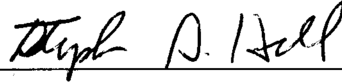
IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

GUADALUPE L. GARCIA, JR., et al.,	)	
Plaintiffs,	)	
v.	)	Civil Action No. 1:00CV02445
	)	Judge Robertson
ANN VENEMAN, Secretary, UNITED STATES DEPARTMENT OF AGRICULTURE,	)	
Defendant.	)	

PLAINTIFFS' EMERGENCY MOTION FOR PRELIMINARY INJUNCTION

Pursuant to Fed. R. Civ. P. 65(a), hereby move for preliminary injunction requesting that the Court require defendant to adhere to the well-established and long-standing policy of the United States Department of Agriculture ('USDA") of not taking adverse actions against a farmer who has filed a civil rights complaints until the completion of the complaint process. As required by LCvR 7.1(m), plaintiffs' counsel conferred with defendant's counsel, Lisa Olson, Esq., concerning this motion. Ms. Olson indicated that the defendant opposes this motion. A memorandum of points and authorities is filed herewith in support of this motion.

Respectfully submitted,



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Date: November 1, 2004

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MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PLAINTIFFS' EMERGENCY MOTION FOR PRELIMINARY INJUNCTION

INTRODUCTION

On September 10, 2004, this Court, in denying class certification, issued a sua sponte order staying the proceedings in the District Court while plaintiffs sought appellate review of the class certification question. Plaintiffs do not wish to disturb the Court's stay order insofar as it continues to toll the special statute of limitations; however, defendant recently foreclosed on several plaintiffs' farms leaving plaintiffs no choice but to file this motion for preliminary injunction requesting relief from adverse actions taken by the defendant. In addition, during the emergency telephone hearing on September 7, 2004, the Court invited plaintiffs to address this issue via an appropriate motion.

FACTUAL BACKGROUND

The United States Department of Agriculture ("USDA") has long had a policy that USDA would not take any adverse action such as foreclosure against any farmer who had filed a discrimination complaint with it until it had resolved the complaint. This policy is reflected in, for example, Farmers Home Administration ("FmHA") Instructions 2012-B, § 2012.57, which

provides that "[w]hen a complaint has been filed, all adverse actions (i.e., foreclosure, liquidations, etc.) must be suspended until the case has been resolved by the Department's Office of Civil Rights." FmHA Instruction, Audits and Investigations 2012-B § 2012.57(c).[1] Similarly, Farm Service Agency ("FSA") Handbook 18-AO for civil rights compliance also states that "[i]f a complaint has been filed, all adverse actions, such as foreclosure, liquidation, etc., must be suspended until the case has been resolved by CR." FSA Handbook 18-AO (Rev. 2) Amend. 1.[2]

That policy was confirmed in 2002 at a meeting between, among others, Stephen Hill and Frederick D. Isler, then Deputy Director of Programs, Office of Civil Rights ("OCR"). On September 26, 2002, at the request of Lou Gallegos, then USDA Assistant Secretary of Administration, certain plaintiffs met with Mr. Gallegos and Mr. Isler. During that meeting, Mr. Isler stated that once a farmer has filed a civil rights complaint, it is USDA's policy to stay foreclosure proceedings and any other adverse action until the completion of an investigation. Mr. Isler also stated that if the USDA attempted to take any adverse action against our clients with pending civil rights complaints, that plaintiffs should immediately notify him.

While the complaint must be "filed" with the USDA OCR, there is no requirement that the farmer's complaint be in writing. To the contrary, USDA regulations make clear that the complaint may be verbal. See FSA Program Discrimination Complaint Process and Factfinding Inquiries Notice AO-1174 § D.[3] Moreover, once an FSA employee receives a verbal complaint of discrimination, the employee is required to reduce the complaint to writing and pass it on to the OCR.

Unfortunately, the OCR has a well-deserved reputation for maintaining very lax controls over its files. Many of the problems with the OCR's shoddy record keeping are a direct result of USDA's having secretly hobbled the OCR's investigatory function in the early 1980s. As Lloyd

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[1] See Exhibit 1.

[2] See Exhibit 2.

[3] See Exhibit 3.

E. Wright, a former Director of the OCR, confirmed in his declaration of June 30, 2004, filed in the Keepseagle case:

> Finally, I created a computer tracking system for complaints. . . . Prior to the tracking system, OCR's handling of complaints lacked any accountability. As a result of the dismantlement of the [OCR], files were left in an unsecured room, where anyone could walk in, take a file and no one would ever know the file was missing. OCR had not assigned anyone to manage the files in the file room. [As] [a]n example of how bad the situation was, several days after becoming OCR Director, I walked into the room containing the complaint files and no one ever questioned or stopped me from accessing the files in the file room. There were files thrown on top of file cabinets and some lying in the corner. Upon examining the files, we found complaint files for one farmer mixed in with another farmer's file.

Declaration of Lloyd E. Wright, June 30, 2004, ¶ 11.[4] In addition, Rosalind Gray, Wright's successor as Director of the OCR, stated that "[b]ased upon my first-hand knowledge, I can attest that many complaints were destroyed or not accepted at all." Declaration of Rosalind Gray, April 6, 2002, ¶ 20.[5] Ms. Gray further noted that when she arrived at OCR there was a significant backlog and the "files were and remained in disarray." Id. ¶ 11.

For a period of nearly twenty years extending at least into the late 1990s, complaints, to the extent that they were reduced to writing and passed on to the OCR, were relegated to an unsecured empty office to gather dust. Against the backdrop of this sordid history of shoddy record keeping, USDA now takes the position that if OCR cannot find a copy of a complaint in its files, then no complaint was filed. Furthermore, notwithstanding explicit requirements to the contrary, OCR also takes the position that an oral complaint does not constitute a filed complaint.

On August 17, 2004, Vicky and Ray Garza along with Adam and his former wife Stella Garza ("the Garzas") received a "Notice of Substitute Trustee's Sale" from Vanessa Studdard, the farm loan manager of the USDA/FSA Hockley County office in Levelland, TX. The notice stated that Ms. Studdard, the "Substitute Trustee," planned to foreclose upon and sell their properties at a public auction to be held on September 7, 2004. The Garzas are putative class

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[4] See Exhibit 4, September 8, 2004 Letter to Lisa Olson from Stephen Hill, Exhibit B.

[5] See Exhibit 4, Exhibit C.

members of the Garcia lawsuit. More importantly, they have all filed civil rights complaints with the USDA. Indeed, Vicky Garza has on more than one occasion complained directly to Lisa Burgay, Farm Loan Specialist at the Texas state FSA office on behalf of herself and her other family members.[6] In addition, between 1994 and 1999, William Arens, a farmers' advocate, made several complaints on the Garzas' behalf to the local USDA office. In 1995, Ms. Garza also enlisted the aid of then Senator Gramm to help in her dealings with the FSA. Moreover, Vicky Garza attended the September 25, 2002 House Agriculture Committee hearing regarding USDA's treatment of minority farmers and her declaration submitted in support of plaintiffs' motion for class certification was made a part of the hearing record. At that time, Ms. Garza spoke at length to Congressmen Reyes and Stenholm regarding the discriminatory treatment her family has suffered at the hands of the USDA. To date, the Garzas have received no indication that an investigation of their complaints has been initiated, much less completed.

In response to the above notice and pursuant to Mr. Isler's instructions, plaintiffs' counsel notified Mr. Wai-Ping Chan, the USDA Civil Rights EEO Specialist, Programs Investigator and Class Action Coordinator, and Paul Gutierrez, the Deputy Assistant Secretary of Civil Rights, and informed them of FSA's intent to foreclose against the Garzas despite their pending civil rights complaints.[7] On August 20, 2004, Mr. Chan responded stating that he would look into the matter. Plaintiffs were in continuous contact with USDA asking it to adhere to its well-settled policy of not taking adverse action against farmers with pending civil rights complaints. Again, on August 24, 2004 and August 30, 2004 plaintiffs contacted Messrs. Chan and Gutierrez regarding the status of the Garzas' investigation. On August 30, 2004, Mr. Gutierrez replied that the USDA was still looking into the matter.[8]

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[6] See Exhibit 3, FSA Program Discrimination Complaint Process and Factfinding Inquiries Notice AO-1174 § D ("A verbal complaint may be filed with any FSA employee. If a complainant makes an allegation in person, or through a telephone conversation, and is unable or unwilling to put the allegation in writing, the employee to whom the allegation is made must put the particulars of the complaint in writing.").

[7] See Exhibit 5, August 19, 2004 email to Mr. Chan from Jennifer Samolyk.

[8] See Exhibit 6, August 30, 2004 email to Ms. Samolyk from Mr. Gutierrez.

On August 31, 2004, plaintiffs' counsel sent a letter to Vernon Parker, Assistant Secretary for Civil Rights, detailing the Garzas' dilemma.[9] Opposing Counsel, Lisa Olson, was also provided a copy of the letter. To date, there has been no response to the letter from the Assistant Secretary. As discussed more fully, infra, Ms. Olson's "response" was received approximately ten minutes before the proposed foreclosure sale. Thus, on the eve of the Labor Day holiday weekend, the matter presumably was still under review by USDA so far as counsel for plaintiffs knew. At some point on Friday, Vickie Garza was informed that FSA planned to go forward with the sale. Unfortunately, plaintiffs' counsel was out of the office that day and did not learn of the FSA's intention to proceed until that evening.

On the morning of September 7, 2004, the very next business day, plaintiffs' counsel was again in contact with the OCR and providing it with additional evidence of the Garzas' complaints. When those talks broke down, plaintiffs' counsel contacted Ms. Olson who, in turn, contacted Ms. Gause of the USDA Office of the General Counsel. During that conversation, plaintiffs' counsel informed Ms. Olson and Ms. Gause that plaintiffs planned to seek an emergency hearing with the Court to stay the sale of the Garza's properties. At the request of Ms. Gause, plaintiffs delayed seeking that hearing to provide Ms. Gause an opportunity to determine USDA's final position concerning the proposed sale. Plaintiffs, in good faith, agreed to Ms. Gause's request. Plaintiffs' counsel waited approximately one hour and twenty minutes for USDA's response. With ten minutes left before the proposed sale, Ms. Olson informed plaintiffs that USDA had decided not to delay the sale. Significantly, when plaintiffs sought to contact the Court to request an emergency hearing, Ms. Olson refused to remain on the line. Instead, Ms. Olson insisted that plaintiffs' counsel contact the Court and then call her, thereby further delaying matters when time was clearly of the essence.[10]

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[9] See Exhibit 7, August 31, 2004 Letter to Vernon Parker from Stephen Hill.

[10] See Exhibit 4, September 8, 2004 Letter to Lisa Olson from Stephen Hill.

Once the hearing commenced, Ms. Olson continued to delay the process. After a lengthy delay to confer, Ms. Olson argued that USDA was not required to adhere to its well-settled policy because (1) the policy is "voluntary" and (2) USDA could not find any record of the Garzas complaints filed with OCR. Ms. Olson's argument was wholly disingenuous and without merit.[11] Ultimately, the Court requested that USDA delay the sale for thirty days. Unfortunately, however, the sale of the properties occurred approximately twelve minutes before the USDA Office of the General Counsel asked the FSA to stop it. Significantly, the Texas State FSA advised plaintiffs' counsel that all that was required to stop the sale was a telephone call from OCR. That is what prompted plaintiffs to contact OCR on multiple occasions, including at the eleventh hour. The failure of OCR to respond forced plaintiffs' counsel to seek an emergency hearing with the Court, but USDA thwarted this effort through stalling tactics which effectively rendered the matter moot. It would have been a simple matter for OCR to instruct the Texas state FSA to briefly delay the foreclosure sale to permit the Court to fully and fairly consider the issue.

ARGUMENT

USDA SHOULD BE REQUIRED TO ADHERE TO ITS POLICY OF NOT TAKING ADVERSE ACTION AGAINST FARMERS WITH PENDING CIVIL RIGHTS COMPLAINTS.

The Court may issue a preliminary injunction when the movant demonstrates that: (1) the movant will be irreparably harmed if an injunction is not granted; (2) there is a substantial likelihood that the movant will succeed on the merits; (3) the public interest will be furthered by the injunction; and (4) an injunction will not substantially injure the other party. See Lee v. Christian Coalition of Am., 160 F. Supp. 2d 14, 26 (D.D.C. 2001). Plaintiffs are able to demonstrate each of the required factors, and accordingly request that the Court issue a

[11] See Exhibit 4, September 8, 2004 Letter to Lisa Olson from Stephen Hill detailing the deficiencies in opposing counsel's argument.

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preliminary injunction enjoining the defendant from foreclosing, transferring the debt of the plaintiffs to the Secretary of the Treasury, and pursuing any other debt enforcement measures.

A. The Plaintiffs Will Be Irreparably Harmed If An Injunction Is Not Granted.

The Garzas lost their property and several other plaintiffs are on the verge of foreclosure by the USDA. As the Seventh Circuit noted, "[i]t is settled beyond the need for citation . . . that a given piece of property is considered to be unique, and its loss is always an irreparable injury." United Church of the Med. Ctr. v. Medical Ctr. Comm'n, 689 F.2d 693, 701 (7th Cir. 1982). The plaintiffs filed suit against the USDA for discriminatory practices in connection with its credit and non-credit programs. The debt in question occurred as a result of USDA's refusal to supply Hispanic farmers with the proper funding and servicing afforded to their white counterparts. Therefore, forcing these impoverished plaintiffs out of their homes and off their land will cause them substantial harm. See Johnson v. United States Dep't of Agric., 734 F.2d 774, 788-89 (11th Cir. 1984) ("Possibly wrongful eviction from one's home is a serious injury. It is well recognized that real property is unique and not fungible. A person's home has even more intangible value. The whole family is uprooted and displaced. . . . We are convinced that the relative harm to the government from granting a preliminary injunction pales when compared to the serious injury class members suffer when they are forced from their homes."). Clearly, plaintiffs have demonstrated that they have and will continue to suffer irreparable harm so long as USDA continues to flout its policy of not taking adverse action against farmers who have pending civil rights complaints.

B. There Is A Substantial Likelihood That The Plaintiffs Will Succeed On The Merits.

Plaintiffs have brought a claim against the USDA for discrimination on the basis of national origin and ethnicity in violation of, inter alia, the Equal Credit Opportunity Act ("ECOA"). Plaintiffs allege that the USDA willfully discriminated against them when it denied their applications for credit and/or benefit programs or delayed the processing of their

applications for credit and/or benefit programs solely on the basis of their national origin and ethnicity. In addition, plaintiffs allege that the USDA failed to properly investigate and resolve their initial complaints of discrimination.

ECOA prohibits discrimination in the processing and servicing of credit applications. In denying defendant's motion to dismiss, this Court acknowledged that plaintiffs have stated a viable cause of action. Indeed, the statutory language makes that conclusion inescapable. See, e.g., 15 U.S.C. §§ 1691(a)(1) ("It shall be unlawful for any creditor to discriminate against any applicant, with respect to any aspect of a credit transaction – (1) on the basis of race, color, religion, national origin, sex or marital status, or age"); 1691a(e) (defining a "creditor" as "any person who regularly extends, renews, or continues credit; any person who regularly arranges for the extension, renewal or continuation of credit; or . . . who participates in the decision to extend, renew, or continue credit"); 1691a(f) (defining a "person" as including the "government or governmental subdivision or agency,"); 1691e(a) (providing that "any creditor who fails to comply with any requirement . . . [of ECOA] shall be liable to the aggrieved applicant for any actual damages sustained by such applicant acting either in an individual capacity or as a member of a class"); and 1691e(c) (authorizing the court to "grant such equitable and declaratory relief as is necessary to enforce the requirements [of ECOA].") (Emphasis added.)

The USDA's discrimination in farm loan programs is well established. In 1982, the United States Civil Rights Commission issued a detailed study of credit discrimination at USDA.[12] The Commission found, inter alia, that "there were significant and chronic discrimination problems" within the USDA. Farmers' Legal Action Group Inc., Standard Operating Procedure Manual for Investigators, Part I ("FLAG Manual") at 7 (1997).[13] Over a

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[12] U.S. Civil Rights Commission, The Decline of Black Farming in America (1982).

[13] FLAG is a well-respected farmer's advocacy group that was requested by Congress to give testimony in connection with the 1990 House hearings on the Decline of Minority Farming in the United States. See Hearing Before the Subcomm. on Government Information, Justice, and Agriculture of the House Comm. on Government Operations, 101st Cong. (1990) (Exhibit 6 to Plaintiffs' Supplemental Memorandum In Support of Their Motion For Class Certification, filed April 8, 2002 (Docket #50)).

decade later, in 1994, the FSA commissioned a massive study of discrimination in the various USDA credit and benefit programs by D.J. Miller & Associates. Having had unprecedented access to USDA's credit and benefit program records, D.J. Miller & Associates, in two volumes that came to be known as the Miller Report, documented the systemic discrimination that infected those programs with anecdotal and statistical evidence. In 1998, acknowledging the USDA's blatant disregard for the requirements of ECOA, Congress waived the statute of limitations applicable to ECOA claims arising between 1981 and 1996 in connection with the USDA's farm loan programs.

Furthermore, former Secretary Glickman, the original defendant in this lawsuit, admitted that USDA had a history of discriminating against minorities. See Treatment of Minority and Limited Resource Producers by the U.S. Department of Agriculture: Hearings Before the Subcomm. on Department Operations, Nutrition, and Foreign Agriculture of the House Comm. on Agriculture, 105th Cong. 94-95 (1997) (testimony of Hon. Dan Glickman).[14] In an attempt to address USDA's discriminatory practices, Secretary Glickman held approximately twelve Civil Rights Action Team listening sessions. During these sessions, Secretary Glickman repeatedly acknowledged the many accounts of USDA's discriminatory practices. Secretary Glickman further promised to change discriminatory policies and take measures to stamp out discrimination within the USDA. See id. However, in the end these declarations proved to be empty promises.

Considering the defendant's well-documented and blatant history of discrimination, plaintiffs have certainly demonstrated a strong likelihood of success on the merits of their ECOA claims.

C. The Public Interest Will Be Furthered By The Injunction.

As previously mentioned, FSA has foreclosed against several plaintiffs who had pending civil rights complaints. However, in a case brought by a group of white farmers against the USDA alleging that USDA discriminated against them by providing African-American farmers

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[14] See Exhibit 8.

with certain remedies and debt servicing that were not afforded to white farmers, plaintiffs sought, inter alia, a preliminary injunction prohibiting USDA from foreclosing, accelerating plaintiffs' accounts and other debt collection activities until the resolution of the suit. See Green v. Veneman, 159 F.Supp.2d 360, 362 (S.D. Miss. 2001); see also Letter to Michael Sitcov from James Robertson dated June 25, 2000. [15] However, the parties reached an agreement by which USDA agreed, inter alia,

> (1) The United States Department of Agriculture and all of its agencies and instrumentalities ("USDA") will not continue or complete any formal foreclosure or other repossession proceedings against Plaintiffs property, including judicial foreclosures, power of sale foreclosures, and other non-judicial foreclosures.
>
> (2) The USDA will not commence any new formal foreclosure or repossession proceedings.
>
> [T]he USDA will suspend its non-judicial collection efforts, including the suspension of any further referrals of delinquent loans or accounts to the Treasury Department and in the case of those accounts that have already been referred, will request that the Treasury Department suspend its efforts to collect, including the efforts of any private collection agency acting on behalf of the Treasury Department or the USDA.

See (Exhibit 9, ¶¶ 1-2, 8).

Essentially, USDA agreed to a "general moratorium on debt enforcement." (Id. at Introduction). It is significant that Michael Sitcov and Rupa Bhattacharyya, the same attorneys handling the instant matter, represented USDA in negotiating the aforesaid moratorium on debt enforcement in Green.

In light of USDA's agreement with the Green plaintiffs, there can be no justification for USDA's refusal to accord the same treatment for Hispanic plaintiffs. The public interest will certainly be furthered by an injunction ordering the USDA to comply with its own longstanding policy. Furthermore, given the agreement reached in Green, USDA simply cannot be permitted

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[15] See Exhibit 9.

to engage in a policy of unequal treatment of Hispanic farmers in the administration of its regulations. What is fair for white farmers is equally fair for Hispanic farmers.[16]

D. An Injunction Will Not Substantially Injure The Defendant.

The requested relief will not substantially impinge upon the defendant financially. Though the defendant will be prohibited from foreclosing upon farmers who have filed discrimination complaints while their complaints are pending, interest will continue to accrue and the defendant will be free to take such action once the pending civil rights complaint is resolved unless the Court determines that the debt is legally unenforceable. Thus, there is no cognizable harm to the defendant, while the harm to the plaintiffs by denying the requested relief is undeniably severe. In considering the "harm to the non-moving party" prong of a preliminary injunction request, the Court should balance the equities, see, e.g., Lee, 160 F. Supp. 2d at 34, and in the present action, the balance of the equities favors the plaintiffs.

CONCLUSION

For the foregoing reasons, plaintiffs request that the Court enter an order prohibiting the defendant from foreclosing against plaintiffs who have pending civil rights complaints and in the case of the Garzas that USDA be ordered to repurchase the property sold and return it to the Garzas thereby restoring the status quo ante.

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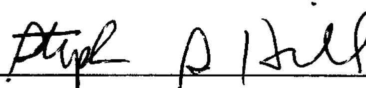
[16] On information and belief, USDA is deferring action on pending civil rights complaints while the current litigation is pending. The problem, however, is that, as previously noted, USDA takes the position if it cannot find a farmers complaint then the farmer is deemed not to have filed a complaint notwithstanding the well-documented lapses in USDA's record keeping practices and the bureaucratic black hole that was OCR's complaint filing system.

Respectfully submitted,



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Date: November 1, 2004

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ORDER

Upon consideration of Plaintiffs' Emergency Motion for Preliminary Injunction and defendant's opposition thereto, it is hereby

ORDERED that United States Department of Agriculture ("USDA") refrain from taking adverse actions, including foreclosures and other debt enforcement, against farmers who have pending civil rights complaints until such complaints have been finally resolved by USDA through its administrative process or until this litigation is finally resolved, which ever is later.

It is further ORDERED that the United States Department of Agriculture repurchase the properties belonging to Vickie and Ray Garza and Adam and Stella Garza that were sold at auction on September 7, 2004 and return said properties to the Garzas thereby restoring the status quo ante.

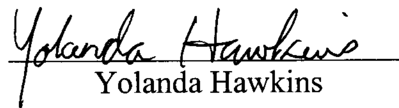
SO ORDERED this _______ day of __________ 2004.

James Robertson
United States District Judge

CERTIFICATE OF SERVICE

I hereby certify that I caused a copy of the foregoing Plaintiffs' MOTION FOR EMERGENCY PRELIMINARY INJUNCTION to be served by means of the clerk's electronic notification system, this 1st day of November, 2004 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



Yolanda Hawkins