IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
SOUTHERN DIVISION

CHRIS LOVE et al.,	)	
	)	
Plaintiff,	)	
	)	CIVIL ACTION NO.: 1:20-cv-365-ALB-JTA
v.	)	
	)	
UNITED STATES DEPARTMENT OF AGRICULTURE, et al.,	)	
	)	
Defendants.	)	

DEFENDANTS' MEMORANDUM IN SUPPORT OF MOTION TO DISMISS

COMES NOW, Defendants United States Department of Agriculture ("USDA"), Sonny Perdue in his official capacity as Secretary of the USDA, and Richard Fordyce, in his official capacity as Administrator of the Farm Service Agency ("FSA"), (hereinafter collectively "the Federal Defendants"), by and through Louis F. Franklin, Sr., United States Attorney for the Middle District of Alabama, and submit this Memorandum in Support of their Motion to Dismiss. As set forth below, Plaintiffs' claims against the Federal Defendants should be dismissed pursuant to Rules 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure because this Court lacks subject matter jurisdiction and Plaintiffs fail to state a claim upon which relief may be granted.

Plaintiffs filed this purported class action lawsuit challenging the Federal Defendants' alleged failure to timely process and pay benefits that they claim they are due under the USDA's Noninsured Crop Disaster Assistance Program ("NAP" or "the Program"). (Complaint, ¶ 1). Plaintiffs, however, have not even attempted to plead a cause of action under the exclusive administrative and judicial review scheme that Congress created to handle challenges to USDA decisions regarding or relating to the NAP. This review scheme provides for federal court review of final agency decisions after they have been fully exhausted. Plaintiffs cannot show the existence

of subject matter jurisdiction for the tort, contractual, and Florida state-law legal theories that they chose to plead in their Complaint instead of filing an appeal pursuant to the review scheme established by Congress. It follows that their claims should be dismissed.

STATEMENT OF THE CASE

This is a purported class action lawsuit brought by farmers who allege that they are due NAP benefits from the FSA, a component of the USDA. Plaintiffs Chris Love and RWE Farms, LLE, allege that they applied for NAP benefits, paid the premiums, suffered a loss, submitted a claim, and that they have not been paid. (Complaint, ¶¶ 12-13). In their six-count Complaint, they allege that the Federal Defendants failure to timely pay these NAP benefits constitutes: (1) common law negligence; (2) common law negligence per se; (3) breach of contract; (4) breach of an implied duty of good faith and fair dealing; and (5) violation of the Florida Deceptive and Unfair Trade Practices Act, Fla. Stat. § 501.201 *et seq*. (Complaint, ¶¶ 5, 49, 57, 62, 66 & 70). They also seek relief under the Declaratory Judgement Act. (Id. at ¶¶ 67-68). In addition, Plaintiffs' Complaint purports to represent a putative class of other farmers who have also allegedly not been timely paid NAP benefits. (Id. at ¶¶ 33-42). Plaintiffs seek declaratory relief, damages, punitive damages, injunctive relief, and attorney's fees. (Id. at ¶ 6 & pg. 17, Prayer for Relief).

A. Non-insured Crop Disaster Assistance Program.

The NAP is a program authorized by section 196 of the Federal Agriculture Improvement and Reform Act of 1996, 7 U.S.C. § 7333. The FSA administers the Program and uses the funds of the Commodity Credit Corporation. See Mahon v. USDA, 485 F.3d 1247, 1253 (11th Cir. 2007). As part of administering the Program, the FSA has issued regulations governing NAP as well as a

Handbook with additional provisions and explanations.[1] See 7 C.F.R. pt. 1437 (2019). See also Mahon, 485 F.3d at 1253 (discussing regulations).

The general purpose of the NAP is to "provide [] financial assistance to producers of non-insurable crops when low yields, loss of inventory or prevented planting occurs due to natural disasters." (NAP Fact Sheet, USDA, FSA).[2] The Program, therefore, helps reduce the production risks faced by producers of certain commercial crops for which catastrophic loss coverage under the Federal Crop Insurance Act is not available. See 7 CFR § 1437.1(a) and (b).

In order to demonstrate eligibility for NAP payments, an otherwise eligible farmer's crop loss must come from "an eligible cause of loss." See 7 C.F.R. § 1437.9 (a) & (c). The statute defines eligible cause of loss as being due to drought, flood, or other natural disaster as determined by the Secretary of the USDA. See 7 U.S.C. § 7333(a)(3). The implementing regulations further define the eligible causes of loss as including such things as damaging weather (which includes drought, hail, excessive moisture, freeze, tornado, hurricane, excessive wind, or any combination therefore), natural occurrences (which includes earthquakes, floods, and volcanic eruptions), or conditions related to these types of events (such as heat, insect infestation, disease, insufficient chill hours, or wildlife). See 7 C.F.R. § 1437.10. Among other things, if a farmer's reported loss is not due to an eligible cause, then he is not entitled to NAP benefits.[3] See Uschock v. USDA, 2011 U.S. Dist. LEXIS 137052, at *19-20 (W.D. Pa. Nov. 29, 2001) (upholding agency denial of NAP benefits).

1 The manual for 2015 and subsequent years can be found at: https://www.fsa.usda.gov/Internet/FSA_File/1-nap_r02_a16.pdf.
2 The 2019 Fact Sheet can be found at: https://www.fsa.usda.gov/Assets/USDA-FSA-Public/usdafiles/FactSheets/noninsured_crop_disaster_assistance_program-nap-fact_sheet.pdf
3 As one example, the NAP Handbook states that losses due to failure to follow good farming practices for the eligible crop are not covered. See NAP Handbook, at pg. 2-6, 51A.

B. National Appeals Division Administrative and Judicial Review.

The Federal Crop Insurance Reform and Department of Agriculture Reorganization Act of 1994 (the "Reorganization Act"), 7 U.S.C. § 6901 et seq., and its implementing regulations established specific and exclusive administrative procedures to process claims related to USDA programs such as the NAP at issue in this case. See Allied Home Mortgage Capital Corp., v. United States, 95 Fed. Cl. 769, 778 (2010); Farmers & Merchants Bank of Eatonton v. United States, 43 Fed. Cl. 38, 40-41 (1999). The Reorganization Act directed the Secretary of the USDA to create an independent National Appeals Division ("NAD") within USDA to review "adverse agency decisions." See Aageson Grain & Cattle v. USDA, 500 F.3d 1038, 1042 (9th Cir. 2007); 7 U.S.C. § 6992(a). An adverse agency decision is defined as "an administrative decision made by an officer, an employee, or committee of an agency that is adverse to the participant…" as well as "the failure of an agency to issue a decision or otherwise fail to act on the right or request of a participant." See 7 U.S.C. § 6991(1). It even includes decisions on whether an issue can be raised through the NAD appeal process. See Bartlett v. USDA, 716 F.3d 464, 470 (8th Cir. 2013).

Pursuant to the NAD review scheme established by the Reorganization Act and its implementing regulations, a NAP participant who suffers an adverse decision from the FSA must first appeal for an evidentiary hearing before a NAD Hearing Officer. See 7 C.F.R. § 11.6(b)(1); 7 U.S.C § 6996. The hearing before the NAD Hearing Officer is de novo as the administrative judge is not bound by any prior factual findings of the agency and may consider evidence that was not before the initial decision-maker. See 7 C.F.R. §§ 11.8(b)(3); 11.10(a). The hearing is adversarial in nature, and the Hearing Officer receives written statements from both parties, accepts evidence, creates a transcript, and establishes a record upon which the decision will be based. See 7 C.F.R. 11.8(c); Mahon, 485 F.3d at 1256. The party challenging the agency action has the burden of showing it is erroneous by a preponderance of the evidence. See 7 C.F.R. § 11.8.

If a participant is unsatisfied with the Hearing Officer's decision, then an appeal may be taken to the NAD Director. See 7 C.F.R. 11.9; 7 U.S.C. 6998; Aageson Grain & Cattle, 500 F.3d at 1042. The Director will issue a determination that upholds, reverses, or modifies the decision of the Hearing Officer. See 7 U.S.C. § 6998. Either party can then seek reconsideration of the Director's decision. See 7 C.F.R. § 11.11. The final determination of the NAD Director, after any request for reconsideration is resolved, becomes the agency's final determination, and it should be implemented within 30 days of its effective date. See 7 U.S.C. § 7000.

After exhausting the mandatory administrative review provisions of this remedial scheme, a participant may appeal the final determination of the NAD to federal court pursuant to 7 U.S.C. § 6999.[4] See Bruhn v. United States, 74 Fed. Cl. 749, 755 (2006) ("section 6999 provides the district court with jurisdiction over all final determinations of the NAD."). See also 7 C.F.R. § 11.13 ("an appellant may not seek judicial review of any agency adverse decision appealable under this part without receiving a final determination from the Division…") (emphasis added). The statutory exhaustion procedures that lead to a final agency decision are mandatory in nature and apply to all claims and theories of relief. See Bastek v. Fed. Crop Ins. Corp., 145 F.3d 90, 94-95 (2d Cir. 1998); Gaunce v. De Vincintis, 708 F.2d 1290, 1293 (7th Cir. 1983) ("Where Congress has provided a statutory procedure for the review of an administrative order, such procedure is exclusive."). See also Farmers & Merchants Bank of Eatonton, 43 Fed. Cl. at 40-41 ("the plain language of the statute demonstrates a clear congressional intent to require all parties dissatisfied

[4] Not only is finality a requirement for judicial review of NAD decisions by statute, but it is also an aspect of standing. See Mississippi Chemical Corp. v. EEOC, 786 F.2d 1013, 1016 (11th Cir. 1986) (applying ripeness doctrine and stating that 'a court's determination that agency action is not final ends its inquiry" into standing). Indeed, a plaintiff still before the NAD may obtain relief that moots any claim. Review only after full exhaustion also leads to a complete record for judicial review. See Nat'l Advertising Co. v. City of Miami, 402 F.3d 1335, 1339 (11th Cir. 2005) ("when a court is asked to review agency decisions of administrative agencies, it is hornbook law that courts must exercise patience and permit the administrative agency the proper time and adherence for those agencies to consider the case fully.").

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