

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

GUADALUPE L. GARCIA,	:	Civil Action No. 00-2445
et al.	:	
	:	
Plaintiffs	:	
v.	:	January 16, 2008
	:	
DAN GLICKMAN, Secretary,	:	2:00 p.m.
United States Department of	:	
Agriculture, et al.	:	
	:	
Defendants	:	
	:	
.....	:
ROSEMARY LOVE, et al.	:	Civil Action No. 00-2502
	:	
	:	
v.	:	
ANN VENEMAN	:	
	:	
Defendant	:	
	:	
.....	:

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

APPEARANCES:

For the Garcia Plaintiffs:	STEPHEN S. HILL, ESQUIRE HOWRY SIMON ARNOLD & WHITE 1299 Pennsylvania Avenue, NW Washington, DC 20004 (202) 383-6967
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P R O C E E D I N G S

COURTROOM DEPUTY: This is Civil Action Numbers 00-2445 and 00-2502, Garcia and Love, et al. versus Glickman and Veneman. If counsel that will be addressing the Court please identify yourselves.

MR. HILL: Good afternoon, Your Honor. Stephen Hill on behalf of the Garcia plaintiffs.

MR. WAHL: Good afternoon, Your Honor. Barbara Wahl on behalf of the Love plaintiffs.

MR. SITCOV: Good afternoon, Your Honor. Michael Sitcov, I'll be speaking on behalf of the defendants in Garcia.

MS. WELLS: Carlotta Wells on behalf of the defendants in Love.

THE COURT: Okay. Forgive me for this, but I have difficulty, frankly, keeping these two cases separate, one from another, and so I expect I'm going to hear echos of the same arguments from the Garcia people and the Love people.

We are here this afternoon I think to solve what I consider a problem. The problem is that the plaintiffs want to take an interlocutory appeal of my decision about their APA claims, and they want me to stay further proceedings in this case while they take the appeal.

The government's position is, no, you don't want to grant an interlocutory appeal, and, more importantly, you don't want to stay anything. Let's get on with it. It's been years

1 and years and years. And then the government says some rather
2 unattractive things about the plaintiff, which I wish the
3 government wouldn't say in their papers.

4 By the way, counsel, I've told lots of counsel less
5 seasoned than any of you, but my watch word for the correct
6 borderline in the nasty things you put in pleadings is never
7 ascribe a motive to your opponent. If everybody stuck with that
8 rule, this would be a nicer world and a more pleasant court.

9 At any rate, I'm ascribing no motives to anybody, but I
10 think there are actually merits to both sides of this. It seems
11 to me that the APA issue is an issue that ought to go up. The
12 Court of Appeals expressed some rather prurient interest in the
13 issue when they sent it back to decide, and they're obviously
14 interested in the issue, or were interested enough in the issue
15 to send it back for further proceedings.

16 And I can see that for the plaintiffs, the prospect of
17 a reversal on the APA rulings that I have made means something.
18 But what I want to talk to the plaintiffs about is what does it
19 mean, what do you get out of it.

20 On the other hand, I also think there is justice, so to
21 speak, in the defendant's point of view here, which is if there
22 are individual plaintiffs with individual claims that need to be
23 adjudicated, let's do it.

24 Now, I've been looking at -- and you-all know better
25 than I do what the case law is on appeals and jurisdiction on

1 appeal and what I'm ousted of on appeal and what I'm not. An
2 interlocutory appeal would cut off my jurisdiction to discuss
3 the APA issue, but not, I think, the individual ECOA claims of
4 the plaintiffs that are still unadjudicated. And I would like
5 to hear from both sides why I should not both grant the
6 interlocutory appeal and proceed with the merits of the
7 individual cases.

8 So who wants to talk about that first? Mr. Hill,
9 you're on your way, I can see that.

10 MR. HILL: Thank you. Thank you, Your Honor.
11 Obviously we believe that you should, as you're suggesting,
12 proceed with an interlocutory appeal of your November 30th, 2007
13 order.

14 We also believe, Your Honor, that from the standpoint
15 of conservation of the parties' resources and the Court's
16 resources, it makes sense to stay these proceedings until there
17 is some resolution by the Court of Appeals.

18 Clearly, the prospect of trying these cases twice is
19 one that is not appealing by any stretch of the imagination,
20 trying ECOA claims and then discovering that we may also have
21 the opportunity to try the APA claims as well.

22 THE COURT: What do you try when you try an APA claim?
23 It's a legal issue, isn't it?

24 MR. HILL: Yes. Yes and no. I mean, one of the splits
25 in the circuit is whether or not there is a cause for a

1 certification on the basis of the APA claims, and going forward
2 with them as a class action.

3 Again, here there's the further complication, because
4 as I read it, under the logic of Your Honor's order, we would
5 seem to be entitled to a class with respect to our noncredit
6 claims, because you cite three reasons why the APA claims fail
7 with respect to ECOA at page 11 of your opinion. And you say
8 none of those seem to apply with respect to the noncredit
9 claims, but then you point out that the Love plaintiffs don't
10 have any plaintiff that's asserting such claims.

11 We do, and as we've pointed out in our opening brief
12 and other places, we have any number of named plaintiffs and
13 putative class members who assert such noncredit claims.

14 So it would appear, under the logic of your decision,
15 that we would be entitled -- again, if on the APA claim, if
16 there is a valid claim, you seem to suggest in the past that the
17 class issue would follow almost as a foregone conclusion.

18 THE COURT: Well, if this is all about class actions -
19 and again, I'm ascribing no motives to anybody - but if this is
20 all about getting this thing into a class posture, let me
21 suggest two things to you.

22 First, the non-ECOA disaster benefit claims as to which
23 you have plaintiffs --

24 MR. HILL: Yes.

25 THE COURT: -- strike me -- I mean, what you may have

1 is the right to move for class certification, but on the face of
2 it, they strike me as no different in kind when you're looking
3 at class certification issues from the ECOA claims.

4 I'm not prejudging this, I hope, but I think you're
5 going to come out the same place with your class certification
6 motion with respect to the disaster benefit claims as you did
7 with the ECOA claims.

8 Now, with the APA claim, I'm not sure what you get out
9 of a class action with APA. An individual, I mean, all you get
10 is injunctive relief anyway. Class-wide injunctive relief, I'm
11 not sure about this, but it seems to me, again on the face of
12 it, that a single plaintiff could achieve injunctive relief that
13 would cover everybody if the government is not doing what it's
14 supposed to be doing.

15 MR. HILL: Well, I think that might prove to be
16 problematic. Because there certainly is case law for the
17 proposition that injunctions should be narrowly drawn, and I
18 could easily see a situation where the injunctive relief would
19 be -- and the government would no doubt be arguing that it
20 should be narrowly tailored to the claim raised by that
21 individual plaintiff. And we could well have a situation where
22 they would argue that it applied only with respect to the FSA
23 office that was involved, and thereby avoid the sort of broad
24 relief that we think we're entitled to.

25 THE COURT: Well, you may be right. But let's play

1 this out. You take this to the Court of Appeals on
2 interlocutory appeal; the Court of Appeals says, once again,
3 what was he thinking about? Of course there's an APA claim
4 here. And you come back and apply for class certification for
5 your APA claim and you get it. Now what?

6 MR. HILL: Well, in *Pigford*, as I understand it, the
7 APA claim was the basis for certification with respect to all of
8 their claims.

9 THE COURT: Yeah, except I've already denied it with
10 respect to the ECOA claims and the Court of Appeals has affirmed
11 that denial. You don't expect me to re-open that, do you?

12 MR. HILL: Well, it's been denied on the basis of the
13 pure ECOA issue, but whether or not the failure to investigate
14 creates a situation that applies across the board, which is
15 what, for example, Judge Sullivan found in the *Keepseagle* case,
16 as I recall, that that creates another basis for -- that creates
17 an independent basis for B(2) certification, Your Honor.

18 THE COURT: Yeah, I know. But here's my point: You've
19 got a class, but it's a class making what claim and expecting
20 what relief? It's an APA claim with APA relief.

21 MR. HILL: And we did spell out in our third amended
22 complaint, and Your Honor took note of it, that we asked for
23 rather broad and well tailored injunctive relief in that
24 complaint that would be -- again, if we have a class, it would
25 be system wide.

1 My concern is that, as I said, case law as I understand
2 it is you draw injunctive relief very narrowly, and I can see
3 the government arguing on the other side that we have to
4 narrowly tailor this. It will be one FSA office or one county,
5 one state, that kind of thing, and that's certainly the kind of
6 thing we're trying to avoid.

7 And we just think it makes sense from the standpoint of
8 a private litigant that's investing her own money to go forward
9 against the limitless resources of the government, that we try
10 to do this in the most efficient and cost effective manner
11 possible.

12 I mean, we have spent millions of dollars on this case,
13 and we're trying to do this in a way that makes sense, and, as I
14 say, is efficient. And I think that's what the case law calls
15 for, that you be concerned about the resources of the individual
16 parties as well as the judicial resources.

17 Do you really want to be in a situation where you're
18 trying hundred of these cases individually, only to find out
19 that --

20 THE COURT: I don't know about hundreds. I mean, how
21 many do you think there are individually?

22 MR. HILL: Hundreds. I can think of 110 easily in the
23 Garcia case.

24 THE COURT: And how fresh is the freshest of those,
25 Mr. Hill, and how stale is the stalest?

1 MR. HILL: Well, some of those parties, you know, have
2 claims that arise under the extended statute of limitations in
3 the early '80s, some have claims that because of continuing --
4 what we allege are continuing violations of USDA that go right
5 up to the present.

6 But again, I think where you're heading on this,
7 Your Honor, is the question of lost documents and that sort of
8 thing. I think it's fair to say that that ship has already
9 sailed. The records are what the records are at this point. As
10 we pointed out in our brief, of the 110 or so plaintiffs named
11 in our second amended complaint, the government was able to find
12 files for only they claim 37, but produced files for only 35.

13 So, you know, further delay to have this done in the
14 most efficient manner possible isn't going to prejudice us in
15 terms of documents lost. We have the files that they claim that
16 they were able to find. Now, if there are additional ones, we
17 would love to have those as well.

18 THE COURT: What about the other 70 or so people? Do
19 they have any files of their own?

20 MR. HILL: In some instances they do, Your Honor. But
21 in most cases not.

22 THE COURT: So you're talking about 50, 60, 70 cases of
23 people who have claims, but there are no documents either in
24 their possession or in the government's possession?

25 MR. HILL: I mean, that is a distinct possibility, but

1 that would not prevent, for example, them going forward with --
2 you know, they're alive, and going forward with their testimony
3 as to what exactly happened to them and the treatment that they
4 encountered with respect to both their credit and noncredit
5 claims. And it seems to me that becomes a problem for the
6 government, that for whatever reason they didn't preserve these
7 files.

8 THE COURT: All right. Thank you, Mr. Hill. Anything
9 further?

10 MR. HILL: Not at the moment, Your Honor. We would be
11 happy to respond to any questions you have. But we really think
12 that in the interest of efficiency, and I think there should be
13 some concern about that, because, as I say, the Court was
14 certainly concerned about the claims of cost that were raised by
15 the government with respect to discovery, and here we are, as I
16 say, financing this litigation, and we need to do it in the most
17 efficient way possible.

18 And absent a class, I'm afraid that there are going to
19 be a whole slew of claims, maybe hundreds of claims that are
20 just going to be lost. Because the likelihood that any firm is
21 going to take on this task is pretty remote, I would think.

22 Thank you, Your Honor.

23 THE COURT: I think you're right.

24 MS. WAHL: Good afternoon, Your Honor. I won't repeat
25 anything Mr. Hill said because no need to do it. I appreciate

1 that the Court is in a problem-solving posture, and I just want
2 to embellish or clarify, I think, a couple of points.

3 If an ECOA-only case were to go forward and the APA
4 claims of a particular plaintiff were up on appeal and the Court
5 were reversed, then of course, as Mr. Hill points out, we have
6 the posture of what happens, do we have to duplicate efforts, do
7 we have to have yet another trial.

8 And an ECOA-only case versus an APA and ECOA case are
9 very different animals. An ECOA case is a damages case; it has
10 to do with did the plaintiff receive fair treatment, was she
11 discriminated against in receiving an application, in getting a
12 loan, in getting loan servicing.

13 An APA claim is a different animal, and that is, did
14 the government engage in the proper investigative process once
15 the claimant made her civil rights claim.

16 As far as an APA claim goes, once the plaintiff made
17 her claim, she's more or less done her part of the case. Then,
18 in essence, the focus shifts to the government. What was their
19 process? Who was available? What were they doing? All of
20 these things would be part of a trial and part of the evidence
21 developed if there were an APA claim.

22 And if there is no APA claim, we come back and it's
23 reversed on appeal, we have a slightly different focus. These
24 are two different areas, two different focuses, and frankly, the
25 damages are also different.

1 An ECOA claimant, as the Court of course is aware, is
2 seeking primarily damages; in the APA claim you cannot get
3 damages. And in fact, the agency's own relief available
4 provides for a very different sort of remedy, and that includes
5 everything from cancellation of the individual's debt to changes
6 of the agency, awarding of a loan, disciplinary action against
7 employees at the agency. There's a whole host --

8 THE COURT: If they still exist.

9 MS. WAHL: If the employees still exist.

10 THE COURT: Yes.

11 MS. WAHL: Well, that's correct. Luckily, as I
12 understand, USDA has a very proud tradition of having lots of
13 employees that stay for a very long time.

14 But the Court raises a point, and that is if the
15 individual ECOA claims go forward, it is highly possible, since
16 the loan decisions were made locally, that those cases ought to
17 be transferred to the individual jurisdictions where the
18 plaintiffs reside and the decision makers reside.

19 So, for example, Ms. Lynn Weaver, one of our claimants,
20 is in Florida, and some of the activities that formed the basis
21 of her ECOA claim occurred in Florida. The decision makers on
22 her claims are also in Florida. Given resources, or I should
23 say lack of resources, and the availability of witnesses there,
24 it may well make sense to have that case tried in Florida as
25 opposed to bringing everybody up here. Certainly Ms. Weaver

1 would appreciate that.

2 In contrast, an APA claim that focuses on what the
3 agency was doing with regard to investigating complaints is
4 something that occurred here in Washington, entirely within the
5 agency within the District of Columbia. The witnesses are here,
6 the documents, to the extent they exist or don't exist, are
7 here, everybody involved is here; again, a dichotomy in how one
8 should approach this.

9 It seems that not only would letting the APA claim go
10 up, but letting the ECOA claims go forward, create the
11 possibility of duplicative litigation, as Mr. Hill points out,
12 among people who don't necessarily have access to counsel.

13 THE COURT: I'm not quite sure I'm following what
14 you're saying about this APA trial. It sounds to me as if
15 you're suggesting that if my holding on the APA is reversed,
16 then you go forward with individual ECOA claims, and the
17 government is somehow is in a defensive posture in that same
18 trial to explain what investigation it did. In other words, you
19 want to sort of shift the burden of proof to the government in
20 that trial in some way, or make it -- it's certainly not a
21 counterclaim, it's an ancillary claim to your ECOA claim.

22 MS. WAHL: I don't think that's right, Your Honor. The
23 ECOA claim under the extension has a component of it that the
24 plaintiffs must demonstrate that they complained, that they made
25 a civil rights complaint in order to avail themselves of the

1 two-year extension. That's different from alleging a cause of
2 action under the APA, which we've done.

3 And you're right, we don't agree on whether that's a
4 viable cause of action, but under your rubric, if the Court of
5 Appeals were to reverse your ruling and find that there is a
6 cognizable cause of action for an APA violation, it's not that
7 the burden shifts - the plaintiff still has that burden - but
8 the focus and not the burden would shift.

9 Meaning we're no longer concerned, as we would be under
10 ECOA and the two-year extension, about whether the plaintiff can
11 demonstrate that she actually filed some sort of civil rights
12 complaint, but now we're talking about what did the agency do
13 once she filed that civil rights complaint. The burden is still
14 hers to demonstrate that there was no follow-up, et cetera,
15 et cetera, but the vast amount of evidence the Court would be
16 hearing on that point would be something that is internal to the
17 USDA, not to the plaintiff.

18 THE COURT: Well, I hear the theory behind that, but in
19 practice you have admissions, stipulations. I mean, the
20 government would not resist a proffer in those cases that, yes,
21 in that period of time the government was doing nothing to
22 investigate.

23 MS. WAHL: Well, I would hope that Your Honor would be
24 right, but we have taken some discovery, and that was not the
25 posture that the government took during our discovery.

1 I took Mr. Frederick Isler's deposition - he was the
2 interim acting head of the Office of Civil Rights - and he did
3 not take that position. He took the position that they were
4 actively pursuing cases, that they had files, et cetera,
5 et cetera. There is a bit of dichotomy between, shall we say,
6 the Court's, and I use that word collectively, your
7 acknowledgment of the lack of functionality of OCR. And Judge
8 Friedman and Judge Sullivan made the same observations, but I
9 don't know that USDA would come right out and agree with you,
10 and certainly stipulate to that effect. They certainly had not
11 taken that position in discovery.

12 And while Ms. Gray was quite up front, she was the
13 director of civil rights for some period of time, about how
14 non-functional --

15 THE COURT: She was your witness, if I recall
16 correctly.

17 MS. WAHL: She was indeed, Your Honor. And she
18 provided an affidavit in connection with some of the matters
19 here, too, I believe. She put in her declaration under oath
20 that the office was non-functional, that the administrative
21 process that was put in place under Section 741 was
22 non-functional, the whole thing didn't work. I don't know that
23 the government is prepared to agree that all of that is correct.

24 THE COURT: Well, maybe not. But there are
25 Congressional findings, there's Congressional reports, there are

1 three judges who all agree on that point, there's Rosalind Gray,
 2 who's testified about that point. It may be that a file emerges
 3 from someplace, maybe in those 37 cases that Mr. Hill is talking
 4 about, but I just don't see what you get -- I don't see how you
 5 enhance the situation by having an APA trial, and in fact, I
 6 don't even understand the concept of an APA trial, since APA
 7 actions are not trials almost by definition.

8 MS. WAHL: Well, if Your Honor would indulge me. I
 9 know you don't recognize a cause of action, but if you did, an
 10 APA claim trial would go something like this:

11 The plaintiff would allege that the agency failed to
 12 adhere to its own internal regulations, that she lodged a
 13 complaint, and then the agency did the following with it.

14 And then there would be witnesses about what did or
 15 didn't happen, what their policies were with regard to document
 16 retention. There would be testimony about what they did with
 17 her particular claim, assuming they could find it.

18 And at the end of all of this, the Court would make a
 19 decision about what relief would be appropriate in light of what
 20 the plaintiff had asked for and what the evidence entailed.

21 And even under perhaps the most generous of
 22 stipulations, I don't know that the government would be prepared
 23 to in essence capitulate and say, you're right, we totally
 24 screwed up, it was non-functional, we did nothing, and now we're
 25 just talking about what you get as a result. Which, by the way,

1 is different relief than you get if you prevail on an ECOA
2 claim.

3 An ECOA claim, even if it's injunctive and declaratory
4 relief, would only get you some sort of declaration or an
5 injunction that said, give out applications fairly, don't
6 discriminate on the basis of giving out farm loans.

7 This is a different process.

8 THE COURT: But what you are talking about is not a
9 class trial, it's an APA focus or component, as you put it, in
10 each individual ECOA trial. Right?

11 MS. WAHL: There is a component in an ECOA trial if the
12 plaintiff is going to avail herself of the extension of the
13 statute of limitations. But that's not the same thing,
14 necessarily, as a full-blown APA claim. In fact, I would argue
15 vigorously that it's not.

16 In order to satisfy that limitations period extension,
17 all she's got to do is show that she complained; as opposed to a
18 trial on an APA claim, which is a different focus. And you're
19 correct, I'm not right now, and maybe never, henceforth, talking
20 about a class action. I don't think that's what this is about.

21 THE COURT: Do you share Mr. Hill's concern? I mean,
22 what I heard Mr. Hill saying was that if this devolves into 100
23 individual lawsuits, forget it, there isn't anybody who is going
24 to shoulder that burden. There are no law firms that will do
25 it.

1 And I recognize, by the way, with considerable
2 admiration, the investments that both of your firms have made on
3 what has been up to this point essentially a pro bono basis.
4 And I admire that and honor it, but I can't just cave to it.

5 But the question is whether you agree with Mr. Hill
6 that if this devolves into hundreds of individual actions, it's
7 basically never going to go anywhere.

8 MS. WAHL: There is that very strong possibility.
9 Certainly the plaintiffs themselves are not sophisticated and
10 financially capable of pursuing litigation, and frankly, I'm not
11 sure that there's enough -- the pot at the end of rainbow would
12 be big enough for them to undergo a disputed action and a trial
13 and put themselves through that. I mean, by definition, these
14 are people who don't have a lot of means. That's why they're
15 applying for USDA farm loans.

16 So you've got the problems with the plaintiffs, and
17 then, as Mr. Hill points out and you underscore, you have the
18 further problem of legal representation. Very difficult to find
19 counsel who would be willing to get immersed in these issues,
20 who would be willing to shoulder the burden, who would be
21 willing to put the rest of their practices on hold to be able to
22 do this.

23 And I think this group of plaintiffs as a group has
24 been able to get as far as they have because they've been able
25 to do it as a group. Certainly the plaintiffs who were denied

1 applications, I mean, what sorts of damages are they going to be
2 able to even show? I mean, in essence they will be totally cut
3 off from any sort of court proceeding because there would be no
4 real reason for them to engage in this legal battle to what end.

5 In sum, Your Honor, we not only agree with Mr. Hill, we
6 see this problem, as you've put it, as one that could easily be
7 solved by the Court, which is don't let us run the risk of
8 having to have plaintiffs who are entirely cut off from
9 proceeding, having no remedy, or for the ones who are remaining,
10 have to potentially have duplicative or even vastly different
11 trials, depending upon what the Court of Appeals does.

12 I share Mr. Hill's lack of concern about the loss of
13 documents, and memories are what they are. We have all the
14 documents that I think were available. I think, as we pointed
15 out in our brief, there were already -- by USDA's account, there
16 were already a huge number of documents that were not
17 maintained, either originally not kept or not preserved, and
18 whatever there is we got a few years ago.

19 And do some of the individual plaintiffs have their own
20 documents? I believe they do. So we have perhaps yet further
21 documents to look into. There are not going to be a lot of
22 documents in these cases. By nature, there would not be, at
23 least on the plaintiffs' side, and perhaps not on the
24 defendant's side.

25 But we believe that proceeding with the APA claim going

1 up on interlocutory appeal and the remaining ECOA claims being
2 stayed is the best way for this case to be postured both for the
3 parties and for the courts.

4 THE COURT: All right. Thank you. Mr. Sitcov? My
5 first question to you, Mr. Sitcov, is, hearing what you've just
6 heard from counsel for both sets of plaintiffs, why isn't it in
7 the interest of the Justice Department to have a stay pending
8 interlocutory appeal? If you are as right as you think you are
9 on the APA claim, and my decision is affirmed by the Court of
10 Appeals, what I think you've just heard - they haven't said it
11 quite this plainly - but what I think I just heard from
12 plaintiffs' counsel is, this case becomes a pop foul. Nobody is
13 going to run it out. It will never happen.

14 MR. SITCOV: I don't think that's the case, Your Honor.
15 Our experience in *Pigford* suggests that it probably is not.
16 There have been thousands of cases handled in *Pigford* by
17 attorneys from all over the country. Some of the biggest firms
18 in the country have handled the Track B cases, there have been
19 lots of attorneys who have handled the Track A cases, and I have
20 no reason to believe that attorneys would refuse to handle these
21 cases, especially because there is the availability of
22 attorneys' fees.

23 And just so everyone is aware, the government has paid
24 enormous amounts of money in attorneys' fees under the *Pigford*
25 consent decree, and those fees are paid at actual hourly rates.

1 They are not capped. So I don't think it's correct to say that
2 at the end of the day, if your decision is affirmed, the cases
3 will go away.

4 Now, Mr. Hill said that he thinks there are 100 or so
5 cases. If I'm recalling their complaint correctly, it talks
6 about thousands; in fact, tens of thousands of such cases.
7 Ms. Wahl's complaint in Love I believe talked about 700 cases.
8 So it's not as though there are just a small number of cases
9 that are going to vanish.

10 THE COURT: Well, excuse me, but help me out here. I
11 thought that in *Pigford* these cases that these law firms all
12 stepped up to hoping for attorneys' fees are cases in which
13 liability was essentially conceded.

14 MR. SITCOV: Liability was not conceded in the case.

15 THE COURT: No, I mean general kind of inaction of the
16 federal government was conceded, and it remained only for the
17 plaintiffs to prove that they were damaged or that they made
18 claims. Isn't that right?

19 MR. SITCOV: Absolutely not, Your Honor. Paragraph 13
20 of the *Pigford* consent decree explicitly stated that the
21 government did not concede liability, and in each case, under
22 each track of the consent decree, every plaintiff had to prove
23 liability individually. And in about 63 percent of the Track A
24 cases, the plaintiffs were able to do so; in Track B, I think
25 the government has won about 60 percent of those cases.

1 So there is in each case a requirement under the
2 *Pigford* consent decree to establish liability, and that would be
3 the same thing here.

4 THE COURT: And what does it take to establish
5 liability?

6 MR. SITCOV: It depends what track you're on. Under
7 Track A, it's the test of substantial evidence; under Track B,
8 it's the normal preponderance of the evidence. And in each one
9 of those cases the plaintiffs had to produce documents, whatever
10 documents they had, the government would produce whatever
11 documents it had, and they would be decided individually.

12 So there has never been a concession of liability in
13 any of these cases.

14 THE COURT: ECOA carries with it an attorney's fee. Is
15 this just equal justice under law fee or is this some special
16 statutory fee arrangement?

17 MR. SITCOV: It has a provision under -- I think it's
18 15 U.S.C. 1691D(e) provides attorneys' fees at market rates. So
19 there are ECOA claims brought against the government all the
20 time. ECOA does not apply only to the government, it applies
21 across the board to credit institutions, and there is a regular
22 litigation process under ECOA. There isn't any suggestion that
23 fees don't work. And we have paid to some of the largest firms
24 in the country significant fees under *Pigford*. And those fees
25 would be available in the event that a plaintiff won an ECOA

1 claim in these cases, just as it would in any ECOA claim for the
2 prevailing plaintiff.

3 On the other hand, there's no guarantee that an
4 unsuccessful plaintiff would receive fees in any situation, even
5 where there's a fee-shifting statute.

6 THE COURT: Respond if you will to the plaintiffs'
7 argument that if I don't stay the ECOA claims, and if I'm
8 reversed on the APA, I'm dooming everybody to two trials.

9 MR. SITCOV: Well that's not at all the case. For one
10 thing, courts bifurcate litigation all the time, and bifurcating
11 this case would not be a problem.

12 But the notion that there would be a trial on the APA
13 claims I think is wrong. The Supreme Court's decision, for
14 example, in *Florida Power & Light vs. Lorion* is quite clear that
15 it's record review; there are a plethora of cases from this
16 circuit that make it clear that APA review would be record
17 review.

18 The issue would be, was there an investigation. That's
19 all. I mean, their claim is we didn't do an investigation. The
20 question is, did we do an investigation, and there would be an
21 administrative record or there wouldn't of the investigation.
22 But the notion that there would be a trial on that issue I think
23 is fundamentally incorrect.

24 And that claim is entirely separate from a credit
25 discrimination case, which is simply, was the applicant for

1 credit treated in a discriminatory fashion, in these cases based
2 either on ethnicity, which would be being Hispanic, or on
3 gender. And it has nothing to do with whether or not there was
4 an investigation under this entirely different program that
5 predated ECOA by about 10 years.

6 The provisions under which the APA claim arose were
7 first put into place I believe in 1964, and they were
8 promulgated -- the regulation itself was promulgated under
9 5 U.S.C. Section 301, the so-called housekeeping statute. It
10 had nothing to do with credit discrimination, and it has
11 continued on.

12 But the fact that the credit discrimination claim is
13 actively being litigated doesn't in any way inhibit what would
14 happen in the event you were reversed, which frankly I believe
15 is unlikely. But...

16 THE COURT: But who knows?

17 MR. SITCOV: Well, I'm going to roll the dice in your
18 favor, judge. But I just don't think that really it is a
19 problem.

20 THE COURT: Well, I confess that I'm still having
21 trouble understanding this different focus claim that's been
22 made, if there's an APA component in an individual ECOA trial.
23 I just don't understand it.

24 But I think neither do I understand why the government
25 is in a hurry to proceed with the individual ECOA claims.

1 MR. SITCOV: Because, Your Honor, the more time passes,
2 the more difficult it is for us to defend against them. I can
3 tell you --

4 THE COURT: And the more difficult it is for the
5 plaintiffs to make their cases. They've got the burden of
6 proof.

7 MR. SITCOV: I don't think so, Your Honor. And here's
8 why: As these claims go on -- and I'm now relying on my
9 experience in the *Pigford* case. I have been government counsel
10 in that case since it was filed. And although we don't do the
11 Track A cases, I'm responsible for all the Track B cases, the
12 arbitrations that are done as a trial.

13 And it is frequently the case that there is very little
14 documentary evidence, and it's impossible to find any USDA
15 employee who was involved in the claim at issue. The plaintiff
16 testifies, and we have nothing to respond to. Or I should say
17 we have no real response. That isn't always the case, but it is
18 frequently the case that we are not in a position to dispute
19 claims made against us.

20 And as more time goes by, that problem is exacerbated.
21 The claims are now -- the oldest of the claims are now 27 years
22 old, and I don't think that it's fair for us to have to wait
23 until the claims are 29 years old or 30 years old to litigate
24 them. That's the purpose of statutes of limitation. And
25 although Congress did retroactively extend this one, there does

1 come a point at which time does make a difference. And our
2 experience in *Pigford* has shown that it does.

3 As I think Ms. Wahl alluded to, and I'm sure Your Honor
4 is aware of, there are document destruction schedules that
5 agencies are required to employ, and those schedules kicked in
6 long before this case was filed. Federal employees can retire
7 after 30 years; some of these claims are almost 30 years old.
8 It's not possible for us always to get people with information
9 or to find the documents, and the more time that passes, the
10 more difficult that becomes for us.

11 THE COURT: What in your view -- I came in here
12 thinking that the APA question that I recently decided is
13 separable, distinct from, not involved with the ECOA claim.

14 MR. SITCOV: We agree.

15 THE COURT: Plaintiffs seem to think otherwise. And I
16 said the government has already conceded, or at least it sounds
17 like the government has already conceded that it failed to
18 investigate lots of complaints of discrimination; the Civil
19 Rights Office was if not shut down, moribund; Congress so found
20 in extending the statute of limitations. What is the
21 government's position on that in individual ECOA trials? Oh,
22 yes, we did investigate, or it's irrelevant whether we
23 investigated or not?

24 MR. SITCOV: Well, in an ECOA trial, it would not be
25 relevant. There's no administrative filing requirement in ECOA.

1 The only issue is, did the defendant engage in discrimination in
2 a credit transaction. It doesn't matter whether or not there
3 was a complaint made about it.

4 And we could be, as we pointed out in our brief -- and
5 I do want to make -- just to digress for a second, I'm
6 responsible for those briefs, and it certainly wasn't my
7 intention to disparage the plaintiffs. But I am the person who
8 is responsible for what's in them, and I certainly bear whatever
9 blame goes along with that.

10 But one of the things we pointed out is there could
11 be --

12 THE COURT: You shouldn't be blamed for forthrightness,
13 Mr. Sitcov.

14 MR. SITCOV: Well, I get blamed for lots of things,
15 judge. I don't mind that.

16 But in any event, as we pointed out in our brief, we
17 could have the anomalous situation of the government winning a
18 claim that a plaintiff asserts under ECOA, and then having to
19 still address the issue of whether the government did or did not
20 investigate that claim. If it's simply a matter of
21 investigation, the plaintiffs will get whatever investigation is
22 available through discovery in the civil action.

23 But there is no connection between the two. Whether we
24 discriminated has nothing to do with whether or not an
25 investigation was undertaken in a particular case. There is no,

1 as I said under ECOA, investigation requirement.

2 THE COURT: Now, we haven't even talked about your
3 resistance to the very idea of an interlocutory appeal. Do you
4 want to speak to that?

5 MR. SITCOV: Well, we oppose an interlocutory appeal on
6 a couple of grounds. One is, we don't think that the plaintiffs
7 have satisfied the pretty tough standard that 1292B sets. And I
8 think we've made it pretty clear in the complaint -- I'm sorry,
9 in our opposition in both memoranda that they just don't like
10 your decision, but the fact that they don't like it isn't a
11 sufficient basis for you to grant their request. We don't think
12 that there is really significant disagreement, and we don't
13 think that the cases that they cited establish the standard that
14 they claim they do.

15 We think, for the reasons we've explained before, that
16 you and I have just been discussing, that staying this
17 litigation is going to inure to our detriment. And although I
18 don't represent the plaintiffs, we believe it's going to inure
19 to theirs.

20 Ultimately they're going to have to prove their cases.
21 One of the things we have found in *Pigford* is that as the case
22 has gone on, class members die. And when they die, in this case
23 that will be the end of their claim. Because at least in
24 *Pigford* there were ways around that, because under Track A, the
25 rules of evidence don't apply. They do apply in these cases.

1 And if, as Mr. Hill and Ms. Wahl were describing to
2 you, they have almost no documentation, if they die, they'll
3 have nothing to prove. Their estates will have no basis on
4 which to prove their claims.

5 So that's an issue for them, but it does make things
6 difficult for us, just the passage of time.

7 THE COURT: Okay. Anything further from the government
8 side, or do you --

9 MS. WELLS: No, I have nothing further to add.

10 THE COURT: Ditto?

11 MR. SITCOV: Is there anything else I can answer for
12 you?

13 THE COURT: I don't think so. Thank you. But I'll
14 hear any replies from plaintiffs.

15 MR. HILL: Just a couple of points, Your Honor. To
16 mention the *Pigford* case is really sort of comparing apples and
17 oranges. In the *Pigford* case there was, after all, the
18 settlement, there was a reduced burden of proof in that case,
19 and in fact, the whole question of just how minimal a level of
20 proof has been the cause for some controversy. As you may or
21 may not be aware, there's now, for example, a bill in Congress
22 with respect to the *Pigford* litigants to give them a further
23 opportunity to pursue those claims.

24 You know, we do have, as we point out in our brief,
25 some track record with respect to trying to get our cause in

1 this case, and we do have that.

2 On the other question, with respect to documents, we
3 already have plaintiffs who have died, and their estates are
4 continuing and we've been notified by estate counsel that their
5 estates want to continue in these cases. And Mr. Sitcov is
6 really sort of assuming facts that are not in evidence in a
7 sense, because it doesn't necessarily follow and is not always
8 the case that some of these people went to the office
9 individually. Quite often the case, husband and wife went.
10 Maybe the husband is dead, but the wife is still there to
11 testify with respect to the circumstances that the family
12 together encountered.

13 Children often went with them. For some of our
14 Spanish-speaking-only plaintiffs, they had to take neighbors and
15 friends who could interpret for them.

16 So I appreciate his concern for us that he's expressing
17 about the delay of time, but we think it just makes incredibly
18 more sense to do this in the most efficient way possible given
19 the investment that we are in fact making.

20 And just to be clear, he said that there were probably
21 a hundred cases, and that we had mentioned thousands. I said
22 there are potentially thousands, hundreds if not thousands of
23 putative plaintiffs in this case with respect to the Hispanic
24 farmers, but we have entered appearances for 110 or so. So that
25 was the point I was making there, and so I just wanted to be

1 clear on that point, Your Honor.

2 But I think there is clearly a difference in terms of
3 the situation in *Pigford* and what we face here. Thank you.

4 MS. WAHL: One and a half points, Your Honor. *Pigford*
5 was different and is different and is not a template for this
6 case in one other very important respect, and that is that under
7 the consent decree, class counsel would be representing the
8 plaintiffs in Track B or Track A. And they were lined up, they
9 were in line, and everybody was already ready, and that's not
10 the case here. There is not other counsel coming out of the
11 woodwork looking to represent these plaintiffs, nor has there
12 been an offer of, as in the Track A cases, \$50,000 off the bat
13 to anybody who can make a minimal showing.

14 So our cases are substantially different. As Mr. Hill
15 said, there is no settlement in place here.

16 Secondly, if the Court does let the APA claims go up
17 and has the ECOA cases go forward, the Court is likely going to
18 want to entertain some sort of a stay in any case anyway.
19 Because the Garcia case has 110 named plaintiffs, the Love case
20 has roughly 10 named plaintiffs; unless the Court wants all of
21 those 120 cases to go forward simultaneously in this court, we
22 are likely to be talking about some sort of representative trial
23 by one or a group of plaintiffs while the other cases are
24 stayed. That's even if the ECOA cases go forward.

25 So a stay of some sort is likely to be the case, and we

1 might just as well do the most efficient thing and have it apply
2 to everybody. Thank you, Your Honor.

3 MR. SITCOV: Your Honor, can I make two quick responses
4 to that?

5 THE COURT: Sure.

6 MR. SITCOV: The first is that although there were --
7 there are still class counsel in *Pigford*, they didn't by any
8 means represent all of the plaintiffs, and certainly not in
9 Track B, the arbitrations that were trial-like proceedings.
10 Firms from all over the country did that.

11 The second thing is, I don't know why there would
12 necessarily be a stay of these cases. There is, as we pointed
13 out in a case that is pending in this court before
14 Judge Friedman - it's called *Benoit versus I believe Veneman*, by
15 a number of opt-outs from the *Pigford* consent decree - that in
16 that case we argued that the cases should be dismissed, but if
17 they're not dismissed, they should be transferred to their home
18 districts. And in this case we believe that would be
19 appropriate.

20 And so there isn't any -- there certainly is no reason
21 why this court would be required, or ought to maintain all of
22 these cases. None of them really arose here, and the cases in
23 this district and circuit are quite clear about issues like
24 that.

25 So I don't think that we have to worry in that regard.

1 MR. HILL: May I?

2 THE COURT: Last word, Mr. Hill.

3 MR. HILL: Thank you, Your Honor. On the question of
4 transferring them to the various districts, Your Honor, I think
5 you had once before indicated that you had no intention of
6 transferring the cases, number one. Number two, it would be
7 adding greatly to our burden as the lawyers in this case to have
8 to suddenly go try 100 or so cases or more in various districts
9 around the country, and would add enormously to the expense, the
10 cost and burden of those trials, travel time and everything
11 else, in a situation where we -- as you've pointed out, we've
12 already made a very substantial investment.

13 We think that the most efficient -- again, the most
14 efficient way to proceed is to stay this pending the appeal to
15 the D.C. Circuit. We don't think that should take terribly
16 long, and we can go forward after that. Thank you.

17 THE COURT: Well, I'm about to make a ruling that as
18 the old joke says, represents a triumph of hope over experience.
19 And it takes off from the very last thing Mr. Hill said, which
20 is that the appeal shouldn't take so very long. I hope that
21 you're right about that, and I direct that your interlocutory
22 appeal be accompanied by a motion for expedited appeal, which
23 the Court of Appeals might be inclined to undertake, because,
24 after all, it's already seen this case, it's already seen
25 briefing in the case, it may even assign it to the same panel,

1 the panel that expressed interest in why on earth I had ruled as
2 I had on the APA claim in the first place.

3 If the Court of Appeals expedites its review of my
4 decision, it seems conceivable that instead of a year, you might
5 get a result in six months. It is also correct that one way or
6 another, I would have to -- I mean, to crank up the individual
7 cases that we're talking about, I would have to, it seems to me,
8 in fairness, stay the effectiveness of any ruling for some
9 period of time to permit the plaintiffs to identify and join
10 individual plaintiffs as to whom everything has been stayed
11 during the pendency of the class action and post-ruling
12 decisions, so that would take a month or two.

13 And then it would take a couple of months to just crank
14 up the organization of either test trials or to decide whether
15 these cases should be divided up and sent out to other
16 districts.

17 And because one of my obligations is to construe the
18 federal rules to promote the just, speedy, and inexpensive
19 resolution of disputes - that's rule one - and in particular
20 recognition of the investment that has been made, at least
21 initially, as a public service on the part of the two law firms
22 who represent the plaintiffs in this case, I'm going to grant
23 the stay motion together with the motion for interlocutory
24 appeal.

25 I don't actually quite understand the refocusing of any

1 individual trials if I'm reversed on appeal, but as I say, I
2 think what changed my mind from what I expected to do when I
3 came in here today is the argument about the burden on
4 individual law firms that have already invested so much in these
5 cases if they are forced to go ahead on what would essentially
6 be a two-track system.

7 So I will grant the motion and certify both decisions
8 for interlocutory appeal under 1292B, and stay all proceedings
9 in this court pending decision by the Court of Appeals.

10 I want counsel to know that if the Court of Appeals
11 affirms my decision, they better get to work right then, without
12 waiting for time to run to see who they're going to add to these
13 cases. Because we're not going to have further stays and
14 further -- it's time to bring these cases to an end one way or
15 another.

16 So you're on notice that if you lose the appeal, we're
17 going to be moving very quickly to find a way to resolve the
18 individual cases.

19 If there's nothing further, I think we're done, because
20 everything is now on hold.

21 MR. HILL: Thank you, Your Honor.

22 MS. WAHL: Thank you, Your Honor.

23 (Proceedings adjourned at 3:12 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

1/23/08

SIGNATURE OF COURT REPORTER

DATE