

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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U.S. DISTRICT COURT
DISTRICT OF COLUMBIA
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GUADALUPE L. GARCIA, JR., et al.,)	NANCY H.
)	MAYER-WHITTINGTON
)	CLERK
Plaintiffs,)	
)	
v.)	Civil Action No. 1:00CVO2445
)	Judge Robertson
ANN VENEMAN, Secretary of the)	
United States Department of Agriculture)	
)	
Defendant.)	

**PLAINTIFFS' REPLY TO DEFENDANT'S
RESPONSE TO PLAINTIFFS' DISCOVERY REQUESTS**

INTRODUCTION

Defendant's response to plaintiffs' discovery requests represents defendant's latest effort to deny plaintiffs meaningful discovery. During the January 15, 2003 status hearing in this matter, the Court authorized plaintiffs to commence class discovery.¹ The Court also ordered defendant to serve her objections to that discovery on February 14, 2003. January 15, 2003 Status Hearing Tr. at 17. Despite the Court's clear directive, defendant has instead served what defendant characterizes as "general objections." Defendant's Response at 2 n.1. Indeed, defendant stated that defendant "does not intend to provide specific objections," and unilaterally purports to "reserve[] the right to make further and specific objections to plaintiffs' discovery requests" at some later date apparently to be determined by defendant. *Ibid.*

The audacity with which defendant flouts the Court's express order is exceeded only by the cynicism of defendant's attempt to limit plaintiffs' discovery to the same

¹ Plaintiffs' First Set of Document Requests to Defendant, Plaintiffs' First Set of Interrogatories to Defendant and Plaintiffs' Notices of Deposition are attached hereto as Exhibits A, B and C, respectively.

centralized databases that defendant has already conceded are useless.² Indeed, defendant offers to provide plaintiffs information from the same databases that were the subject of the June 24, 2002 in-chambers status conference that resulted in the Court requiring plaintiffs to file their second supplemental memorandum in support of their motion for class certification. Lest it be forgotten, the purpose of that whole exercise was to permit the Court “to narrow the issues” in dispute with respect to discovery.³ As a result of adhering in good faith to that Court-prescribed process, plaintiffs found themselves in the rather peculiar position of facing an order denying their motion for class certification without ever having been afforded any discovery and without the Court ever having addressed the propriety of defendant’s attempt to limit plaintiffs to the admittedly useless databases. Now, eight months later, defendant is still arguing that, for purposes of class discovery, plaintiffs must be limited to databases that are devoid of the information necessary to establish commonality and typicality under either a disparate impact or disparate treatment theory. Meanwhile, the United States Department of Agriculture (“USDA”), emboldened by the success of its stonewalling tactics to date, continues unabated to discriminate against Hispanic farmers and ranchers and to attempt to harass and intimidate plaintiffs.

² Affidavit of Stephen S. Hill, ¶¶ 12-13 and Exhibits D and F to the Hill Affidavit, which is Exhibit 1 to Plaintiffs’ Second Supplemental Memorandum In Support of Their Motion For Class Certification (“Plaintiffs’ Second Supplemental Memorandum”), filed July 17, 2002.

³ As described by the Court, plaintiffs were to file a second supplemental memorandum and an affidavit of counsel describing the deficiencies in the electronic databases to which defendant sought to limit plaintiffs’ class discovery. Thereafter, defendant was to respond concerning those deficiencies. Plaintiffs undertook, in good faith, to adhere to the procedure proposed by the Court and submitted not only the affidavit of counsel, Stephen S. Hill, but also the declaration of an expert, Dr. Krock. See Affidavit of Stephen S. Hill and Declaration of Joseph A. Krock, Ph.D., respectively Exhibits 1 and 2 to Plaintiffs’ Second Supplemental Memorandum. Significantly, defendant, after obtaining an extension of time that postponed defendant’s response to the end of August, did not dispute so much as a single word in either the Hill Affidavit or the Krock Declaration. Instead, defendant falsely accused plaintiffs of voluntarily foregoing discovery and argued that the motion was ripe for decision.

Simply put, to limit plaintiffs' discovery in the manner defendant proposes, would make a mockery of the judicial process as the following example makes clear. Plaintiffs contend, *inter alia*, that the subjectivity that infects the USDA loan approval process permits USDA to discriminate against Hispanic farmers. One way that discrimination manifests itself is that Hispanic farmers are less likely to receive farm loans from USDA than their white male counterparts and that the disparity is statistically significant, a fact documented by, among others, Professor Hausman.⁴ Under a disparate impact theory, plaintiffs would be required, to the extent that defendant's lending practices are susceptible to separate analysis,⁵ to demonstrate a nexus between the alleged adverse impact and some facially neutral policy. Thus, for example, commonality might be shown by demonstrating that the "character" or "commitment" requirement adversely impacted upon Hispanic farmers applying for USDA loans when compared to their white counterparts. *See, e.g.*, December 2, 2002 Memorandum Opinion at 15. ("A statistical analysis demonstrating that Hispanic farmers are disproportionately disqualified on grounds of 'character' or 'commitment' ... might well support a finding of commonality as to those criteria, which are indeed subjective.") While "character" and "commitment" are, as the Court recognized, two of a number of subjective criteria used in the USDA loan approval process, the databases to which defendant seeks to limit plaintiffs' discovery do not provide any information whatsoever concerning the reason why a rejected loan application was in fact rejected. In other words, it is absolutely impossible to determine from the centralized databases whether a loan application was rejected

⁴ Declaration of Professor Jerry Hausman, ¶¶ 5, 13-15, Exhibit 4 to Plaintiffs' Supplemental Memorandum In Support of Their Motion for Class Certification ("Plaintiffs' Supplemental Memorandum"), filed April 8, 2002.

⁵ *See* 42 U.S.C. § 2000e-2(k)(1) ("the complaining party shall demonstrate that each particular challenged employment practice causes disparate impact, except that if the complaining party can demonstrate to the court that the elements of a respondent's decisionmaking process are not capable of separation for analysis, the decisionmaking process may be analyzed as one employment practice.")

because of “character,” “commitment” or some other reason. Thus, by arguing that plaintiffs are entitled to only that information contained in the databases, defendant would place plaintiffs in the position of being required to identify the reason why the application was rejected by relying on databases that exclude any information whatsoever concerning the reason for rejecting the applications. In essence, defendant’s position with respect to class discovery is tantamount to offering plaintiffs the opportunity to participate in a coin toss to determine class certification in which “heads” means plaintiffs lose and “tails” means defendant wins.

Whether to make it extremely difficult, if not impossible, for anyone to audit its lending practices for evidence of discrimination, as plaintiffs believe and the evidence suggests, or merely the result of incredible happenstance, defendant has failed to capture from the individual loan files and include in the centralized databases the very information necessary to audit its lending practices and, for example, to establish the reason why a loan application is rejected. That being the case, defendant cannot, therefore, be heard to complain about the burden of searching individual loan files for the information necessary to establish commonality and typicality.

ARGUMENT

I. DEFENDANT’S FAILURE TO OBJECT AND ITS USE OF GENERAL OBJECTIONS CONSTITUTE A WAIVER OF DEFENDANT’S OBJECTIONS TO PLAINTIFFS’ DISCOVERY REQUESTS

Following the January 15, 2003 status hearing, plaintiffs, pursuant to a schedule prescribed by the Court, served various discovery requests upon defendant. As it is authorized to do pursuant to Fed. R. Civ. P. 33(b)(3) and 34(b) and more generally, under its discretionary authority to control discovery, the Court ordered defendant to serve objections to plaintiffs’ discovery requests by February 14, 2003. January 15, 2003 Status Hearing Tr. at 17. As the Court stated at that time, “[t]he plaintiffs will serve their

discovery next week. The government is going to respond with any objections to that discovery by the 14th of February.” *Ibid.* In terms of the nature of the objections the government was to serve, the Court made clear that it expected the government to “respond to [the discovery] with . . . not only an omnibus but ... specific objections where they apply, so that we have some idea of what the burden is. . . .” *Id.* at 14.

Defendant concedes that defendant has not interposed specific objections to plaintiffs’ discovery requests. Defendant’s Response at 2 n.1. Instead, defendant has interposed so-called “general objections” to certain of plaintiffs’ discovery requests. Yet, even with respect to the general objections, defendant has not interposed such objections with respect to certain of plaintiffs’ discovery requests. With respect to those requests, defendant has waived any objection she might otherwise have had. Moreover, even with respect to those requests for which defendant purports to interpose general objections, defendant has also waived her right to object to those discovery requests because the objections lack the requisite specificity.

A. Defendant Has Failed To Object To Document Request Nos. 13-15, and 25-29 and Interrogatory Nos. 3-4, 9-11, 15 and 18-19 Within The Time Ordered by the Court And Has Therefore Waived Any Objection Defendant Might Have Had with Respect To Those Requests.

At the January 15, 2003 status hearing, the Court clearly stated that defendant serve objections to plaintiffs’ discovery requests by February 14, 2003. A review of defendant’s response indicates that defendant has not interposed any objection to Document Request Nos. 13-15, and 25-29 or Interrogatory Nos. 3-4, 9-11, 15 and 18-19. With respect to those discovery requests, defendant has waived any objection she might have had to those document requests by failing to serve timely objections. Rule 33(b)(4), for example, expressly provides that “[a]ny ground not stated in a timely objection is waived unless the party’s failure is excused by the Court for good cause shown.” Fed. R. Civ. P. 33(b)(4). Significantly, defendant offers no reason for failing to comply with the

Court's order other than defendant's unilateral decision to defer filing specific objections. Defendant's Response at 2 n.1.

Rule 34 requires that "[t]he party upon whom the request is served shall serve a written response" within the prescribed timeframe, which in the instant case was by February 14, 2003. Fed. R. Civ. P. 34(b). The rule further provides that "[t]he response shall state with respect to each item or category that inspection will be permitted as requested, unless the request is objected to, in which event the reasons for the objection shall be stated." *Ibid.* While Rule 34(b), unlike Rule 33(b)(4), does not explicitly provide for a waiver when objections are not stated, courts have nevertheless held that failure to state a timely objection to a Rule 34 request waives any such objection. As the court in Drexel Heritage Furnishings, Inc. v. Henredon Furniture Industries, Inc., 200 F.R.D. 255, 258 (N.D. N.C. 2001), stated:

Rule 34(b), like Rule 33(b)(4), requires the reasons for any objections to be explicitly stated. Therefore, the Court finds the waiver to be an implicit one. Some courts have previously found that failure to make an explicit timely objection based on privilege waives the objection. . . . The Court agrees and adds that there would be no point to require such a specific and detailed procedure for objections unless it were important to follow it and there were consequences for failure to do so. . . . Such a construction of Rule 34 makes it similar to, and compatible with, Rule 33(b)(4), which provides for waiver, and also relief from waiver for good cause. Courts have long viewed the discovery rules as an integrated mechanism to be read in pari materia. . . . Rules 33(b)(4) and 34(b) should be so read.

See also Daumer v. Allstate Insurance Company, 1992 U.S. Dist. LEXIS 16184 *3 (E.D. Pa. Oct. 2, 1992) (failure to make timely objections constitutes a waiver of any objections defendant might have had); Usery v. Chef Italia, 540 F. Supp. 587, 592 n.13 (E.D. Pa. 1982); Davis v. Romney, 53 F.R.D. 247, 248 (E.D. Pa. 1971); Cephus v. Busch, 47 F.R.D. 371 (E.D. Pa. 1969). As is the case with respect to plaintiffs' interrogatories,

defendant offers no reason for failing to comply with the Court's order other than defendant's unilateral decision to defer serving specific objections. Defendant's Response at 2, n.1.

B. Defendant's General Objections Constitute A Waiver of Defendant's Objections To Plaintiffs' Discovery Requests.

Rule 33(b)(4) provides that "[a]ll grounds for an objection to an interrogatory shall be stated with specificity." Fed. R. Civ. P. 33 (b)(4). Moreover, "[a]ny ground not stated in a timely objection is waived unless the party's failure to object is excused by the Court for good cause shown." *Ibid.* In addition, L.Cv.R. 30.4 provides that "objections to interrogatories and requests for ... production of documents . . . shall identify and quote each interrogatory or request in full immediately preceding the . . . objection thereto." Defendant's response satisfied none of the aforementioned requirements.

Defendant contends, for example, that "[m]any of plaintiffs' requests are staggeringly burdensome and overbroad." Defendant's Response at 9. Aside from the bald conclusory assertion that "many of plaintiffs' requests seek . . . details regarding farmers that can be derived only by identifying, reviewing and/or producing hundreds of thousands of documents maintained in individual files relating to hundreds, if not thousands, of farmers and ranchers, the sole support for that bald assertion is defendant's citation "see Document Request Nos. 2, 3, 4, 5, 6, 7, 8, 9, 17, 24; Interrogatory Nos. 1, 2, 6, 7, 12." *Ibid.* It is, however, well settled that generalized claims of undue burden and over breadth are unavailing. "Such general objections do not comply with Fed. R. Civ. P. 34(b) and courts disfavor them." *Athridge v. Aetna Casualty and Surety Co.*, 84 F.R.D. 181, 190 (D.D.C. 1998); *Pulsecard, Inc. v. Discover Card Services*, 168 F.R.D. 295, 303 (D. Ka. 1996).

A party opposing discovery bears the burden of showing why discovery should be denied. *Ellsworth Assocs. Inc. v. U.S.*, 917 F. Supp. 841, 844 (D.D.C. 1996); *Alexander*

v. FBI, 192 F.R.D. 50, 53 (D.D.C. 2000). In order to satisfy its burden, the objecting party must make a specific, detailed showing of how the interrogatory is burdensome, overly broad or oppressive by submitting affidavits or offering evidence which reveals the nature of the burden. Alexander, 192 F.R.D. at 153; Chubb Integrated Systems Limited v. The National Bank of Washington, 103 F.R.D. 52, 60-61 (D.D.C. 1984); see Lohrenz v. Donnelly, 187 F.R.D. 1, 4 (D.D.C. 1999) (compelling the objecting party to fully answer the interrogatories at issue because there was no showing that the research required was unduly burdensome). Similarly, it is equally well settled that:

The party requesting a protective order must make a specific demonstration of facts in support of the request as opposed to conclusory or speculative statements about the need for a protective order and the harm which will be suffered without one. Indeed, “the moving party has a heavy burden of showing ‘extraordinary circumstances’ based on ‘specific facts’ that would justify such an order.”

Alexander v. FBI, 186 F.R.D. 60, 64 (D.D.C. 1998), quoting Prozine Shipping Co. Ltd. V. Thirty-Four Automobiles, 53 F. Supp. 775 (D. Mass. 1988).

Similarly, “[l]abelling plaintiffs’ efforts as repetitious or alleging that a discovery request requires a search does not support . . . [a] claim of burdensomeness.” Chubb, 103 F.R.D. at 59. The mere fact that discovery requires work and may be time consuming is not sufficient to establish undue burden.⁶ Fagan v. D.C., 136 F.R.D. 5, 7 (D.D.C. 1991).

⁶ Apparently, defendant considers producing anything beyond precisely what defendant proposes to produce as being unduly burdensome or unreasonable. Initially, defendant claimed that plaintiffs wanted to subject them to the task of searching files and producing documents in 2,700 counties throughout the nation. December 18, 2002 Hearing Tr. at 15. When it became clear that that claim was baseless, defendant nevertheless continued unabated in defendant’s generalized overblown claim of burden. When plaintiffs reduced the number of counties to address concerns raised by the Court, defendant accused plaintiffs of having either “cherry-picked the counties from which they seek information or . . . simply fishing through as many documents as possible in the hope that they can identify a pattern or practice of discrimination. . . .” Defendant’s Response at 4 n.3. Defendant’s accusation is simply baseless. With the exception of 8 counties, the counties listed in Appendix B to Plaintiffs’ Interrogatories and Document Requests are the counties in which counsel’s clients live. The Court made clear that plaintiffs were entitled to discovery with respect to plaintiffs’ counsel’s clients. January 15, 2003 Status Hearing Tr. at 8 (“the people who . . . already are your clients. That’s easy. You’re certainly entitled to do that.”) With respect to the remaining 8 counties, they represent counties which, according to USDA data, have large numbers of Hispanic farmers in states where substantial interest in this litigation has been shown by Hispanic farmers.

Moreover, where it is reasonable to expect defendant has the information plaintiffs seek and for the information to be accessible in defendant's files, "plaintiffs should not suffer if the information is not easily accessible because defendants have an inefficient filing system." Ibid.

Defendant's general objections with respect to the listed discovery requests are clearly inadequate. See Defendant's Response at 9. For example, defendant contends that Document Request No. 2 is somehow staggeringly burdensome and overbroad. Yet that request merely asks defendant to "[p]roduce all documents identified in response to any interrogatory directed to [defendant] by plaintiffs or referred to or reviewed by [defendant] in connection with responding to any interrogatory directed to [defendant] by plaintiffs in this proceeding." Defendant offers no explanation of why it would be unduly burdensome to produce documents defendant has either already identified or reviewed in responding to plaintiffs' discovery requests. Similarly, Request No. 3 seeks documents relating to or referring to the named plaintiffs listed in Appendix A to the Document requests. Interestingly, defendant indicates a willingness to respond to Request Nos. 3-9, so long as the responses are limited to information contained in defendant's useless centralized databases that do not contain the information that the Court has suggested would demonstrate commonality. Defendant contends that responding to Interrogatory Nos. 6, 7, and 12 would be "staggeringly burdensome." Interrogatory Nos. 6 and 7 respectively merely ask defendant to identify each Hispanic and white male farmer in a limited number of counties who had supervised accounts, the dates the accounts were closed, if applicable, and reason for establishing such an account. Given the relatively few Hispanic farmers who were and are successful in obtaining USDA loans nationwide, it is difficult to imagine how a search of the files of Hispanic farmers in a limited number of counties could pose an undue burden for defendant. Moreover, given how rarely white male farmers were subjected to supervised accounts, it is highly unlikely that identifying the few who were would be unduly burdensome. Furthermore, in light of the active role

the USDA would play in connection with supervised accounts (i.e., approving all expenditures by the supervised farmer, including grocery purchases), USDA should not have difficulty identifying such accounts.

Interrogatory No. 12 merely asks USDA to identify the number of complaints filed by Hispanic farmers with respect to credit and benefit programs that were processed during each year of the relevant time period and identify each such complaint. Inasmuch as defendant's own regulations require its employees to receive and report such complaints, defendant fails to explain how reporting that information would be unduly burdensome or require defendant to identify and review hundreds of thousands of documents or review the "files relating to hundreds, if not thousands, of farmers and ranchers."

Interrogatory No. 17, which asks defendant to identify "each analysis, investigation, audit or review of [USDA's] lending practices and [USDA's] administration of non-credit farm benefit programs undertaken by an entity" including inter alia "the USDA . . . , the United States Commission on Civil Rights, either House of Congress . . . Government Accounting Office⁷ or the Office of the Inspector General or any consultant. . . ." To suggest, as defendant does, that such an interrogatory "would require the Agency . . . to identify and review virtually every document submitted to or obtained from Congress over the last twenty years in the course of entirely ordinary and routine appropriations reviews and oversight" is absurd. It is inconceivable that USDA does not know when and by whom USDA's lending practices and non-credit benefit programs have been investigated, audited or reviewed by USDA itself or by consultants working for USDA or by Congress or the U.S. Commission on Civil Rights.

⁷ The reference to Government Accounting Office should read "General Accounting Office."

II. PLAINTIFFS' DISCOVERY REQUESTS ARE CLEARLY RELATED TO CLASS CERTIFICATION

Defendant faults plaintiffs for allegedly using a “scattershot approach” and seeking “documents relating to half a dozen different processes.” Defendant’s Response at 6. In particular, defendant complains that

[p]laintiffs’ discovery requests seek documents regarding (1) decisions relating to the distribution of loan funds throughout the geographic area served by FSA, see Document Request No. 18, Interrogatory No. 5; (2) the point at which individual applications for loans are granted or denied, see Document Request Nos. 3, 4, 5, 6, 7, 8, 9, 10, 17; Interrogatory Nos. 1, 2, 6, 7; (3) the decision made as to the amount of the loan to be granted, see id.; (4) the manner in which loans are serviced over their terms; see id., (5) the placement of certain loan monies in supervisory accounts, see id.; and (6) the process by which and civil rights complaints are made and investigated. See Document Request Nos. 11, 16, 19, 21, 22, 23; Interrogatory Nos. 8, 12, 13, 14.

Ibid. at n.4. Defendant’s argument is wide of the mark.

To establish commonality, plaintiffs must demonstrate that “there are questions of law or fact common to the class. . . .” Fed. R. Civ. P. 23(a)(2). Similarly, to establish typicality, plaintiffs must demonstrate that “the claims or defenses of the representative parties are typical of claims or defenses of the class. . . .” Fed. R. Civ. P. 23(a)(3). Moreover, Rule 23 also expressly provides that “[w]hen appropriate (A) an action may be brought or maintained as a class action with respect to particular issues or (B) a class may be divided into subclasses and each subclass treated as a class. . . .” Fed. R. Civ. P. 23(c)(4).

In the instant case, plaintiffs allege that they have been the victims of discrimination by USDA in its administration of farm credit and non-credit benefit programs. Plaintiffs further allege that the unfettered discretion that infects USDA’s farm credit and non-credit benefit programs permits USDA to discriminate against Hispanic farmers and ranchers under both disparate impact and disparate treatment theories.

Moreover, that unfettered discretion not only permits USDA to continue to discriminate against Hispanic farmers and ranchers, but also permits USDA to intimidate and harass those who would dare stand up for their rights.⁸

In connection with the farm credit programs, plaintiffs contend that the aforementioned unfettered discretion manifested itself to their detriment in a limited number of ways, including denial of applications, refusal to assist farmers to complete applications, rejection of loans, delay of loans and arbitrary reduction of loan amounts. Indeed, USDA's own Civil Rights Action Team ("CRAT") Report succinctly described the pattern of discrimination that confronted minority farmers:

The minority or limited-resource farmer tries to apply for a farm operating loan through the FSA county office well in advance of planting season. The FSA county office might claim to have no applications available and ask the farmers to return later. Upon returning, the farmer might receive an application without any assistance in completing it, then be asked repeatedly to correct mistakes or complete oversights in the loan application. Often those requests for correcting the application could be stretched for months, since they would come only if the minority farmer contacted the office to check on the loan processing. By the time processing is completed, even when the loan is approved, planting season has already passed and the farmer either has not been able to plant at all, or has obtained limited credit on the strength of an expected FSA loan to plant a small crop, usually without the fertilizer and other supplies necessary for the best yields. The farmer's profit is then reduced.

⁸ Defendant argues that plaintiffs' discovery requests directed at USDA's attempts to harass and intimidate Mr. Davis after he submitted a declaration in support of plaintiffs' motion for class certification is unrelated to class certification. See Defendant's Response at 7 and Interrogatory No. 16. Plaintiffs submit that the incident in question is just the most flagrant and ham-handed attempt to harass and intimidate plaintiffs and is part of a pattern of harassment that has increased in recent months. At a minimum, the incident calls into question the very integrity of the judicial process. Indeed, an attack upon Mr. Davis, whose declaration was prominently featured in a recent oversight hearing by the House Agriculture Committee Subcommittee on Department Operations, Oversight, Nutrition and Forestry, is designed to have a chilling affect on Hispanic farmers seeking vindication of their rights. Such discovery also addresses the issue of the USDA's knowledge of and ratification of discriminatory practices taking place in the field and thus bears directly upon plaintiffs' ability to have a class certified under a disparate treatment theory. See discussion infra at pages 16-17.

If the farmer's promised FS loan finally does arrive, it may have been arbitrarily reduced, leaving the farmer without enough money to repay suppliers and any mortgage or equipment debts. In some cases, the FSA loan never arrives, again leaving the farmer without means to repay debts. Further operating and disaster loans may be denied because of the farmer's debt load, making it impossible for the farmer to earn any money from the farm. The farmer then will have to sell the land or be foreclosed on to settle debts. As an alternative, the local FSA official might offer the farmers an opportunity to lease back the land with an option to buy it back later. The appraised value of that land is et very high, presumably to support the needed operating loans, but also making repurchase of the land beyond the limited-resource farmer's means. The land is lost finally and sold at auction, where it is bought by someone else at half the price being asked of the minority farmer. Often it is alleged that the person was a friends or relative of one of the FSA county officials.

CRAT Report at 15-16.

The pattern of discrimination described by the CRAT Report is also reflected in the allegations of the Second Amended Complaint ("Complaint") in this proceeding. Of the ten named plaintiffs for which there are substantive paragraphs in the Complaint, all were at one point denied loans by USDA. Complaint ¶¶ 4 (Garcia), 7 (Tony and Patricia Jimenez), 13 (Edward & Normal Flores), 19 (Gloria Morales), 26 (Rudolph & Beatrice Garza), and 29 (Larry & Robert Chavarria). Of that ten, six were denied loan servicing. Id. ¶¶ 4 (Garcia), 7 (Tony & Patricia Jimenez), 20 (Gloria Morales), and 32 (Larry & Robert Chavarria). Similarly, Edward and Norma Flores received their loan proceeds after the planting season, while Gloria Morales received substantially less than the applied-for amount. Complaint ¶¶ 11 and 19.

In addition to the pattern and practice of discrimination experienced by minority farmers as described by the CRAT Report, when Hispanic farmers and ranchers were ultimately able to obtain USDA loans, the proceeds were often placed in supervised bank accounts. As long-time farmers advocate William Arens testified,

I have also observed situations in which the Farm Service Agency required those Hispanic farmers who successfully obtained FSA loans to maintain a supervised bank account. The supervised account gives the FSA veto authority over the Hispanic farmer's spending. Thus, although the loan proceeds have been deposited in the Hispanic farmer's bank account, the farmer cannot make any payments without first obtaining FSA approval. Anglo farmers typically are spared this humiliation. FSA rules require that a supervised account be required only in those limited situations where it is greed to by the borrower and where the purpose is mainly to teach an agreeable borrower how to manage his accounts. The supervised accounts should not be in place any more than one year. I know of only a few instances where an Anglo borrower was required to use a supervised bank account, while almost all the Hispanic farmers I have worked with have been forced to accept supervised accounts. Many are forced to maintain those supervised accounts well over the one year limit; indeed, I know of cases where Hispanic farmers were required to maintained a supervised bank account for up to five years.

Declaration of William Hodgson Arens, ¶ 9, Exhibit 10 to Plaintiffs' Supplemental Memorandum In Support of Their Motion For Class Certification. Like the pattern of discrimination described in the CRAT Report, the discriminatory use of supervised accounts is reflected in the allegations of the Complaint. Indeed, named plaintiff, Gloria Morales, was required to place the proceeds of her USDA loan in a supervised account. Complaint ¶ 19.

What defendant has characterized as "scattershot" is in fact discovery carefully tailored to elicit facts with respect to the pattern and practice of discrimination which USDA itself documented and described in the CRAT Report. Apparently, defendant would require plaintiffs to confine themselves to a single class and a single issue or policy. However, there is no such requirement in law or fact. Indeed, Rule 23(c)(4) makes clear that "an action may be brought or maintained as a class action with respect to particular issues, or . . . divided into subclasses. . . ." Fed. R. Civ. P. 23(c)(4). Thus, for example, plaintiffs assert a single class with respect to certain issues and a number of

subclasses to reflect the discrete way in which the unfettered discretion manifested itself in discrimination against Hispanic farmers and ranchers.

Defendant argues that “[m]iscellaneous, individualized information pertaining to white farmers has no bearing on whether the putative Hispanic class members have claims against defendant that raise common issues of law and fact.” Defendant’s Response at 7. Defendant could not be more mistaken. As the Court has pointed out, “[a] statistical analysis demonstrating that Hispanic farmers are disproportionately disqualified on grounds of ‘character’ or ‘commitment’ . . . will support a finding of commonality as to those criteria, which are indeed subjective.” December 2, 2002 Memorandum Opinion at 15 (emphasis added). In order to determine whether Hispanics are being disproportionately disqualified on grounds such as “character” or “commitment,” one must compare the disqualification rates of Hispanic and white farmers to determine whether there is a statistically significant disparity between those rates.

Defendant also argues that some of plaintiffs’ discovery requests are improper because they are directed at USDA’s discrimination complaint processing and this Court has ruled that the failure to investigate discrimination complaints cannot be a basis for a cause of action under the Equal Credit Opportunity Act, 15 U.S.C. §§ 1691 et seq., or class certification. Defendant’s Response at 8. Once again, defendant is wide of the mark.

First, most of the discovery requests which defendant characterizes as being directed to “the process by which civil rights complaints were made and investigated” are, in fact, not so directed. According to defendant, Document Request Nos. 11, 16, 19, 21, 22, 23 and Interrogatory Nos. 8, 12, 13, 14 are somehow improper because they address “the process by which civil rights complaints are made and investigated.” Defendant’s Response at 6 n.4, see also id. at 8.

Of the cited discovery requests, Document Request Nos. 11, 16 and 21-23, and Interrogatory Nos. 8 and 13, all seek information concerning the nature of discrimination confronted by Hispanic farmers and reported by them in their discrimination complaints, and not whether such complaints were properly processed by USDA's Office of Civil Rights. Clearly, plaintiffs must be allowed to explore fully the nature of the discrimination that Hispanic farmers and ranchers endured as well as how that discrimination manifested itself to ascertain if there exists any common questions of law or fact with respect to such discrimination.

Plaintiffs are also asserting claims of disparate treatment discrimination. Defendant contends that "the large numbers and geographic dispersion of the decisionmakers" make such a theory difficult to prove. See Defendant's Response at 6-7. Apparently, the theory is that the existence of multiple decisionmakers makes it less likely that the decisions reflect a unified policy. But such general "theory" should not stand in the way of the law of this circuit and the facts of this case.

First, it is well settled in this circuit that decentralized decisionmaking does not per se preclude a finding of commonality and typicality. See, e.g., Thomas v. Christopher, 169 F.R.D. 224 (D.D.C. 1996); aff'd in part rev'd in part, 139 F.32 227 (D.C. Cir.), cert. denied, 525 U.S. 1016 (1998); Arnett v. American Nat'l Red Cross, 78 F.R.D. 73, 76 (D.D.C. 1979); Hyman v. First Union Corp., 982 F. Supp. 1, 4-7 (D.D.C. 1997).

Second, the individual decisionmakers, regardless of their number or geographic dispersion, were operating under highly subjective, uniform national regulations which have the force and effect of law and provide the means by which local USDA officials are able to discriminate against Hispanic farmers. Moreover, in the instant case, the national office of USDA has been repeatedly put on notice by reports of the U.S. Commission on Civil Rights, the Congress, the Office of Inspector General and its own Civil Rights Action Team, of the long history of discriminatory practices facilitated by its highly

subjective regulations and has done nothing to correct either the regulations or the practices. See Declaration of Rosalind Gray, ¶ 17 (“Despite ample warnings that minority farmers were being subjected to systematic discrimination at the local level in the delivery of credit and debt servicing, USDA has failed to exercise sufficient control over its field operations to address these lingering problems.”) (Exhibit 7 to Plaintiffs’ Supplemental Memorandum.) Accordingly, Document Request No. 16 and Interrogatory Nos. 12 and 13 seek to elicit information that will show the extent to which USDA headquarters was aware or should have been aware of the extent of the discrimination being perpetrated against Hispanic farmers and ranchers. To the extent that USDA was repeatedly put on notice of widespread discrimination against Hispanic farmers and ranchers and took no steps to end or remedy such discrimination,⁹ USDA can be deemed to have ratified the discriminatory practices employed in the field. Such evidence should constitute a sufficient showing to allow an inference that “a common policy of discrimination . . . pervaded all of the employer’s challenged decisions.” Hartman v. Duffey, 19 F.3d 1459, 1472 (D.D.C. 1999).

⁹ Defendant contends that plaintiffs’ requests for information on USDA employees that are the subject of discrimination complaints or who investigate or work on discrimination complaints filed by Hispanic farmers and ranchers, “will produce nothing of use to plaintiffs’ attempt to identify a common policy or practice that allegedly resulted in discrimination against Hispanic farmers and ranchers.” Defendant’s Response at 8. Again, defendant misses the mark. Plaintiffs’ discovery cannot and should not be limited by defendant’s myopic and self-serving view of relevance. As previously noted, plaintiffs allege that they are the victims of both disparate impact and disparate treatment discrimination. Clearly, to the extent that USDA has notice of repeated complaints of discrimination and fails to take steps to discipline or retrain such employees, that fact is relevant to the issue of whether USDA headquarters acquiesced in or ratified the discrimination by the local USDA officials. Similarly, evidence that USDA was staffing its Office of Civil Rights with people who were unqualified to handle discrimination complaints is relevant to the commitment of USDA headquarters to end discrimination in the field offices and hence the issue of whether USDA, by its actions, ratified the discrimination taking place pursuant to its nationally mandated policies. Indeed, the CRAT Report notes “[t]he widespread perception . . . that the Department’s civil rights offices are ‘dumping grounds,’ where many employees end up as a result of their own EEOC complaints.” CRAT Report at 54. Such evidence taken together supports an inference that discrimination pervades the decisionmaking process of USDA and thus serves as a counterweight to the general theory that a process that involves multiple decisionmakers who are geographically dispersed is somehow inconsistent with disparate treatment class.

III. DEFENDANT'S OBJECTIONS TO PLAINTIFFS' NOTICES OF DEPOSITION ARE WITHOUT MERIT

Defendant contends that plaintiffs are not entitled to proceed with their Rule 30(b)(6) depositions because defendant produced three witnesses in response to a Rule 30(b)(6) notice in the Love case. The objection is frivolous. First, the subjects covered in the Love 30(b)(6) depositions are not "mirrored in the present plaintiffs' 30(b)(6) notice." Defendant's Response at 11. Even assuming, arguendo, that the two notices were identical, plaintiffs' counsel are entitled to examine defendant's designated witnesses themselves so long as the examination is not repetitious of the examination conducted by the Love plaintiffs. Current plaintiffs' trial counsel did not participate in the Love deposition. Indeed, when one of plaintiffs' trial counsel merely sought to observe one of the 30(b)(6) depositions, defendant strenuously objected and would not permit plaintiffs' counsel to observe the deposition. See Deposition of Veldon Hall, Tr. at 34-35 (pertinent excerpts are attached hereto in Exhibit D).

Plaintiffs clearly cannot be denied discovery on the basis for defendant's self-serving assessment of the quality and accuracy of the testimony of their 30(b)(6) deponents. Nor can defendant deny plaintiffs' discovery merely because defendant's deponent has given testimony in a related proceeding. Indeed, even if the deposition had been jointly noticed, the Garcia plaintiffs would still be permitted to pose questions. The most that defendant can claim is the right not to be subjected to repetition.

Defendant also objects to the plaintiffs' deposition notice directed to Fredrick Isler because defendant had previously designated him as a witness in response to a Rule 30(b)(6) notice served by the Love plaintiffs. Defendant baldly asserts that Mr. Isler's testimony has no bearing on the class claims that were intended to be the focus of this discovery. Defendant's Response at 10. Once again defendant misses the mark.¹⁰

¹⁰ Defendant's objection to Mr. Isler's deposition highlights the cynicism of defendant's objections. On the one hand, defendant argues that "operations, procedures and investigations of the Office of Civil Rights, 'cannot serve as the common issue of fact necessary to a Rule 23(a) determination.'" Defendant's Response at 10 n.7; see also id. at 6 n.4, and 8. Yet in opposing plaintiffs' deposition notice for Mr. Isler, defendant

Plaintiffs seek to depose Mr. Isler to discuss his role in an investigation into discrimination against Hispanic farmers and ranchers in New Mexico and Texas. On information and belief, Mr. Isler ordered an investigation of widespread, systemic discrimination against Hispanic farmers and ranchers in New Mexico and Texas. During the course of that investigation, the investigators seized a large number of documents. Given the nature of the investigation, the documents are likely to reflect evidence of discrimination perpetrated against Hispanic farmers by the USDA. Plaintiffs are clearly entitled to pursue such discovery. Evidence with respect to the types of discrimination experienced by Hispanic farmers and ranchers developed in the course of an investigation of systemic discrimination is clearly relevant to whether there exists any issue of fact and law common to the class. Moreover, plaintiffs are entitled to “obtain discovery regarding,” *inter alia*, “the existence, description, nature, custody, condition, and location of any books, documents or other tangible things and the identity and location of persons having knowledge of any discoverable matter.” Fed. R. Civ. P. 26 (b)(1).

Defendant disingenuously argues that plaintiffs should not be permitted to take the deposition of Mr. Califa. Defendant’s Response at 10 n.7. First, defendant argues that because Mr. Califa is an employee of USDA’s Office of Civil rights and this Court has previously ruled that “the operations, procedures and investigations of the Office of Civil Rights cannot serve as the common issue of fact necessary for a Rule 23(a) determination . . . plaintiffs’ proposed deposition of Mr. Califa does not relate to any issue relevant to class certification and does not fall within the scope of the discovery authorized by the court.” *Ibid.* Even defendant implicitly concedes the disingenuousness of that argument in light of Mr. Isler having testified “over two days ... regarding the operations and procedures of USDA’s Office of Civil Rights.” *Id.* at 10.

notes that Mr. Isler has already been “deposed over two days by counsel for Love plaintiffs as a Rule 30(b)(6) designated witness regarding the operation and procedures of USDA’s Office of Civil rights.” *Id.* at 10 (emphasis added).

Second, defendant acknowledges that plaintiffs' interest in Mr. Califa stems from an investigation that he began, but did not complete. . . ." Id. at 10 n.7. Defendant suggests that because Mr. Califa did not complete the investigation "many of [his] documents, as well as his own testimony regarding the investigation, constitute material subject to protection pursuant to the deliberative process privilege, and defendant does not intend to waive that privilege." Id. Defendant suggests a very broad application of the deliberative process privilege. Even assuming, arguendo, that the deliberative process privilege might apply to some information Mr. Califa may possess, it does not follow that all of the information that he may have obtained in the course of his investigation was covered by that privilege. Indeed, the privilege is not absolute and is relative to the need demonstrated for the information. See Northrop Corporation v. McDonald Douglas Corporation, 751 F.2d 395, 404-405 (D.C. Cir. 1984); see Carl Zeis Stiftung v. V.E.B. Carl Zeis, Jena, 40 F.R.D. 318, 327 (D.D.C. 1966). Part of the showing necessary to invoke the privilege is "that disclosure would be against the public interest." Northrop, 751 F.2d at 404. It is difficult to imagine how exposing evidence of systemic discrimination against Hispanic farmers by the USDA "would be against the public interest." In fact, if anything would be against the public interest, it would be the continued concealment of such evidence.

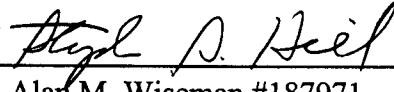
Moreover, on information and belief, Mr. Califa's investigation, which included the gathering of a substantial volume of files and documents, was terminated because of the pendency of this litigation. It would indeed be a cynical distortion of the deliberative process privilege to permit USDA to gather documents and other evidence indicating widespread systemic discrimination against Hispanic farmers under the guise of an investigation and then insulate that evidence from discovery by permanently suspending the so-called investigation. The so-called investigation has been suspended for nearly two years during the pendency of this proceeding. Defendant should not be permitted to use such an obvious ploy to conceal evidence from plaintiffs.

CONCLUSION

Eight months have been lost as a result of defendant's stonewalling and dilatory tactics. Defendant failed to make proper objections in a timely fashion to plaintiffs' discovery requests. Instead, defendant cavalierly asserts that defendant will submit objections on defendant's own yet-to-be-revealed timetable. Defendant continues cynically to offer plaintiffs information from databases that defendant has already conceded are useless. While defendant continues delaying tactics, discrimination continues unabated and farmers such as Mr. Davis and others are being harassed and intimidated.

In light of the foregoing, plaintiffs request that the Court find that defendant has waived the right to object to plaintiffs' discovery requests and that defendant be ordered to respond fully and completely to all of plaintiffs' discovery requests within thirty days. Should the Court feel it necessary to convene a status hearing in light of defendant's failure to interpose appropriate, timely objections to plaintiffs' discovery requests, plaintiffs request that any such hearing be scheduled at the Court's earliest convenience so as not to delay further defendant's responses to plaintiffs' discovery requests.

Respectfully submitted,



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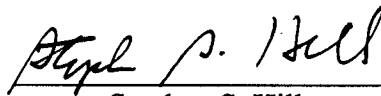
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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing Plaintiffs' Reply To Defendant's Response To Plaintiffs' Discovery Requests was served by hand delivery this 28th day of February, 2003 upon the following:

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