiffs’ executed Shared Appreciation Agreements;
- f) Whether USDA has violated Plaintiffs’ constitutional rights to procedural and substantive due process by seizing Plaintiffs’ property to apply to amounts wrongfully claimed due under the Shared Appreciation Agreements without affording Plaintiffs a fair hearing.

Most of these issues are matters of first impression or have not been thoroughly addressed by the courts. *See* pages 56 to 58 *infra*. At trial or on a summary judgment motion after appropriate opportunity for discovery, Plaintiffs could introduce evidence supporting their claims. For purposes of demonstrating that USDA is not entitled to summary judgment as a matter of law, however, Plaintiffs will present summaries of the legal theories that they rely on at this early stage in the litigation. Of course, these are not the only legal arguments that might be raised over the course of the litigation after remand and discovery. “A complaint should not be dismissed because plaintiff’s allegations do not support the particular legal theory he advances, for the court is under a duty to examine the complaint to determine if the allegations provide for relief under any possible theory.” Bramlet v. Wilson, 495 F.2d 714, 716 (8<sup>th</sup> Cir. 1974).

2. Principles of contract interpretation applicable to the Shared Appreciation Agreement.

In interpreting a contract, the starting point is examination of the plain language of the contract. Gould, Inc. v. United States, 935 F.2d 1271 (Fed. Cir. 1991). The general rule that a contract should be construed in accordance with plain language has particular application to the Shared Appreciation Agreements because Congress specifically directed USDA to utilize forms and notices that were “designed to be readable and understandable by the borrower in implementation of the 1987 ACA.” 7 U.S.C. § 1981d(b)(6).

The principles applicable to contract interpretation are well established by this Court. *See, e.g., Barker v. Ceridian Corp.*, 122 F.3d 628 (8<sup>th</sup> Cir. 1997) (contract to be construed to give effect to all provisions; if two clauses appear in conflict they are to be interpreted harmoniously in order to avoid rendering either one nugatory; when a contract is ambiguous, court may weigh extrinsic evidence; each provision should be read consistently with the others and as part of an integrated whole).

This Court has further established the principle that a contract with the government is to be interpreted and construed under the rules of federal common law. *U.S. v. Basin Electric Power Cooperative*, 248 F.3d 781, 796 (8<sup>th</sup> Cir. 2001). The Supreme Court has determined that ordinary principles of contract interpretation apply to contracts with the government. “[W]hen the United States enters into contract relations, its rights and duties therein are governed generally by the law applicable to contracts between private individuals.” *United States v. Winstar Corp.*, 518 U.S. 839, 895 (1996); *see also Lynch v. United States*, 292 U.S. 571, 579 (1934). The Supreme Court has specifically stated that FmHA, when it acts in a proprietary capacity as a farm lender, “is in substantially the same position as private lenders” and that Congress “did not intend to confer special privileges on agencies that enter the commercial field.” *United States v. Kimbell Foods, Inc.*, 440 U.S. 715, 737-738 (1979). A contract between the federal government and a

citizen binds the government as well as the citizen. Meadow Green-Wildcat Corporation v. Hathaway, 936 F.2d 601, 604 (1<sup>st</sup> Cir. 1991).

If a federal contract is determined to be ambiguous, the “general maxim that a contract should be construed most strongly against the drafter” applies with “considerable emphasis” to the United States “because of the Government’s vast economic resources and stronger bargaining position in contract negotiations.” United States v. Seckinger, 397 U.S. 203, 216 (1970).

3. The Shared Appreciation Agreement.

In keeping with the admonition that contractual interpretation starts with the plain language of the contract, it is essential to review the entire text<sup>4</sup> of the Shared Appreciation Agreement that is at the crux of this case. It provides:

SHARED APPRECIATION AGREEMENT

This agreement is entered into between [FmHA] and [farmer’s name] (called “Borrower”) on [date] and expires on [10 years later<sup>5</sup>].

Borrower is indebted to FmHA for loan(s) as evidenced by the note(s) described below:

<u>Date</u>	<u>Principal Amount</u>	<u>Interest Rate</u>	<u>Due Date</u>
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This Agreement is attached to the notes(s) described above. As of the date of this Agreement, before write-down, the unpaid principal balance on this note was \$\_\_\_\_\_ and the unpaid interest balance was \$\_\_\_\_\_. These note(s)

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<sup>4</sup> The district court did not include the opening or closing portions of the Shared Appreciation Agreement excerpted in its Order, pp. 8-9. These portions, however, are essential to proper construction of the contract.

<sup>5</sup> The form provides “(maximum term of ten (10) years).” All Shared Appreciation Agreements signed by Plaintiffs lasted exactly ten years.

were modified by the following note(s) which are attached to note(s) described above.

<u>Date</u>	<u>Principal Amount</u>	<u>Interest Rate</u>	<u>Due Date</u>
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The note(s) described above are secured by the following real estate security instruments:

<u>Grantor</u>	<u>Date of Security Instrument</u>	<u>Records of County State</u>	<u>Book or Reel</u>	<u>Page</u>
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As a condition to, and in consideration of FmHA writing down the above amounts and restructuring the loan, Borrower agrees to pay FmHA an amount according to one of the following payment schedules:

1. Seventy-five (75) percent of any positive appreciation in the market value of the property securing the loan as described in the above security instrument(s) between the date of this Agreement and either the expiration date of this Agreement or the date the Borrower pays the loan in full, ceases farming or transfers title of the security, if such event occurs four (4) years or less from the date of this Agreement.
2. Fifty (50) percent of any positive appreciation in the market value of the property securing the loan above as described in the security instruments between the date of this Agreement and either the expiration date of the Agreement or the date Borrower pays the loan in full, ceases farming or transfers title of the security, if such event occurs after four years but before the expiration date of this Agreement.

The amount of recapture by FmHA will be based on the difference between the value of the security at the time of disposal or cessation by Borrower of farming and the value of the security at the time this Agreement is entered into. If the borrower violates the term of this agreement FmHA will liquidate after the borrower has been notified of the right to appeal.

Market value of the property securing loan(s) \$\_\_\_\_\_.

Net recovery value of property security loan(s) \$\_\_\_\_\_.

Amount of write down \$\_\_\_\_\_.

Amount of Account Equity \$\_\_\_\_\_.

\_\_\_\_\_  
(Borrowers signature)

\_\_\_\_\_  
(Farmers Home Administration)

4. Plaintiffs' legal theories on material issues of law.

- a. Whether the Shared Appreciation Agreements “expire” in ten years or “mature” in ten years.

Based on the plain language of the Shared Appreciation Agreement, the agreements “expire” on the tenth anniversary date of their execution. As stated by the district court: “USDA contrarily argues that recapture is due when the SAA’s mature after no more than ten years.” Order, p. 4. USDA’s interpretation, which was adopted by the district court, is wrong.

In the paragraph that immediately follows the clause stating that the Agreement “expires on” the tenth anniversary, USDA specifically required that the “due date” of the original promissory note and the “due date” of the new restructured note be entered by the county supervisor. If USDA had intended to make the Shared Appreciation Agreement “due” at the end of the ten year term, it would have clearly said so.

It violates the principles of contract construction to ignore the plain meaning of a word that is unambiguous, and to substitute for it another word that carries an entirely different meaning. The word “expire” is not ambiguous. It does not have the same meaning as “mature.” The plain and ordinary meaning of the word “expire” is “to come to an end . . . to become void at the end of a term.” The New Lexicon Webster’s Dictionary, p. 333 (Encyclopedic ed. 1989).” Black’s Law Dictionary, p. 600 (7<sup>th</sup> ed. 1999) states that an “expiration date” is “[t]he date on which an offer, option, or the like ceases to exist.” Mature means “to become due.” Black’s Law Dictionary, p. 993 (7<sup>th</sup> ed. 1999).

The district court stated that the word “expire” was “nettlesome” and “perhaps not the perfect word.” Order, p. 10. “Expires” is nevertheless the word that USDA chose to use in the contract it drafted and published in the Federal Register. The district court erred in disregarding the plain meaning of this contract term.

- b. Whether a farmer who has neither conveyed the property nor ceased farming during the ten-year term owes *any* amount to USDA under the Shared Appreciation Agreement.

The plain language of the Shared Appreciation Agreement provides for calculation of the amount of recapture as follows: “The amount of recapture by FmHA will be based on the difference between the value of the security at the time of disposal or cessation by Borrower of farming and the value of the security at the

time this Agreement is entered into.” There is no formula contained in the Shared Appreciation Agreement for calculating an amount of recapture if the farmer neither ceases farming nor sells the security property within the ten-year term.

The district court gave no significance to the fact that the amount of recapture formula in the Shared Appreciation Agreement did not apply to the end of the term of the agreement and failed to list the expiration of the agreement as a triggering event. The district court held: “the SAA’s entitle USDA to recapture appreciation upon their expiration, regardless of whether any of the triggering events occurred.” Order, p. 13.

Rather than properly starting with the analysis of the plain language of the Shared Appreciation Agreement itself, the district court commenced with an analysis of the “statutory framework the SAA’s are intended to implement.” Order, pp. 5-8.

The district court reached this conclusion in large part because “the Court is firmly convinced that the controlling statute and regulation require repayment, a conclusion which influences analysis of the SAA.” Order, p. 12.

The district court is in error in its interpretation of the statute and the regulation. The statute does not in fact “require” recapture in all circumstance. 7 U.S.C. § 2001(e)(1) provides:

(1) In general

As a condition of restructuring a loan in accordance with this section, the borrower of the loan **may be required** to enter into a shared appreciation arrangement that requires the repayment of amounts written off or set aside.

(Emphasis added).

The use of the word “may” clearly provides the option to USDA to not require any Shared Appreciation Agreements at all, and indicates that Congress allowed USDA discretion in setting the terms of the agreements. The discretion was provided “in general” and extended to the terms and timing of any recapture.

USDA exercised its discretion by adopting the specific language it used in drafting and promulgating the Shared Appreciation Agreement as a regulation. The explicit formula adopted by USDA in the Shared Appreciation Agreement to calculate the amount to be recaptured and the terms of any recapture provides for recapture only when the farmer ceases farming or sells security property during the term of the Shared Appreciation Agreement.

The Shared Appreciation Agreement does not have a clause which incorporates any statute or regulations into the text, thereby alerting farmers that terms or conditions not apparent on the face of the document may be incorporated into it. To incorporate a statute or a regulation into the Shared Appreciation Agreement, USDA must do so explicitly in the same manner as a private creditor would have to specifically incorporate matters outside the contract. Such

incorporated material must have a “clear and ascertainable meaning.” *See*, AgGrow Oils, L.L.C. v. National Union Fire Ins. Co., 242 F.3d 777, 781 (8<sup>th</sup> Cir. 2001). *See also*, Winstar, 518 U.S. at 895 (United States is governed generally by the law applicable to contracts between private individuals).

- c. Whether FmHA acted unlawfully in discontinuing the use of the “Noncash Credit for Farmer Program Loan When Establishing Recapture Receivable” form.

Administrative regulations duly promulgated and published in the Federal Register have the force and effect of law. Northern States Power Co. v. Rural Electrification Administration, 248 F. Supp. 616 (D.C. Minn. 1965) *rev’d* on other grounds. 373 F.2d 686 (8<sup>th</sup> Cir. 1967). As the court held in Northern States Power Company, rules published in accordance with the Federal Register Act “are binding on those persons publishing them as well as on the general public, until such time as they can be repealed or modified. This binding force and effect of statute or law attached to duly promulgated regulations whether or not the person or body publishing them was under any obligation to impose the duties or restrictions upon himself or others.” 248 F. Supp at 622-23 (citations omitted).

In U.S. v. Nixon, 418 U.S. 683 (1974), the Supreme Court addressed the effect of duly promulgated government regulations and held that until the regulations were amended or repealed, they had the force and effect of law and bound the agency promulgating the regulations. In Nixon, the Court recognized

the authority of the Attorney General to amend or revoke the regulations in question, but pointed out that the Attorney General had not done so. “So long as this regulation remains in force the Executive Branch is bound by it, and indeed the United States as the sovereign composed of the three branches is bound to respect and enforce it.” *Id.* at 696.

A government agency is not free to disregard its duly promulgated rules when it finds them inconvenient or no longer desirable. USDA did not repeal the regulations requiring the use of the Noncash Credit for Farmer Program Loans When Establishing Recapture Receivable form until April 30, 1992. Therefore, at least for any Shared Appreciation Agreements executed prior to April 30, 1992, the maximum amount collectible under the SAA must be determined utilizing the Noncash Credit for Farmer Program Loans When Establishing Recapture Receivable form and the instructions for completing it.

Although USDA claimed that the form was never “intended to be or used as anything more than an accounting mechanism,” this assertion is not credible. A review of the Shared Appreciation Agreements attached to Plaintiffs’ affidavits indicate county supervisors in many states completed the amount of account equity on Plaintiffs’ Shared Appreciation Agreements by using the “equity recapture account amount” as calculated under the instructions for the “Noncash Credit For Farmer Program Loan When Establishing Recapture Receivable form.”

Further, USDA's unsupported claim that because this form was "never intended to be, or used as, anything more than an accounting mechanism," it was unimportant is ludicrous. The federal regulations required this "accounting mechanism" be used to keep track of the borrower's obligations to pay any amounts of recapture and to credit payments received against that obligation. *See*, 7 C.F.R. § 1951.914 (1989) and Forms Manual Insert Form FmHA 451-2, Exhibit A, No. 16. (Add. at p. A36).

- d. Whether USDA has used and is using the proper method of calculating the maximum amount collectible under the Shared Appreciation Agreement.

The Noncash Credit for Farmer Program Loans When Establishing Recapture Receivable form served two functions. Its instruction told explicitly how to calculate the amounts to be used in completing the four items at the bottom of the Shared Appreciation Agreement. It also determined the amount to be used by the finance office in establishing an equity receivable account against which payments by the farmers were to be credited.

Both USDA and the district court totally ignored the significance of the "amount of account equity" listed on the Shared Appreciation Agreement. The significance of the "amount of account equity," however, is shown by Forms Manual Insert for Form FmHA 451-2.

Exhibit A to the Forms Manual Insert Form FmHA 451-2 states specifically:

16. Equity receivable (Net Recovery Buyout, Shared Appreciation Agreement, and Single Family Housing Equity Recapture). This code will be used for all equity recapture receivable collections. . . . The following statements are to be completed and inserted immediately below the name and case number . . . **Amount of Original Equity Recapture Established** \$\_\_\_\_\_.  
**Less:** Amount of Equity Recapture Collected to Date \$\_\_\_\_\_.  
**Equals: Remaining Equity Recapture to be collected** \$\_\_\_\_\_.

(Emphasis added.) Addendum at p. A36.

Another document in the record also supports Plaintiffs’ allegations that the “equity recapture account amount” calculated on the Noncash Credit for Farmer Program Loans When Establishing Recapture Receivable form is the “amount of account equity” to be inserted on page two of the Shared Appreciation Agreement and is the cap on the amount of recapture that can be collected by USDA under the Shared Appreciation Agreement. In 1992, the USDA Office of Inspector General conducted an audit of USDA’s processing of Shared Appreciation Agreements. The Audit Report called the four amounts entered at the bottom of the Shared Appreciation Agreement: (1) “the market value of the property securing loans,” (2) “the net recovery value of property securing the loan,” (3) “the amount of writedown,” and (4) **“the potential recapture amount.”** Audit Report at p. 7. (Add. at p. A33). Thus, the OIG deemed the “Amount of account equity” to be the potential recapture amount under the Shared Appreciation Agreement. Further

Exhibit C to the Audit Report “Potential Recapture Amounts on SA Agreements” (Add. at pp. 34-35) reveals that the “Potential Recapture Per Audit” was calculated by subtracting the net recovery value from the market value of the real estate – the same formula for calculating the equity recapture account amount on the Noncash Credit for Farm Program Loans When Establishing Recapture Receivable form.

The district court accepted USDA’s factual allegation that issuance of AN No. 1934, which directed field staff to stop using the Noncash Credit for Farm Programs Loans When Establishing Recapture Receivable form and to use instead another form entitled “Noncash Credit for Shared Appreciation Writedown,” did not effect any substantive changes. Order p. 18. This conclusion was clearly erroneous. The new form provided with AN No. 1934 directed the field staff in Item 10 of the instructions that the “potential recapture amount” was the “amount written down.”

The Noncash Credit for Farmer Program Loan When Recapturing Recapture Receivable form, however, required the field staff to enter the lesser of the difference between the loan balance and the net recovery value (which was equal to the amount of write down) or the difference between the market value and the net recovery value as the “equity recapture account amount.” Thus, AN No. 1934 impaired the rights of Plaintiffs under the Shared Appreciation Agreements they signed.

USDA ignores the key fact that the instructions on the Noncash Credit for Farmer Program Loans When Establishing Recapture Receivable form specify and require that a copy of the form be given to the borrower. If it were true that this form was simply a computer form for internal use, it would never have been required to be provided to the borrower or printed in the Federal Register.

In an analogous case, a similar argument by a government agency was raised. *See, Northern States Power Co., v. REA*, 248 F.Supp. at 624 (rejecting the argument that a Bulletin published in the Federal Register was a mere policy declaration and therefore could be ignored and calling the argument fatuous.)

Given an opportunity to present evidence and fully brief the issues, Plaintiffs could provide legislative history showing that the overreaching goals of the 1987 ACA were to keep farmers and ranchers on the land to prevent a collapse of land values, to provide clear and readable notices to farmers, and to provide at least as good a deal for the farmer as a Chapter 12 bankruptcy.

In Senate debates on the bill, there was much discussion of the problems caused by farmers taking Chapter 12 bankruptcies. Congressional Record – Senate (December 2, 1987) p. 33610 at p. 33613. Concern was expressed that the Shared Appreciation Agreement provisions might encourage farmers to take a Chapter 12 bankruptcy because they would fare better under a bankruptcy plan. Congress unequivocally stated that it cost the government more when a farmer went through

a Chapter 12 bankruptcy than it would cost the government to restructure the loans. *Id.* The Senate, therefore, directed FmHA “to take into account the farmer’s option to go to chapter 12” when it was restructuring the loans and further directed that the deal FmHA gave “the farmer on restructuring has to be equal to or better than what the farmer would get under chapter 12.” *Id.*

- e. Whether USDA has violated Plaintiffs’ constitutional rights by applying subsequently promulgated inconsistent regulations to Plaintiffs’ executed Shared Appreciation Agreements.

The federal courts have repeatedly held that farmers’ interests in USDA loans and loan collateral are property interests protected by the U.S. Constitution. U.S. v. Kimbell Foods, Inc., 440 U.S. 715, 735 (1979); Love v. United States, 915 F.2d 1242 (9<sup>th</sup> Cir. 1988), amended and superseded, 915 F.2d 1242 (1989), reh. denied, 944 F.2d 632 (1991); Coleman v. Block, 632 F. Supp. 997 (D.N.D. 1986); Coleman v. Block, 562 F. Supp. 1353, (D.N.D. 1983), 580 F. Supp. 192, 194 (D.N.D. 1984).

Plaintiffs have a constitutionally protected property right in the terms of the SAA’s that cannot be altered or amended except in accordance with the law, regulations, or terms that governed the Shared Appreciation Agreements at the time the agreements were executed.

“Taking” of a contract is a deprivation of due process of law. The Fifth Amendment commands that property be not taken without making just compensation. Valid contracts are property, whether the obligor be a private

individual, a municipality, a State or the United States. Rights against the United States arising out of a contract with it are protected by the Fifth Amendment. *United States v. Central Pacific R. Co.*, 118 U.S. 235, 238; *United States v. Northern Pacific Ry. Co.*, 256 U.S. 51, 64, 67.

Lynch v. United States, 292 U.S. 571, 579 (1934).

If Plaintiffs had been provided with the opportunity to do discovery, they would be able to present evidence that USDA enforced amendments to its regulations that added “termination” of the agreement and “acceleration” of the loans to the triggering events, 57 Fed. Reg. 18,649 (April 30, 1992), 63 Fed. Reg. 6627-6629 (February 10, 1998) (cease farming and sale of land) listed in the Agreements they signed.

- f. Whether USDA has violated Plaintiffs’ constitutional rights to procedural and substantive due process by seizing Plaintiffs’ property to apply to amounts wrongfully claimed due under the Shared Appreciation Agreements without affording a fair hearing.

Plaintiffs have already presented detailed affidavits in support of their Motion for a Preliminary Injunction stating that USDA is demanding payments that are not due under the Shared Appreciation Agreements. These affidavits also state USDA is seizing income and property through offsets of government program payments and other means to pay these incorrectly computed amounts. If Plaintiffs had an opportunity to conduct discovery as to the circumstances surrounding the training provided to county supervisors who told them that if they didn’t sell or

cease farming during the term of the agreement they would not owe any money under the Shared Appreciation Agreements and the other discovery referenced throughout this brief, Plaintiffs could provide evidence supporting these claims.

### **III. THE DISTRICT COURT COMMITTED REVERSIBLE ERROR BY FAILING TO CORRECTLY APPLY THE PROPER STANDARDS TO THE RULE 12 (b)(6) MOTION TO DISMISS.**

#### **A. Standard of Review.**

The court of appeals reviews the grant of a dismissal under F.R.Civ.P. Rule 12(b)(6) *de novo*. Stone Motor Co. v. General Motors Corp., 293 F.3d 456 (8<sup>th</sup> Cir. 2002).

#### **B. Stringent Standards Apply to Rule 12 (b)(6) Motions to Dismiss.**

In reviewing a motion to dismiss under F.R.Civ.P. 12(b)(6), “this Court is constrained by ‘a stringent standard.’” Parnes v. Gateway 2000, Inc., 122 F.3d 539, 545-46 (8<sup>th</sup> Cir. 1997) (citations omitted.)

A Rule 12(b)(6) motion is to test the formal sufficiency of the statement of the claim for relief; it is not a procedure for resolving a contest about the facts or the merits of the case. Wright, Miller & Kane, Federal Practice and Procedure: Civil 3d, § 1356. As stated by the Supreme Court in Scheuer v. Rhodes, 416 U.S. 232, 236 (1974): “When a federal court reviews the sufficiency of a complaint before the reception of any evidence either by affidavit or admissions, its task is necessarily a limited one. The issue is not whether a plaintiff will ultimately

prevail, but whether the claimant is entitled to offer evidence to support the claims. Indeed, it may appear on the face of the pleadings that a recovery is very remote and unlikely but that is not the test.”

Courts should be especially reluctant to dismiss cases on the basis of the pleadings when the asserted theory of liability is novel, “since it is important that new legal theories be explored and assayed in the light of actual facts rather than a pleader’s suppositions.” Wright, Miller & Kane, Federal Practice and Procedure: Civil 3d, § 1357. The motion to dismiss for failure to state a claim is viewed with disfavor and is rarely granted. Wright, Miller & Kane, Federal Practice and Procedure: Civil 3d, § 1357.

A Rule 12(b)(6) motion must be read in conjunction with Rule 8(a), governing notice pleading standards. Wright, Miller & Kane, Federal Practice and Procedure: Civil 3d, § 1356. Here, Plaintiffs’ Complaint set forth five claims for relief that more than met the notice pleading standards of Fed. R. Civ. P. Rule 8. A 12(b)(6) motion “will succeed or fail based upon the allegations contained in the face of the complaint.” Fusco v. Xerox Corp., 676 F.2d 332, 334 (8<sup>th</sup> Cir. 1982); Gibb v. Scott, 958 F.2d 814, 816 (1992).

The test most often applied to determine the sufficiency of the complaint was set out in the leading case of Conley v. Gibson, 355 U.S. 41, at 45-46 (1957) where the Supreme Court stated:

[I]n appraising the sufficiency of the complaint we follow, of course, the accepted rule that a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.

*See also*, Briehl v. General Motors Corp., 172 F.3d 623, 627 (8<sup>th</sup> Cir. 1999).

In a 12(b)(6) motion, plaintiffs' allegations must be accepted as true, and the facts are to be construed in the light most favorable to plaintiffs. Leatherman v. Tarrant Co. Narcotics Intelligence & Coordination Unit, 507 U.S. 163, 164 (1993); Botz v. Omni Air Int'l, 286 F.3d 488, 490 (8<sup>th</sup> Cir. 2002). Midwestern Mach., Inc. v. Northwest Airlines, Inc., 167 F.3d 439, 441 (8<sup>th</sup> Cir. 1999).

Rule 12(b)(6) does not countenance dismissals based on a judge's disbelief of a complaint's factual allegations. Neitzke v. Williams, 490 U.S. 319, 327 (1989). "Because the decision to dismiss involves no factual findings, we owe no deference to the District Court. Review is *de novo*. We must construe the complaint so as to favor the non-moving party, here the plaintiffs, and may dismiss 'only if it is clear that no relief can be granted under any set of facts that could be proven consistent with the allegations.'" Abels v. Farmers Commodity Corp., 259 F.3d 910 at 916 (citing Casino Resource Corp v. Harrah's Entertainment Inc., 243 F.3d 435, 437 (8<sup>th</sup> Cir. 2001).

Both the complaint and all reasonable inferences arising from them must be viewed in the light most favorable to the plaintiff. Morton v. Becker, 793 F.2d

185, 187 (8<sup>th</sup> Cir. 1986). As stated by the Supreme Court in Hishon v. King & Spalding, 467 U.S. 69, 73 (1984), a complaint should be dismissed under Rule 12(b)(6) “[o]nly if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations.”

C. The District Court Did Not Comply with the Stringent Standards Applicable to Rule 12(b)(6) Motions.

The district court in this case failed to apply these standards governing a Rule 12(b)(6) dismissal.

The district court did not accept as true Plaintiffs’ factual allegations. In their Complaint, Plaintiffs alleged at Paragraphs 54-60 that the Shared Appreciation Agreement required the farmers to pay, at most, the “amount of account equity” listed on the Shared Appreciation Agreement just above the farmer’s signature. Further, Plaintiffs’ alleged that the “amount of account equity” was the same as the “equity recapture account amount” determined in the companion form “Noncash Credit for Farmer Program Loans When Establishing Recapture Receivable.”

Instead of accepting the facts alleged in the Complaint and all inferences reasonably flowing from them, the district court accepted USDA’s allegations of fact and found “there was simply **insufficient evidence** to support plaintiff’s contentions.” Order, p. 19 (emphasis added). Sufficiency of evidence plays no role in a Rule 12(b)(6) motion. As stated in Scheuer, 416 U.S. at 236, “The issue

is not whether the plaintiff will ultimately prevail, but whether the claimant is entitled to offer evidence to support the claims.” To rule against Plaintiffs for having presented “insufficient evidence” is all the more egregious because Plaintiffs had clearly identified USDA’s original interpretation of the Shared Appreciation Agreement as a contested issue of material fact. Plaintiffs requested leave to conduct discovery that might have led to additional evidence relevant to their claims, but were denied this opportunity by the district court.

The district court’s acceptance of USDA’s claim as to its “uniform” interpretation of the Shared Appreciation Agreement and the meaning, purpose, and use of the terms in that agreement - a contract which the district court found to be “poorly drafted and confusing,” - without affording an opportunity for Plaintiffs to engage in discovery and to offer evidence in support of their allegations is the very antithesis of the proper procedure under a Rule 12(b)(6) motion.

To refute the allegations of fact in Plaintiffs’ Complaint, the district court accepted the good faith of USDA in issuing Administrative Announcement AN No. 1934 and its attachments (which ordered field offices to disregard the duly promulgated regulation requiring use of the “Noncash Credit for Farmer Program Loan When Establishing Recapture Receivable” form); accepted USDA’s claim that this change had affected “no substantive change”; accepted the rationale for eliminating the Noncash Credit for Farmer Program Loan When Establishing

Recapture Receivable” form; accepted inferences from language used in An No. 1934 suggested by USDA as true; and accepted as true USDA’s explanation of the purpose and effect of this AN No. 1934. *See*, Order, pp. 16-19. The district court even relied on a regulation adopted several years later to support its conclusions as to the non-substantive effect of the issuance of AN No. 1934. The district court did not offer Plaintiffs the opportunity to challenge or to contest these assumptions of “facts” by the district court. The United States Supreme Court, under similar circumstances, in Scheuer v. Rhodes, 416 U.S. at 235-36, 249-250, reversed dismissals of a complaint by the district court and court of appeals for making unwarranted assumptions as to the good faith of a governor in issuing a proclamation and for accepting as fact the claims made in the proclamation without offering the plaintiffs a chance to contest those assumptions.

The district court’s order shows that it did not apply the general standards applicable to all Rule 12(b)(6) motions to dismiss because a federal government agency was the moving party. After correctly stating the applicable standard of review that “a dismissal under Rule 12(b)(6) is likely to be granted only in the unusual case in which a plaintiff includes allegations that show on the face of the complaint that there is some insuperable bar to relief,” the district court stated that “[t]hese standards arguably operate somewhat differently here, however, as the court is confronted with a legal challenge to an agency’s interpretation of its own

regulations.” Order, p. 4. However, Rule 12(b)(6) does not carve out a special category for motions made by the federal government. *See, e.g., U.S. v. Golden Elevator, Inc.*, 27 F.3d 301, 304 (7<sup>th</sup> Cir. 1994) (Rule 60(b) motion applies to federal government in the same way as other litigants).

The district court also accepted USDA’s arguments with regard to missing provisions in the Shared Appreciation Agreement. Although the district court acknowledged that the Shared Appreciation Agreement does not have a formula for determining the amount of the recapture at the expiration of the agreement and only has a formula for determining the amount of recapture in the event that the farmer quit farming or sold the land, it decided to adopt the reasoning of the Seventh Circuit in *Israel v. Veneman*, 282 F.3d 521 (7<sup>th</sup> Cir. 2002). Unlike this case, *Israel* was not a claim for a declaratory judgment. *Israel* involved only a review of a USDA hearing officer’s determination that the formula for computing a recapture amount also applied at the termination of the agreement. The *Israel* decision said that the hearing officer’s decision (based on later-adopted regulations and without the benefit of discovery) was not “arbitrary, capricious, or an abuse of discretion or otherwise not in accordance with law” or “unsupported by substantial evidence.” The district court stated, that it “agrees with this reasoning by the Seventh Circuit and thus adopts it here.” *See*, Order, pp. 11-12. This type of deferential approach to the agency’s interpretation is not appropriate when

construing a motion to dismiss for failure to state a claim. To the extent that deference is granted to an agency in the interpretation of its regulations, such deference is appropriate only at a trial or on a motion for summary judgment and not when determining whether the complaint is sufficient to state a claim for relief.

Finally, even though a determination on a Rule 12(b)(6) motion is generally not final and leave to amend is to be liberally granted, Wright & Miller, Federal Practice & Procedure: Civil 2d, § 1357, the district court here dismissed **with prejudice** all of Plaintiffs' claims. *See*, Order, page 21, n. 6. This is a particularly harsh result because, as acknowledged by the district court, Plaintiffs' third cause of action is a matter of **first impression**. *See*, Order, p. 14. Further, although the district court did not discuss or address Plaintiffs' constitutional claims in the fourth and fifth causes of action, these too were dismissed with prejudice and are matters of **first impression**.

Plaintiffs' first and second causes of action have been addressed by other cases, but the litigation on these agreements has only recently commenced. Only a handful of courts have even mentioned the issue. Only six district courts, two bankruptcy courts, one tax court, and one Court of Appeals have touched on the question of interpretation of the Shared Appreciation Agreements. Of these, two district court cases and one bankruptcy case did not contain any challenges to the

agency's interpretation of the Shared Appreciation Agreement.<sup>6</sup> None of these cases were requests for declaratory judgment. None were filed as class actions with a team of highly experienced attorneys. None raised the legislative history of the 1987 ACA or its "plain language" requirement. In addition, all of the district court cases arose as direct appeals from USDA National Appeals Division administrative hearings.<sup>7</sup> These cases reviewed only the administrative record. Consequently, discovery was neither available to the litigants nor were the standards governing a Rule 12(b)(6) motion raised in those cases.

The ability of a farmer to conduct discovery at a USDA administrative hearing is sharply limited. *See, e.g., Israel v. Veneman*, 135 F.Supp. 2d 945 (2001) (the farmers' request to subpoena USDA employees to corroborate the plaintiffs' statements was denied.) Further, the ability of a farmer to challenge the agency's regulations or the agency's generally applicable interpretations is virtually non-

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<sup>6</sup> Wright v. FSA, 2001 WL 822417 (W.D. Mich. 2001) (appeal was untimely and the court held it did not have jurisdiction); Curtis v. Farm Service Agency, 2001 WL 822413 (W.D. Mich. 2001) (dispute regarded factual appraisal issues); In re Tunnissen, 216 B.R. 834 (Bankr. D.S.D. 1996) (question of whether an SAA in the 6<sup>th</sup> year was executory and which of two lenders had priority in the real property collateral).

<sup>7</sup> Wright v. FSA, 2001 WL 822417 (W.D. Mich. 2001); Curtis v. Farm Service Agency, 2001 WL 822413 (W.D. Mich. 2001); Evans v. Veneman, 99-AP-233; Pandora Farms v. USDA, Civil No. 00-1753-A (E.D. Va. July 5, 2001); Israel v. Veneman, 135 F.Supp. 2d 945 (W.D. Wis. 2001); Bukaske v. U.S. Dept. of Agriculture, 193 F.Supp.2d 1162 (D.S.D. 2002).

existent. USDA's National Appeals Division Hearing officers are not allowed to rule on matters of law or to modify any "generally applicable interpretation of the agency." 7 U.S.C. § 6992(d); 7 C.F.R. § 11.3(b).

At this point in the litigation, it was wholly inappropriate for the district court to dismiss all of Plaintiffs' claims with prejudice. Further, this dismissal has also *de facto* dismissed the class of up to 7,000 farmers that Plaintiffs seek to represent because few, if any, individual family farmers who are borrowers from FmHA can afford to mount a similar challenge. The stakes are very high: Plaintiffs' Complaint contends that USDA is wrongfully seeking to collect many millions of dollars. These farmers deserve their "day in court" in keeping with the general purposes of the rules of civil procedure "to secure the just, speedy, and inexpensive determination of every action," Fed.R.Civ.P. Rule 1, and to construe pleadings to "do substantial justice," Fed.R.Civ.P. Rule 8(f). Dismissal in this case for failure to state a claim upon which relief can be granted is also not in keeping with the overall principle that "the purpose of pleading is to facilitate a proper ruling on the merits." Conley v. Gibson, 355 U.S. 41, 48 (1957). *See also*, Swierkiewicz v. Sorema N.A., 534 U.S. 506 (2002).

## CONCLUSION

Plaintiffs/Appellants request this Court to reverse the district court's dismissal of their causes of action with prejudice and remand the case for further development of the record including relevant discovery.

Dated this 20<sup>th</sup> day of September, 2002.\*

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\*Corrected for certain typographical errors on September 27, 2002.

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**CERTIFICATE OF COMPLIANCE**

I hereby certify, pursuant to Federal Rule of Appellate Procedure Rule 32(a) and Eighth Circuit Rule of Appellate Procedure 28a(c) that this brief complies with the type-volume limitations. It was prepared in Times New Roman, 14 pt., a proportional font, and the word counter on Microsoft Word Office 2000 counted 13,399 words.

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/s/  
Sarah Vogel, Attorney

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**CERTIFICATE OF SERVICE**

I hereby certify that on this 20th day of September, 2002, I served two copies of the foregoing Brief of the Plaintiffs/Appellants and one diskette upon counsel of record, postage prepaid, to:

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**CERTIFICATE OF SERVICE**

I hereby certify that on this 27th day of September, 2002, I served two copies of the foregoing Brief of the Plaintiffs/Appellants and one diskette, with corrections, upon counsel of record, postage prepaid, to:

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