

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

GUADALUPE L. GARCIA, JR., et al.,

Plaintiffs,

v.

ANN VENEMAN, Secretary of the
United States Department of Agriculture,

Defendant.

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) Civil Action No. 1:00CVO2445
) Judge Robertson
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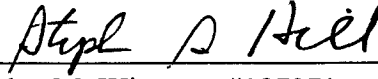
**PLAINTIFFS' MOTION FOR RECONSIDERATION OR,
IN THE ALTERNATIVE, CLARIFICATION OF CERTAIN ISSUES**

Pursuant to LCvR 7.1., plaintiffs hereby move this Court to reconsider or, in the alternative, to clarify its Memorandum Opinion and accompanying Order of December 2, 2002 with respect to certain conclusions upon which the Memorandum Opinion and accompanying Order appear to be based. In particular, in concluding that plaintiffs failed to satisfy the requirements of Fed. R. Civ. P. 23, the Court relied upon three conclusions that plaintiffs respectfully submit are erroneous. First, in determining that this case does not fit within the exception described by the Supreme Court in General Telephone Co. v. Falcon, 457 U.S. 147, 159 n.15 (1982), the Court erroneously relied upon the current regulations rather than the regulations in effect during the vast majority of the time period covered by plaintiffs' complaint. Second, the Court erred in concluding that plaintiffs' complaint does not seek any injunctive relief and that the monetary relief plaintiffs seek predominates. Third, when USDA maintains its records in such a way as to make it impossible for one to analyze the separate components of its decisionmaking process, the Court's reliance upon Wards Cove Packing Co. v. Antonio, 490 U.S. 642 (1989), to require plaintiffs to do that which USDA has made impossible at least insofar

as its centralized databases are concerned is error in light of Congress' having expressly amended Title VII to modify the effect of the Wards Cove holding.

In addition, plaintiffs respectfully request that, in the event the Court, upon reconsideration, remains convinced that plaintiffs have not met the requirements of Fed. R. Civ. P. 23, it nevertheless modify its December 2, 2002 Order by deleting the words "plaintiffs' motion for class certification [18] is denied" and substituting in lieu thereof, consistent with the Court's May 22, 2002 Order, "plaintiffs have not satisfied the requirements of Rule 23 on the basis of the limited record that has been compiled thus far and are entitled to discovery in order to determine if they can satisfy those requirements." Alternatively, plaintiffs request that if, upon reconsideration, the Court is still not convinced that plaintiffs have satisfied the requirements of Fed. R. Civ. P. 23, that, at a minimum, the Court stay the operation of its December 2, 2002 Order for purposes of tolling the statute of limitation until further order of the Court to permit plaintiffs to take class discovery and thereafter to renew their motion for class certification.

Respectfully submitted,



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Date: January 14, 2003

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FOR THE DISTRICT OF COLUMBIA

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Plaintiffs,)	
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v.)	Civil Action No. 1:00CVO2445
)	Judge Robertson
ANN VENEMAN, Secretary of the)	
United States Department of Agriculture,)	
)	
Defendant.)	

**PLAINTIFFS' MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF
PLAINTIFFS' MOTION FOR RECONSIDERATION OR, IN THE ALTERNATIVE,
CLARIFICATION OF CERTAIN ISSUES**

INTRODUCTION

Pursuant to LCvR 7.1, plaintiffs have filed herewith a motion seeking reconsideration or, in the alternative, clarification of this Court's December 2, 2002 Memorandum Opinion ("Memorandum Op.") and accompanying Order ("December 2 Order") denying plaintiffs' long-standing motion for class certification. As required by LCvR 7.1(m), plaintiffs' counsel conferred with defendant's counsel, Lisa Olson, Esq., concerning this motion and Ms. Olson has indicated that defendant opposes the motion. This memorandum is submitted in support of that motion.

What began, following an in-chambers status conference to discuss class discovery on June 24, 2002, as an exercise to narrow issues in dispute with respect to plaintiffs' proposed class discovery resulted in a denial of plaintiffs' motion for class certification without the Court ever having narrowed the issues in dispute or having afforded plaintiffs any discovery. Moreover, under settled authority, at least prior to the promulgation of Fed. R. Civ. P. 23(f), the December 2 Order stopped the tolling of the statute of limitations for the putative class. Consequently,

barring action by the Court, the putative class members would have had less than eight days either to file their own complaints or to intervene in the instant proceeding or otherwise have their rights to assert claims with respect to the period of January 1, 1981 to December 31, 1996 time barred.¹ Accordingly, plaintiffs filed an emergency motion to stay the proceedings *nunc pro tunc* to December 2, 2002 for purposes of tolling the statute of limitations. Plaintiffs also filed a Rule 23(f) petition for permission to file an interlocutory appeal with the D.C. Circuit because the time for filing such an appeal expired two days prior to the date of the status conference scheduled by this Court's December 2 Order.

At the December 18, 2002 status conference, the Court indicated its willingness to allow plaintiffs to take class discovery and to renew their motion for class certification at the conclusion of that discovery. In view of the Court's willingness to allow plaintiffs the discovery that lay at the heart of their Fed. R. Civ. P. 23(f) appeal, plaintiffs elected to withdraw their petition to the D.C. Circuit and to avail themselves of class discovery. That decision prompted plaintiffs to file a second emergency motion with the Court in order to modify the Court's December 9, 2002 order staying the proceedings *nunc pro tunc* to December 2, 2002 for purposes of tolling the statute of limitations. The motion was necessary because the December 9 Order, in pertinent part, stayed the proceedings for the purpose of tolling the statute of limitations "pending resolution of plaintiffs' Rule 23(f) appeal" and plaintiffs have elected to withdraw and have in

¹ Although the Equal Credit Opportunity Act ("ECOA"), 15 U.S.C. §§ 1691 *et seq.*, has a two-year statute of limitations, *id.* § 1691e(f), Congress enacted legislation that retroactively extended the limitations period for certain claims against the United States Department of Agriculture ("USDA") provided that the action was brought within two years of the enactment of the tolling statute, *i.e.*, by October 21, 2000. Congress took this extraordinary step in response to its belated discovery that in the early 1980s, USDA had secretly dismantled its civil rights investigatory unit and hence hobbled one of its means of ECOA enforcement. As a result of USDA's secret actions, for a period of nearly twenty years, Hispanic and other minority farmers who complained of discrimination in connection with USDA's farm credit programs had their complaints relegated to a bureaucratic black hole. Consequently, Congress allowed individuals who filed complaints of discriminations with USDA between January 1, 1981 and July 1, 1997 to sue for discrimination occurring before January 1, 1981 and December 31, 1996. *See* Agriculture, Rural Development, Food and Drug Administration, and Related Agencies Appropriation Act, 1999, Pub. L. No. 105-277, § 741, 12 Stat. 2681 (codified at 7 U.S.C. § 2297 note). Because the complaint in this case was filed on October 13, 2000, there were eight days remaining before the running of the statute of limitations. Plaintiff did not learn of the Court's December 2 Order until the Clerk's office faxed it to plaintiffs' counsel on the evening of December 4, 2002.

fact withdrawn their Rule 23(f) petition. Accordingly, plaintiffs requested that the Court modify its December 9 Order to stay the proceedings *nunc pro tunc* to December 2, 2002 for purposes of tolling the statute of limitations until further order of the Court.

In the instant motion, plaintiffs respectfully request that the Court reconsider or, in the alternative, clarify certain conclusions in its Memorandum Opinion that plaintiffs submit are erroneous. In addition, plaintiffs respectfully request that in the event the Court, upon reconsideration, remains convinced that plaintiffs have not met the requirements of Fed. R. Civ. P. 23, that it nevertheless modify its December 2 Order by deleting the words “plaintiffs’ motion for class certification [18] is denied” and substituting in lieu thereof, consistent with its May 22, 2002 Memorandum Order, “plaintiffs have not satisfied the requirements of Rule 23 on the basis of the limited record that has been compiled thus far and are entitled to discovery in order to determine if they can satisfy those requirements.” Alternatively, plaintiffs request that if upon reconsideration the Court is still not convinced that plaintiffs have satisfied the requirements of Rule 23, that the Court stay the operation of its December 2 Order for the purpose of tolling the statute of limitations until further order of the Court to permit plaintiffs to take class discovery and thereafter to renew their motion for class certification.

In concluding that plaintiffs have failed to satisfy the requirements of Rule 23, the Court relied upon three conclusions that plaintiffs respectfully submit are erroneous. First, in determining whether the instant case fits within the exception described by the Supreme Court in footnote 15 in General Telephone Co. v. Falcon, 457 U.S. 147, 159 (1982), the Court erroneously relied upon the current regulations in concluding that eight of eleven eligibility criteria were objective. Memorandum Op. at 12. In stark contrast to the eligibility requirements prescribed by the current regulations, the regulations that were actually applicable to the county committees during the vast majority of the relevant period prescribed eligibility criteria that were, for all practical purposes, entirely subjective. Second, the Court erred in concluding that plaintiffs’ current complaint “seeks no injunctive relief at all” and that “the monetary relief plaintiffs seek predominate under any applicable test.” Id. at 21. Third, even assuming arguendo that the

committee's decisionmaking process was not, as a practical matter, entirely subjective, given the facts of this case in which USDA has maintained its centralized databases in such a way as to prevent anyone from analyzing its decisionmaking, the Court's reliance upon Wards Cove Packing Co. v. Atonio, 490 U.S. 642 (1989), is erroneous in light of the amendment to Title VII prompted by that case.

ARGUMENT

I. This Court's Reliance On The Current Code Of Federal Regulations Misapprehends The Subjectivity Of The Criteria Employed During A Majority Of The Putative Class Period.

In its December 2, 2002 Memorandum Opinion, the Court cites to the current Code of Federal Regulations to support its conclusion that “[t]he regulations governing the decisions of county committees set forth eleven eligibility criteria, at least eight of which ...cannot properly be characterized as subjective” (*id.* at 12), and hence the instant case does not fit within the exception outlined in Falcon, 457 U.S. at 159 n.15. After noting that “Falcon's note 15 suggests that an ‘entirely subjective’ process might ‘conceivably’ justify class certification,” the Court observed that “[s]lavish adherence to the word ‘entirely’ would be unwise, but where, as here, a number of objective factors guide the decision-making process, the proposed class fits less neatly into the Falcon exception.”² Memorandum Op. at 11.

² There is some ambiguity, if not internal tension, in the Court's analysis of Falcon's footnote 15 exception. The Court begins its analysis by noting that “[s]lavish adherence to the word ‘entirely’ would be unwise. . . .” Memorandum Op. at 11. Thus, it would appear that the Court is merely echoing its earlier conclusion that “the government's reliance upon footnote 15 of [Falcon] [is] overly literal” and that “[t]he Court has not categorically prohibited class actions in discrimination suits involving less than ‘entirely’ subjective decisionmaking processes.” May 22, 2002 Memorandum Order at 1. However, in the ensuing pages, the Court cites cases such as Vuyanich v. Republic Nat'l Bank of Dallas, 723 F.2d 1195, 1199-200 (5th Cir. 1984); Webb v. Merck & Co., 206 F.R.D. 399, 407 (E.D. Pa. 2002); McReynolds v. Sodexo Marriott Servs., Inc., 208 F.R.D. 428 (D.D.C. 2002); and William v. Glickman, Civ. No. 95-1149, 1997 WL 198110 (D.D.C. Apr. 15, 1997) (“Williams II”) for the proposition that decisionmaking processes that are not “entirely” subjective do not satisfy the Falcon footnote 15 exception. See Memorandum Op. at 12-14. Indeed, in referring to the instant case, the Court states that “the presence of at least some mandatory objective criteria in the decision-making process take this case out of the purview of the Falcon exception, and distinguishes the case from McReynolds.” *Id.* at 13 n.4. Simply put, when the correct regulations are appropriately analyzed, it is difficult to reconcile the foregoing quote with the Court's conclusion that a “[s]lavish adherence to the word ‘entirely’ would be unwise” and its assertion in the May 22, 2002 Memorandum Order that

Relying upon the current regulations, the Court concluded that the county committee, in determining a farmer's eligibility for USDA loans programs, considered eleven criteria: (1) United States citizenship; (2) the legal capacity to incur loan obligations; (3) education and/or farming experience in managing or operating a farm or ranch; (4) character (emphasizing credit history, past record of debt repayment and reliability); (5) a commitment to carrying out undertakings and obligations; (6) inability to obtain credit elsewhere; (7) farm size (the farm to be no larger than a family farm); (8) and (9) loan history (restricting the permissible number of prior years in which the applicant executed a promissory note for a "direct OL loan"); (10) no previous debt forgiveness causing a loss to the Agency; and (11) no delinquency on any federal debt. Memorandum Op. at 12-13, citing 7 C.F.R. § 1941.12(a) of "the current provisions of the Code of Federal Regulations." Memorandum Op. at 13 n.5. Of these eleven criteria, the Court concluded that "the first, second, sixth, seventh, eighth, ninth, tenth and eleventh cannot properly be characterized as subjective." *Id.* at 12-13.

Significantly, however, the regulations relied upon by the Court were not promulgated until March 1997, more than sixteen years after the putative class period began. *See* 62 F.R. 9351, 9354-55. The regulations used to determine eligibility for participation in USDA loan programs during most of the putative class period were: (1) United States citizenship; (2) the legal capacity to incur loan obligations; (3) education and/or farming experience in managing and operating a farm or ranch; (4) character and industry to carry out the proposed operation; (5) a commitment to carry out undertakings and obligations; (6) inability to obtain sufficient credit elsewhere; and (7) farm size (the farm to be no larger than a family farm). 7 C.F.R. § 1941.12; *see also id.* at § 1943.12 (1989).

Under this Court's analysis, four of these seven criteria (citizenship, capacity, inability to obtain credit, and farm size) are not subjective. Memorandum Op. at 12. However, a careful

"[t]he Court has not categorically prohibited class actions in discrimination suits involving less than 'entirely' subjective decisionmaking processes."

reading of the regulations shows that in actuality only the citizenship and capacity criteria were truly objective. The seemingly objective sounding “inability to obtain credit elsewhere” criteria was in fact open to extensive subjective interpretation and application. For example, the regulation in question provided that the applicant was eligible for a loan only if he could not obtain sufficient credit elsewhere to:

finance actual needs at reasonable rates and terms taking into consideration prevailing private and cooperative rates and terms in the community in or near where the applicant resides for loans for similar purposes and periods of time.

7 C.F.R. § 1941.6 (1989) (Emphasis added.) For most of the relevant period, the county committee had discretion to determine an applicant’s “actual needs” and what constituted “reasonable rates and terms” given an applicant’s particular circumstances. Similarly, the committee could determine which commercial lending institutions were “near” the applicant’s residence in determining how far from home an applicant might have to travel to apply for commercial credit to satisfy the committee that he was unable to obtain credit elsewhere.

In a similar vein, the definition of a “family farm” was equally open to subjective interpretation. Rather than being defined in terms of minimum acreage or a production amount in terms of specific dollar value, the “family farm” was defined as, inter alia, “[a] farm which ... [p]roduces agricultural commodities for sale in sufficient quantities so that it is recognized in the community as a farm rather than a rural residence.” 7 C.F.R. § 1941.4 (1989) (Emphasis added). The regulation clearly gave the committee discretion to determine whether the applicant produced “commodities for sale in sufficient quantities” to be “recognized” as “a farm rather than a rural residence” by undefined entities or parties within or constituting the “community.”

Hence, of the seven eligibility criteria in place during a majority of the period at issue, all except citizenship and capacity were highly subjective and fraught with incentive and opportunity for discrimination against each and every potential class member in this case. Moreover, citizenship and capacity to contract are threshold, minimum legal requirements. It is highly unlikely that either requirement disqualified any applicants. Furthermore, given USDA’s

well-documented history of discrimination, a history that Hispanic farmers knew all too well from first-hand experience, it is equally unlikely that a Hispanic farmer who was not a United States citizen or who was not of the legal age to enter into contracts would ever present himself at a USDA office to apply for a loan. Thus, aside from the minimal legal requirements of citizenship and age, the eligibility criteria were, as a practical matter, “entirely subjective.”

Furthermore, the subjectivity that infected the USDA credit program is more than the product of mere speculation or unsubstantiated allegations. To the contrary, as noted in Plaintiffs’ Supplemental Memorandum In Support of Their Motion for Class Certification, the subjectivity at issue here was documented by the United States Commission on Civil Rights twenty years ago. As the Commission stated in its 1982 report,

[a]s a lender of last resort, the goals of the [FmHA] appear to be clear. However, regulations intended to implement these goals leave room for a wide range of subjective interpretation. . . . The problem of subjectivity permeates much of the FmHA loan decision process. . . . Lack of specific criteria for loan determinations potentially enhances FmHA’s flexibility and ability to serve clients. It also creates loopholes which allow for discriminatory treatment.

United States Commission on Civil Rights, The Decline of Black Farming In America, 80-81 (1982) (“Commission Report”) (emphasis added), quoted with approval in The Minority Farmer: A Disappearing American Resource; Has the Farmers Home Administration Been The Primary Catalyst? Thirty First Report of the Comm. On Gov’t Operations. 101st Cong. 10-11 (1990). (The House Report is included as Ex. 5 to Plaintiffs’ Supplemental Memorandum.)

Finally, the fact that the subjectivity at issue here is proven and well documented is significant. First, in Williams v. Glickman, No. 95-1149, 1997 U.S. Dist. LEXIS 1683 (D.D.C. Feb. 14, 1997) (“Williams I”), Judge Flannery noted that while plaintiffs had “claimed that the local FmHA supervisors had ‘unbridled discretion’ in making their decisions, they have not presented ‘significant proof’ that this is so.” Id. at *21 n.16. (Emphasis added.) Plaintiffs respectfully submit that the aforementioned findings of the United States Commission on Civil

Rights constitute significant proof of the subjectivity and discretion afforded the county committees in determining a farmer's eligibility to participate in USDA farm credit programs. That proven and well-documented subjectivity suffices to establish commonality and typicality. See Williams I, 1997 U.S. Dist. LEXIS 1683, at *21 n.16. Indeed, as the court held in Buycks-Roberson v. Citibank Fed. Savs. Bank, 162 F.R.D. 322, 331 (N.D. IL 1995) (emphasis added), "[t]he unifying force between the named representatives' claims and those of the proposed class is the allegation that [defendant] subjectively applied its neutral underwriting criteria in a way which resulted in the denial of . . . loans to African American applicants on the basis of race or the racial composition of the neighborhoods in which the applicants lived This 'subjective decisionmaking' . . . is the practice which is 'generally applicable' to the class."

Second, precisely because of the findings of the United States Commission on Civil Rights with respect to the subjectivity that infects the USDA farm credit decisionmaking process, as well as the findings of the Commission and Congress with respect to USDA's long history of a pattern and practice of discrimination with respect to farm credit, this case is clearly different from the typical case alluded to by the Court in Falcon. As the Court observed in Falcon,

Conceptually, there is a wide gap between (a) an individual's claim that he has been denied a promotion on discriminatory grounds, and his otherwise unsupported allegation that the company has a policy of discrimination and (b) the existence of a class of persons who have suffered the same injury as that individual, such that the individual's claim and the class claims share a common question of law or fact and that the individual's claim will be typical of the class claims.

457 U.S. at 157. (Emphasis added.) Here, the explicit findings of the Commission and Congress make clear that we are dealing with more than mere "unsupported allegations" contained in a complaint. To the contrary, the pattern and practice of USDA's discrimination against Hispanic and other minority farmers is as well documented as the subjectivity that infects its credit programs. And, insofar as disparate impact is concerned, it is the proven "subjective decisionmaking" inherent in the applicable eligibility criteria that "is the practice which is

‘generally applicable’ to the class.” Buycks-Roberson, 162 F.R.D. at 331; see also Williams I, 1997 U.S. Dist. LEXIS 1628, at * 21 n.16.

II. The Court Erred In Holding That Plaintiffs’ Complaint Seeks No Injunctive Relief At All And In Holding That Plaintiffs’ Demand For Monetary Damages Predominate Over Their Demand for Injunctive Relief.

A. Plaintiffs Do Seek A Variety of Injunctive Relief.

The Court’s assertion that plaintiffs’ complaint “seeks no injunctive relief at all” is flatly contradicted by the second amended complaint itself. Memorandum Op. at 21. In a footnote to that assertion, the Court notes that “[i]f plaintiffs’ complaint-processing claim were still in the case, their prayer for ‘specific performance with respect to their program benefits’ (under a claim of violation of the Administrative Procedure Act), 2d Amended Complaint ¶ 129, might support the provisional certification of a Rule 23(b)(2) class.” Id. n.9. (Emphasis added.) In focusing upon the complaint-processing claim, the Court apparently overlooked the fact that, unlike the plaintiffs in Love v. Veneman, the plaintiffs in the instant case have stated a viable APA claim. As the Court will no doubt recall, it had initially indicated that it viewed the complaints in Love and Garcia as essentially identical and indicated its intention to enter in Garcia the same rulings that it had previously entered in Love. See Feb. 21, 2002 Status Hearing Tr. at 3. However, in its subsequent March 20, 2002 Memorandum Order, the Court noted that:

The only legal issue requiring further discussion arises from plaintiffs’ claims for discriminatory administration of disaster benefit programs. A disaster benefit decision is not a “credit transaction” within the meaning of ECOA. 15 U.S.C. § 1691(a). A final agency action denying a disaster benefit is, however, reviewable under the Administrative Procedure Act, 5 U.S.C. §§ 702, 704. Plaintiff Gloria Morales asserts that she was denied disaster benefit payments for losses to her grape crop in 1993 and that she filed a discrimination complaint with the USDA prior to July 1, 1997, concerning that denial. Although the effectiveness of APA relief is questionable – the APA does not waive the government’s sovereign immunity with regard to money damages, 5 U.S.C. § 702 -- Ms. Morales has satisfied the special statute of

limitations approved by Congress and has standing to assert her claim before this court. 7 U.S.C. § 2279 Note.

March 20, 2002 Memorandum Order at 4. See also id. n.3.

Thus, as the foregoing makes clear, the instant complaint not only contains a prayer for injunctive relief, but the very prayer (i.e. ““for specific performance with respect to their program benefits””) that this Court noted “might support the provisional certification of a Rule 23(b)(2) class.” See Memorandum Op. at 21 n.9. However, that is by no means the only injunctive relief that plaintiffs seek.

In Paragraph 122 of the Second Amended Complaint, plaintiffs allege, inter alia, that:

Defendant’s acts of denying plaintiffs and Class members credit and other benefits and systematically failing to properly process their discrimination complaints was racially discriminatory and contrary to the requirements of the Equal Credit Opportunity Act, 15 U.S.C. §1691(a).

Moreover, in Paragraph 123, plaintiffs pray that “the defendant’s actions be reversed as violative of the Equal Credit Opportunity Act. Id. at ¶ 123. Thus, paragraph 123 clearly seeks injunctive relief with respect to, inter alia, “[d]efendant’s acts of denying plaintiffs and Class members credit . . . contrary to the requirements of the Equal Credit Opportunity Act” Second Amended Complaint ¶ 122.

Indeed, pursuant to the notice-pleading regime under which we operate, there is no requirement, and this Court cites none, that the plaintiffs must set forth in minute detail the precise nature and contours of the injunctive relief they seek. See, e.g. Western Colorado Fruit Growers Ass’n v. Marshall, 473 F. Supp. 6931, 699-700 (D. C. 1979) (motion to dismiss counterclaim seeking injunctive relief based in part on particularity requirements of Fed. R. Civ. P. 65(d) denied because “[u]nder our system of notice pleading the counter claim adequately places plaintiff on notice of the area into which the defendants will inquire at trial”); see also Sparrow v. United Air Lines, Inc. 216 F.3d 1111, 1113 (D.C. Cir. 2000); Woodruff v. DiMario, 197 F.R.D. 191, 192 (D.D.C. 2000). In this vein, plaintiffs have adequately pled their demands for declaratory and injunctive relief and, particularly since the Howrey Simon firm assumed lead

responsibility for prosecuting the litigation, plaintiffs have repeatedly emphasized that a major part of this case involves trying to fix the USDA farm credit and benefit systems once and for all so that another set of plaintiffs will not have to repeat this exercise a few years from now. Indeed, plaintiffs have requested that this Court enjoin the USDA from further violations of ECOA in its farm loan programs and root out, once and for all, the discrimination that has infected the loan programs since their inception more than six decades ago.

B. The Court Has Placed Unwarranted Reliance Upon an Unsubstantiated Damage Estimate.

The principal basis for the proposition that damages predominate over injunctive relief is the fact that the complaint contains a damage claim of \$20 billion. Plaintiffs respectfully submit that the Court places entirely too much weight on a number that, at best, can be described as designed to get attention. As current lead counsel made clear at the December 18, 2002 status conference, we were not the drafters of the complaint and while that complaint suffices to put the defendant on notice generally of plaintiffs' claims, in various respects it is inartfully drafted and thus may not fully reflect the current focus of plaintiffs' efforts.

Those efforts, as we have repeatedly stated whenever an opportunity presented itself, are directed towards, first and foremost, fixing the USDA credit system once and for all. Given the years of well-documented and deep-rooted discrimination, that may well prove to be a substantial challenge. Certainly, Congress and the Executive Branch have heretofore not been able to reform the USDA's credit programs and plaintiffs do not underestimate the effort that will be required if the Court is to do what the Congress and Executive Branches have thus far been unable to do.

Finally, in order to disabuse the Court of the notion that monetary relief predominates over injunctive relief in this case, plaintiffs intend to seek leave of the Court to amend their complaint to spell out with greater specificity the injunctive relief that plaintiffs seek and to delete any reference to a \$20 billion damage claim. The amendments to the complaint will

unambiguously demonstrate that the primary relief plaintiffs seek is to reform USDA's broken credit and benefit systems and that monetary relief is secondary to that reform goal.

III. THIS COURT'S APPARENT HEAVY RELIANCE ON WARDS COVE PACKING CO. V. ATONIO IS MISPLACED AND FAILS TO TAKE INTO ACCOUNT CONGRESS' 1991 AMENDMENT TO TITLE 7.

The Court faults plaintiffs for "hav[ing] failed to make [a] 'significant showing'" that members of the class suffered from a common policy of discrimination. Memorandum Op. at 8. The Court also faults the statistical analysis performed by Professor Jerry Hausman for failing to show how the statistically significant disparity in the ability of Hispanic farmers to obtain USDA loans "is attributable to any one, or more, of the arguably subjective criteria that are part of the loan approval process." *Id.* at 15. The Court concluded that this alleged failure on the part of plaintiffs' statistical analysis "is particularly toxic to [plaintiffs'] claim of disparate impact." *Id.* at 16 n.7. The Court also concluded that "where an employer combines subjective criteria with the use of more rigid standardized rules or tests," plaintiffs are "responsible for isolating and identifying the specific employment practices that are responsible for any observed statistical disparities." *Ibid.* (quoting Wards Cove Packaging v. Atonio, 490 U.S. at 656 (1989) (quoting Watson v. Fort Worth Bank & Trust, 487 U.S. 977, 994 (1988) (O'Connor, J. concurring))). Significantly, this Court faults plaintiffs for not including in its analysis facts that, if they exist at all, exist only in the files and records of the defendant, and as to which plaintiffs have been afforded no discovery whatsoever.³ Indeed, the Court's reliance on Wards Cove, suggests that plaintiffs must demonstrate the precise policy that caused the alleged disparate impact upon them even when the defendant's policies are not capable of separate analysis.

³ This Court cites as another potential bar to class certification the geographic dispersion of the decision-makers. Significantly, the Court concedes that such a theoretical bar to class certification may be overcome by an appropriate statistical analysis. Memorandum Op. at 18-19. Nevertheless, the Court denied class certification without ever affording plaintiffs any discovery.

Plaintiffs respectfully submit that the Court's heavy reliance upon Wards Cove and Watson is misplaced.⁴ In Watson, the Court had before it the very narrow issue of whether disparate impact analysis applied to subjective criteria. See, e.g., 487 U.S. at 1011 (Stevens, J. concurring in the judgment). Of the eight justices participating in the decision, the Court unanimously held that disparate impact analysis did apply. However, Justice O'Connor, who wrote the opinion for the Court, also wrote a concurring opinion substantially revising the allocation of the burdens of proof and production in disparate-impact cases. The justices divided evenly on most of those issues.⁵

When the Court considered Wards Cove in the next term, a bitterly divided Court, by a vote of 5 to 4, essentially adopted and expanded upon the O'Connor concurring opinion in Watson. The majority, citing Justice O'Connor's concurring opinion in Watson, held that

Respondents will also have to demonstrate that the disparity they complain of is the result of one or more of the employment practices that they are attacking here, specifically showing that

⁴ The Court has indicated a willingness to permit plaintiffs to take discovery in support of their motion for class certification and plaintiffs intend to avail themselves of that discovery in the event that the Court concludes, upon reconsideration, that plaintiffs have not satisfied the requirements of Fed. R. Civ. P. 23. Notwithstanding the foregoing, the Court's apparent heavy reliance upon Wards Cove and cases following it (see May 22, 2002 Memorandum Order at 2 citing Koger v. Reno, 98 F.3d 631, 639 (D.C. Cir. 1996) and Memorandum Op. at 16 n.7 citing Lu v. Woods, 717 Supp. 886, 890 (D.D.C. 1989), raises a critical issue because, as USDA's centralized databases make clear, USDA by now may well have purged its records and conducted its affairs in such a way as to make it impossible for anyone to analyze the separate components of its decisionmaking process in determining, inter alia, farm credit eligibility. If defendant has in fact done so, the Court must recognize that Wards Cove is not controlling. Indeed, as explained more fully infra, Congress expressly amended Title VII to modify Wards Cove and require the Court to treat defendant's decisionmaking process as an undifferentiated single practice and view any statistically significant disparities with respect to the ability of Hispanic farmers to obtain USDA credit as evidence of the discriminatory effect of that practice in the absence of contrary evidence.

⁵ Justice Kennedy did not participate in the decision. Of the eight justices who participated in the decision, only Chief Justice Rehnquist and Justices White and Scalia joined Justice O'Connor's concurrence discussing the allocation of the burdens of proof and production. 487 U.S. at 982. In a concurring opinion joined by Justices Brennan and Marshall, Justice Blackmun, noting the narrow question presented, stated that he would have limited the holding to the question presented, but felt constrained to address Justice O'Connor's concurrence because he felt it was "flatly contradicted by our case." Id. at 1000-01 (Blackmun, J., concurring in part). In a separate opinion concurring in the judgment, Justice Stevens questioned the prudence of announcing "a fresh" interpretation to our prior cases applying disparate impact analysis to objective employment criteria," and stated that, given the narrow question presented, he "would . . . [have] postpone[d] any further discussion of the evidentiary standards set forth in our prior cases until after the District Court ha[d] made appropriate findings concerning . . . plaintiff's prima facie evidence of disparate impact. . . ." Id. at 1011.

each challenged practice has a significantly disparate impact on employment opportunities for whites and nonwhites.

490 U.S. at 657.

In a strongly worded dissent, Justice Steven stated:

Also troubling is the Court's apparent redefinition of the employees' burden of proof in a disparate-impact case. No prima facie case will be made, it declares, unless the employees "isolat[e] and identif[y] the specific employment practices that are allegedly responsible for any observed statistical disparities." Ante, at 656 (quoting Watson v. Fort Worth Bank & Trust, 487 U.S. 977, 994 (1988) (plurality opinion)). This additional proof requirement is unwarranted. It is elementary that a plaintiff cannot recover upon proof of injury alone; rather, the plaintiff must connect the injury to an act of the defendant in order to establish prima facie that the defendant is liable. E.G., Restatement § 430. Although the causal link must have substance, the act need not constitute the sole or primary cause of the harm. §§ 431-433; cf. Price Waterhouse v. Hopkins, 490 U.S. 228 (1989). Thus in a disparate-impact case, proof of numerous questionable employment practices ought to fortify an employee's assertion that the practices caused racial disparities. Ordinary principles of fairness require that Title VII actions be tried like "any lawsuit." Cf. Postal Service Bd. Of Governors v. Aikens, 460 U.S. 711, 714 n.3 (1983). The changes the majority makes today, tipping the scales in favor of employers, are not faithful to those principles.

Id. at 672-73 (Stevens, J. dissenting). (Emphasis added and footnote omitted.)

The Wards Cove decision subsequently prompted Congress to amend Title VII in 1991.⁶ As amended, the statute provides that a plaintiff, asserting a disparate impact claim, must "demonstrate[] that a respondent uses a particular employment practice that causes a disparate impact on the basis of race, color, religion, sex or national origin. . . ." 42 U.S.C. § 2000e-2(k)(1)(A)(i). Significantly, the revised statute provides an exception to this requirement where "the complaining party can demonstrate to the court that the elements of a respondent's decision

⁶ The only other case cited by this court in support of the requirement that plaintiffs identify the specific matters causing the disparate impact is Lu v. Woods, 717 F. Supp. 886, a decision which predates the 1991 amendment to Title VII.

making process are not capable of separation for analysis, the decision making process may be analyzed as one employment practice.” *Id.*, § 2000e-2(k)(1)(B)(i). (Emphasis added.)

To the extent that USDA is permitted to limit plaintiffs’ ultimate discovery to databases and records which, as USDA concedes, do not contain any information concerning the reasons for rejecting loan applications, USDA is, in effect, maintaining a system in which “the elements of [its] decision making process are not capable of separation for analysis [and hence] may be analyzed as one . . . practice.” *Ibid.* (Emphasis added.) Under such an approach, evidence of “numerous questionable” subjective criteria in USDA’s eligibility requirements “ought to fortify [plaintiffs’] assertion that the practices caused racial disparities.” *Wards Cove*, 490 U.S. at 673 (Stevens, J. dissenting).

In addressing the perceived shortcomings in plaintiffs’ statistical analysis, the Court notes that “[p]laintiffs blame their inability to present better statistical proof on defendant’s databases, which do not contain specific reasons for the denials of loan and benefit applications made by Hispanic farmers.” Memorandum Op. at 15 n.6. In addition, the Court dismisses plaintiffs’ reliance upon *Medina v. Reinhardt*, 686 F.2d 997 (D.C. Cir. 1982), and *Segar v. Smith*, 738 F.2d 1249 (D.C. Civ. 1984), by noting that:

Perhaps [plaintiffs] are suggesting that, in the absence of better USDA data, their ‘across-the-board’ showing ought to shift the burden for disproving commonality to defendant, requiring defendant to show that Hispanic farmers’ applications were rejected for objective reasons, just as proof of a prima facie case shifts the burden of proof in a Title VII case. If that is the suggestion, it is unsupported by case authority and unpersuasive.

Memorandum Op. at 15-16 n.16.

Plaintiffs respectfully submit that the 1991 amendment to Title VII in effect shifts, or at a minimum reduces, the burden of proof that would be required if *Wards Cove* remained good law in circumstances where defendant has made it impossible to analyze separately the objective and subjective criteria in defendant’s decisionmaking process. As the foregoing makes clear, in such circumstances, plaintiffs are entitled to treat defendant’s decisionmaking process as a single

practice and plaintiffs are relieved of the requirement of linking the statistically significant disparity in the ability of Hispanic farmers versus white male farmers to obtain USDA credit to a specific suspect criterion. While defendant presumably will try to overcome such a showing by demonstrating that the disparity is due to appropriate objective criteria, in the likely event that defendant is unable to do so the combination of statistically significant disparity coupled with anecdotal evidence should suffice to demonstrate commonality under the 1991 amendment to Title VII. Indeed, to permit any other result would reward defendants who are clever enough to make their decisionmaking process incapable of separate analysis.

Moreover, in McReynolds, as in the instant case, the Court confronted criticism of plaintiffs' statistical analysis. In response to the claim that plaintiffs' statistical analysis "did not control for education and experience by position," the McReynolds court noted that "plaintiffs explain that they failed to control for education and experience because Sodexho has no computerized data that would allow them to be evaluated quantitatively." McReynolds, 208 F.R.D. at 444 n.25. Significantly, the court stated that "plaintiffs should not be penalized for defendant's lack of centralized controls and recordkeeping." Ibid. See also Hartman v. Duffey, 973 F. Supp. 189, 193 (D.D.C. 1997) (court "cannot allow the lack of information resulting from defendant's practices to affect the legal requirements governing this suit").

Finally, of additional importance is the fact that the Garcia plaintiffs have alleged not only disparate impact but also disparate treatment. Where plaintiffs allege "intentional discrimination... plaintiff[s] need not isolate the particular practice and prove that such practices caused the discrimination..." Hartman v. Duffy, 19 F.3d 1459, 1472 (D.C. Cir. 1994). (Emphasis added and in the original.) Instead, "plaintiffs must make a significant showing to permit the court to infer that members of the class suffered from a common policy of discrimination that pervaded all of [the defendant's] challenged...decisions." Id.

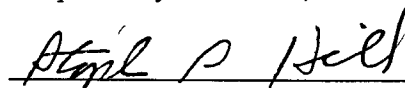
Plaintiffs respectfully submit that they have made a significant showing that they are the victims of a well-documented and long-standing pattern and practice of discrimination. Indeed, the existence of this pattern and practice has been confirmed by explicit findings by the Civil

Rights Commission and by Congress. The Court, however, thus far has elected to ignore such evidence and has focused instead upon sterile theories of how to prove a pattern and practice of discrimination in the absence of the very evidence that is manifest in the instant case.

CONCLUSION

Accordingly, plaintiffs request that the Court reconsider or, in the alternative, clarify its December 2, 2002 Memorandum Opinion and accompanying Order denying plaintiffs' motion for class certification. Plaintiffs contend that an analysis of the actual Regulations prescribing the eligibility requirements that the county committees were to employ during the vast majority of the time period covered by the complaint makes clear that the defendant operated within a decisionmaking system that was, for all practical purposes, entirely subjective; that plaintiffs' claim for money damages do not predominate over their demand for extensive injunctive and declaratory relief; and that the Court's heavy reliance on Wards Cove is misplaced in light of Congress' 1991 amendment to Title VII.

Respectfully submitted,



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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

_____)	
GUADALUPE L. GARCIA, JR., et al.,)	
)	
Plaintiffs,)	
)	
v.)	Civil Action No. 1:00CVO2445
)	Judge Robertson
ANN VENEMAN, Secretary of the)	
United States Department of Agriculture,)	
)	
Defendant.)	
_____)	

ORDER

After considering plaintiffs' motion for reconsideration or, in the alternative, clarification of certain issues and defendant's opposition thereto, it is

ORDERED that plaintiffs' motion is for clarification is granted to the extent that the Court STAYS the operation of its December 2, 2002 Order for purposes of tolling the statute of limitations until further order of the Court to permit plaintiffs to take class discovery and thereafter to renew their motion for class certification.

SO ORDERED this _____ day of _____, 2003.

James Robertson
United States District Judge

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)	Judge Robertson
ANN VENEMAN, Secretary of the)	
United States Department of Agriculture,)	
)	
Defendant.)	
_____)	

ORDER

After considering plaintiffs' motion for reconsideration or, in the alternative, clarification of certain issues and defendant's opposition thereto, it is

ORDERED that plaintiffs' motion is for reconsideration is granted to the extent that the Court clarifies its December 2, 2002 Memorandum Opinion and accompanying Order, by deleting the words "plaintiffs' motion for class certification [18] is denied" and substituting in lieu thereof "plaintiffs have not satisfied the requirements of Rule 23 on the basis of the limited record that has been compiled thus far and are entitled to discovery in order to determine if they can satisfy those requirements."

SO ORDERED this ____ day of _____, 2003.

James Robertson
United States District Judge

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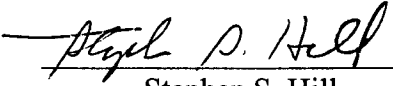
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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Plaintiffs' Motion For Reconsideration Or, In The Alternative, Clarification of Certain Issues was served by hand delivery, this 14th day of January 2003 upon the following:

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Stephen S. Hill