

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

GUADALUPE L. GARCIA, et al.,	.	
	.	Docket No. 00-CV-2445
Plaintiffs,	.	
	.	Washington, D.C.
v.	.	Wednesday, December 18, 2002
	.	10:05 a.m.
SECRETARY, UNITED STATES	.	
DEPARTMENT OF AGRICULTURE,	.	
et al.,	.	
	.	
Defendants.	.	
.....	.	

TRANSCRIPT OF STATUS HEARING  
BEFORE THE HONORABLE JAMES ROBERTSON  
UNITED STATES DISTRICT JUDGE

APPEARANCES:

For the Plaintiffs:	HOGAN & HARTSON PHILLIP L. FRAAS, ESQ. 555 13th Street, N.W. Washington, D.C. 20004
	HOWREY, SIMON, ARNOLD & WHITE STEPHEN S. HILL, ESQ. ALAN M. WISEMAN, ESQ. 1299 Pennsylvania Avenue, N.W. Washington, D.C. 20004-2402

APPEARANCES - Continued:

**APPEARANCES - Continued:****For the Defendants:****U.S. DEPARTMENT OF JUSTICE  
LISA A. OLSON, ESQ.  
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by computer-aided transcription**

P R O C E E D I N G S

(10:05 a.m.)

1  
2  
3 THE DEPUTY CLERK: Civil Action 00-2445, Guadalupe  
4 Garcia and others versus Ann Veneman. For the plaintiffs,  
5 Phillip Fraas; for the defendant, Lisa Olson and Michael  
6 Sitcov.

7 THE COURT: Good morning.

8 MR. HILL: Good morning.

9 THE COURT: I set this status conference after  
10 denying the class action motion. I understand the plaintiffs  
11 are going to file a rule 23(f) appeal. I would have expected  
12 that; but I thought it would be useful for to us get together,  
13 I think quite briefly, to discuss where either side or both  
14 sides think we're going with this.

15 It occurs to me that because of the dependence of my class  
16 certification decision on my earlier decision about the cause  
17 of action under ECOA that if there is to be an appeal, they  
18 should both be appealed; and if it is necessary to certify the  
19 ECOA decision appeal, it seems to me it would present a cleaner  
20 set of issues for the Court of Appeals and you wouldn't run  
21 into the kind of problems that -- that Keepseagle ran into in  
22 the Court of Appeals.

23 And so that's one idea or proposition. Another question  
24 is -- in my mind is whether anything at all should happen in  
25 this case during the pendency of the appeal, whether the

1 plaintiffs want to continue with discovery; and the third  
2 question, I suppose, is what the plaintiffs expect me to do  
3 with their suggestion that I sua sponte reconsider.

4 That's either a motion or it's not a motion. I'd like to  
5 hear from plaintiffs as to what they expect.

6 MR. HILL: Thank you, Your Honor.

7 THE COURT: The government looks confused about this  
8 reconsideration thing. You know what I'm talking about?

9 (Inaudible response -- off microphone.)

10 THE COURT: That's all right. She doesn't have to  
11 speak at the podium. I'll hear from the plaintiffs first and  
12 then I'll hear from defense counsel.

13 MR. HILL: Thank you, Your Honor. Stephen Hill for  
14 the plaintiffs.

15 First, Your Honor, we'd like to address the question of  
16 reconsideration. We would request that Your Honor withdraw the  
17 motion -- the order of December 2 and allows the opportunity to  
18 take discovery that we haven't had thus far in this case and  
19 give us the opportunity to try to establish the linkage that  
20 Your Honor seems to think is critical to the case as you've  
21 expressed in your May 22 order and again in your December 2  
22 order.

23 So that's -- that would be our proposal, number one.

24 If Your Honor is not inclined to do that, then we think we  
25 should proceed with discovery with respect to the remaining

1 case pending they appeal.

2 If you'd like, I could go into the reasons why I think it  
3 probably makes sense to withdraw that order. Somewhere along  
4 the line, we seem to have fallen off the track and  
5 miscommunicated because we came away from the June 24 meeting  
6 thinking that we had a procedure that was going to narrow the  
7 scope of issues in dispute on discovery and that if Your Honor  
8 were not convinced with our presentation at that point, we  
9 would have the opportunity for discovery.

10 THE COURT: Well, I'm not going to withdraw that  
11 opinion. I worked pretty hard on that opinion to try to lay  
12 out what I thought the law was and what the facts were; but the  
13 order that I issued in the opinion that I ordered is not a  
14 "with prejudice" end to your class action. It says quite  
15 plainly, I think, up front, that you have not yet demonstrated  
16 that you have a class action here. If you think that there  
17 is -- if you think that there is in that opinion the  
18 opportunity for you to establish the commonality or the -- what  
19 you call linkage or the commonality issue that I found to be  
20 lacking and you think that can be accomplished by proceeding  
21 with the case, then that's what you ought to do.

22 I thought -- I thought I understood that the plaintiffs  
23 said fine, this is a death knell to us, and we're going up with  
24 this decision because we're not going to be able to prove what  
25 the Court thinks we need to prove.

1           MR. HILL: No, Your Honor. Out of an abundance of  
2 caution, given the limited amount of time left on the statute  
3 of limitations with respect to those plaintiffs who might  
4 assert -- those putative class members who might assert claims  
5 going back to the period 1981 to 1986, there being only eight  
6 days left in the running of the statute of limitations and  
7 there being also some question with respect to the state of the  
8 law whether or not your order of December 2 started the running  
9 of the statute again, out of an abundance of caution, we filed  
10 an emergency motion asking to stay.

11           THE COURT: That's fine. I granted that.

12           MR. HILL: I understand.

13           THE COURT: There's no problem with staying the  
14 operation of that order, and I shouldn't imagine the government  
15 is trying to run you to the sidelines to let the clock run out  
16 anyway. That's the wrong metaphor. If you go to the  
17 sidelines, the clock stops.

18           MR. HILL: Yes, it does.

19           THE COURT: But I don't -- I have no problem with  
20 whatever procedural --

21           MR. HILL: We would like the opportunity --

22           THE COURT: -- I was going to use the word  
23 "machinations," but that's the wrong word, too. I don't have  
24 any problem with whatever procedural steps are necessary to  
25 ensure the statute does not run on the plaintiffs who are not

1 yet class members, who are not yet plaintiffs.

2 But we have to sort out this question of whether there is  
3 ever going to be a class action.

4 MR. HILL: Well, we agree, Your Honor; and, frankly,  
5 we think we would like to address a couple of concerns in that  
6 regard that your December 2 order raised in our minds; but,  
7 again, just to be clear, we would like the opportunity for  
8 discovery, the discovery we've never had, to try to establish  
9 the commonality or the linkage that you say we have thus far  
10 not established.

11 In connection with -- we would like to also address two  
12 points in the order that I think will have bearing on this down  
13 the road in terms of whether or not we'll ever be able to prove  
14 it.

15 One is the question of injunctive relief. Mr. Wiseman and  
16 I with Howrey and Simon got into this case in January of this  
17 year. We were not the original drafters of the complaint.  
18 While we think the complaint in some cases is inartfully  
19 drafted, we do think it is sufficient under a notice regime to  
20 put the defendant on notice that the parties are seeking  
21 injunctive relief; and certainly every opportunity we have had  
22 in any paper we file, we have tried to make it crystal clear  
23 that job number one in our mind was trying to fix the system  
24 once and for all so that we wouldn't have to come back or  
25 another group of plaintiffs wouldn't have to come back a few

1 years from now and try this process all over.

2 More to the point, Your Honor ruled I think in  
3 connection -- footnote 9 -- of your order that if our failure  
4 to investigate claims were still in the case, that might serve  
5 as a basis for at least the conditional 23(b)(2) certification.  
6 I think that's at page 21 of your memorandum and order, Your  
7 Honor, footnote 9.

8 But you say that that APA claim is out of the case.

9 We would call Your Honor's attention to your March 20  
10 order in which you found in this case that we did, in fact,  
11 have a plaintiff asserting a valid APA claim in connection with  
12 the disaster benefits relief. That was Gloria Morales. At  
13 footnote 3 of your March 20 order, you expressly distinguish  
14 our case from the Love case in that regard, so we do have a  
15 valid APA claim going forward requesting injunctive relief.

16 More importantly, if you look at paragraphs 122 and 123 of  
17 the second amended complaint, you'll see that we assert claims  
18 for injunctive relief with respect --

19 THE COURT: Look, Mr. Hill, you're getting -- this is  
20 getting awfully complicated for me to deal with on the fly. It  
21 sounds to me like you want to file a motion.

22 MR. HILL: We'll be happy to, Your Honor. The  
23 only -- we were just -- we were just addressing these points.

24 THE COURT: I know, but I don't have all -- I have to  
25 flip around through paragraph this, footnote that, page that.

1 I'm not sure I can do all that in the context of this -- of an  
2 oral presentation.

3 What are you telling me? That you want to move for  
4 reconsideration? You want to amend your complaint?

5 MR. HILL: At a minimum we want to move for  
6 reconsideration because we think our complaint as it stands now  
7 clearly asserts injunctive relief notwithstanding the fact that  
8 Your Honor said it did not.

9 THE COURT: Well, even if it does assert injunctive  
10 relief, Mr. Hill, there is a requirement of injunctive relief  
11 being predominant.

12 MR. HILL: Yes, sir and I think --

13 THE COURT: -- and I would have a -- I would have a  
14 tough time getting predominance when you have sued for I don't  
15 know how many millions or billions of dollars here and, in view  
16 of the -- the obvious thrust of this case, Pigford, Keepseagle,  
17 they all seem essentially to be about money. Am I wrong about  
18 that?

19 MR. HILL: Yes, Your Honor.

20 THE COURT: Are you telling me this is not about  
21 money? You're going to abandon the claim for damages or  
22 downplay them or look for nominal damages? I don't think so.

23 MR. HILL: I haven't said we are going to completely  
24 abandon the claim for damages, Your Honor, but I think we can  
25 satisfy the proposition that damages are going to predominate

1 in this case. To begin with, what we are being held to is a  
2 number that probably was pulled out of the air and cited for  
3 whatever news value it would get. \$20 billion catches the  
4 attention. I think a similar number was probably cited in  
5 the -- in the Pigford case, and the damages that were  
6 ultimately paid out of that case nowhere approach that.

7 At this juncture, you know, we have a guesstimate as to  
8 how many people are in the putative class in toto. We have no  
9 idea, to be fair, about what the ultimate damages will be or  
10 can be proven. But we are sincere and steadfast in our belief  
11 that job number one here is to fix the system. As we have laid  
12 out to Your Honor, the problems at USDA and its credit and  
13 benefits programs have been going on unabated for over 60  
14 years. We have laid it out in great detail.

15 Our clients tell us over and over again when we meet with  
16 them what we want done here is to have this system fixed so  
17 that we can continue to farm, so that our children will have  
18 the same opportunity that we have, and maybe their children as  
19 well.

20 So I don't know how else to say it, but we are sincere;  
21 and as an officer of the court, I represent to you that that is  
22 a sincere, heartfelt desire on our part to fix that system.

23 We have in place working with us right now experts who are  
24 very knowledgeable and have experience at USDA trying to come  
25 up with ways to help us fix this system. So we are sincere --

1           THE COURT: Mr. Hill, I don't doubt your sincerity.  
2 I applaud your sincerity. I know why you and your partners are  
3 in this case. I think it is admirable. I am not happy about  
4 having to deny the class certification motion in this case,  
5 because as I pointed out in my memorandum there are certainly  
6 reasons to believe that class certification or class action  
7 treatment of this case is superior to other means of dealing  
8 with the claims of the plaintiff class; but you have a  
9 fundamental problem.

10           And the fundamental problem is the inherent difference of  
11 all the decisions that have been made in all of the counties  
12 and all of the farms around the country.

13           I don't think we're going to cure that problem by amending  
14 the complaint to state more clearly injunctive relief. I don't  
15 think we're going to cure that problem by pointing out that in  
16 an earlier version, the CFR had fewer criteria for loans and  
17 that some of them were subjective.

18           It seems to me that the cure for this problem -- if there  
19 is one -- is to make a cleaner factual linkage between the  
20 shortfall that you claim occurred in the number of -- the  
21 number and amount of benefits given to Hispanic farmers on the  
22 one hand and the subjectivity that you claim that is in the  
23 criteria.

24           That's the guts of the decision that I made here.

25           MR. HILL: I understand, Your Honor.

1           THE COURT: Now, if you think you can make that  
2 linkage, if you think discovery will enable you to make that  
3 linkage on something other than just an anecdotal basis, then  
4 me reaction to what you're saying is go for it. Continue your  
5 discovery and see what you can develop.

6           MR. HILL: Thank you. Well, on your last point, Your  
7 Honor, that raises one other issue I'd like to address briefly.

8           That is the necessity to establish a linkage, a specific  
9 linkage to a specific policy. I think we've laid out in our  
10 papers in the past, your heavy reliance on Ward Cove -- Wards  
11 Cove -- we think is somewhat misplaced in this regard. If at  
12 the end of the day we have a system in place that makes it  
13 impossible to separately analyze the decision-making process in  
14 terms of the subjective versus the objective components of it,  
15 we think under the congressional amendment to title VII that  
16 was designed specifically to deal with the Ward Coves case, you  
17 have to look at the decision-making process as one practice;  
18 and I think you would then find you would look at the  
19 statistics on the basis of the whole in terms of whether or not  
20 people were accepted or denied credit; and you would not be  
21 placed under the impossible burden of distinguishing between  
22 and pointing out a particular subjective criteria.

23           That's the thrust of Congress' legislation amending the  
24 Ward Cove case.

25           The particular statute, Your Honor -- excuse me, I have a

1 bad cold -- is 42 U.S.C. 2000(e)(2)K(1)(b)Roman 1.

2 We would like again the opportunity to take discovery we  
3 haven't had and ask Your Honor to lift the stay and allow us a  
4 reasonable time in which to take discovery.

5 My guesstimate at this point is somewhere in the  
6 neighborhood of six to eight months; and the reason I say that  
7 is because so far the Love plaintiffs have been in discovery  
8 for six months, and it is my understanding that they're going  
9 to be asking shortly for an additional period of time.

10 THE COURT: Yeah, but I understood they were going to  
11 ask for more time to see what happens in this case. This is  
12 getting to be one of these --

13 MR. HILL: Well, at a minimum, Your Honor, we  
14 would -- I think we ought to -- should be entitled to the same  
15 amount of time the Love plaintiffs got to take discovery.  
16 We've had none. What we've been able to develop is purely on  
17 the public record.

18 THE COURT: Okay. Thank you, sir.

19 MR. HILL: Thing you, Your Honor.

20 THE COURT: Let me hear from the government.

21 MS. OLSON: Thank you, Your Honor. Would you like me  
22 to address what Mr. Hill just discussed or the -- I know you  
23 also mentioned there were two other areas you wanted to cover,  
24 the ECOA and the possibility of a stay.

25 THE COURT: Well, I mean I wouldn't expect you to

1 appeal my decision about ECOA, and I wouldn't expect you to  
2 appeal from the class certification decision. So why don't you  
3 just respond to what Mr. Hill had to say about discovery.

4 MS. OLSON: The plaintiffs have had ample opportunity  
5 to conduct discovery here. They've created an impression that  
6 we have somehow put a roadblock in the way of their discovery.  
7 What has happened is we've made available to them all of our  
8 databases; and there is a fundamental problem and that is that  
9 the databases don't prove what the plaintiffs need to show to  
10 demonstrate that class certification is warranted here.

11 So we are in this -- we were in this very same spot last  
12 summer as you may recall. After our -- I believe we had an  
13 informal conference in chambers. And the point that I raised  
14 at that time was that if they want to conduct discovery, it  
15 would be helpful and necessary to know exactly what they intend  
16 to discover and what they -- what facts they hope to elicit and  
17 what those facts would prove, because the discovery that  
18 they're hoping to conduct can only be anecdotal. The databases  
19 that USDA has do not supply the information that they need to  
20 show common policy and practice.

21 Indeed, other than making broad allegations that the  
22 decision-making process is subjective, like there's a whiff of  
23 discrimination in the air, they haven't been able to show any  
24 part of that decision-making mechanism that involves a degree  
25 of subjectivity that is common to 20,000 class members. So

1 again we're faced with the prospect of this open ended vague  
2 discovery. It is unclear what it's going to prove; and my --  
3 my guess is that we're going to end up in 2700 FSA offices  
4 around the country examining the claims of 20,000 plaintiffs  
5 regarding maybe 100,000 claims; and time after time, the  
6 plaintiffs have been given a chance to discover information, to  
7 identify common policies or practices, even to name a common  
8 policy practice that they hope to show is -- or even to name a  
9 policy or practice that they hope to show is common to the  
10 class members; and they haven't been able to come up with  
11 anything. So at this point, I think we're back to square one,  
12 and discovery is inappropriate.

13 And then if they want to file a motion for  
14 reconsideration, I also just want to make the point that they  
15 have filed multiple briefs on class certification. There are  
16 no new issues here of law or fact; and it certainly is their  
17 prerogative to file a motion for reconsideration, but I suspect  
18 that we are again going to be brought back to square one.

19 It seems to me that -- and they can go ahead and file  
20 their motions and we'll -- we would like a chance to respond  
21 obviously; but it seems to me there are two sensible -- there  
22 are two ways that this case can go right now.

23 That is a stay of the District Court proceedings and they  
24 can file their motion for stay, and it is very possible that we  
25 wouldn't oppose it and that would mean putting an end to all

1 the District Court proceedings until we have some idea of  
2 whether this is a class action or just a grouping of individual  
3 claims.

4 But if they don't stay the District Court proceedings,  
5 they don't seek a stay, we will seek to sever the claims.  
6 Right now we just have a conglomeration of thousands of claims  
7 that can't possibly be litigated in this venue in a sensible --  
8 excuse me -- or efficient manner. So those would seem to be  
9 the two --

10 THE COURT: You seek to sever? You mean --

11 MS. OLSON: If there is no class certified. All we  
12 have here are 20,000 individual claimants whose claims  
13 originate in 2700 FSA offices around the country involving  
14 different personnel at each of those offices, and it would be  
15 nearly impossible for this Court in this venue to litigate all  
16 those claims. So we would move to sever them so that they can  
17 be litigated in the venue where the county records are located,  
18 the FSA records are located, the alleged discriminators are  
19 employed and where these individuals' claims arose.

20 THE COURT: Well, the specter you raise of going to a  
21 hundred county extension offices to look at 2700 or more than  
22 that -- I don't know how many offices there are.

23 MS. OLSON: 2700 FSA offices.

24 THE COURT: 2700 FSA offices, 20,000 claimants, a  
25 hundred thousand claims, of course the plaintiffs could do that

1 if they had the time, energy, money, and stomach for it claim  
2 by claim by claim, could they not?

3 MS. OLSON: They could. It would make more sense to  
4 sever these into individual claims handled by different judges  
5 in those jurisdictions rather than for us to have to  
6 orchestrate it all from here in this courtroom. Because these  
7 claims are highly individualized and localized; and so if  
8 there's no class certified, it would seem to make more sense  
9 for the case to proceed in that fashion, in the appropriate  
10 venue for each of these particular claims.

11 THE COURT: You will agree with the plaintiffs that  
12 they haven't really taken any discovery to support their class  
13 certification motion?

14 MS. OLSON: They have. The dialogue we had with them  
15 over the course of last summer involved the question of whether  
16 USDA had information that would be useful to them. We produced  
17 lists of -- we produced spreadsheets or whatever it is the USDA  
18 produces with all the information they had about these loans.

19 And the problem was that either because they didn't retain  
20 the information or because they never originally collected it,  
21 because they aren't trying to prepare plaintiffs' case for  
22 them, it's just been not -- the information they collect isn't  
23 of the nature the plaintiffs, need but they didn't have the  
24 information that would have assisted plaintiffs in proving  
25 their claim. So we came up against a brick wall. Every time

1 plaintiffs go out to seek discovery, they make inquiries about  
2 what USDA has, we just don't have what they need.

3 So that's why we always come back to the fact that we have  
4 just a bunch of individualized claims here.

5 I mean further discovery at this point would be pointless.  
6 They've had -- I don't know how many years this case has been  
7 going on. Long before I was involved. They haven't come up  
8 with anything.

9 THE COURT: Let's explore the proposition of whether  
10 further discovery would be pointless.

11 I said myself just a few minutes ago that the plaintiffs  
12 would have to come up with something that is not simply  
13 anecdotal. Your response is you can't image that there is  
14 anything except anecdotal evidence. Of course, a thousand  
15 anecdotes make a statistic, so at some point anecdotes become  
16 statistics; and I suppose the question is what kind of  
17 discovery could reasonably be expected to develop information  
18 that would test the plaintiffs' theory of a linkage between  
19 subjective -- between the subjective criteria of which there  
20 clearly are some on the one hand and the low number, assertedly  
21 low number of loans and grants to Hispanic farmers on the other  
22 hand?

23 You could conceive of taking discovery of all the people  
24 they have named in their complaint, which is something like 90  
25 or a hundred people.

1           You could conceive of some random sampling. You could  
2 conceive of any number of ways to test the plaintiffs'  
3 hypothesis without going to 2700 FSA offices and looking at all  
4 10,000 claimants, could you not?

5           MS. OLSON: This recalls what Judge Flannery said in  
6 his opinion in that we're not looking at a subjective  
7 decision-making process here. They haven't been able to point  
8 to anything in the -- pardon me -- in the USDA regs that shows  
9 a completely subjective link in this decision-making process.  
10 That's the only common policy that the plaintiffs have  
11 identified is this existence of subjectivity.

12           But we don't have a subjective decision-making process.  
13 We might have some individual instances where an FSA officer  
14 made a subjective decision. But that doesn't make out a class  
15 claim because we identify a hundred FSA officers who were out  
16 of line and failed to abide by the objective regulatory  
17 requirements doesn't make it a subjective decision-making  
18 process.

19           They haven't been able to show, to pinpoint where in the  
20 regulations this is subjective -- this subjective process,  
21 where is the step that is subjective, that is common to 20,000  
22 class members.

23           The problem is they're saying they want discovery. The  
24 defendants are going to just be subjected to -- I mean from the  
25 nature of things, we could be subjected to thousands of

1 depositions nationwide and come up with nothing but the fact  
2 that these folks each have potential discrimination claims that  
3 involve completely different scenarios.

4 If we had a focal point, something which the plaintiffs  
5 could identify as a potentially common policy of some kind,  
6 they could pinpoint the subjectivity in the process, then I  
7 think we could embark on some sensible discovery; but that just  
8 doesn't seem to exist here.

9 We can't make something out of this case that just isn't.  
10 We come up time and time against the reality that the facts  
11 just aren't what the plaintiffs need. And in the other cases,  
12 the Pigford case, it is true that some of these individuals who  
13 couldn't meet I believe -- couldn't prove discrimination in  
14 court were subject to a lesser standard, and they've recovered  
15 in about half the cases.

16 But -- and so there is redress for these individuals who  
17 are concerned that they've been discriminated against; but by  
18 the same token, that doesn't mean that the correct vehicle for  
19 their -- for the processing or for the remedy that they want is  
20 a class action.

21 THE COURT: Well, I hear you. You have articulated  
22 the government's position, I think, clearly and eloquently.

23 The problem I have is this:

24 If we were painting on a clean canvas every word of what  
25 you said would be absolutely correct. The canvas is not clean.

1 There is this history within the Department of Agriculture of  
2 closing down their civil rights department for sometime, of  
3 making admissions on the record of discrimination, and the  
4 result of that, the background -- accordingly -- is deep  
5 abiding suspicion and history on the part of -- on the part of  
6 Hispanic farmers.

7 Now -- it seems to me there are two ways to go here but  
8 one is not severing this case into individual parts. One is  
9 for the plaintiffs to do what I thought they were going to do,  
10 which was to appeal this ruling and appeal the ECOA  
11 determination at the same time and get a clean ruling from the  
12 Court of Appeals about whether they can go forward with the big  
13 class action they want or not.

14 Now the other way to go, it seems to me, is for the  
15 plaintiffs to -- I don't think they are required to accept my  
16 rulings, but to at least let them be for a while while they go  
17 off and take some kind of discovery. The question is what kind  
18 of discovery.

19 I agree with you that -- I don't think even these lawyers  
20 are going to go to 2700 FSA offices, and I don't think I'm  
21 going to require the Department of Agriculture to box up and  
22 send to Washington all the records from 2700 FSA offices in  
23 pursuit of what may be a will-o'-the-wisp here; but if the  
24 plaintiffs want to put together a discovery plan that is modest  
25 in scope and reasonably calculated to explore whether there is

1 the connection they claim there is between the statistical  
2 results they've mentioned, they've found and subjective  
3 criteria, I'm prepared to let them to that.

4 Now we may struggle about what that discovery program  
5 consists of, and maybe what you need to do is to go off and see  
6 if you can work out a discovery program you can both agree  
7 with; and if you can't, come back to me.

8 But hypothetically -- hypothetically -- if the plaintiffs  
9 establish that X number of -- I hesitate to name a number  
10 because it will become -- somebody will think it's law of the  
11 case, so it's not. X number of Hispanic farmers, all of whom  
12 were qualified on the basis of United States citizenship, legal  
13 capacity to incur loan obligations, inability to obtain credit  
14 elsewhere, farms no larger than family farms, loan history  
15 meeting the criteria, no previous debt forgiveness causing a  
16 loss to the agency and no delinquency on any federal debt --  
17 all qualified according to those criteria -- were denied loans  
18 and benefits whereas a corresponding sample of whites  
19 qualifying the same way were granted them, the picture might  
20 very well be different.

21 MS. OLSON: That would allow the plaintiffs to look  
22 at their pool of class members and pick out all the people who  
23 have those qualifications and were denied.

24 THE COURT: That's why I talked about random  
25 sampling. Cherry-picking claims is not going to make the

1 chase.

2 MS. OLSON: And they'll do the same for the white  
3 applicants. They'll pick out people who had those  
4 qualifications and got the loan.

5 THE COURT: I repeat: Random sampling is the answer  
6 to that, isn't it?

7 MS. OLSON: Well, how do we -- who's going to -- may  
8 I confer with Mr. Sitcov?

9 THE COURT: Yes.

10 MS. OLSON: May I allow or will you allow Mr. Sitcov  
11 to address the Court.

12 THE COURT: We will both allow him to speak.

13 MR. SITCOV: May it please the Court, Michael Sitcov,  
14 Your Honor.

15 The issue of randomization is an important one. I do a  
16 lot of litigation involving the decennial census. We use  
17 statistical analyses all the time.

18 Whether or not a randomized sample could be developed on a  
19 national level is probably somewhat of an open question; but I  
20 think it could be done, but it might not be easily done. And  
21 the types of analyses then would be based on the nature of the  
22 sample and what goes into the sample assessment.

23 As I think Your Honor will recall the plaintiffs relied on  
24 Gerry Hausman, an econometrician from MIT. We relied on David  
25 Friedman, a statistician from UC Berkeley. Both looked at the

1 same date. Both came up with entirely different views about  
2 the meaning of the data; and I say these things only because I  
3 don't think that sampling is going to be easily done, and I  
4 don't think that it would provide anything near the sort of  
5 clear result that would mandate an easy decision that they  
6 have, in fact, demonstrated that these criteria that you laid  
7 out have been met.

8 I think if you were to go back and to compare the two  
9 declarations from Hausman -- each submitted two -- Hausman and  
10 Friedman, you'd see exactly the issue.

11 And that was based on just available information; so I  
12 think it's something that we have to be very careful about  
13 before we embark upon.

14 THE COURT: You may be exactly correct about that,  
15 Mr. Sitcov. It may be -- it may not be an attainable  
16 objective; but I'm not inclined to dismiss it out of hand  
17 without the parties sitting down and seeing if they can work it  
18 out.

19 MR. SITCOV: That's fine, Your Honor. I just wanted  
20 to make it clear that we do have these concerns and that I  
21 think they are, based on my involvement in lots of statistical  
22 litigation, they are concerns that can be quite problematic,  
23 that can inject more questions than they answer. Thank you.

24 Yes, sir?

25 MR. HILL: Just briefly, Your Honor, just to be

1 clear, we haven't had any discovery as you know. Second of  
2 all, I think it does -- I said it doesn't do us any good to  
3 point to an earlier rendition of the CFR. I think it is  
4 critical because the CFR sets forth the standards that the --  
5 the criteria that the county committee had to utilize in  
6 determining eligibility; and for the majority of the time  
7 covered by the complaint, there were only six or seven  
8 criteria, all but two of which -- all but one of which was  
9 highly subjective. I have here a copy of the 1994 version of  
10 the CFR that confirms that.

11 We also think that programs at this juncture, it might  
12 make sense, Your Honor, to set up in the near term another  
13 status conference because, frankly, in light of your comments  
14 this morning and the way things are, we have decisions that we  
15 obviously have to make and we've already -- consistent with the  
16 deadline of the 23 -- already filed 23(f) petition -- perhaps  
17 another status conference in a matter of -- maybe in the next  
18 week or some point or a telephone conference would be helpful.

19 THE COURT: Well, the stay -- the emergency stay that  
20 I put into effect, is that time limited?

21 MR. HILL: No.

22 THE COURT: Is it until further order of the Court?

23 MR. HILL: It's pending the resolution of our 23(f)  
24 petition.

25 THE COURT: Fine. So that, as a practical matter, is

1 open-ended?

2 MR. HILL: Yes, sir.

3 THE COURT: It seems to me there are three ways for  
4 the plaintiffs to go here.

5 One is to perfect your appeal on the 23(f) thing, go to  
6 the Court of Appeals, ask me to certify the ECOA thing, take it  
7 all up, get a ruling from the Court of Appeals.

8 The second way is to -- maybe there are four ways.

9 Maybe you can appeal that simultaneously with going ahead  
10 with discovery, but that seems to me to be a little messy.

11 Maybe that is 1-A.

12 Two would be withdraw or suspend or do something with your  
13 23(f) appeal. We can take care of the statute of limitations  
14 issues.

15 And move for reconsideration. I haven't decided that.  
16 I've certainly sent a few signals about how I feel about that;  
17 but if you want to -- if you think I've got that wrong and that  
18 there's something that you can clarify, that's another way to  
19 go.

20 And the third way to go is to sit down with the government  
21 and try to work out some specific structured form of discovery  
22 that you think may yield a result that would conform to my view  
23 of the law on the class action thing. The decisions are all  
24 yours, it seems to me.

25 MR. HILL: I understand.

1 THE COURT: You need to sit down and think about it.

2 MR. HILL: Yes, Your Honor.

3 THE COURT: A week? No thank you. We're not going  
4 to do another status conference in a week, because we're going  
5 to be in recess next week and for a couple of days of the week  
6 after that.

7 And I'm not sure that another status conference is really  
8 what we need. You need to -- if you file a motion, you file a  
9 motion. If you sit down with the department and work out a  
10 discovery thing, then all you have to do is submit a proposal  
11 to me.

12 MR. HILL: All right.

13 THE COURT: That said, if anybody wants a status  
14 conference, we can accommodate you. But for the first few  
15 weeks of January, it's going to have to be in the late  
16 afternoon, because according to our current schedule, we're in  
17 trial practically back to back.

18 So we could do a late afternoon status conference on  
19 January 15?

20 MR. HILL: That's fine, Your Honor.

21 MS. OLSON: Fine with the United States also, Your  
22 Honor.

23 THE COURT: 4:30 p.m. we'll set it up as a states  
24 conference on January 15 at 4:30 p.m. If it is not necessary,  
25 let me know. We'll take it off.

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MR. HILL: Thank you, Your Honor.

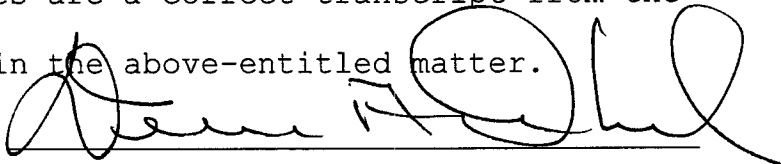
THE COURT: All right? Thank you.

(Proceedings adjourned at 10:50 a.m.)

\* \* \* \* \*

## CERTIFICATE

I, DENNIS A. DINKEL, Official Court Reporter, certify that the foregoing pages are a correct transcript from the record of proceedings in the above-entitled matter.

A handwritten signature in cursive script, appearing to read "Dennis A. Dinkel", written over a horizontal line.

Dennis A. Dinkel, RDR, CRR