

1 UNITED STATES DISTRICT COURT  
 FOR THE DISTRICT OF COLUMBIA

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4 GUADALUPE L. GARCIA, et al., :

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5 Plaintiffs, : Docket No. CA 00-2445 JR  
 : Washington, D.C.

6 v. :  
 : Tuesday, July 15, 2003

7 SECRETARY, U.S. DEPARTMENT OF : 4:21 p.m.  
 AGRICULTURE, :

8 :  
 Defendant.

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

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APPEARANCES:

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25 APPEARANCES - continued:



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7 APPEARANCES - continued:

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9 For the Defendant: UNITED STATES DEPARTMENT OF JUSTICE

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1 P-R-O-C-E-E-D-I-N-G-S

2 (4:21 p.m.)

3 THE DEPUTY CLERK: Civil Action No. 00-2445 Guadalupe  
4 Garcia versus Ann Veneman. Would counsel who are going to be  
5 speaking please step to the podium and announce their names for  
6 the record?

7 MR. HILL: Stephen S. Hill, Your Honor, with the law  
8 firm of Howrey, Simon, Arnold & White for the plaintiffs.

9 MS. OLSON: Lisa Olson, Your Honor, with the Department  
10 of Justice and with me is Michael Sitcov and Lisa Goitein.

11 THE COURT: Okay. First of all, this discovery status  
12 report that you laid on my desk today has been breezed through  
13 by my law clerk; but until this minute, not even opened by my  
14 own hot little hands. I don't know how you expect me to read  
15 this before I have come on the bench. I don't know if we're  
16 making progress or not.

17 The parties were last here on April 29. I understand  
18 from Mr. Thomadakis, who has been through this briefly, that  
19 your discovery status report asserts that although the defendant  
20 has provided a whole lot of data from databases, none of it  
21 includes the reasons for loan rejections, so the plaintiff says  
22 it has no use for them.

23 That the defendant has not so far been willing to  
24 discuss the creation of a random sampling of applicants.

25 That the 30(b)(6) deponents have confirmed plaintiffs'

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1 view that the only way to get the information plaintiffs seek is  
2 from individual files.

3 That 37 files have been inspected, but some parts of  
4 them not made available and requested copies not furnished.

5 And I guess the question is are we making progress or  
6 not?

7 Mr. Hill is anxious to get up here and is on his feet,  
8 so come on up, Mr. Hill.

9 MR. HILL: Thank you, Your Honor.

10 The one addendum I would have to the report, Your  
11 Honor -- and I apologize that I didn't get it in sooner -- is  
12 that we did receive this morning 10 compact disks that purport  
13 to be the copies of the plaintiffs' files that we inspected two  
14 months ago today on May 15.

15 The letter that came with it was faxed to us late last  
16 evening. The diskettes themselves actually came this morning.

17 We have -- you know, we have been the recipients of  
18 what you might call computer dumps. There have been large-scale  
19 dumps of CDs that contain information of little use in this  
20 case. And as our report indicates, and the witnesses confirm,  
21 that to perform the type of statistical analysis that Your Honor  
22 has suggested is required in your May -- your May 22, 2002 order  
23 and again in your December 2, 2002 order, we are going to have  
24 to get into the individual files of producers; that there's no  
25 database that contains the kind of information that's going to

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1 allow to us make the linkage between, say, for example, the  
2 character issue and any disparity in the lending rates.

3       And on that very character point, we've now discovered  
4 a document from 1984 where a directive from headquarters that  
5 instructed the field offices that if you're going to reject  
6 someone on the basis of character, don't use that term.

7       So there's some question as to what we're going to find  
8 when we get to the hard files; but at least we know for sure  
9 there is no question, there is no doubt at this juncture that  
10 the -- the much touted databases they've been trying to limit us  
11 to just don't contain the information that we need if we're  
12 going to have a fair chance at establishing commonality in this  
13 case.

14       They have put up the claim of burden, and they've had  
15 an unprecedented number of opportunities in over four months now  
16 to substantiate that burden claim; but what they finally filed  
17 in the way of responses to our data requests are largely  
18 boilerplate objections that -- frankly -- couldn't have taken  
19 more than a couple of days to put together.

20       We are at a substantial disadvantage. We've received  
21 in one instance seven -- I think it was seven -- seven CDs, Your  
22 Honor; and if I just may -- the information -- and our estimate  
23 is that we're probably somewhere in the neighborhood of 230,000  
24 pages of that data -- but the data consists of what you see at  
25 tab J in our status report; that's on the disaster relief

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1 program.

2 Now there's -- there's nothing that you can -- you

3 know -- that you can do of an analytical nature with that data.

4 Indeed, when we took the deposition of Mr. Tjerdema -- and that

5 is spelled T-J-E-E-R-D-S-M-A --

6 THE COURT: Thank you for spelling that.

7 MR. HILL: Yes, sir.

8 -- he confirmed that you are going to have to look at

9 the individual files to get any information with respect to the

10 reasons why these disaster payments were made and that sort of

11 thing. You can't discern that information from the databases.

12 Similarly, with respect to the loan application

13 information. That's set forth at tab H, Your Honor. Tens of

14 thousands of pages of that information; but, again, you can't do

15 the type of analysis that Wards Cove suggests or the Cover case

16 that you cited suggests on the basis of that analysis.

17 If you're looking for the reason why a loan was

18 rejected, the database won't tell you; and we submit that it is

19 no accident that that was the case.

20 We had the deposition of Mr. Cantrell, who was their IP

21 expert. He said the database always had the capacity, if they

22 wanted to, to include the reason why a loan was rejected, for

23 example; but it did not.

24 And they actually considered it when they switched from

25 the MRS database to the current MAC database, and that

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1 consideration was rejected because they said we'll just keep  
2 that information in the individual files.

3       So simply put, we have -- you know, we have -- in  
4 effect -- been asked to dig a garden and haven't been given any  
5 implements.

6       We have to have access to those files, and the  
7 two-month delay in producing documents that we inspected on May  
8 15, Your Honor, we just got them again this morning; and it is  
9 going to take a considerable amount of time -- this particular  
10 diskette has 13,033 images. They're in the form of sort of PDF  
11 files, a picture of a page comes up. Either the operator that  
12 gets this back has to click on that page, it has to come up on  
13 the screen, he has to press print. There's no sort of  
14 push-one-button way we know of to get this data off the files.

15       So it's going to take a considerable amount of time for  
16 us to get to it, to access it, and to review it; and, again, if  
17 they're going to take two months to conduct their privilege  
18 review for 35 files, I shudder to think what will be required if  
19 we got any additional files, but we absolutely need them again  
20 if we're going to have a fair chance here.

21       The other thought I had, Your Honor, is that -- you  
22 know -- given the experience that we've had with their review of  
23 the documents, again taking two months to give us 35 files, we  
24 may want to consider the suggestion that we made in connection  
25 with the protective order in the first instance which is that we

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1 get immediate access to these files without prejudice to their  
2 right to assert a privilege and the fact that they've disclosed  
3 the documents to us wouldn't waive any privilege that would --  
4 they would later seek to assert.

5       But right now, here is the situation: We've gotten  
6 tens of thousands of images that will have to be singularly  
7 converted to hard paper for us to review. It has taken two  
8 months to get that. They've indicated that they have withheld  
9 certain documents or redacted documents on the basis of  
10 privilege, but we've received no privilege log two months down  
11 the road. When will we receive that? When will we have an  
12 opportunity to question their privilege assertions?

13       They also indicate in their transmittal letter that  
14 these files include disaster relief information. That is  
15 contrary to the understanding we had when we reviewed these  
16 materials on May 15. We were advised on May 15 that the files  
17 we were going to review and were reviewing were just loan files.

18       Now, they say in their transmittal letter that there  
19 are also 33 disaster relief files. If that is, in fact, the  
20 case, it is news to us, because we were told at the time that  
21 the disaster relief files would be produced in the near future,  
22 probably the next week and we would be called and told when we  
23 could come and inspect those; and we never received that phone  
24 call, Your Honor.

25       THE COURT: All right. Thank you, Mr. Hill.

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1 Ms. Olson, you want to respond to that?

2 MS. OLSON: Yes. Thank you, Your Honor.

3 As an initial matter, I would like to just clarify for  
4 the court that this status report is the plaintiffs' product and  
5 we just received it this morning as well.

6 I want to respond to your first question: Are we  
7 making progress, and I think we are making progress. The case  
8 has come to a point, I think a decisive point now. We have  
9 produced everything that the plaintiffs asked for, that is  
10 within our reasonable power to produce. That is short of  
11 compiling a tailor-made database by reviewing every borrower  
12 file of every white or Hispanic borrower from USDA over the past  
13 20 years.

14 We have given them everything that USDA has been  
15 required by Congress to compile that is relevant to this case;  
16 and if that's not sufficient, that's simply because Congress  
17 hasn't required us to do more. We warned the plaintiffs that  
18 much of this discovery would be of little use. And they still  
19 wanted it. They still asked for it. And we gave it to them.

20 There are obviously infinite different types of data  
21 the USDA could collect; but it is not incumbent on USDA to  
22 anticipate the needs of future litigants 20 years hence. That  
23 is what the plaintiffs are assuming we should have done.

24 I'd just say to the court it is time to put their money  
25 where their mouth is. They've tried to certify a class once

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1 before and they've failed. Now they are several hundred  
2 thousand pages of discovery later, and they're still unable to  
3 pinpoint a common policy or practice that affects all these  
4 proposed class members uniformly.

5 No amount of discovery short of this monumentally  
6 burdensome undertaking that they're now proposing is sufficient  
7 to the plaintiffs. They've made that very clear in their status  
8 report.

9 And the burdensomeness of the task that he described,  
10 that the plaintiff described -- the plaintiff described in  
11 pulling together the information we've produced was doubly  
12 burdensome for the defendants because we had to pull it all  
13 together. It is even greater to pull all the personnel we  
14 needed off of their regular duties to put all this material  
15 together.

16 But it is especially burdensome in view of the fact and  
17 further discovery would be unwarranted and unduly burdensome in  
18 view of the fact that there is no evidence that what the  
19 plaintiffs already have is -- contains the information that they  
20 say they need. That is evidence of a common policy or practice.  
21 They have these 35 files. We've produced 35 borrower files and  
22 33 disaster benefits files of the named plaintiffs, the  
23 purported class representatives.

24 How many more would help? Why aren't these enough?

25 This is supposedly a group with standing to represent

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1 the -- all the proposed class members. And yet there's not a  
2 hint of evidence in any of these files so far that there is a  
3 common policy or practice that would warrant class certification  
4 here.

5 I want to point out in this connection that the  
6 plaintiffs have had free access to these files since mid-May,  
7 that these privilege redactions are extremely labor-intensive  
8 because we're talking about almost a hundred thousand pages of  
9 documents that had to be reviewed page by page by USDA staff  
10 members to remove privileged material in conformance with the  
11 court's protective order.

12 So the disks that they got this morning, they've had  
13 access to that material for two months. I think the problem  
14 here is the plaintiffs are trying to force a class action out of  
15 a case that just isn't suitable for class treatment. They're  
16 trying to root out discrimination, but perhaps the solution is  
17 individual disparate treatment claims. Perhaps there isn't --  
18 and the evidence shows that there isn't a common policy or  
19 practice which makes this a case for appropriate -- for class  
20 treatment.

21 We've already gone to great expense to satisfy the  
22 plaintiffs' demands, and to what lengths are we going to be  
23 asked to go in conducting what will inevitably be an exercise in  
24 futility?

25 They have hundreds of thousands of pages of relevant

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1 information in addition to these named plaintiffs' files. They  
2 should be required to take their second shot at class  
3 certification now; and no further discovery is appropriate or  
4 necessary, nor will it be fruitful, and the cost is too great to  
5 engage in an exercise in futility.

6 THE COURT: Two or three questions.

7 First, weren't we discussing the last time you were  
8 here the prospect of some sort of a statistical sample of  
9 individual files?

10 MS. OLSON: Yes.

11 THE COURT: What happened to that idea?

12 MS. OLSON: We decided that taking the 35 named  
13 plaintiffs' files was a good place to start. Indeed, if there  
14 had been some scintilla of evidence within those files of a  
15 common policy or practice, perhaps the idea of doing a larger  
16 sample might be appropriate. But the problem here is we don't  
17 even know what we'd be taking a random sampling of. How would  
18 you do a random sampling when you don't know what your goal is?  
19 And here we don't have a goal. We don't have a policy or any  
20 hint of a policy that affects all these class members uniformly  
21 in a discriminatory way.

22 There is enough intellectual power in this room to  
23 litigate discovery issues until we all retire, and it seems like  
24 there's a danger we could be headed in that direction. We can  
25 get our very expensive experts to discuss what the appropriate

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1 random sampling might be; and I think the problem is that it is  
2 an aimless search.

3       So there has been a lack of definition on the  
4 plaintiffs' part of where we expect to go here. It is all of  
5 our goals -- I am sure it is USDA's goal to root out  
6 discrimination; but is this the appropriate vehicle?

7       It seems not to be.

8       THE COURT: Well --

9       MS. OLSON: I mean a class -- a class action as opposed  
10 to --

11       THE COURT: If you're addressing that comment to  
12 litigation qua litigation rather than something more executive  
13 in nature or congressional in nature, I'm afraid we are where we  
14 are on that one. You happen to be in court. You're not before  
15 Congress and you're not before -- you're not in the Cabinet  
16 room.

17       MS. OLSON: The solution might more appropriately be  
18 with Congress.

19       THE COURT: It may be the wrong instrument, but it is  
20 the one in our hands.

21       MS. OLSON: If the goal is to root out discrimination,  
22 if such discrimination exists, is a class action the right  
23 vehicle?

24       THE COURT: Well --

25       MS. OLSON: If there is no common policy or practice,

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1 which there hasn't -- it -- certainly the plaintiffs have not  
2 identified one.

3 THE COURT: Of course, that begs the whole question  
4 that the plaintiffs are trying to get at.

5 But I hear you. All right.

6 Second question: How much privileged material was  
7 redacted from these nine CDs? Do you know?

8 MS. OLSON: I don't know. I can find out. I don't  
9 think it was --

10 THE COURT: Give me an example of something that was  
11 privileged in these -- that might have been redacted?

12 MS. OLSON: The -- I believe we redacted Privacy Act  
13 information in addition -- is that --

14 THE COURT: But the plaintiffs are represented by these  
15 people. I should think they have --

16 MS. OLSON: We did it pursuant to the protective order.

17 The point is this information can be used in the litigation.

18 We're trying to prevent further delays down the road by getting  
19 it all off the record now so they can use it freely.

20 In the meantime, they've had access to a hundred  
21 thousand pages of documents but they -- USDA was required to go  
22 through them, obviously, page by page. I think the bulk of it  
23 was Privacy Act information. The protective order the court  
24 entered in April or May -- early May, late April -- indicated  
25 they could have free access to the information. But in the

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1 meantime, we would redact anything of a privileged nature.

2 Now, that's been done. If these files are useful in  
3 the litigation, that won't pose any obstacles to their free use.

4 MR. HILL: May I be heard briefly.

5 THE COURT: The third question you say is they've had  
6 access to these documents since mid-May. They get the CDs in  
7 July. Where have they had access?

8 MS. OLSON: They were sitting in rooms at USDA; and  
9 with I believe 24 hours notice -- if plaintiffs provided  
10 us with 24-hour notice, they were entitled to go over and look  
11 at the files. They were all put together in a single place so  
12 the plaintiffs could make whatever use of them they wanted to  
13 during that time.

14 THE COURT: And they never did it?

15 MS. OLSON: No. They appeared briefly one day at the  
16 beginning and said, we want copies of everything. The  
17 protective order said if they want copies of portions of them,  
18 that USDA would make copies of portions of them. They came in  
19 and said we want copies of everything; and that happened to be  
20 about a hundred thousand pages, 90- or a hundred thousand pages  
21 of material.

22 It took time in addition to all the other hundreds of  
23 thousands of pages or at least tens of thousands of pages of  
24 material we were producing. We scheduled four witnesses, a  
25 couple of whom came from across the country. It just took, I

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1 think, a very reasonable amount of time. This was all

2 accomplished in two months.

3 THE COURT: Okay. Mr. Hill is over there slapping his

4 forehead and groaning. I'll let him come to the podium and

5 explain what that's all about.

6 MR. HILL: Your Honor, there simply isn't any polite

7 way to describe what's just been said. They --

8 THE COURT: Do your best.

9 MR. HILL: I'm going to do my best. But they are

10 flagrant misrepresentations of facts. There's -- I'm reminded

11 of a Bible story when Ananias and Sapphira are -- in the Book of

12 Acts after they made similar statements, they were buried within

13 the hour. They were killed because -- these things -- the

14 notion that we have had access to this, here are the facts.

15 We were told we had -- on 48 hours notice, we could

16 come in and inspect the documents. We immediately responded and

17 said we will be there on May 15, day one of the inspection

18 period. We stayed there -- a team of lawyers consisting of

19 myself, two of the young ladies back there, and two more

20 lawyers, stayed there all day long; and I personally reviewed

21 files, and I individually tagged pages that I wanted copied; and

22 if I thought it was outside the scope, I said not to copy those

23 pages. So the notion that we just popped in, said give us

24 everything, popped out is false.

25 THE COURT: Okay. So you're there for a whole day.

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1 How many files did you get through in a day?

2 MR. HILL: We got through all of them, Your Honor. We  
3 had a team of five or six lawyers. We inspected all of the  
4 files, designated the copies that we wanted, and I'm not aware  
5 of any circumstance after that you then get to come back and  
6 look at the documents; and if we're somehow -- I don't know if  
7 we were put on notice we could come back any time we wanted to  
8 review the documents. Presumably they were in the process of  
9 reviewing the documents for the privileged search.

10 This notion that we have had everything, there's not a  
11 scintilla of evidence. Maybe Ms. Olson is an extremely fast  
12 reader. I can't read a hundred thousand pages since 9:00  
13 o'clock this morning.

14 THE COURT: If your team has been through all these  
15 documents already, then there's not going to be any big deal to  
16 re-find what you want on these CDs, is it?

17 MR. HILL: There's going to be a deal, one, to get  
18 these things printed out.

19 THE COURT: You don't have to print them out. You --  
20 if you've got everything, do you think you have everything  
21 designated or everything including stuff you did not designate?

22 MR. HILL: At this point I don't know. I have 10  
23 diskettes that I received approximately sometime between 9:00  
24 and 10:00 o'clock this morning. There is no way I can tell you  
25 whether I got -- you know, just from my own personal review of

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1 the files, whether I got everything I designated.

2       There were some particular documents I made special  
3 note of as sort of a quality check; but until I get into those  
4 documents, I can't see them. I can't tell you that. But the  
5 point that we somehow have everything, one of the things that  
6 we -- say the question of commonality is whether or not there is  
7 a common practice.

8       Say, for example, X number of Hispanic farmers are  
9 disqualified on the basis of character. That might be a  
10 position of commonality, but we won't create -- create an issue  
11 of commonality. But we won't know that until we are able to  
12 compare it to the comparable number of whites who have been  
13 disqualified on that basis, because if it is in the ballpark,  
14 how can we then say that's discrimination?

15       That is one of the critical points. We have to have a  
16 comparison to -- to work with. You just can't look at -- that  
17 is like the sound of one clapping hand. Look at the Hispanic  
18 hands. Say X number were disqualified on the basis of  
19 character. It tells you nothing as to whether or not that is in  
20 the ballpark that a similar number of whites are -- every day --  
21 disqualified on that basis.

22       So you've got to look at both of those files. The only  
23 place you can see it is in those files.

24       They have been stonewalling at every turn any access  
25 that we could get to the individual files of white farmers or

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1 any farmers other than these 35 that we -- Hispanic farmers  
2 other than the 35 that they have identified.

3 And to say that -- you know -- we can't -- you know --  
4 we -- they've given us everything we've asked for, that's just  
5 not true. If you look at their objections, they object time and  
6 time again to producing anything with respect to the individual  
7 files of white farmers.

8 They -- if you look at the document that I've cited,  
9 there's another document here where they take the position with  
10 respect to the whole issue of character. Again that's what I  
11 brought out earlier. They've, in fact, instructed their people  
12 to falsify their records.

13 THE COURT: Wait. Wait. Wait. Wait. Show me that  
14 document.

15 MR. HILL: I'll be happy to. It is on tab K.

16 MR. SITCOV: Could we see a copy of it, Your Honor?  
17 We've never seen the attachments.

18 MS. OLSON: I have it.

19 MR. HILL: Another misstatement.

20 MR. SITCOV: Another flagrant misrepresentation?

21 MR. HILL: Absolutely.

22 THE COURT: Have you been through these 37 files enough  
23 to know whether -- to know how many of these 37 plaintiffs that  
24 you represent were rejected on grounds of character or were told  
25 that they were rejected on grounds of character?

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1 MR. HILL: No, Your Honor. The exposure we've had to  
2 those 37 files was that they were presented to us in a room. We  
3 went in. We looked at the documents in that room, made a quick  
4 assessment in a day of the documents that we thought were  
5 responsive and relevant, designated those documents, gave our --  
6 gave that information to them.

7 They then proceeded to copy them; and the first thing  
8 we get in response to that is this morning, 10 -- 10 compact  
9 diskettes, and we've had no opportunity since -- you know --  
10 since May 15 to go and further review those documents.

11 THE COURT: Give me a minute.

12 THE COURT: Well, I want to focus on what you just told  
13 me about being told to misrepresent things. What you have shown  
14 me is a letter or memorandum dated August 1, 1984, almost 20  
15 years ago from the administrator of the Farmers Home  
16 Administration to all state directors, former program chiefs,  
17 district directors and county supervisors that reads in its  
18 entirety as follows:

19 "The county office advisory team has brought to your  
20 attention that the term 'character' is frequently used in county  
21 committee rejection letters. Referring to an applicant's  
22 character in a rejection letter is often considered an insult  
23 and generates hostility. Therefore, you should discontinue the  
24 use of the term 'character' in rejection letters. The phrases  
25 in paragraph 4 on page 2 of FMHA guide letter number 410-3,

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1 revision 3 or similar wording will be used when referring to an  
2 applicant's credit history or other traits that involve  
3 character."

4 Now, that I take it -- I don't have that particular  
5 guide letter or the FMHA instruction before me -- but that I  
6 gather is a reference to the same -- to the regulations that I  
7 mentioned in my memorandum issued back whenever I issued it  
8 indicating that there are indeed some objective criteria. I  
9 mean subjective criteria. And one of them is called  
10 "character." But character emphasizes credit history, past  
11 record of debt repayment, and reliability.

12 Now, if and to the extent the phrases in paragraph 4 on  
13 page 2 of FMHA guide letter number 410-3 deal not with the word  
14 "character" but with credit history, past record of debt  
15 repayment, and reliability, then I'm not sure whether this  
16 document that you found is even a popgun let alone a smoking  
17 pistol.

18 MR. HILL: Well, Your Honor, all I can say in response  
19 to that is that when Mr. Rodentz [phonetic] who is in charge of  
20 loan making at USDA testified on this subject, he said in no  
21 uncertain terms that they are to avoid using the term  
22 "character" even when that was the reason for the rejection of  
23 the loan. He's testified to that. It is on page 30 of his  
24 deposition transcript. I apologize. I noticed that in our  
25 excerpt of his transcript, page 30 is missing; but I can

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1 certainly provide it to the court.

2 THE COURT: So the language police have infected all of  
3 our lives.

4 All right. Well, Ms. Olson suggests that we've come to  
5 a critical dispositive point in this case. If you have a motion  
6 to make, Ms. Olson, file it. But if not, I don't think we're  
7 through yet.

8 The plaintiffs need to go through those materials that  
9 they have -- that they have now received. If there is in those  
10 materials a colorable basis on which the plaintiffs can assert  
11 that the plaintiffs -- all of them or a significant number of  
12 them or a -- I don't know whether -- 37 isn't enough for  
13 statistical significance, but a substantial number of them were  
14 rejected for loans or benefits on grounds that are the kinds of  
15 subjective grounds that plaintiff asserts he can establish  
16 commonality for, then you come back and tell me what you've got  
17 in what has been delivered to you and tell me what you need by  
18 way of a statistically significant sample of other files that  
19 you need to look at for comparison purposes.

20 If those 37 files don't contain -- of course let's say  
21 for the sake of the argument that five of the 37 files include  
22 rejections on character grounds, then I've got a problem.  
23 Because I don't know whether five out of 37 is meaningful.

24 But if it were 25 out of 37 -- I'm just -- this is a  
25 quite hypothetical here, I'm just trying to tell you how I'm

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1 thinking -- if it were 25 out of 37, then I would think you'd be  
2 entitled to figure out whether the percentage of non-Hispanic or  
3 white farmers who were rejected is anything like that.

4       But I -- there's a lot to what Ms. Olson says. We  
5 can't really begin a class action by saying we've got to unpack  
6 every haystack in the United States in order to find facts. We  
7 can't do that. The class action wasn't designed for that.

8       And if there is no way for the plaintiff to establish  
9 or to feel that it has had a sufficient opportunity to establish  
10 commonality without going into all those extension offices all  
11 over the country and looking through all those files, then I  
12 think we're going to wind up in the court of appeals with this  
13 class certification question sooner rather than later.

14       But if you can, with the materials you have just been  
15 given -- I'm not going to fight the issue of whether you should  
16 have been given them two months ago or how long it took to copy  
17 them or whether you should have gone in after the first day or  
18 not. That's water over the dam.

19       But if you can find a basis in what you have been given  
20 about your own clients to set up a colorable claim or set up a  
21 factual basis for asserting your clients were rejected for  
22 subjective grounds on what appears to be beyond some threshold  
23 of reasonableness, then I'm going to talk to you further about  
24 more discovery.

25       But you've got to go through those documents first and

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1 make that showing to me before I'm going to open up the  
2 Department of Agriculture to wide-ranging comparative discovery.

3 Now it is up to you how long that is going to take you.  
4 I know 10 CDs is a lot of documents. You could put most of the  
5 literature of mankind on 10 CDs. I understand that. It is up  
6 to you.

7 I think really we should adjourn until you file a  
8 motion or file a statement or say that you're ready for another  
9 status call. It is up to you.

10 MR. HILL: I think that's fair, Your Honor.

11 I just would point out -- when you raise the question  
12 about trying to put together a survey, I think if you look at  
13 tab A of our folder, you'll see that we suggested doing just  
14 that immediately following the status conference on April 29.  
15 That proposal was flatly rejected by USDA, and -- so we -- we  
16 were certainly amenable then and we continue to be amenable to  
17 continue to work out a sampling technique.

18 THE COURT: Well, I'm sorry that the department flatly  
19 rejected that. I thought I had suggested that. I thought that  
20 that was the way to go. I still think it is the way to go.

21 But I also take Ms. Olson's point that until there's  
22 some sense of what it is you're looking for, that it's a little  
23 hard to figure out what the -- how the statistical sample ought  
24 to be set up. So I'm afraid you've got to go back and go over  
25 these documents you've been given and make some kind of a

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1 showing that I can look at and the government can respond to and  
2 be back here one more time

3 MR. HILL: Thank you, Your Honor.

4 THE COURT: Now, do you want to give me an estimate of  
5 how long you think that's going to take?

6 MR. HILL: I would estimate maybe -- this is the 15th  
7 of July. Around the first of September. I will try to do it  
8 sooner. I can assure you we will work as diligently and as  
9 quickly as possible.

10 THE COURT: Well, it's your case. As I say, you notify  
11 opposing counsel and Dereck Miller here when you think you're  
12 ready to go, and we'll set up another status.

13 MR. HILL: Thank you, Your Honor.

14 MS. OLSON: Thank you.

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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.

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Dennis A. Dinkel

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