

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

GUADALUPE L. GARCIA, JR., <u>et al.</u> ,)	
)	
Plaintiffs,)	
)	
v.)	Case No. 1:00CV02445
)	
ANN VENEMAN, Secretary of)	Judge: James Robertson
Agriculture,)	
)	
Defendant.)	
_____)	

**DEFENDANT'S OPPOSITION TO PLAINTIFFS' MOTION FOR LEAVE TO FILE A
THIRD AMENDED CLASS ACTION COMPLAINT**

INTRODUCTION

Plaintiffs have a problem. Plaintiffs are seeking hundreds of millions, if not billions, of dollars in damages under the Equal Credit Opportunity Act ("ECOA") for tens of thousands of separate instances of credit discrimination that allegedly occurred in more than 2700 different Department of Agriculture ("USDA") county offices over a 20-year period . But the sheer magnitude of plaintiffs' damages claim overwhelms their claim for non-monetary relief, which, in turn, is fatal to their motion for class certification. To complicate matters further, plaintiffs' ability even to articulate some form of relief "other than money damages," see 5 U.S.C. § 702, that they can portray as being their primary goal in the litigation is dramatically curtailed by their inability to assert claims under the Administrative Procedure Act ("APA"). Id. § 704; see also Garcia v. Veneman, 211 F.R.D. 17, 23 n.9; Love v. Veneman, No. 00-2502 (D.D.C. Dec. 13, 2001), slip op. at 13. As we explain more fully below, the proposed Third Amended Complaint

does not correct the problems that preclude class certification, but rather would introduce a degree of confusion and complexity that would make class treatment of plaintiffs' claims a nightmare for the parties and the Court.

First, as amended, the complaint would create five subclasses. But since the subclasses are not mutually exclusive, members of any subclass could also belong to any number or combination of the other subclasses. With 19,000 putative class members, the permutations and the confusion the subclasses would sow are limitless. Thus, the creation of these new subclasses would exponentially complicate the resolution of plaintiffs' tens of thousands of individual claims. Nor does plaintiffs proposal that one subclass be reserved for Hispanic farmers whose applications were rejected "by the use of highly subjective criteria" address their continued inability to identify a subjective credit approval criterion that was generally applied to all, or almost all, members of the putative class.

Second, in an effort to circumvent this Court's ruling that plaintiffs' \$20 billion damage claim is "predominant" for purposes of Fed. R. Civ. P. 23(b)(2), the amended complaint deletes the references to the actual amount of damages plaintiffs are seeking and that appeared in all the preceding versions of the complaint. This proposed change is a silly one, given that neither the proposed amended complaint nor its supporting memorandum suggests that the amount of the damages plaintiffs are after is any less now than it was the day before the motion to amend was filed.

ARGUMENT

PLAINTIFFS' MOTION FOR LEAVE TO FILE A THIRD AMENDED CLASS ACTION COMPLAINT SHOULD BE DENIED

Once a complaint has been answered it may be amended only by leave of court or by written consent of defendant. Fed. R. Civ. P. 15(a). Although leave shall be "freely given when justice so requires," *id.*, "[t]he district court's discretion to deny leave to amend is particularly broad where plaintiff has previously amended the complaint." Allen v. Beverly Hills, 911 F.2d 367, 373 (9th Cir. 1990) (internal quotation marks omitted); *see also* Fidelity Fin. Corp. v. Federal Home Loan Bank, 792 F.2d 1432, 1438 (9th Cir. 1986) (refusing to allow plaintiff to file a fourth amended complaint where "[t]he factual bases of the claims were known to [plaintiff] long before" and the defendant would have been prejudiced); Scientific Control Corp. Secs. Litig. v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 71 F.R.D. 491, 514 (S.D.N.Y. 1976) ("There comes a time, when after nearly four years of litigation, there must be an end to the amending process"). Leave to amend also should be denied where the proposed amendments would be futile, Willoughby v. Potomac Elec. Power Co., 100 F.3d 999, 1003 (D.C. Cir. 1996), and amendment should not be allowed merely to enhance the class action aspect of the litigation. Scientific Control, 71 F.R.D. at 514. Plaintiffs' request to amend the complaint a third time should be denied on all these grounds.

1. The Creation Of Subclasses Would Not Cure Plaintiffs' Failure To Show That USDA's Loan Criteria Are Subjective, But Rather Would Hopelessly Complicate This Litigation

Plaintiffs have taken two shots at attempting to prove that USDA's subjective loanmaking criteria formed the basis for its adverse credit decisions with respect to the bulk of the 35

plaintiffs whose credit files they have been given. First, they contend that 25 of the 35 plaintiffs had credit applications denied on subjective grounds. Second, they propose amending the class definition by dividing the class into five subclasses based on the "stages" of the loan process at which the alleged discrimination occurred, with one subclass focusing on loan denials based on subjective criteria. Both shots have come a cropper.

Plaintiffs' numerical argument is doubly flawed. On the one hand, plaintiffs' phraseology – putative class members who were denied "at least one loan on the basis of highly subjective criteria," Pl. Mem. at 19 – makes it clear that they are not talking about 25 people who never obtained FmHA/FSA loans, but rather, about 25 people whose loan applications were sometimes approved and sometimes not. Thus, the claims of these 25 individuals would not be common to the claims of people who never obtained a farm loan or to those who invariably obtained loans, but allegedly with some difficulty. Moreover, they would not be common to each other, given the myriad factual scenarios that would be presented by two dozen people who sometimes obtained loans and sometimes did not, over a two-decade period, in an unknown number of counties and states, and involving dozens of current, former, and likely deceased, FmHA/FSA county office employees.

On the other hand, the supposedly "subjective" criteria to which plaintiffs refer are subjective only according to plaintiffs' mischaracterization of them.¹ Most of the 25 plaintiffs supposedly victimized by USDA's subjective loanmaking criteria actually were denied loans due to their inability to come up with a feasible farm and home plan. But determining whether an

¹ The Court has already determined that the regulatory criteria for loan and benefit applications are largely objective. Garcia v. Veneman, 211 F.R.D. at 20-21.

applicant has submitted a feasible farm and home is an essentially objective, mathematical exercise that turns on facts supplied by the loan applicant and that are used to determine whether the applicant's projected income will cover his debts and projected expenses. 7 C.F.R. § 1941.4. The regulations leave little, if any, room for subjectivity. See Garcia v. Veneman, 211 F.R.D. at 24 (observing that the determination of whether an application was feasible would require scrutiny of "such objective criteria as an applicant's financial qualifications and repayment ability").

Nor would plaintiffs proposed subclasses get them where they want to go. One of the subclasses, "Subclass C," is defined as "those Hispanics whom defendant sought to discourage from availing themselves of the USDA farm loan and non-credit benefit programs by the use of highly subjective criteria to reject their applications." See Third Amended Class Action Complaint ("Third Am. Compl.") ¶ 103(c). Plaintiffs appear to believe that this will enable them to argue that there is an entire subclass of plaintiffs who were denied loans on subjective grounds which, in turn, will allow them claim that they satisfied the district court's concern about subjective credit standards. Here again, plaintiffs' proposed amendment is not up to the task it was designed to accomplish.

First, during the July 15, 2003 status conference the Court was clear about plaintiffs' burden on the "subjective criteria" front. As the Court put it, unless plaintiffs could show that something in the neighborhood of 25 of the 35 plaintiffs whose files they received were denied loans on subjective grounds, they would be entitled to no further class discovery and the Court would not certify a class. See 7/15/03 Transcript at 22-23. Plaintiffs' effort to package a much smaller number of "subjective" denials into a subclass does not meet the Court's test. And as just

noted, most of the criteria plaintiffs characterize as subjective are not subjective at all.

Second, the other four Subclasses all are defined by objective criteria: viz., Hispanic farmers denied either an application for credit or assistance in completing one (Subclass A); Hispanic farmers who experienced protracted delays in the application process or the dispersal of loan funds (Subclass B); Hispanic farmers who were required to maintain supervised bank accounts (Subclass D); and Hispanic farmers for whom loan servicing was delayed or denied. Thus, even with a single subclass that focuses on alleged subjective criteria, the four remaining subclasses would be defined by objective criteria and decisions.

Finally, the proposed subclasses would hopelessly complicate the litigation. The subclasses are not mutually exclusive, and the vast majority of the 19,000 putative class members likely would fall into more than one subclass. For example, many plaintiffs will allege that they were not provided assistance in completing their credit applications (Subclass A), and that their applications were not processed promptly and/or their loan dispersals were delayed (Subclass B). Others will make one, both, or neither of those claims, and/but will assert that they were required to maintain supervised bank accounts (Subclass D), and/or experienced loan servicing delays (Subclass E). Some will assert only that they were denied credit on subjective grounds (Subclass C), while still others are sure to make claim in addition to others. These are just a few of the possible subclass membership permutations that undoubtedly will arise if the subclasses are permitted. Rather than streamlining the litigation if a class is certified, the subclasses would hopelessly complicate it.

2. Cosmetic Changes To The Complaint Do Not Alter The Fact That Plaintiffs' Primary Objective To Recover Hundreds of Millions, If Not Billions, Of Dollars In Damages

Plaintiffs' motion to amend is also a clumsy attempt to mask the fact that their primary objective in this litigation is the recovery of approximately \$19 billion in damages. The proposed third amended complaint is substantively the same as its predecessors. However, in response to the Court's finding that the billions in damages plaintiffs seek "predominates under any applicable test" under Rule 23(b)(2), Garcia v. Veneman, 211 F.R.D. at 23, plaintiffs' proposed amended complaint attempts to hide the size of their damages claim by deleting any reference to its specific dollar amount. But neither the proposed amended complaint nor its supporting memorandum give any indication that plaintiffs do not continue to seek the same \$19 billion in damages they explicitly claimed in each previous version of the complaint. And to the extent that the complaint discusses damages at all, it leaves no doubt that plaintiffs are demanding enormous amounts of money. For instance, plaintiffs acknowledge that they are seeking damages of such magnitude that "computer modeling" may be necessary for proper calculations, see Third Am. Compl. at 3; see also id. at 48 ¶ 7, and they note that plaintiffs in Pigford v. Veneman, No. 97-1978 (D.D.C.), have to date recovered \$850 million in damages on claims identical to those asserted here, Third Am. Compl. at 3. In these circumstances, clumsy wordsmithing cannot mask the fact that plaintiffs' real goal in this case remains the recovery of a vast amount of money damages.

Furthermore, the declaratory and injunctive relief plaintiffs seek is largely ornamental. Three years have passed since this suit was filed and plaintiffs remain unable to identify the specific policies or practices at USDA which caused the alleged disparities among all purported

class members. Hence, the nonmonetary relief they request is meaningless given that it is not targeted at a specific problem, but rather, at "discrimination" in general. Plaintiffs request injunctions generally "prohibiting the defendant . . . from engaging in discrimination" as it is described in the complaint; requiring defendant to comply with ECOA and the APA; and "remedy[ing defendant's] discriminatory patterns and practices." Third Am. Compl. at 46. However, the injunctive relief plaintiffs propose is unrealistic given that the APA has been off the table for more than a year, and remedies to correct an alleged "abstract policy of discrimination," are not only ineffectual but also inappropriate. See General Tel. Co. of the S.W. v. Falcon, 457 U.S. 147, 159 n.15 (1982).

CONCLUSION

Despite two prior amendments of their complaint and exhaustive discovery, plaintiffs remain unable to articulate a proper basis for class certification. Because plaintiffs' sole motivation for amending their complaint a third time – to enhance their prospects for class certification – is a goal beyond their reach, and because the byzantine subclass structure the amendment would introduce would erect steep new obstacles to the efficient resolution of this litigation, plaintiffs' motion to amend their complaint should be denied.

Respectfully submitted,

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Dated: Jan. 16, 2004

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on January 16, 2004, Defendant's Opposition to Plaintiffs' Motion for Leave to File a Third Amended Class Action Complaint was filed electronically with the Clerk of the Court to be served by operation of the Court's electronic filing system upon plaintiffs' counsel as follows:

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