

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

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| GUADALUPE L. GARCIA, et al.,  | .                             |
|                               | . Docket No. CA 00-2445 JR    |
| Plaintiffs,                   | .                             |
|                               | . Washington, D.C.            |
| v.                            | . Wednesday, January 15, 2003 |
|                               | . 5:07 p.m.                   |
| SECRETARY, U.S. DEPARTMENT OF | .                             |
| AGRICULTURE, et al.,          | .                             |
|                               | .                             |
| Defendants.                   | .                             |
| .....                         | .                             |

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

APPEARANCES:

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| For the Plaintiffs: | CONLON, FRANTZ, PHELAN & PIRES<br>ALEXANDER J. PIRES, JR., ESQ.<br>1818 N Street, N.W.<br>Washington, D.C. 20036<br>HOWREY, SIMON, ARNOLD & WHITE<br>STEPHEN HILL, ESQ.<br>ALAN M. WISEMAN, ESQ.<br>1299 Pennsylvania Avenue, N.W.<br>Washington, D.C. 20004 |
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| For the Defendants: | UNITED STATES DEPARTMENT OF JUSTICE<br>LISA A. OLSON, ESQ.<br>MICHAEL SITCOV, ESQ.<br>20 Massachusetts Avenue, N.W.<br>Washington, D.C. 20530 |
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| Court Reporter: | DENNIS A. DINKEL, RDR, CRR<br>Official Court Reporter<br>Room 6818, U.S. Courthouse<br>Washington, D.C. 20001<br>PHONE: (202) 289-8661 |
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Proceedings reported by machine shorthand, transcript produced  
by computer-aided transcription

PROCEEDINGS

(5:07 p.m.)

1  
2  
3 THE COURT: Call the Garcia case.

4 THE DEPUTY CLERK: Yes, Your Honor. Civil Action  
5 number 00-2445, Guadalupe Garcia and others versus Ann Veneman.  
6 For the plaintiff, Mr. Pires, Mr. Hill, Mr. Anderson, and  
7 Mr. Wiseman. For the defendant, Mr. Hill and Mr. Sitcov.

8 THE COURT: The last time we were here before  
9 Christmas, I basically gave the plaintiff some options about  
10 how to proceed; and my understanding is you -- disabuse me if  
11 I'm wrong -- that you basically have decided not to pursue the  
12 23(f) appeal but instead continue with discovery and see  
13 whether you can -- my words not yours -- beef up your class  
14 action motion with further discovery?

15 MR. HILL: That's correct, Your Honor.

16 THE COURT: And you have -- you filed that emergency  
17 motion -- which I signed -- which has the effect of staying the  
18 effect of this, to remove statute of limitations problems  
19 which, of course, is perfectly appropriate and a discovery --  
20 and now you moved to lift the stay on discovery and adopt a  
21 discovery plan; and you have dates for the completion of class  
22 discovery and exchange of expert reports, expert depositions,  
23 supplemental memoranda, all of this to be fully briefed and  
24 ready for essentially another run at the class action motion  
25 just about one year from now; is that right?

1 MR. HILL: That's correct, Your Honor.

2 THE COURT: Is the defendant on board with this  
3 schedule?

4 MS. OLSON: No, we're not.

5 THE COURT: I thought this was all agreed. Come up  
6 and tell me what's wrong with that approach.

7 MS. OLSON: The plaintiffs have filed a motion to  
8 lift the stay on discovery, but they also filed a motion for  
9 reconsideration, which raises purely legal issues. They're  
10 taking a scatter-shot approach.

11 THE COURT: The motion for reconsideration is going  
12 to be denied.

13 Now, you on board with the discovery?

14 MS. OLSON: Well, we would like to address -- we  
15 would like the opportunity to respond in writing.

16 THE COURT: To the motion for reconsideration?

17 MS. OLSON: No. To the motion to lift the stay on  
18 discovery. It is unclear -- once again we're back to the same  
19 point. That is, it is unclear what they hope to accomplish  
20 with this discovery. They're proposing 50 depositions and a  
21 hundred interrogatories. The whole point of class  
22 certification is to avoid discovery that is so onerous. This  
23 is going to be nationwide discovery. They're talking about  
24 focusing on six states. If they're trying to develop  
25 statistics, they have information regarding the plaintiffs, the

1 proposed class members at their disposal.

2 Why do we need all this discovery? I remember the court  
3 referred in our last status conference to maybe a hundred  
4 instances make a statistic; but what are they hoping to elicit  
5 from our witnesses that requires such burdensome discovery?  
6 So, no, we don't agree. I would like the opportunity to take a  
7 little bit of time to address this.

8 And it just seems inefficient to go about this by having  
9 them propound all these depositions. They haven't even put any  
10 limit on documents that they might request. We have already  
11 offered them everything they have. They didn't want it.

12 This is what we went through last summer when we had a  
13 couple of discussions about our databases and said you can have  
14 it if you want it; but there wasn't anything in there they  
15 wanted.

16 So now they are proposing to propound all this discovery,  
17 and are we going to have to file a motion for protective order  
18 as to each one? Or can we have some idea at the outset about  
19 what they're hoping to accomplish? This is blank in here about  
20 that. All they say is we would like this discovery. We would  
21 like some chance to understand where they hope to go with it.

22 THE COURT: Tell me about the discovery you plan to  
23 take.

24 MS. OLSON: Excuse me, Your Honor, may I also say I  
25 just got this yesterday. I was in California at the time it

1 arrived. I just haven't had much chance to digest it.

2 THE COURT: Okay.

3 MS. OLSON: Thank you.

4 MR. HILL: Thank you, Your Honor.

5 First of all, as it seems to be Mrs. Olson's practice,  
6 she's exaggerated greatly. What we've asked for is to take up  
7 to 25 depositions and up to -- and to propound up to 50  
8 interrogatories. I think at the outset, we ought to note that  
9 our law firm is financing this litigation, and there is  
10 absolutely no incentive on our part to take one bit of  
11 discovery more than is absolutely necessary to satisfy Your  
12 Honor's requirements to establish commonality in this case.

13 What we are -- what they have offered us was a database  
14 that they concede doesn't contain the information that we need  
15 to establish commonality. Since we can't do it with their  
16 database, the only alternative we have is to go out in the  
17 field and look at the files in the individual FSA offices.  
18 We're not talking about nationwide discovery.

19 We are hoping to limit our discovery to the states where  
20 our clients live, and we are talking about five or six states,  
21 Your Honor.

22 THE COURT: Let's get as specific as you can about  
23 what kind of discovery, of whom, and so forth. Up to 25  
24 depositions of whom?

25 MR. HILL: Well, we would like to take 30(b)(6)

1 depositions, Your Honor, with respect to the sorts of  
2 information that is contained not only in their electronic  
3 databases but in their hard files and any other non-electronic  
4 databases to establish this information that's there with  
5 respect to the various applicants for credit.

6 We'd also like to take the depositions of the people who  
7 designed their databases in the first instance and to make the  
8 determinations as to what information should and should not be  
9 included.

10 THE COURT: Whoa. Whoa. Whoa. Stop right there.  
11 People who designed their databases to find out what  
12 information was or was not and whether it should or should not  
13 leaf been included.

14 MR. HILL: Let me back up a little bit. There were  
15 determinations made along the way as to what information from  
16 the raw files would go into the databases that they have  
17 maintained on a centralized basis. It seems to us that given  
18 the repeated investigations of this organization with respect  
19 to its alleged discrimination against Hispanics and other  
20 minorities, it is significant that they have compiled databases  
21 that appear to be absolutely useless for the purpose of  
22 auditing their lending practices; and that has some potential  
23 significance -- it seems to me -- in terms of the whole  
24 question of where we go in terms of establishing a linkage,  
25 Your Honor, under the Wards Cove case and the -- and the

1 legislation amending that -- amending title VII in light of the  
2 effect of Wards Cove.

3 THE COURT: I'm just catching that idea on the fly,  
4 counsel, but that strikes me as a really difficult proposition  
5 that you're advancing here. I suppose ultimately what you'd  
6 like to develop from taking the depositions of people who  
7 developed the software is they knew that some day somebody  
8 would be looking into this and the less information we keep the  
9 better because if you keep the information that you think we  
10 ought to have kept, then you could have proven commonality, and  
11 that amounts to kind of a bad faith case from which you would  
12 ask me to infer commonality based on what might have been  
13 collected.

14 MR. HILL: Well, no. That, Your Honor -- we  
15 respectfully suggest that that might be one element of many  
16 that will come together hopefully in establishing commonality  
17 or at least having Your Honor consider a somewhat less  
18 stringent requirement on our linking the disparity we think we  
19 will be able to show regarding the ability of Hispanic farmers  
20 to get loans versus white farmers to get loans and some  
21 specific practice or policy of USDA.

22 THE COURT: Well, my inclination at this point is the  
23 database that USDA has is the database they have.

24 MR. HILL: Certainly.

25 THE COURT: Going back -- without some -- without

1 some good-faith basis on which to assert that it was -- that  
2 somebody tinkered with it at its creation in order to obscure  
3 data, I'm very unlikely to allow to you take that kind of  
4 deposition.

5 What's the next kind?

6 MR. HILL: Well, I would just point out in that  
7 connection, Your Honor, we do believe we have a witness who  
8 will address that very point, that part and parcel of the  
9 process in preparing their database was to keep it as obscure  
10 and as opaque as possible; so we would -- but in the -- but in  
11 addition to that, we would also like to take discovery, Your  
12 Honor, with respect to the -- certainly our named plaintiffs  
13 and also any Hispanic applicants in the five or six states that  
14 we isolate to determine their -- to check the files to see  
15 whether they were able to get loans and the reasons why if they  
16 were denied loans, they were denied loans.

17 The very information that will be critical in establishing  
18 commonality that isn't in the electronic database.

19 THE COURT: That's just your own clients. The people  
20 who were all -- already are your clients. That's easy. You're  
21 certainly entitled to do that.

22 MR. HILL: But I think, Your Honor, we would also be  
23 entitled to look at any Hispanic applicants in those -- in the  
24 states in those five states as further evidence of establishing  
25 commonality, it seems to me. We certainly -- we certainly

1 would want to start with our own clients.

2 THE COURT: What five states?

3 MR. HILL: California, New Mexico, Colorado, Texas,  
4 Washington, and Florida.

5 THE COURT: That's six.

6 MR. HILL: Six states, Your Honor. I said five or  
7 six states.

8 THE COURT: California and Florida are two pretty  
9 populous states. Texas, I think you probably picked -- New  
10 Mexico and Texas being border states. What happened to  
11 Arizona? How did you leave this one out if you're looking for  
12 Hispanics?

13 MR. HILL: We'd be happy to include Arizona.

14 THE COURT: What do you want from those states?

15 MR. HILL: We want the opportunity, Your Honor, to  
16 look at the FSA files in the county offices.

17 THE COURT: Of all the county offices in all those  
18 six states?

19 MR. HILL: Yes, Your Honor. To determine -- to  
20 determine the -- to look and see if we can find in those files  
21 the information that Your Honor said we need to show to  
22 establish commonality.

23 The connection between why they're being rejected for  
24 loans. You know, what -- and they're required to give a reason  
25 when they reject someone for a loan. They don't -- they don't

1 capture or record that information in the centralized database.  
2 We have no alternative if we're going to satisfy Your Honor's  
3 requirement but to go out and look at those individual files.

4 THE COURT: All right.

5 MR. HILL: It is a tedious, expensive proposition  
6 that we don't -- you know -- look forward to, but we have no  
7 alternative but to do.

8 THE COURT: Well, counsel, we're in a -- in I think a  
9 relatively -- it is not an uncharted field but it's a field in  
10 which there's a lot of judgment and discretion. I mean -- I'm  
11 looking at this thing as two intersecting curves. One of them  
12 is the plaintiffs' legitimate need to take discovery on a  
13 colorable claim of commonality.

14 And the other is the burden to the government -- I know  
15 you're paying for it, but the taxpayer is paying for the other  
16 side of it. And the burden to the government of responding  
17 to -- to discovery is also -- establishes a curve. And  
18 someplace those two curves intersect. Exactly where they  
19 intersect, I'm not sure I know.

20 I take the government's point. They're going to have to  
21 file 50 motions for protective order, and the answer to that  
22 has to be no.

23 The motion that you filed -- I'm thinking out loud here,  
24 which is probably obvious -- the motion that you have filed to  
25 take discovery is unspecific as to the discovery you wish to

1 take.

2 MR. HILL: Well, Your Honor --

3 THE COURT: And you're trying to specify it now.

4 MR. HILL: We have -- we are in the process of  
5 drafting interrogatories, document requests, and a notice of  
6 30(b)(6) deposition; but in -- really in all my years of  
7 practice, you start the process. We file our formal discovery.  
8 If they have a valid objection to it, they make it.

9 It seems like they're wanting us to define in some great  
10 detail ahead of time what it is we want to take, and they will  
11 pass judgment on it.

12 We are certainly -- we're certainly willing to go forward  
13 and subject our -- submit our discovery. We think that's the  
14 most efficient way to proceed. We're not -- we're not talking  
15 about 50 depositions, as they say. That's an exaggeration.  
16 We're not talking about a hundred interrogatories. I would  
17 think at the outset we're probably talking about -- you know --  
18 10 or so depositions to begin with.

19 But it is a strange situation that these people can  
20 intentionally keep their records in such a way as to make them  
21 absolutely opaque, obscure, and useless.

22 THE COURT: Well, that premise I have not bought  
23 into, counsel. I have not bought into that. If you say you  
24 have a witness to that proposition, show me your witness.

25 MR. HILL: We have such a witness. We would like to

1 take his deposition.

2 THE COURT: I have indicated and I did indicate the  
3 last time you were here that one of the plaintiffs' options is  
4 to withdraw its 23(f) appeal and pursue discovery because I was  
5 careful to say in the order denying the position for class  
6 certification that the decision was without prejudice to  
7 renewing the motion if, as, and to the extent the plaintiffs  
8 could establish commonality.

9 I don't want to put my thumb on that scale, but neither do  
10 I want to allow anything like sort of an open -- open season on  
11 taking as many depositions, particularly looking at the files  
12 of all the FSA offices in six states. That sounds to me like  
13 an enormous job. I don't know who's going to organize those  
14 files, how you're going to do it, whether you are going to send  
15 people to those states, whether you want the agriculture  
16 department to package them up and send them here. We had some  
17 discussion of that the last time as I recall. I don't remember  
18 the conclusion of it.

19 But a document production, a document production could --  
20 we might need to have an environmental impact statement before  
21 they produce documents.

22 MR. HILL: Well, we were -- we were concerned in  
23 addressing their contention that we were asking them to go off  
24 willy-nilly on some nationwide 2700-county search, and we  
25 wanted to disabuse them and the court of any such notion. We

1 thought we had come up with a fair compromise but limiting it  
2 to the states where we have substantial numbers of plaintiffs  
3 and where there are substantial numbers of Hispanic farmers.

4 I suppose -- I'm sort of at a loss to figure out a further  
5 compromise unless we're talking about limiting our discovery to  
6 the very counties where we have -- the actual counties where we  
7 have plaintiffs located. It seems to me that at the -- again,  
8 at the end of the day, we -- we're faced with the problem of  
9 trying to establish a linkage. You're saying we have to  
10 establish a linkage between a specific policy undertaken by  
11 USDA and a statistically significant disparity that we found.

12 Now we can't do it, it is impossible to do it, with the  
13 centralized database that they have chosen to maintain for  
14 whatever reason.

15 The alternative is to give up and go home or have an  
16 opportunity to take meaningful, fulsome discovery of their  
17 records; and if they've chosen to conduct their business in  
18 this way and to keep their files in this fashion, they've  
19 brought this burden on themselves to a certain extent.

20 THE COURT: I'm not aware of any doctrine that  
21 requires a government agency or any company to keep its files  
22 in a way that will maximize the opportunities for anybody who  
23 wants to sue them to take discovery.

24 And I'm not -- this government has kept the files the way  
25 they've kept them. You keep coming back to that, counsel. I

1 hear you, but I'm not buying it.

2 MR. HILL: Uh-huh.

3 THE COURT: I am buying the notion that you can go  
4 forward to discovery. I think a government motion to lift the  
5 stay on discovery would be at this time too abstract for me to  
6 deal with.

7 Here is what we're going to do. Serve your discovery.  
8 Bottle it all up. Get it all together. Serve it. Then you  
9 can oppose it and you can oppose it piecemeal. You can oppose  
10 it -- you can say the whole thing is too burden -- you can  
11 suggest -- you can suggest a subset of it that might be useful.  
12 You might want to suggest -- frankly, I wish you'd get together  
13 and work on this, but you might want to suggest a sampling in  
14 order to get to the same place.

15 But I take your point that unless you serve the discovery,  
16 they don't know exactly what they're shooting at. So serve it.  
17 Serve your interrogatories and especially your document  
18 production requests, and your notices of deposition, and your  
19 request for admissions; and then give the government something  
20 more than the standard time to respond to it all. But the  
21 government will respond to it with what I imagine would be not  
22 only an omnibus but a -- specific objections where they apply,  
23 so that we have some idea of what the burden is and what the  
24 shape of these two curves are that I'm trying to find the  
25 intersection point.

1           Now when can you do that?

2           MR. HILL: We can serve the discovery, Your Honor, by  
3 the first of next week.

4           THE COURT: Great.

5           Government -- let's say 30 days to respond. Not on the  
6 merits of the discovery but to respond with any objections or  
7 with any objections either to the discovery or to the nature of  
8 the discovery that's propounded.

9           MS. OLSON: I'm sorry.

10          I was just going to mention two things. First of all,  
11 that I was going to be out of the country the last two weeks of  
12 February; and I wondered if we could make it 45 days to account  
13 for that.

14          THE COURT: You all alone there?

15          MS. OLSON: I'm pretty much -- I am all alone, yes.  
16 Jean Lynn went to the attorney general's office in New York.

17          THE COURT: Who's this handsome fellow sitting with  
18 you at counsel table? Doesn't he do any work?

19          MS. OLSON: I'll let him answer that.

20          MR. SITCOV: The answer is no, and you've blown my  
21 cover. We have -- in addition to this case, Your Honor, we  
22 have the Keepseagle case which is now in remand. We still are  
23 working with Pigford. There is a limit to the amount of things  
24 that I can do. We have on occasion had other people in to help  
25 on these cases; but on something like this, where a more global

1 and strategic approach is necessary, I am not sure that that  
2 would necessarily be the answer.

3 THE COURT: You say you're going to be -- let's see.  
4 You say that you're going to serve this by the beginning of  
5 next week?

6 MR. HILL: Yes, Your Honor.

7 THE COURT: Which will be the 20th of January. You  
8 tell me you're going to be absent the last two weeks of  
9 February.

10 MS. OLSON: That's right.

11 THE COURT: You could respond by Valentine's day.  
12 You can do it in less than 30 days.

13 MS. OLSON: Okay. I'll give it a shot.

14 May I -- Your Honor, I'm concerned you're speaking for the  
15 need for some specificity. If they're serving notices for  
16 deposition, we won't know what they hope to accomplish. It  
17 would be helpful to us if there could be some specificity in  
18 their discovery requests.

19 THE COURT: Well, I certainly -- you have to be  
20 specific with a 30(b)(6) notice.

21 MR. HILL: Absolutely. We intend to be.

22 THE COURT: That will be specific.

23 How many of those notices will be 30(b)(6) notices, I  
24 don't know; but I'm assuming that will give you a pretty good  
25 clue about where they're going.

1 MS. OLSON: The only reason I mentioned 50  
2 depositions and a hundred interrogatories is that was the total  
3 of what they envision.

4 THE COURT: This is how we left it. The plaintiffs  
5 will serve their discovery next week. The government is going  
6 to respond with any objections to that discovery by the 14th of  
7 February.

8 Happy Valentine's day to you, too.

9 Then we'll have a reply; and then at some time early in  
10 March, we'll get back together and talk about this discovery  
11 thing in a much more focused way. And it will take a couple of  
12 months out of your schedule to do that, but I have the hope --  
13 maybe it is a vain hope -- that by getting specific on the  
14 discovery, we'll also be getting toward the to point where  
15 those two curves intersect.

16 Fair enough?

17 MR. HILL: Thank you, Your Honor.

18 MS. OLSON: Yes. Thank you.

19 THE COURT: Do we need to do anything further today?  
20 I've signed the order that stays the order for -- stays  
21 whatever I need to stay for the statute of limitations.

22 MR. HILL: The only --

23 THE COURT: I know. You want me to change the  
24 language of my order. But I don't -- what's the point of that?

25 MR. HILL: As long as it is clear that we're -- that

1       it's -- the effect of the order is to stay the effect of your  
2       December second order, I think that's fine. Because I didn't  
3       want there to be any ambiguity that the proceedings now  
4       starting up again has caused the statute to run in any way,  
5       shape, or form.

6               THE COURT: I think it should be very clear from what  
7       I've already said that I regard whatever I've signed to stay  
8       the statute of limitations.

9               MR. HILL: Thank you, Your Honor.

10              THE COURT: The government is nodding its head and  
11       isn't objecting to that.

12              MR. SITCOV: Your Honor, I have one issue for one  
13       quick second.

14              Can I take from your comment earlier that we need not  
15       respond to the motion to reconsider?

16              THE COURT: You need not respond to the motion to  
17       reconsider unless I call for a response after reading it more  
18       carefully; but I believe I indicated pretty clearly the last  
19       time you were here that I'm not going to reconsider that order.

20              Now reconsider and reconsider. What we're talking about  
21       is a renewed beefed up augmented whatever you call it motion.  
22       In that sense, I do intend to keep considering it; but  
23       reconsider the order I issued before, no.

24              MR. HILL: One final point, Your Honor.

25              There's currently in place a March 17 trial date that

1 obviously has been --

2 THE COURT: Of 2003?

3 MR. HILL: Yes.

4 THE COURT: It's off.

5 MR. HILL: It's off. We were wondering if Your Honor  
6 would be inclined to enter a trial date of September 1, 2004?  
7 Just so we have something to focus on?

8 THE COURT: I'm all for focus. September 1, 2004? I  
9 think we can do it by that time, if we're going to do it at  
10 all.

11 MR. HILL: Thank you, Your Honor.

12 THE COURT: Okay?

13 MS. OLSON: Thank you, Your Honor.

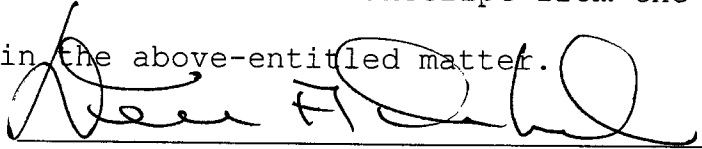
14 THE COURT: Thank you, counsel.

15 (Proceedings adjourned at 5:35 p.m.)  
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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