

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

GUADALUPE L. GARCIA, JR., et al., )  
 )  
 Plaintiffs, )  
 )  
 v. )  
 )  
 ANN VENEMAN, Secretary of )  
 Agriculture, )  
 )  
 Defendant. )  
 )  
 \_\_\_\_\_ )

Case No. 1:00CV02445

Judge: James Robertson

**DEFENDANT'S MOTION TO FILE A SURREPLY TO PLAINTIFFS' SECOND  
SUPPLEMENTAL MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION FOR  
CLASS CERTIFICATION**

Pursuant to Fed. R. Civ. P. 7(b) and Federal Local Court Rule 7.1 for the District of Columbia, defendant hereby moves for leave to file a surreply to plaintiffs' second supplemental memorandum in support of their motion for class certification. By this motion defendant seeks a fair opportunity to respond to the analysis offered by plaintiffs' expert in his last declaration. Throughout this litigation plaintiffs have consistently obstructed defendant from learning what their expert did and how he did it. Instead of providing data regarding Dr. Hausman's analysis when defendant requested it months ago, plaintiffs only made selective, piecemeal disclosures to support various briefs. It is solely because of plaintiffs' obfuscation that defendant now needs to be able to respond to Dr. Hausman's latest assertions.

Plaintiffs have placed in issue the question of whether there exists a statistically significant disparity in loan rates between Whites and Hispanics at USDA. Through the testimony of their expert, plaintiffs have had two opportunities to explain their position. On the other hand, defendant has had

one opportunity, through its expert, Dr. Freedman, to explain why the conclusions in Dr. Hausman's first declaration lack any probative value. Defendant has not had the chance to address the critical errors afflicting Dr. Hausman's second declaration, which defendant proposes to do in a short surreply.

Plaintiffs' arguments in favor of class certification hinge largely on Dr. Hausman's conclusions. A decision on class certification should therefore not be made until defendant has the opportunity to explain why Dr. Hausman's analysis is flawed, so as to allow for a full airing of the issues. Because of the highly technical nature of those issues, they can only be properly addressed by Dr. Freedman in a second declaration.

Defendant therefore seeks to file a brief surreply, supported by a second declaration from Dr. Freedman, that responds to the matters raised by Dr. Hausman in his second declaration. Defendant would also address – in highly abbreviated form – certain other more minor arguments made by plaintiffs which are unsupportable. The proposed surreply, which is only five pages long and which is supported by a five-page declaration, accompanies this motion. Its filing will not unreasonably delay this case, create any undue burden, or prejudice the parties. Indeed, the only possible explanation for plaintiffs' opposition to the filing of a surreply is their concern that Dr. Hausman's conclusions will again be exposed as completely worthless.

The filing of a surreply will, in fact, serve the interests of efficiency and economy, see Fed. R. Civ. P. 1, because a thorough explanation of why Dr. Hausman's conclusions are unsound may allow the Court to make a more fully informed decision about class certification. If a class is improperly certified in reliance on Dr. Hausman's defective analysis, this litigation will be unnecessarily protracted, costly, and burdensome for all concerned.

For the foregoing reasons, defendant's motion to file a surreply to plaintiffs' second supplemental memorandum in support of their motion for class certification should be granted.

Plaintiffs' counsel has informed defendant's counsel that plaintiffs oppose this motion.

Respectfully submitted,

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Dated: Sept. 13, 2002

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GUADALUPE L. GARCIA, JR., et al., )  
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Plaintiffs, )  
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 )  
ANN VENEMAN, Secretary of ) Judge: James Robertson  
Agriculture, )  
 )  
Defendant. )  
\_\_\_\_\_ )

**ORDER**

This Court having considered Defendant's Motion for Leave to File Surreply to Plaintiffs' Second Supplemental Memorandum in Support of Their Motion for Class Certification, and good cause having been shown, it is, this \_\_\_\_\_ day of \_\_\_\_\_, 2002, hereby

ORDERED, that defendant's motion is granted, and it is further

ORDERED, that Defendant's Surreply to Plaintiffs' Second Supplemental Memorandum in Support of Their Motion for Class Certification shall be docketed in this case and deemed filed as of this date.

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JAMES ROBERTSON  
UNITED STATES DISTRICT JUDGE

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_____	)	

**DEFENDANT'S SURREPLY TO PLAINTIFFS' SECOND SUPPLEMENTAL  
MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION FOR CLASS  
CERTIFICATION**

1. Plaintiffs attempted to conceal the model Dr. Hausman employed in making his calculations regarding alleged statistical disparities. See Defendant's Response to Plaintiffs' Second Supplemental Memorandum in Support of Their Motion for Class Certification at Exhibit 3, p.2. Nevertheless, Dr. Freedman was able to reproduce the model results. Dr. Hausman does not deny that Dr. Freedman correctly described Dr. Hausman's assumptions, his model, and his fitting procedure. Second Report of David A. Freedman ("Second Freedman Dec.") (attached) ¶ 1.

Granting Dr. Hausman's model for present purposes, the remaining dispute between him and Dr. Freedman is whether "iteration" is appropriate. This dispute boils down to the question whether the "iterated GLS" procedure gives a more accurate estimate than the "one-step GLS." Second Freedman Dec. ¶ 3. As Dr. Freedman explains, iterated GLS is far more accurate than the one-step GLS because the latter is substantially more biased and artificially inflates the apparent disparity between Hispanics and Whites. Id. ¶¶ 6-7. This is demonstrated by a statistical technique called "the

bootstrap," which amounts to an experiment on the computer comparing the two forms of GLS under controlled conditions. Id. ¶¶ 5-7. Hence, iterated GLS results in a more accurate measure of any possible disparity in loan rates between Hispanics and Whites at USDA. Id. ¶ 3.

Dr. Hausman's defense of the one-step GLS procedure rests on circular reasoning. Second Freedman Dec. ¶ 3. In effect, Dr. Hausman assumes that the iterated GLS procedure is biased merely because it produces results at variance with the one-step GLS procedure (and ordinary least squares ("OLS"), from which one-step GLS begins). Id. ¶ 9(i). In other words, Dr. Hausman assumes that the results produced by the one-step procedure approximate the truth, and any results at variance with them are therefore biased. Id. This assumption begs the question at issue, viz., which procedure is more biased. Id.

In addition, Dr. Hausman's argument relies on a large number of arbitrary statistical assumptions which he is unwilling to articulate and unable to defend. Second Freedman Dec. ¶ 9. For example, Dr. Hausman admits that factors unique to particular states within the United States may affect loan rates in different ways. Id.; Second Declaration of Professor Jerry A. Hausman ("Second Hausman Dec.") ¶ 9. Yet, Dr. Hausman's analysis assumes that the difference between Hispanic and white farmer loan rates is the same across all fifty states. Second Freedman Dec. ¶¶ 9-10. Dr. Hausman overlooks the fact that other significant factors omitted from his model could explain the alleged disparity in loan rates. Id. ¶¶ 9-10.

Dr. Hausman concedes that while his statistical results are consistent with discrimination, those

results could alternatively be attributable to any number of other factors.<sup>1</sup> Second Hausman Dec. ¶ 2.

In other words, Dr. Hausman essentially admits that his statistical analysis is worthless to prove that the alleged statistical disparity was caused by discrimination.

Finally, plaintiffs' contention that Dr. Freedman's conclusions are based on the wrong class definition is simply a smokescreen. Dr. Freedman showed that Dr. Hausman's calculations are flawed when taken at face value – regardless of class definition. Report of David A. Freedman ("First Freedman Dec.") ¶ 9. The fact that Dr. Hausman's calculations are based on a model that does not reflect the class definition that has remained unchanged through three iterations of the complaint is an entirely separate – and fatal – flaw in Dr. Hausman's analysis.<sup>2</sup>

2. The remainder of plaintiffs' Reply merits only a brief response. The fact that plaintiffs allege they and the members of the putative class all experienced discrimination does not satisfy the typicality and commonality requirements of Fed. R. Civ. P. 23(a)(2)-(3). See Williams v. Glickman, Civ. Action No. 95-1149 (TAF), Mem. Op. at 15 (D.D.C. Feb. 14, 1997). Nor is there any merit to plaintiffs'

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<sup>1</sup> Plaintiffs' reliance on Caridad v. Metro-North Commuter R.R., 191 F.3d 283, 291 (2d Cir. 1999), in support of Dr. Hausman's analysis is unavailing. See Plaintiffs' Reply to Defendant's Response to Plaintiffs' Second Supplemental Memorandum in Support of Their Motion for Class Certification ("Pl. Reply") at 9. Unlike Dr. Hausman, the expert in Caridad did take into account, and control for, all relevant variables other than race that could be expected to affect the results of the analysis. Id. at 288.

<sup>2</sup> Moreover, the class definition on which plaintiffs now purport to rely is one they unilaterally proposed in a legal brief filed only last April. See April 8, 2002 Supplemental Memorandum in Support of Their Motion for Class Certification at 4. Plaintiffs' apparent attempt to amend the pleadings de facto through their motion for class certification is inappropriate. See Retired Chicago Police Ass'n v. City of Chicago, 141 F.R.D. 477, 484 (N.D. Ill. 1992) (Analysis should proceed on the basis of the class definition stated in the complaint).

claim that they have been limited to data which has no probative value. Pl. Reply at 2, 13, 18. Quite to the contrary, defendant has given plaintiffs access to all the data in defendant's possession which has any possible relevance to this case. The fact of the matter is that the data does not show the existence of a common policy or practice with respect to USDA's farm loans that has had a discriminatory effect on all proposed class members. Finally, defendant is not required to have retained the files of every individual listed on the second amended complaint. The complaint only discusses the factual circumstances of six of the named plaintiffs and only those six therefore fall within the purview of the record retention requirements of 12 C.F.R. § 202.12(b)(4).

### **CONCLUSION**

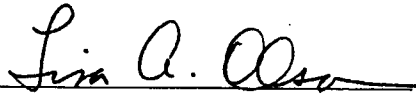
For the foregoing reasons, in addition to those stated in Defendant's Response to Plaintiffs' Second Supplemental Memorandum in Support of Their Motion for Class Certification, Defendant's Memorandum of Points and Authorities in Support of Defendant's Motion to Dismiss and to Strike Class Action Allegations, Reply in support thereof, and Defendant's Opposition to Plaintiffs' Motion for Class Certification, plaintiffs' motion for class certification should be denied.

Respectfully submitted,

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Dated: Sept. 13, 2002