

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

GUADALUPE L. GARCIA, JR., <u>et al.</u> ,)	
)	
Plaintiffs,)	
)	
v.)	Civil Action No. 1:00CV02445
)	Judge Robertson
ANN VENEMAN, Secretary of the)	
United States Department of Agriculture,)	
)	
Defendant.)	
)	

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

INTRODUCTION

Pursuant to LCvR 7.1(d), plaintiffs submit their reply to defendant’s opposition to plaintiffs’ Motion for Leave to File a Third Amended Class Action Complaint. As set forth more fully herein, plaintiffs submit that defendant fails to provide any sound basis for denying plaintiffs’ motion.

ARGUMENT

DEFENDANT OFFERS NO SOUND BASIS FOR DENYING PLAINTIFFS’ MOTION

Defendant argues that the Court should deny plaintiffs’ request to amend the complaint because plaintiffs have previously amended the complaint.¹ To support her position, defendant relies on “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

¹ The two prior amendments were essentially ministerial – the first merely added some additional plaintiffs and the second provided the identity of plaintiffs previously identified as “Mr. & Mrs. X.” Neither was substantive and neither occasioned any burden for defendant.

the claims were known to [plaintiff] long before' and the defendant would have been prejudiced.") Defendant's Opposition to Plaintiffs' Motion for Leave to File a Third Amended Class Action Complaint ("Opposition") at 3. However, that case is clearly distinguishable from the instant matter. In the instant case, unlike the situation in Fidelity, plaintiffs seek to amend their complaint in light of the results of the limited discovery that was only recently received and there is no claim that the amendment poses any burden for defendant. See 792 F.2d at 1438.

Defendant also suggests that plaintiffs have somehow been dilatory in the prosecution of this case and for that reason the motion should be denied relying on 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."). Opposition at 3. Defendant's reliance upon Scientific Control is also misplaced. Indeed, in the paragraph immediately following the language quoted by defendant, the court noted that Judge Tyler, to whom the case had been originally assigned, granted plaintiffs leave to file the second amended complaint "conditioned on the representation that the second amended complaint would be the final amendment." 71 F.R.D. at 514. The court made clear that Judge Tyler did so "[b]ecause of the inordinate delays in [the] case, traceable in substantial measure to plaintiffs." Id. Significantly, in denying plaintiffs' motion for leave to amend the complaint, the court held that "further amendment will be permitted ... as is necessary to conform to the proof, either as elicited in discovery or at trial." Id. (emphasis added).

Any suggestion that plaintiffs have been dilatory in the prosecution of this case simply will not withstand scrutiny. First, it should be noted that the Howrey firm did not become involved in the case until February 2002. See Docket Entry 45. Since that time, plaintiffs have prosecuted this case as expeditiously as the Court and circumstances would permit. Fully six months were taken up over a dispute that arose over defendant's attempt to limit plaintiffs' class discovery to certain centrally maintained databases. See Memorandum In Response To The Court's July 16, 2003 Order With Respect To Commonality ("Plaintiffs' 12/05/03 Memorandum") at 2-3. It was not until January 2003 that plaintiffs were permitted to conduct

even limited discovery. Plaintiffs filed their discovery requests on January 21, 2003, and through a series of delays completely beyond plaintiffs' control, defendant did not complete her partial document production until July 15, 2003. Even then, defendant had withheld hundreds of documents on dubious privilege claims and did not produce a privilege log until August 11, 2003. In approximately four months, plaintiffs reviewed approximately 140,000 documents from 35 proffered loan files and certain disaster relief files, prepared a memorandum regarding commonality, and amended the complaint to reflect facts that plaintiffs learned in the course of the limited discovery. By comparison, it took defendant two months from May 15, 2003 to July 15, 2003 just to review the same documents for privilege² and nearly three months to prepare a privilege log that ultimately had to be substantially revised.³

Furthermore, Fed. R. Civ. P. 15(a) provides for liberal amendment of pleadings and expressly states that leave to amend "shall be freely given when justice so requires." In the leading case construing this rule, Foman v. Davis, 371 U.S. 178, 182 (1962), the United States Supreme Court declared that:

If the underlying facts or circumstances relied upon by a plaintiff may be a proper subject of relief, he ought to be afforded an opportunity to test his claim on the merits. In the absence of any apparent or declared reason – such as undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of amendment, etc. – the leave sought should, as the rules require, be "freely given."

Id. As previously noted, defendant does not claim that the proposed amendment would prejudice her in any way nor does defendant contend that plaintiffs seek to amend the complaint in bad faith.

² See Plaintiffs' Status Report on the Progress of Discovery at 10.

³ See Plaintiffs' Motion to Compel Production of Certain Allegedly Privileged Documents And For In Camera Inspection Of Other Alleged Privileged Documents, filed September 25, 2003, at 3.

Presumably suggesting that the proposed amendment would be futile, defendant contends that the creation of subclasses would not cure plaintiffs alleged inability to show USDA's loanmaking criteria are subjective. See, e.g., Opposition at 3-4. Defendant's argument is utterly without merit. First, plaintiffs allege both disparate treatment and disparate impact discrimination and the subjectivity of USDA's lending criteria relates primarily to Subclass C. Second, in any event, to the extent that plaintiffs' claims rest upon the subjectivity of USDA's lending criteria, there is ample evidence to demonstrate that those criteria are subjective. Indeed, defendant significantly ignores findings by the United States Commission on Civil Rights and Congress pointing out the subjective nature of USDA's lending criteria. Moreover, defendant completely ignores, and understandably so, USDA's own admission that its lending criteria are wholly subjective. Plaintiffs' 12/05/03 Memorandum at 14-16. As the Farm Home Administration ("FmHA") of the USDA, the agency then responsible for promulgating and administering the lending criteria, made crystal clear in unequivocal terms: "the decisions on eligibility, feasibility, creditworthiness etc. are unreviewable because they are subjective criteria...." Id. at 15 (emphasis added).⁴

In addition to taking issue with the admitted subjectivity of USDA's lending criteria, defendant argues that plaintiffs who had loans rejected on subjective grounds (Subclass C) would not have claims in common because at some point some or all of them may have had a loan application approved. Defendant offers no support whatsoever for the assertion.⁵ Indeed, that is

⁴ Defendant seems to have two ways of dealing with facts that are inconvenient to her argument. She either completely ignores them or she creates her own "reality" to suit her argument. The former approach is best illustrated by her complete failure to address in any fashion the aforementioned findings and FmHA's own admissions. The latter approach manifests itself in defendant's apparent ability to read the minds of plaintiffs and their counsel and conclude that notwithstanding plaintiffs counsel's repeated disavowal of the \$20 billion damage claims, defendant somehow knows that plaintiffs' counsel really do not mean it.

⁵ Significantly, while defendant has had access to the loan files since their creation and has had years to review them since plaintiffs first listed their names in the amended complaint, defendant has not offered a single concrete example of any conflict among the claims of the plaintiffs denied credit on the basis of subjective criteria. As for the assertion that plaintiffs who were denied loans might not have common claims with "those who inevitably obtained loans but allegedly with some difficulty" (Opposition at 4), it is precisely for that reason that plaintiffs proposed separate subclasses to address those claims. See Subclass B and Subclass C. Third Amended Complaint, ¶ 103.

not surprising inasmuch as plaintiffs are complaining about the denial of loans on subjective grounds. The fact that some or all of the subclass members may have received credit at some point is irrelevant. It is the unreasonable denial of credit for proscribed reasons that is actionable and there is no requirement in the Equal Credit Opportunity Act, 15 U.S.C.A. § 1691 et seq., (“ECOA”) that, in order to bring an action under ECOA, plaintiffs must be denied credit each time they apply.

Returning to the subjective versus objective dichotomy, defendant argues that:

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.

Opposition at 6. Defendant’s argument is both illogical and quite beside the point. First, defendant fails to explain what is, in fact, the “objective criteria” upon which USDA determines to deny Hispanic farmers applications or assistance in completing the credit applications other than the fact that the farmers are Hispanic. Moreover, as previously noted, plaintiffs allege both disparate treatment and disparate impact discrimination. And, the discriminatory application of arguably objective criteria is every bit as much of a violation of ECOA as is the discriminatory abuse of subjective criteria.

In addition, defendant contends that the proposed subclasses would complicate the litigation because the subclasses are not mutually exclusive. Id. Defendant claims that since plaintiffs may qualify for more than one subclass somehow this makes the case more complicated. Significantly, defendant fails to cite any legal authority suggesting that a court refused to permit subclasses because the plaintiffs may qualify for more than one subclass. Moreover, insofar as establishing liability and a basis for remedial relief are concerned in connection with a Fed.R.Civ.P. 23(b)(2) certification, there is nothing unduly complicated about the proposed subclasses in the Third Amended Complaint.

Defendant argues that plaintiffs' disavowal of the \$20 billion damage demand in the current complaint is insincere, but offers nothing in support of that argument other than self-serving speculation. Opposition at 7. As plaintiffs' current counsel have consistently stated to the Court, the main objective of this litigation is, once and for all times, to rid USDA's farm credit and non-credit benefit programs of the systemic discrimination that has heretofore infected them. See December 18, 2002 Status Hearing Tr. at 7-8. The relief sought in this case is designed to fix the system and to alleviate the necessity of bringing of another lawsuit in several years. In that connection, the current well-publicized dissatisfaction with the Pigford case is instructive. Despite USDA's payment of millions of dollars in damages, many black farmers are unhappy with the settlement and frustrated because they continue to confront discrimination when they seek access to USDA's farm credit and non-credit benefit programs. The detailed remedial relief that plaintiffs seek in the proposed Third Amended Complaint are designed to correct this problem.

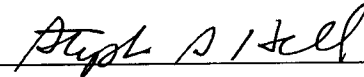
Finally, defendant disparages plaintiffs' request for injunctive relief as "ornamental" and seems to believe that the only way plaintiffs can obtain injunctive and declaratory relief is through the Administrative Procedure Act ("APA"). Opposition at 7-8. Defendant is mistaken on both counts. First, far from being ornamental, the requested injunctive relief addresses discrimination issues that have been revealed in the limited discovery permitted to date. For example, the discovery to date demonstrates, inter alia, that among the tactics employed to deny Hispanic farmers equal access to credit are the following: (i) the denial of loan applications to Hispanic farmers or, if they succeeded in obtaining applications, the denial of their requests for assistance in completing the paperwork, (ii) the systematic delay in the processing of their credit applications; (iii) the utilization of highly subjective criteria to reject loan applications of Hispanic farmers, and (iv) the denial and delay of needed loan servicing requests by Hispanics farmers. See Plaintiffs' 12/05/03 Memorandum at 19-21, 32-39. Each of these tactics is the subject of a prayer for remedial relief in the proposed Third Amendment Complaint. See Third Amended Complaint Prayer for Relief ¶¶ 1-4. In addition, plaintiffs seek remedial relief aimed

at correcting the longstanding problems with USDA's data collection and maintenance that make it impossible to audit USDA's lending practices and have been the sources of repeated criticism by the Civil Rights Commission and Congress. See Third Amended Complaint Prayer For Relief ¶¶ 4(g), 5-6. Second, as for the suggestion that the Court's ruling with respect to the so-called APA claims somehow precludes plaintiffs' prayer for injunctive relief, defendant's assumption is fatally flawed. Under the ECOA, the Court is expressly authorized to "grant such equitable and declaratory relief as is necessary to enforce the requirements imposed under . . . [ECOA]." 15 U.S.C.A. § 1691e(c).

CONCLUSION

In sum, defendant has not provided any sound basis for denying plaintiffs' motion. Granting the motion will not in any way unfairly prejudice defendant and is appropriate at this pre-class certification stage of the action. Therefore, plaintiffs' motion for leave to file a Third Amended Complaint should be granted.

Respectfully Submitted,



Alan W. Wiseman #187971

Stephen S. Hill #927137

Yolanda Hawkins #477616

HOWREY SIMON ARNOLD & WHITE, LLP

1299 Pennsylvania Ave., N.W.

Washington, D.C. 20004

(202) 783-0800

(202) 383-6610 – Fax

Alexander J. Pires, Jr. #185009

CONLON, FRANTZ, PHELAN & PIRES, LLP

1818 N Street, N.W.

Suite 700

Washington, DC 20036

(202) 331-7050

(202) 331-9306 – Fax

Philip Fraas #211219

3050 K Street, NW

Washington, DC 20007

(202) 342-8864

(202) 342-8451 – Fax

Attorneys for Plaintiffs

GUADALUPE L. GARCIA, JR., et al.

Of Counsel:

Kenneth C. Anderson #243962

Robert L. Green, Jr. #935775

HOWREY SIMON ARNOLD & WHITE, LLP

1299 Pennsylvania Ave., N.W.

Washington, D.C. 20004

(202) 783-0800

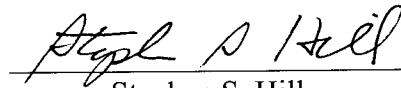
(202) 383-6610

Date: January 26, 2004

CERTIFICATE OF SERVICE

I hereby certify that on January 26, 2004 Plaintiffs' Reply to Defendant's Opposition to Plaintiffs' Motion for Leave to file 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 the following:

Lisa Olson, Esquire
UNITED STATES DEPARTMENT OF JUSTICE
Civil Division
Federal Programs Branch
20 Massachusetts Ave., N.W.
P.O. Box 833
Washington, DC 20044


Stephen S. Hill