

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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| GUADALUPE L. GARCIA, ET AL. | : | Civil Action No. 00-2445 |
| | : | |
| Plaintiffs | : | June 28, 2006 |
| v. | : | |
| | : | |
| DAN GLICKMAN, SECRETARY, | : | 4:00 p.m. |
| UNITED STATES DEPARTMENT OF | : | |
| AGRICULTURE, | : | |
| | : | |
| Defendant | : | |
| | : | |

TRANSCRIPT OF SCHEDULING CONFERENCE
BEFORE THE HONORABLE JAMES ROBERTSON
UNITED STATES DISTRICT JUDGE

APPEARANCES:

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P R O C E E D I N G S

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COURTROOM DEPUTY: This is civil action number 00-2445, Garcia, et al. versus Dan Glickman, Secretary, United States Department of Agriculture. Mr. Hill present for the plaintiffs, Ms. Olson, Ms. Franklin, and Mr. Walkow present for the defendants.

THE COURT: This is the first matter I've had all day that isn't a criminal matter, so just be careful I don't step somebody back at the end of the proceeding this morning.

Mr. Hill, how are you, sir?

MR. HILL: Good afternoon, Your Honor. Fine, thank you, and yourself. Also appearing with me is Mr. Fraas for the plaintiffs.

THE COURT: Mr. Fraas.

MR. HILL: We would like to raise just two issues this time, Your Honor, in light of the Court of Appeals' recent rulings. One, we would like to renew our motion and request to file a third amended complaint - that's been fully briefed - and the only other matter we would raise is a briefing schedule.

THE COURT: All right. Am I in default on a ruling on a motion for leave to file a third amended complaint?

MR. HILL: You denied it without prejudice, Your Honor, when you ruled on our motion for class certification. And since the Howrey law firm took over primary responsibility for the day-to-day running of this case, we've undertaken our own sort

1 of investigation and analysis. We have our own theory of the
2 case. We have never been afforded an opportunity to file an
3 amended complaint to craft the complaint in the way we think it
4 makes the most sense.

5 One of the things we certainly would like to do, as we
6 have repeatedly said, Your Honor: Abandon that \$20 billion
7 damage demand.

8 THE COURT: Okay. The third amended complaint -- does
9 the third amended complaint include this APA count --

10 MR. HILL: Yes.

11 THE COURT: -- that is still up for grabs after the
12 Court of Appeals?

13 MR. HILL: Yes.

14 THE COURT: All right. Any objection, Ms. Olson?

15 MS. OLSON: Yes, Your Honor. Just on the -- I would
16 first like to address the issue of the third amended complaint,
17 because I think it's pretty clear-cut. And then there are a
18 couple of other points I wanted to make.

19 But the Court of Appeals in footnote 13 said that -- it
20 said the five subclasses were set forth in their proposed third
21 amended complaint, which the District Court denied without
22 prejudice. Their challenge to the District Court's denial of
23 their motion to amend is supported by conclusion assertions
24 only, and they have therefore waived the issue. So they've
25 already had I don't know how many bites at the apple, and their

1 law firm was representing the plaintiffs when they moved to
2 amend the third -- to file the third amended complaint --

3 THE COURT: Well, but I denied it without prejudice, so
4 how are you prejudiced by the filing of a third amended
5 complaint?

6 MS. OLSON: Well, we're prejudiced in that we're at
7 some point entitled to repose. I mean, how many times are they
8 allowed to draft and redraft their complaint? I mean, it's
9 costly to the government.

10 THE COURT: I understand. Understood. What does it
11 add to -- what does its add -- now, one thing I have frequently
12 done with amended complaints, particularly with, excuse me,
13 Mr. Hill, serially amended complaints, is to tell the defendant,
14 you don't have to file a reply to a third amended complaint. If
15 it's just stating another legal theory and not more facts that
16 have to be responded to, then it's kind of a waste of time to
17 put you through the burden of filing another whole response to a
18 third amended complaint.

19 So we can manage the burden on the government of
20 responding to a third amended complaint, but except for the
21 burden, how are you prejudiced by the filing of the third
22 amended complaint?

23 MS. OLSON: I don't think -- other than the burden, I
24 don't see that there is one. I would like -- we would like the
25 chance, though, to respond, because I think we could explain how

1 it differs from previous complaints and maybe save the Court
2 some leg work, or at least --

3 THE COURT: I'm not going to deny you the chance to
4 respond, I'm just going to relieve you of the burden of
5 responding. Those are, in my mind, two different concepts.

6 MS. OLSON: I think it's primarily the burden, and the
7 fact --

8 THE COURT: The motion for leave to file the third
9 amended complaint is granted, with the understanding that the
10 government will not be required to file a complete response
11 within the rule, but only such response as the government feels
12 it needs to make. Okay?

13 MS. OLSON: Thank you.

14 THE COURT: Done. Now let's get on to the next
15 request.

16 MR. HILL: The only other request, Your Honor, is a
17 briefing schedule that tracks the time periods in terms of
18 number of days that you granted in the Love case.

19 THE COURT: That's fine with me. Do you have any
20 objection to that, Ms. Olson?

21 MS. OLSON: Well, yes, Your Honor. I do want to point
22 out to the Court that they've had plenty of bites at the apple
23 here and opportunities to brief this APA issue. I think at this
24 point they ought to at least be required to make some proffer as
25 to what new issues they're going to raise. This was fully

1 developed in the District Court. In our motion to dismiss, we
2 devoted about 12 pages to it. I don't know what we did in the
3 reply. They had a full opportunity to respond, and did so, and
4 the question now is what can they say about their APA claim
5 that's new.

6 I think they're just going to be putting old wine in
7 new bottles, and we've been through this so many times before,
8 each party has had a chance to say everything it could say, and
9 I think that they ought to at least be able to explain what
10 they're going to bring out that's new.

11 And secondly I wanted to point out to the Court that
12 the APA claim was properly dismissed, and the Court of Appeals
13 didn't disturb that decision, it just remanded it. But a remand
14 isn't an order for more briefing, it's just the Court of Appeals
15 just declined to exercise its jurisdiction over the issue and it
16 said that the claim could benefit from further development.
17 Because on appeal, at least, the appellant devoted only four
18 pages to the issue in its brief, but as we've said, it was fully
19 fleshed out in this court. And I think now they're being given
20 sort of an open-ended chance to continue to revive this case,
21 when I think it should be dead -- or this issue, anyway.

22 And then there's, of course, the question of what
23 relief they could be granted under a failure to investigate
24 claim under the APA. Because as this court has observed, their
25 remedy was to file an ECOA suit, Equal Credit Opportunity Act

1 suit, on the underlying credit discrimination claim, and
 2 Congress specifically looked at the issue of the systematic
 3 failure to investigate and gave the complainants two extra years
 4 to file on the underlying ECOA claim. They waived the statute
 5 of limitations for two years. So that's where their remedy
 6 lies. And if they're looking for money here on this failure to
 7 investigate claim, the APA doesn't provide it. So I just don't
 8 know where this is going to end.

9 And then if we do get into briefing, I hope we can
 10 avoid getting into Rule 23 until we at least find out whether
 11 there's a viable APA claim, because that's a lot of work for
 12 nothing if the APA claim is in fact dead, as this court has I
 13 think rightfully said it is.

14 And if they're trying to buy time here to bring their
 15 individual claims, I just think we should confront that issue
 16 head on. They overlooked the fact that once the Court of
 17 Appeals issued their mandate, they should have filed their
 18 claims the next day or sought additional time to do so, and they
 19 didn't. I think that's a gross oversight, which apparently -- I
 20 don't know why it deserves to be excused, but if we are going to
 21 excuse it, we should have some finite time limit for those
 22 claims to be filed so that this case has a foreseeable end.

23 THE COURT: Old wine in new bottles, Rule 23,
 24 individual claims, Mr. Hill?

25 MR. HILL: Thank you, Your Honor. There's certainly

1 not going to be old wine in new bottles, however the expression
2 goes. We do have additional arguments to make. I don't know
3 why we're suddenly subject to a special rule, when the Love
4 plaintiffs were given a briefing schedule and we're in
5 essentially the same posture. There is certainly case law for
6 the proposition that you can assert both a discrimination claim
7 and an APA claim at the same time, the Weinberger case being one
8 decided by the DC Circuit.

9 In addition, there are arguments that we never got the
10 chance to make because the ruling had already been made by the
11 time we got into the case, essentially.

12 On the question of the Rule 23, as we see it, this is a
13 pure legal question that was sent up under
14 Section 28 U.S.C. 1292, and we propose to address the legal
15 question that the Court of Appeals remanded and said would
16 benefit from further briefing here at the District Court.

17 Her argument with respect to ECOA being the alternative
18 remedy; one, we think the Weinberger case gets around that, but
19 assuming argument that it doesn't, Your Honor found that we had
20 satisfied the requirements with respect to the noncredit benefit
21 claims in connection with the claims of plaintiff
22 Gloria Morales. And with respect to those claims, Your Honor
23 also found that they were not credit claims; therefore it
24 follows ineluctably that ECOA can't be an adequate remedy for
25 those claims. And Your Honor pointed out that those claims are

1 properly brought under the APA.

2 Your Honor also pointed out in footnote nine in your
3 initial decision that if the APA claims were still in the case,
4 we would be entitled to the specific remedies that we cite in
5 our complaint. And the Court of Appeals took special note of
6 that during the oral argument, I point out at pages 12 through
7 14 of the transcript.

8 So there are clearly answers, and it's my understanding
9 because you entered such an order after we filed an emergency
10 motion back when you issued the first decision in December 2002,
11 that these matters, as far as the statute of limitations was
12 concerned, were stayed pending further order of the Court.

13 So I don't think we have had any -- we have been
14 relying on that, and if you recall in our December 18th, 2002 --

15 THE COURT: That's a big if.

16 MR. HILL: Well, I could --

17 THE COURT: Four years ago.

18 MR. HILL: Well, there was an extended colloquy between
19 Your Honor and myself about the wording of that and whether it
20 needed to be clarified further, and you got an understanding
21 from the -- you got a commitment from the DOJ that everybody was
22 operating on the assumption that the statute of limitation was
23 stayed with respect to the punitive class members pending
24 further order of the court. So for them to go back on that now
25 and suggest somehow we've waived something is a bit

1 breathtaking, from my standpoint.

2 We have a proposed schedule. In terms of the days, it
3 tracks the days you gave --

4 THE COURT: What's your schedule, Mr. Hill?

5 MR. HILL: If I may present it to Your Honor.

6 THE COURT: Sure. Ms. Olson, do you have any dispute
7 about Mr. Hill's proposition that the statute of limitations has
8 been tolled up until now?

9 MS. OLSON: I didn't understand what he was relying on
10 for that assumption. Because is this for the -- for the
11 individual claims, the ECOA statute of limitations expired the
12 day after they filed their -- or would have expired the day
13 after they filed their suit. So when the mandate issued, they
14 should have filed their claims. May I confer with --

15 THE COURT: Mr. Hill, explain that to me. Because my
16 understanding, too, was that the ECOA deadline was about the
17 same time you filed your -- so what is it that was stayed?

18 MR. HILL: There was an eight-day gap -- now, the Love
19 plaintiffs, they filed their complaint a day before the special
20 statute of limitations was to run. We filed our case on
21 October 13th, and the statute would have run on October 21st, I
22 believe. So we would have eight days. And when Your Honor
23 issued your first order on December 2nd, 2002, we immediately
24 filed an emergency motion nunc pro tunc that Your Honor granted
25 staying the tolling of the statute of limitations until further

1 order of the court.

2 And whence once -- you know, we also had filed a
3 motion -- we had filed an appeal, as you'll recall, and when we
4 withdrew that appeal after getting further -- after being
5 promised further discovery, there was a colloquy, as I recall,
6 about whether or not the order needed to be revised. Your Honor
7 was not inclined to revise the order, saying that it was
8 understood -- and I believe you got a commitment on the record
9 in the transcript from the government that everyone understood
10 that the statute of limitations was tolled pending further order
11 of the Court. And we have operated in good faith under that
12 assumption ever since, and it has never been any distinction --
13 understanding that there was any distinction in our mind between
14 an ECOA claim or an APA claim, since both were extended by the
15 same special statute.

16 THE COURT: All right. Give me a minute here. I'm
17 pulling this. Let's see. On December the 2nd, 2002, all I did
18 was to set a status.

19 MR. HILL: Right. And shortly thereafter, Your Honor,
20 a day or two thereafter, we filed an emergency motion
21 nunc pro tunc that you granted. Because the problem was, Your
22 Honor, you issued your order denying class certification, which
23 came as something of a surprise to us since we thought we were
24 pending a discovery dispute, and you set the pre-hearing date
25 for a time outside the period for filing a petition for review.

1 So out of an abundance of caution --

2 THE COURT: "Upon consideration of plaintiff's
3 emergency motion to stay proceedings in this case nunc pro tunc
4 for purposes of tolling the statute of limitations pending
5 resolution of plaintiff's Rule 23(F) appeal, it is by the Court
6 ordered that the plaintiff's motion to stay proceedings for
7 purposes of tolling the statute of limitations is granted, and
8 the case is stayed nunc pro tunc to December 2nd for purposes of
9 tolling the statute of limitations pending resolution of
10 plaintiff's Rule 23(F) appeal."

11 MR. HILL: Yes, Your Honor.

12 THE COURT: But what statute of limitations was I
13 talking about?

14 MR. HILL: I assumed you were talking about the special
15 statute -- the reason we filed that was because under the
16 special statute of limitations, once you denied our motion for
17 class certification, under the case law as we understood it, we
18 had a certain period of time in which to either file to have
19 putative plaintiffs join this case or file their separate cases.

20 And that's why we filed that motion, and when it was
21 granted -- and then after Your Honor gave us discovery and we
22 withdrew appeal -- petition for review, we raised the issue
23 again and asked if the order needed to be modified or clarified.
24 And you said no, everyone understood what it meant, and that the
25 government wasn't going to take any -- and got a commitment from

1 I believe it was Mr. Sitkoff (ph) that they weren't going to
2 take any action contrary to that understanding.

3 MS. OLSON: If I'm recalling correctly, and this has
4 been our understanding and our discussions within the office,
5 the statute -- that order addressed the statute of limitations
6 until the resolution of the class certification appeal. And
7 that occurred when the circuit court issued its mandate. So
8 that's when we believed any extension of the statute of
9 limitations expired, and I think that's what your December order
10 meant.

11 MR. HILL: But Your Honor's order was quite clear that
12 it was until further order of the court; i.e., Your Honor.

13 MS. OLSON: Well, but pending -- I mean, I'm not going
14 to argue with what the Court meant. The Court knows what it
15 meant. But our understanding was that it was pending the
16 resolution of the class certification issue, unless --

17 THE COURT: Well, you know the line attributed to
18 Robert Browning, don't you?

19 MS. OLSON: Although I was an English major, I should
20 know that.

21 THE COURT: When I wrote that line, only God and
22 Robert Browning knew what it meant, and now, only God knows.

23 MS. OLSON: Well, we'll ask you to be God.

24 MR. HILL: We have been operating -- and I dare say the
25 Love plaintiffs as well, we've been operating -- I know we have

1 been operating under the assumption that it was clear that the
2 statute of limitations with respect to those individual claims
3 were stayed.

4 THE COURT: Okay. I think I understand the issue now.
5 Ms. Olson, you don't doubt that the order that I issued in
6 December 2002 for purposes of tolling the statute of limitations
7 referred to any remaining time on the statute of limitations
8 under the ECOA statute --

9 MS. OLSON: That's correct. For filing --

10 THE COURT: -- but your position is that once the
11 Court of Appeals decided on the Rule 23(F) appeal, whenever they
12 took it up, that ended the period of limitations. Right?

13 MS. OLSON: That's right. And we were interpreting
14 that conservatively; that is, not when the Court of Appeals came
15 down with its decision, but when the mandate issued, so that it
16 was completely out of the Court of Appeals. And at that point
17 it was incumbent on them to file their individual claims.

18 THE COURT: Well, Ms. Olson, the statute of limitations
19 is what it is. It's a matter of law, it's a matter within the
20 competence both of this court and of the Court of Appeals. I am
21 not going to put any more of a gloss on this statute of
22 limitations issue than the orders themselves impose. I am going
23 to continue to allow the plaintiffs to pursue any ECOA claims
24 that they may have left, and if there is an issue that has to be
25 made with the statute of limitations, it can be -- I'm not going

1 to decide this on the fly today, nor do I think, as a matter of
2 fact, that I'm going to rule out the ECOA claims myself, but the
3 Court of Appeals might. They have more than once told me that
4 the statute of limitations had run when I thought it had not.
5 And that's going to be up to the Court of Appeals.

6 It was Mr. Hill who was first to remind me that a
7 mandate had come down, and wasn't I going to get a status
8 conference together, which I did, and I, at least at this stage,
9 am not going to penalize the plaintiffs for not acting the day
10 after the Court of Appeals mandate came down in this case.

11 So now --

12 MS. OLSON: And Your Honor, we were not aware of the
13 mandate until this court set the status conference either, so we
14 weren't hiding anything.

15 THE COURT: The only question I have is whether I need
16 to amend this proposed order that Mr. Hill has given me so that
17 it doesn't put my thumb on one side or another of the scale on
18 this statute of limitations question.

19 MR. HILL: Your Honor, in form and substance, it's the
20 same that you entered in the Love case.

21 MS. OLSON: Well, but Your Honor, if they were going to
22 bring individual claims, that would be separate from what the
23 Court might do today in response to the Court of Appeals order
24 regarding the failure to investigate claim under the APA.

25 THE COURT: All right. I'll take this order and I will

1 either tinker with it or sign it. But the briefing schedule --
2 there's nothing wrong with the briefing schedule, is there?

3 MS. OLSON: No, time wise.

4 MR. HILL: And again, Your Honor, you're certainly free
5 to check it, but you'll find that that last paragraph is a
6 verbatim quote from the Love order.

7 THE COURT: What, "continues to toll"?

8 MR. HILL: Yes, Your Honor. Absolutely.

9 THE COURT: All right. Well, I'm sure you're right,
10 Mr. Hill, but I just want to go back and do a little archaeology
11 on this myself before I sign this order.

12 MR. HILL: And in that case you might want to look for
13 further background at I believe it's the status conference that
14 took place in January of 2003, right after -- you told me on
15 December 18th, you have a decision to make, Mr. Hill, either go
16 forward with your appeal, or perfect your appeal, or withdraw it
17 and get discovery, and I believe it was either at the December
18 hearing or the January when I think -- more than likely the
19 January one, where we discussed modifying the order, and you
20 said there was no need to modify it, and got an understanding
21 from the government. But thank you for your time.

22 THE COURT: That status hearing was in early January?

23 MR. HILL: Yes, Your Honor. As I recall.

24 THE COURT: All right. Well, there's already a
25 transcript on file. I'll pull the transcript and take a look at

1 it. Thank you.

2 MR. HILL: Absolutely. Thank you, Your Honor.

3 THE COURT: So again, Ms. Olson, on the question of
4 briefing, if and to the extent your response to the plaintiff's
5 brief that they're going to file in August is, we've been over
6 this all and this has all been fully briefed before, then you
7 don't have to write it all again, you can just incorporate by
8 reference what you've briefed before. So you can manage your
9 own burden here. All right?

10 MS. OLSON: Yes. But Your Honor, are they going to get
11 into class certification issues? Because it would seem
12 appropriate to limit the briefing to whether or not the APA
13 failure to investigate claim is viable.

14 THE COURT: I don't read this as suggesting that you're
15 going to tee up the class certification question again in
16 August, are you?

17 MR. HILL: As I understand it, Your Honor, if we're
18 right on the question of the APA claim, class certification
19 follows naturally, in light of your earlier rulings and given
20 the holdings --

21 THE COURT: My earlier what?

22 MR. HILL: Your comment -- I'll put it this way. Not
23 your earlier ruling, your comment in footnote nine in the first
24 Garcia case suggesting that if the APA claims are still in the
25 case, then there is a predicate for a B(2) certification. And,

1 you know, that's the --

2 THE COURT: Well, that's the common-question question
3 again, is it not? I think what Ms. Olson is asking is
4 whether -- I mean, we could, I think, pretty efficiently do this
5 in two steps. If there's an APA claim, there's an APA claim,
6 and it may follow almost automatically that there's class
7 certification.

8 MR. HILL: That's what I think, Your Honor.

9 THE COURT: And so why don't we just talk about the APA
10 claim and not the class certification claim, and if the APA
11 claim survives, then she might even agree with you that there's
12 a class.

13 MR. HILL: That's fine.

14 THE COURT: We can save ourselves some briefing pages
15 that way, you writing and me reading.

16 MR. HILL: I think that's wholly consistent with what
17 the Court of Appeals had in mind, Your Honor, frankly.

18 MS. OLSON: And it's the APA failure to investigate
19 claim that the Court of Appeals focused on, not any other claim
20 of any other nature. Their credit claims were dismissed, you
21 know -- right. So I just don't want it to become a free-for-all
22 where we're rehashing everything that's already been done.

23 THE COURT: Okay. I think we all understand each
24 other. I will sign some version of this order, if not exactly
25 this order, within the next day or two, and your schedule is

1 approved.

2 MR. HILL: Thank you, Your Honor.

3 MS. OLSON: Thank you, Your Honor.

4 (Proceedings adjourned at 4:40 p.m.)

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CERTIFICATE OF OFFICIAL COURT REPORTER

I, Rebecca Stonestreet, certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

Rebecca Stonestreet

7-14-06

SIGNATURE OF COURT REPORTER

DATE