

Civil Action No. 1:00CV02445

EXHIBIT 13

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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GUADALUPE L. GARCIA, .
et al., .
. Docket No. CA 00-2445JR
Plaintiffs, .
. Washington, D.C.
v. . Tuesday, April 29, 2003
. 4:50 p.m.

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SECRETARY, U.S. DEPARTMENT.
OF AGRICULTURE, .
Defendant. .

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TRANSCRIPT OF STATUS HEARING
BEFORE THE HONORABLE JAMES ROBERTSON
UNITED STATES DISTRICT JUDGE

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APPEARANCES:

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For the Plaintiffs: HOWREY, SIMON, ARNOLD & WHITE
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APPEARANCES - Continued:

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For the Defendants: UNITED STATES DEPARTMENT OF JUSTICE

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1 PROCEEDINGS

2 (4:50 p.m.)

3 THE DEPUTY CLERK: Civil Action No. 00-2445, Guadalupe Garcia
4 and others versus Ann Veneman. For the plaintiffs,
5 Mr. Anderson, Mr. Hill; for the defendants, Ms. Olson,
6 Mr. Sitcov, and Ms. Bhattacharyya.

7 THE COURT: I thought Ms. Cheatham was going to be in this
8 case, too. She's very welcome.

9 All right. You all know this before I start, but I'm
10 going to tell you just for opening that judges hate discovery
11 disputes. The instinct is to send you all off to a magistrate
12 judge and let this matter disappear from my visage. I'm not
13 going to do that. I never do that, but I like to treat this more
14 like a therapy session than like an adversary proceeding.

15 Because the plaintiffs -- as I said to you last time you
16 were here -- there is a curve here where the needs of the
17 plaintiff and the burden on the government intersect, and the
18 trick is to find that curve.

19 Now, I'm going to let you all talk about this, but I
20 just -- the reactions I have on learning about this dispute so
21 far are several.

22 First, the defendants don't offer the plaintiffs much when
23 they offer them access to their database, because the plaintiffs
24 -- I think we have already established the database doesn't show
25 anything or much of interest.

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1 Indeed, that's probably why we're here in this next round.

2 Second, the plaintiffs seem to want to pursue the issue of
3 complaint processing, and I think I've pretty well ruled that out
4 of this case; and I'm not going to -- the complaint processing
5 part of this case doesn't help the class certification question.

6 As to the redundancy between depositions and discovery in
7 this case and Love, there is a certain merit in the government's
8 position that -- we're certainly not going to redo everything
9 that was done in Love. That's not going to work.

10 On the other hand, just because a deposition was taken in
11 Love doesn't mean a deposition can't be taken in this case,
12 because they're really different cases about different plaintiff
13 classes; so a deposition taken in Love, a deponent whose
14 deposition was taken in Love may be deposed in this case, too;
15 but not repetitively with what the Love testimony was.

16 The crunch here seems to be how -- how many files, how
17 many counties. I understand the plaintiffs are now talking about
18 eight states and 28 counties. They were talking the last time we
19 were here about six states. I don't see on the plaintiffs' part
20 or on the defendant's part any effort to work out some sort of
21 sample approach to this discovery, which is what I had hoped
22 would happen.

23 That is, I think, the pretty standard approach which is to
24 take whether it is statistically significant or not, to start
25 with something, take a look at it, and then come back and see how

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1 you're doing with it.

2 So it may be -- it may be excessively Solomonic, but my
3 one instinct is to say you want 28 counties, start with five or
4 something like that; or you want eight states, start with two; or
5 you want all the documents from some county extension office?
6 Why not take A through F in one county, G through L in another
7 county, M through P in a third county, and Q through Z. I'm just
8 thinking off the top of my head.

9 There has to be a way to approach this with samples. Even
10 if -- the plaintiffs have told me more than once that they're
11 willing to go at this hammer and tongs in 28 counties and eight
12 states and go until the last dog is hung. That's fine for the
13 plaintiffs; but the government also has resources that need to be
14 husbanded here, and I'm not -- no matter how much the plaintiffs
15 are prepared to commit to this, there is a reasonableness point
16 here at which the government should not have to respond.

17 Those are very general reactions on my part. I would hope
18 now that I could hear from each side and hear something more
19 specific about what what you really want or need and what -- and
20 what the other side is not -- has unreasonably failed to agree
21 upon.

22 One thing I want to hear from the plaintiffs is have you
23 taken 30(b)(6) depositions to find out what it is and where it
24 is.

25 MR. HILL: Your Honor, we understand there was a stay on

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1 discovery. We have not taken any discovery.

2 THE COURT: Okay. I guess that's right. It seems to me I
3 always thought when taking any kind of complex discovery like
4 this, before you start asking for the records of 28 agencies, you
5 need to take a 30(b)(6) deposition to find out what there is and
6 how it's filed and who has it and where it is and what the
7 quantity of it is.

8 Maybe you know that. Maybe you don't.

9 MR. HILL: Well, Your Honor, what we do know is based on
10 conversations we had back in June at your urging; and we met with
11 the USDA and talked about there databases; and we have a fair
12 understanding as we set forth in pleadings with Your Honor.

13 One thought that occurred me, Your Honor, considering
14 you're talking about doing sampling, it seems to me I certainly
15 wouldn't feel qualified to come up with the appropriate sample;
16 and I would want to engage the efforts of our expert, and I would
17 assume the government's expert as well would have to be involved
18 for this to be an appropriate sample.

19 That's going to take a little time; and while we've --
20 we've been at this, sort of held in a state of limbo for the last
21 10 months, maybe a little more time wouldn't be a bad idea.

22 In that connection, we think it might also make sense to
23 consider the possibility of ordering mediation in this case while
24 we try to work out our discovery disputes as well.

25 THE COURT: Mediation of the discovery dispute?

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1 MR. HILL: No. Mediation of the case on the merits, Your
2 Honor. We raised it once before. The government expressed no
3 interest; but we continue to think that in the final analysis,
4 this is a case that ought to be resolved. I think the -- the
5 evidence that we've uncovered so far is pretty clear that there
6 has been widespread discrimination.

7 The government really doesn't dispute that. The question
8 now is whether or not we'll qualify hyper technical -- the
9 technical terms of class certification.

10 But our clients are continuing to suffer on a daily basis;
11 and we think if we're going to take additional time, we ought to
12 be -- to also be using some of that time to try to come to a fair
13 and just resolution of this case, Your Honor. But we're
14 certainly prepared to go forward with a sampling approach.

15 On the question of whether or not we're trying to revisit
16 or explore the question of complaint processing, that is not our
17 intention, Your Honor, at all. The discovery that we have
18 proposed along those lines really go to our -- to a second prong
19 of our case, which is the disparate treatment theory of our case;
20 and we are trying to get discovery as I set out in our papers to
21 determine among other things the extent to which USDA was on
22 notice of the discrimination that was taking place in the field
23 as a result of its lax regulations; and that we think that
24 that -- there's sufficient notice that we can impute to them
25 either under a theory of acquiescence or ratification liability

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1 here and that would go to the whole question of whether or not
2 taken as a whole this -- there is evidence of disparate
3 treatment, pattern, and practice.

4 We're not looking at that evidence in terms of -- or that
5 information in terms of the whole question of whether or not
6 complaints were properly processed, but it really goes to the
7 issue of notice to USDA about what was going on in the field.

8 THE COURT: Spell out that notice theory for me a little
9 bit more.

10 MR. HILL: All right, sir.

11 One of the things, Your Honor, we -- you know, we contend
12 that USDA has been under investigation since at least 1965 by
13 various agencies of the government, the civil rights commission,
14 various committees of Congress as a result of their
15 discriminatory practices in their lending; and one of the things
16 that we say that we -- that we need to show in terms of a
17 disparate treatment is that while there are decision-makers
18 dispersed across the country and the case law suggests that when
19 you have that it is sort of difficult to prove a class of --
20 under a disparate treatment theory, we take the position that if
21 there is evidence that the -- that USDA, the headquarters, the
22 top officials there knew of the problems that were going on in
23 the field with respect to their lending practices, the rampant
24 discrimination that was taking place, and did nothing to remedy
25 that over a period of 20 years, that that evidence cumulatively

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1 taken goes to the question of whether or not you have an
2 effective pattern and practice of discrimination; and
3 discrimination that has been endorsed or ratified or acquiesced
4 to by USDA.

5 It is a respondent superior argument in a sense; so that's
6 where we're going with that. We're not trying to argue the point
7 that the failure to process complaints properly in and of itself
8 was a cause of action.

9 THE COURT: Okay.

10 MR. HILL: In coming up with the counties that we
11 selected, it is in part in direct response to Your Honor's
12 December 2 order where you cite in that order, a memorandum
13 opinion, cases that stand for the proposition, as I recall, that
14 if there is -- if you're trying a disparate treatment theory, the
15 fact there is dispersal, it can be a problem; and you said that
16 our statistical data did nothing to solve that problem because it
17 didn't segregate the issue on either a state or county basis; and
18 you cited cases at -- I believe -- page 18 of your opinion that
19 stood for the proposition that if -- in order to establish this
20 you had to show that there was a similar discrimination across
21 the divisions in an organization that had multiple locations.

22 We took that to mean similarly that we would have to look
23 at the individual counties to satisfy Your Honor's concern in
24 that regard.

25 So -- you know -- we certainly aren't trying to come up

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1 with any more work than we absolutely have to do or to impose
2 upon ourselves any expense more than is absolutely necessary.

3 But at every point along the way, we have tried to address
4 either concerns Your Honor has raised in the December 2 opinion
5 or concerns that the government raised in its expert testimony
6 filed with their response to our second supplemental pleading,
7 the testimony of Dr. Friedman.

8 That's why we asked for some of the detailed information
9 that we do, to get -- to satisfy their concern that any
10 discrimination -- any disparity that we show between the ability
11 of Hispanic farmers to get loans and their white counterparts is
12 the result of discrimination on the basis of ethnicity or race
13 and not some other reason such as creditworthiness or whatever
14 experience.

15 So we have tried to carefully tailor our discovery to
16 address each and every one of those concerns.

17 THE COURT: All right. Thank you, sir.

18 Who's going to speak for the government?

19 MS. BHATTACHARYYA: Your Honor --

20 THE COURT: I did say -- and while we're -- just to follow
21 up on the last comment, in looking at what is indeed on page 18
22 of my memorandum, I said the thousands of Hispanic farmers
23 plaintiffs seek to represent have dealt with hundreds if not
24 thousands of local FSA officials in more than 2700 county offices
25 across the country over a 19-year period.

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1 Those farmers' allegations of discrimination cannot be
2 sorted out without individualized inquiries regarding the
3 practices of the various county committees. Plaintiffs'
4 statistical analysis does not inform the issue because it is not
5 broken down by county or even by state. And there's a long
6 footnote here that says a successful disparate treatment,
7 plaintiff must establish discriminatory intent on the part of the
8 decision-maker, that proof would have to be adduced on at least a
9 county-by-county basis so that, in effect, the government's
10 resistance to the class action -- class certification motion may
11 prove too much. I don't know.

12 Okay. Your nickel.

13 MS. BHATTACHARYYA: Good afternoon, Your Honor. I am Rupa
14 Bhattacharyya. I will start off by apologizing. I'm relatively
15 new to this case. If I need to consult my colleagues, I hope you
16 indulge me.

17 THE COURT: You don't have to apologize for being new to
18 this case. It is a breath of fresh air. Of course, feel free to
19 consult if you need to.

20 MS. BHATTACHARYYA: I did want to make sure we were clear
21 on one issue, Your Honor. Despite Mr. Hill's representations,
22 the government has in no way conceded liability in this case or
23 conceded there was discrimination against Hispanic farmers. I
24 think that with respect to the suggestion that this case be taken
25 to mediation, until a class certification decision is made that

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1 suggestion is highly premature since we don't know what we will
2 be mediating: A class claim or many individualized disparate
3 treatment claims, so I would ask for Your Honor to keep that in
4 mind.

5 With respect to Your Honor's concerns about the offering
6 of the databases, I do believe that we are prepared today to make
7 a suggestion with respect to the suggestion that there be a
8 sampling. I don't think it is possible -- although I'm certainly
9 not a statistician -- to create a valid sample in this case that
10 both sides are going to be able to agree upon. But what we can
11 do, Your Honor, is we have been able to identify from the 110
12 named farmers that are identified in the complaint that there are
13 USDA borrower files for 37 of them.

14 That's approximately one-third of the names listed in the
15 complaint.

16 And we are prepared upon the entry of the appropriate
17 protective order -- since these are documents protected by the
18 Privacy Act -- to produce the borrower files for that sample of
19 farmers.

20 Given that the plaintiffs' effort here is to attempt to
21 show -- that their burden is to attempt to show there are common
22 issues of fact or law associated with those people such as to
23 require the certification for class action, we believe that's a
24 sufficient number. In fact, it is probably a more than
25 sufficient number of files from which they can attempt to make

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1 that showing.

2 We had in our papers indicated that we were prepared to
3 provide the 10 named representative plaintiffs. Quite frankly,
4 we believe that's a sufficient representative number; but as I
5 said, we have been able to identify 37, and we are prepared --
6 upon review and the entry of the appropriate order -- to provide
7 all 37 files.

8 I am told --

9 THE COURT: Where are those files? Are they in USDA or
10 all over the country?

11 MS. BHATTACHARYYA: They are all over the country. I am
12 told they average about a box per name. Some may be larger, some
13 may be smaller. It will be a significant task to retrieve them,
14 to duplicate them, to review them for privileged documents, and
15 then to produce them.

16 Beyond -- to require us to do -- to go beyond that is a
17 gargantuan task, particularly for field offices that are already
18 understaffed and overburdened -- to ask them to go through and
19 generate files for both Hispanic farmers and the white farmers in
20 the same counties, which we think is a request that really goes
21 far too far.

22 The purpose of the discovery here, Your Honor, was to
23 try -- as you said during the hearing -- was to try to establish
24 the nexus of commonality that's required in order to certify a
25 class action. Many of the requests that the plaintiffs have

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1 filed go to reliability issues. The articulation Mr. Hill just
2 gave about you why they seek civil rights processing information
3 goes to a liability issue. It has nothing to do with whether or
4 not a class ought to be certified in this case..

5 It seems to me this discovery is best focused at this
6 stage of the proceedings by looking for reasonable documents
7 associated with the issues of class certification.

8 On that front, we've agreed to provide several categories
9 of documents. We've agreed to provide those documents that we
10 call "policy" documents, manuals, processing information, how
11 these loans are done, how they're approved, how they're serviced.

12 Those documents were provided to the plaintiffs in the
13 Love case. They can be provided again to the plaintiffs here if
14 this court so orders.

15 The second group of documents that we've agreed to provide
16 are the borrower files for these 37 named plaintiffs for whom
17 we've been able to identify that USDA has files.

18 And then we've also agreed to provide the databases. I
19 understand that Mr. Hill thinks they're not very useful, but they
20 are the only source of aggregate information that USDA has. To
21 aggregate other kinds of information of the sort Mr. Hill and his
22 colleagues request in their discovery requests would require the
23 agency to review individually every single farmer file in order
24 to determine, for example, how many farmers had supervised
25 accounts.

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1 There was no other way to compile that information; and to
2 do that in 28 counties in eight states is -- over the course of
3 20 years is extraordinarily burdensome. We don't think it is
4 necessary in order for the plaintiffs to be able to make a
5 finding or to make a showing about commonality. We think they
6 should be able to do that, if they can do it, on the basis of the
7 information that we are prepared to provide.

8 We ask the court to limit the plaintiffs' discovery to
9 that information.

10 Just a final point, Your Honor. On the question of the
11 depositions.

12 THE COURT: Let me just test what you just said.

13 Are you prepared to concede that if the plaintiffs
14 establish enough commonality on a review of 37 files as among
15 those 37 files, that they will stand as a surrogate for the
16 entire country and permit class certification?

17 MS. BHATTACHARYYA: I think, Your Honor, that that would
18 be a start; but I'm not -- because -- because I would need to
19 have my expert determine whether or not those files sufficiently
20 stand for the country, that might be useful; but they certainly
21 provide a basis for a start. If it appears once those files are
22 reviewed, once the plaintiffs have attempted to compile that
23 information and we can see what they've managed to find, that
24 additional discovery might be necessary, then that may be the way
25 to go.

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1 THE COURT: I'll take that as a no, I'm not quite prepared
2 to concede that yet, Judge.

3 MS. BHATTACHARYYA: We do think, Your Honor, in many cases
4 obviously it is helpful to stage discovery. This may be one of
5 those cases where the burdens on the government of responding to
6 the requests in the form that they have been propounded is so
7 extreme; and I would note, Your Honor -- despite Mr. Hill's
8 representation that those requests were carefully tailored --
9 they weren't. They refer to USDA credit programs not simply the
10 FSA programs that are at issue here. They refer to all
11 non-credit benefit programs, not simply the disaster relief
12 programs that are cited in their class definition.

13 They sought -- one of the discovery requests asked for all
14 records containing the names of Hispanic farmers, regardless of
15 their content. Many that would require USDA literally to review
16 every single piece of paper in their offices to determine whether
17 or not the name of an Hispanic farmer was written on them.

18 It would require USDA to produce the phone book.

19 These are not narrowly tailored requests; and they are
20 quite simply staggeringly burdensome.

21 On the question of depositions, Your Honor, we completely
22 agree that repetitive depositions are unnecessary. Given that
23 plaintiffs are seeking 30(b)(6) depositions in order for us to be
24 able to appropriately prepare witnesses, we think that their
25 30(b)(6) notices should specify which areas were not covered in

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1 the Love depositions where additional clarification is needed so
2 that we can prepare the witnesses to respond to those questions.
3 Otherwise, we're stuck with the same general categories that were
4 asked of the 30(b)(6) Love witnesses, and we're unable to
5 properly prepare those witnesses. I don't think that's
6 effective. If the goal is to avoid repetition, then more
7 specificity should be required of the plaintiffs on their
8 30(b)(6) notices.

9 THE COURT: These 37 borrower files, 37 boxes of
10 documents, where are they?

11 MS. BHATTACHARYYA: They are currently located in the
12 county offices where the borrowers were borrowers.

13 THE COURT: And you would bring them all to Washington?

14 MS. BHATTACHARYYA: I think at this point that's the plan,
15 Your Honor, because they would have to undergo a review for
16 privileged documents. That's best done here.

17 THE COURT: Privilege?

18 MS. BHATTACHARYYA: Well, many of these -- some of these
19 documents may contain deliberative -- some of these files may
20 contain deliberative process privileged documents. Some contain
21 attorney-client materials. As an example, Your Honor --

22 THE COURT: Deliberative process privilege is a FOIA
23 privilege. It is not a litigation privilege.

24 MS. BHATTACHARYYA: It is a litigation privilege, Your
25 Honor.

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1 THE COURT: Really?

2 MS. BHATTACHARYYA: Yes, it is.

3 THE COURT: Show me.

4 MS. BHATTACHARYYA: Do you have a cite for that?

5 THE COURT: In fact, the deliberation is what this is all
6 about, isn't it?

7 MS. BHATTACHARYYA: I'll be happy to provide Your Honor
8 with some cites for that, but it is a litigation privilege, Your
9 Honor.

10 THE COURT: Good luck.

11 MS. BHATTACHARYYA: It is intended to protect
12 decision-making, and it protects pre-decisional materials, not
13 the decision that is, in fact, made.

14 It does apply in litigation.

15 THE COURT: Better give me a brief on that.

16 MS. BHATTACHARYYA: Okay. I can do that.

17 THE COURT: I'm serious about that. The sooner the
18 better. Pre-decisional -- what you call pre-decisional
19 deliberative matters in litigation between parties on a
20 discrimination case I don't think is privileged at all. Maybe
21 I'm way off base. It is late in the afternoon. You show me,
22 okay?

23 MS. BHATTACHARYYA: The other type of privileged document
24 that may appear in these files, Your Honor, is attorney-client or
25 attorney work product.

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1 THE COURT: Which attorneys?

2 MS. BHATTACHARYYA: Farmers go into bankruptcy
3 occasionally. Documents that may appear in the course of
4 bankruptcy proceedings do appear in their files.

5 THE COURT: These are named plaintiffs. These people
6 represent them.

7 MS. BHATTACHARYYA: There would still have to be a
8 protective order.

9 THE COURT: They get a waiver from their clients.

10 MS. BHATTACHARYYA: Work product they don't get a waiver
11 on. My attorneys' work product that appears in the plaintiffs'
12 files.

13 THE COURT: When was litigation contemplated? You're
14 throwing up a flag here which is what I'm concerned about.
15 You're issue spotting, which is what a good lawyer is supposed to
16 do; but discovery is discovery. There's no -- there's no
17 protective order, there is no reason these things cannot be made
18 available with a general protective order rather than have --
19 rather than tell me your lawyers are going to crawl through these
20 for six months and raise all these issues.

21 If you want to start, I'll give you a start. Bring the
22 documents to Washington. Put them in a room. Make them
23 available to plaintiffs' counsel. Without pre-screening. Make
24 them available to counsel.

25 MS. BHATTACHARYYA: Your Honor, I'm not authorized to

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1 waive privileges on behalf of the agency. If there are
2 privileged documents in those files, we need to be able to
3 attempt to identify them.

4 THE COURT: We'll get an agreement from plaintiffs'
5 counsel that if any document -- if they want to copy any document
6 that is privileged that the privilege is not deemed waived and
7 won't be used. We can get past that.

8 You tell me about the staggering burdens on the agency.
9 If part of the staggering burden is combing through all these
10 documents and asserting privileges, then it is a non-starter. If
11 you want to start someplace, fine. Bring the documents here.
12 We'll start with the 37 documents -- the 37 boxes of documents.

13 You can draft the tightest protective order you can think
14 of. I'll be happy to sign the protective order. But let them
15 start looking at them.

16 MS. BHATTACHARYYA: I think we can do that.

17 THE COURT: Policy documents you're going to give them?
18 Databases you're going to give them.

19 MS. BHATTACHARYYA: Yes, Your Honor.

20 THE COURT: 30(b)(6) motions you say you want something
21 more -- 30(b)(6) depositions, you say you want more detailed
22 data. More detailed requests.

23 Well, a 30(b)(6) deposition has to be accompanied by a
24 request.

25 MS. BHATTACHARYYA: Yes, Your Honor. They were here, but

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1 there are two categories of information that they've sought
2 30(b)(6) information about. The first is categories of
3 information that the Love depositions have already covered. With
4 respect to those, we agree, Your Honor, they're entitled to
5 redepose those witnesses; but the depositions should not be
6 repetitive. Sworn statements of the agency are already on
7 record. If they want to re-cover that ground, they need to tell
8 us specifically what is new and what needs to be clarified so we
9 can prepare those witnesses correctly.

10 THE COURT: Let's not create problems before they happen.
11 Have you served 30(b)(6) notices?

12 MR. HILL: Yes, Your Honor.

13 THE COURT: What is objectionable about what they've
14 served?

15 MS. BHATTACHARYYA: As I said Your Honor in the -- the
16 first objection is to those categories of requests that are
17 duplicative of what was testified to in Love. That would be, on
18 my copy of the deposition notice, the first eight categories.
19 No, I'm sorry the first seven categories.

20 The eighth and ninth categories are new to this case.
21 They deal with disaster relief programs, and we can provide a
22 witness to talk about disaster relief programs.

23 The tenth category, Your Honor, on that list deals with an
24 issue we believe the plaintiffs are not entitled to raise, which
25 is the question of how USDA's databases were compiled and what

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1 decisions were made about what goes in them.

2 THE COURT: Why not? Pre-decisional?

3 MS. BHATTACHARYYA: No, Your Honor. I fail to see how
4 that leads to anything of interest in this case.

5 THE COURT: That's the whole point of a 30(b)(6)
6 deposition is to find out what you've got, why it is the way it
7 is, what's been left out and why it's been left out.

8 That's the whole point of it. I would start with that
9 one. That would have been number one on my list of things I
10 wanted to know. That's -- you're saying the database -- they say
11 the database is no good. You say the database is all there is.
12 They're entitled to inquire how the database was created and what
13 it is and how it is put together and how you get information out
14 of it and all that kind of stuff.

15 MS. BHATTACHARYYA: I agree, Your Honor, but what this
16 question goes to is the plaintiffs' theory that USDA has somehow
17 purposely compiled a database so as to avoid providing
18 information to plaintiffs with discrimination claims.

19 I don't think that that is something that the motivations
20 behind USDA's, even assuming that that farfetched theory had any
21 kernel of truth to it that that motivation is a proper subject
22 for discovery.

23 USDA creates this database for purposes of USDA's
24 business. What is in them, why they are put together, who
25 maintains that information, that's perfectly appropriate.

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1 But Your Honor has previously expressed some skepticism of
2 the question of whether or not plaintiff can inquire into the
3 evil intent behind information that is not maintained in a
4 centralized database.

5 THE COURT: Look, I may agree with you completely that
6 they're on a wild goose chase thinking there is something wrong
7 with the way the database was put together; but it seems to me
8 for the government to say that they can't even ask it is to raise
9 all kinds of suspicions that can be allayed very simply by
10 putting a witness up and finding out how it was put together.

11 Now the first eight items in the 30(b)(6) notice of
12 deposition, all or most of them are modified by the term
13 "Hispanic farmers."

14 If and to the extent the answers to those questions are
15 different for Hispanic farmers than they are for women farmers,
16 they're different questions. They call for different answers.

17 MS. BHATTACHARYYA: Yes, Your Honor.

18 THE COURT: I think you can assume that -- or I will
19 hereby tell everybody that those questions are deemed to be
20 modified. You know, the obligation of your witness is to come
21 forward and answer any question -- any part of these questions
22 that are different for Hispanic farmers.

23 MS. BHATTACHARYYA: If that's the obligation of the
24 witness, Your Honor, I think we can prepare a witness for that.

25 THE COURT: Okay. All right. Let's do this stepwise.

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1 Bring those 37 boxes here. Give them the policy documents. Give
2 them your database information. Give them the 30(b)(6) witness
3 that is prepared to talk about whatever additional applies to
4 Hispanics; and yes, can talk about the creation and the design of
5 the database, if -- indeed -- anybody can remember.

6 That's arguably a problem.

7 MS. BHATTACHARYYA: That is arguably a problem.

8 THE COURT: But the fact that anybody should presume to
9 think that anybody had any bad intent in the Department of
10 Agriculture is no reason not to answer the questions about it.

11 Now the process that I've just described could take both
12 sides 60 days to get something done. Then you come back here and
13 let's talk about it some more. Can you go along with that?

14 MS. BHATTACHARYYA: I believe that's doable, Your Honor.

15 MR. HILL: May I be heard briefly?

16 THE COURT: Yes, sir.

17 MR. HILL: Just a couple of points, Your Honor. With
18 respect to the 37 boxes of documents with respect to named
19 plaintiffs, we would also need at some point the documents with
20 respect to their white male counterparts if you're going to do a
21 statistical analysis of -- to satisfy commonality under either a
22 disparate impact or a disparate treatment theory.

23 THE COURT: That may very well be, Mr. Hill. I'm not
24 saying you can't have those. I'm saying we're going to start
25 with these 37.

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1 MR. HILL: Okay. Just to be clear, Your Honor, Assistant
2 Secretary Gallegos, who is the assistant secretary of the
3 Department of Agriculture --

4 THE COURT: Mr. Hill, I'm going ask you to hold for a
5 minute.

6 (Discussion off the record.)

7 THE COURT: Thank you.

8 Back to you, Mr. Hill.

9 MR. HILL: Yes, sir. What we said earlier was that
10 there's pretty clear evidence that there has been widespread
11 discrimination on the part of USDA; and at a recent hearing
12 before the congressional oversight committee, Assistant Secretary
13 Gallegos -- talking to this very subject -- said -- and I
14 quote -- "I should note the fact that the government is opposing
15 class certification of these cases is separate and" -- he's
16 talking about the Love and Garcia cases in in this instance --
17 "is separate and apart from our position on the merits of the
18 cases. The class certification issue is a technical legal
19 matter, and the government simply does not believe that the
20 requirements of class certification have been met.

21 "If the classes are not certified, the government will
22 evaluate the merits of the cases, of any individuals who choose
23 to go forward on an individual basis.

24 "With respect to" --

25 THE COURT: I'm sure the government would be happy to

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1 mediate the individual cases. That's not what you want.

2 MR. HILL: No. That's true, Your Honor. But it's
3 certainly -- it certainly is -- it seems to me -- a concession
4 that there is merit to these cases. That's my only point there.

5 In connection with the government's data collection, it's
6 not just a wild theory on our part that they have been selective
7 in their data collection. The U.S. Commission on Civil Rights in
8 1982 faulted the Department of Agriculture in its data collection
9 saying that under its data collection, you could not determine
10 the impact of its programs on any group.

11 In 19 -- eight years later, in 1990 -- and I have a copy
12 of that, Your Honor, if I may approach?

13 THE COURT: We're talking discovery.

14 MR. HILL: I understand.

15 THE COURT: We're talking discovery. I don't need to hear
16 those -- those are kind of merits arguments which I'm always
17 interested in but not to the point of studying your documents.

18 MR. HILL: Well, what Congress said in 1992 was that FMHA
19 still does not collect, maintain, and analyze data to determine
20 the impact of its programs, that its programs have on minority
21 farmers; and one of the things that did happen as a result of
22 that finding was to instruct USDA to start keeping its records in
23 a better fashion so that you could, in fact, determine the
24 impact.

25 And that's one of the things you're asking us to do with

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1 respect to this database, that simply can't be done.

2 So we need at the end of the day that information; and a
3 lot of my learned colleague's points were directed to the fact
4 that commonality under simply a disparate impact theory, we are
5 alleging both disparate impact and disparate treatment; and they
6 are two separate theories, and they have different implications
7 when it comes to discovery.

8 And I have never known in my nearly 30 years of practicing
9 law that my -- a party's discovery was limited to opposing
10 counsel's perception of our case. We are entitled to liberal
11 discovery, Your Honor, to try to prove our case both in terms of
12 disparate impact and disparate treatment.

13 Thank you.

14 THE COURT: Come back here in 60 days. At the end of 60
15 days, I will expect the government will have produced much, much
16 sooner than 60 days -- since you say you have them in boxes
17 around the country -- 37 boxes of documents to the plaintiff.

18 Do not put legions of lawyers to work combing through
19 them. Bring me the documents themselves here. We're talking
20 original documents are we not?

21 MS. BHATTACHARYYA: Yes, we are, Your Honor -- excuse me.
22 We are talking original documents, Your Honor. So we ask that we
23 be able to make them available for inspection by the plaintiffs.

24 THE COURT: Of course. You're not going to give them to
25 the -- they're going to be put in a room someplace. The

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1 plaintiffs are going to be permitted to come inspect them, within
2 the literal meaning of the word, inspect and copy. If there
3 are -- if they want things copied that you believe are privileged
4 and you want to interpose a privilege, then we'll argue about it.

5 But I don't want -- I don't want to do a big privilege
6 screen before they even look at the documents 'cause that will
7 take 60 days before you even let them in the door.

8 You know, this cannot go on forever.

9 MS. BHATTACHARYYA: Your Honor, documents cannot be
10 produced to the plaintiffs without the entry of the Privacy Act
11 protective orders. I assume the 60-day period would run
12 following entry of that order.

13 THE COURT: The protective order you want, you can give me
14 next Monday.

15 MS. BHATTACHARYYA: I'm sorry, Your Honor, but my schedule
16 may not allow that.

17 THE COURT: Well, you have a lot of other people there.
18 Somebody can give it to me next Monday.

19 MS. BHATTACHARYYA: We'll do that.

20 THE COURT: Okay.

21 MR. HILL: One final issue.

22 MR. SITCOV: May I make a final point?

23 The only timing issue -- and I don't know whose files
24 these 37 are -- any that are active will literally have to be
25 copied. Because if those are active farmers who have ongoing

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1 credit relationships with USDA, there has to be for those people
2 some record in the county.

3 So it may be that there's a little bit of a delay with
4 some of those, because we'll have to make copies.

5 THE COURT: Or can you notify plaintiffs' counsel that you
6 have these seven boxes in seven counties, and they can go to the
7 counties and look at them if they want to.

8 MR. SITCOV: If they prefer to do that, I'm amenable to do
9 that. With active borrowers it is a little bit different on that
10 one issue.

11 THE COURT: Understood.

12 MR. HILL: Finally, Your Honor, is there any interest in
13 the -- since we're going to be another 60 days -- is there any
14 interest in that mediation point.

15 THE COURT: Mediation under our system is a completely
16 consensual process. I hear the government saying they're not
17 consenting to it at this stage..

18 I guess I hear them -- they didn't quite say, but I think
19 I heard you quoting Secretary Gallegos saying if you want to
20 mediate individual cases, we'll talk about that. But we're not
21 at that stage. You guys want class mediation. The government is
22 saying they're not prepared for that. I'm not going to order it.

23 I'm not going to order any unwilling party to mediation.

24 MR. HILL: Thank you, Your Honor.

25 THE COURT: 60 days? Monday June 30.

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1 MR. SITCOV: Your Honor? While there are legions of us, I
2 have a vacation planned for that week as does Ms. Bhattacharyya.
3 Would it be possible to move it to the following week, which
4 would be -- I guess -- July 7, something like that?

5 THE COURT: July 8.

6 MR. SITCOV: Thank you, Your Honor.

7 MR. SITCOV: Ms. Bhattacharyya still won't be back. When
8 will you be back?

9 Could we do it on the 10th or 11th? Ms. Bhattacharyya is
10 going to be out of the country in Europe and won't be returning
11 until the 8th.

12 THE COURT: When are you leaving?

13 MS. BHATTACHARYYA: On the 17th, Your Honor.

14 MS. OLSON: I will be away the week of July 4.

15 MR. HILL: Your Honor, I've never taken a month-long
16 vacation in 30 years. Seriously.

17 THE COURT: Well, they've got you there, Mr. Hill. I'm
18 sorry that you never have taken a month-long vacation. These
19 people do not have quite the private sector incentives that you
20 have not to take vacations. They'll have their vacations. We'll
21 set it up for the 15th of July; and if that turns out to be of 60
22 days plus 15, too bad. 15th of July. 4:00 o'clock in the
23 afternoon.

24 MR. SITCOV: Thank you Your Honor.

25 MR. HILL: One last thing, Your Honor. There -- as I

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1 pointed out in our pleadings, Your Honor, there were a number of
2 discovery requests as to which they interposed no objection
3 whatsoever. Is there any reason why they can't produce those?

4 THE COURT: What are they?

5 MR. HILL: I have them. Interrogatories 3 through 4, 9
6 through 11, 15, 18 through 19, and document requests 13 through
7 15, and 25 through 30. We took issue with their -- their
8 approach to the -- the objections. In any event, but with
9 respect to those they posed absolutely no objections.

10 THE COURT: What's the government's response to that?
11 Interrogatories 3 through 4, 3 through 4, I guess, 9 through 11.

12 Interrogatory 3, do you contend that Hispanic farmers
13 received the same information regarding farm credit and benefit
14 farmers as white farmers -- programs as white farmers?

15 MS. BHATTACHARYYA: We can provide an answer to that, Your
16 Honor.

17 THE COURT: Did USDA or the agencies ever provide
18 information regarding farm credit and benefit programs in
19 Spanish?

20 MS. BHATTACHARYYA: We can provide an answer to that as
21 well.

22 THE COURT: Including the part that says identify all such
23 instances? That's a little heavy.

24 MS. BHATTACHARYYA: That might be a bit overbroad although
25 I have to say at this point I don't know how much information was

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1 provided in Spanish.

2 THE COURT: 9 through 11, for each relevant county,
3 identify all of the agency's benefit and credit programs provided
4 to farmers.

5 No objection?

6 MS. BHATTACHARYYA: We object, Your Honor, to the extent
7 that this request seeks information about non-credit benefit
8 programs beyond disaster relief programs that are the only
9 programs identified in plaintiffs' class request.

10 MR. HILL: The time for filing objections was February 14.

11 THE COURT: Let's not get all technical here.

12 MR. HILL: They didn't object.

13 THE COURT: All right. It is not a waiver. Okay.

14 MR. HILL: Okay.

15 THE COURT: They want all of the agency's benefit -- you
16 say all the agency's benefit and credit programs. They'll say
17 they'll give you disaster relief and what else?

18 MS. BHATTACHARYYA: FMHA and FSA loan programs.

19 THE COURT: Start with that.

20 For each relevant county, state the number of Hispanic
21 farmers. You didn't object to that one.

22 MS. BHATTACHARYYA: We can answer that to the best of our
23 ability, but you should be aware identifying Hispanic farmers is
24 not something the files show.

25 THE COURT: State to the best of your ability.

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1 The number of white male farmers? Same answer?

2 MS. BHATTACHARYYA: Same answer. We do object to number
3 15, Your Honor.

4 THE COURT: You do object, but you didn't object.

5 MS. BHATTACHARYYA: We objected, Your Honor, in our papers
6 with respect to number 16. 15 falls within the same category.
7 It is an individualized request that has nothing to do with class
8 certification issues and involves a limited number of farmers in
9 a limited area of the country.

10 MR. HILL: I'm learning new lessons in discovery every
11 day.

12 THE COURT: What are you talking about here, Mr. Hill?
13 What partnership meeting? Clue me in here. Alamosa County,
14 Holiday Inn, November 21, 2002. What are you talking about.

15 MR. HILL: As it happens, Your Honor, Mr. Anderson and I
16 have been travelling the country interviewing Hispanic farmers,
17 trying to develop and flesh out their stories and whatnot. On
18 this particular date, we happened to be at that hotel in Alamosa
19 County, and we had reserved a conference room; and next door was
20 an organization called the partnership -- I don't have it --
21 well, as it turns out, the partnership turned out to be a meeting
22 held by the local FSA office to discuss benefits and credit
23 programs under the new farm bill; and interestingly enough, the
24 only people who seemed to be invited to that meeting were white
25 farmers.

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1 We met that day with probably 20 to 30 Hispanic farmers in
2 that same county, none of whom had ever heard of either the
3 organization or the meeting in question; and it seems to me that
4 that goes directly to the kind of conduct that is at issue here
5 where they were holding a meeting again of the partnership and
6 somehow the partnership included only white farmers.

7 THE COURT: I think you can go back to Alamosa County and
8 take the deposition of the county agent.

9 MR. HILL: That would be fine.

10 THE COURT: Number 18 and 19. Identify all documents that
11 you consulted or reviewed or referred to in any way in connection
12 with preparing or verifying your response to these
13 interrogatories.

14 For each such document, identify the interrogatory --
15 identify each person who answered or provided any information.

16 Well, you have to -- you're going -- interrogatory answers
17 have to be sworn. That's for sure.

18 MS. BHATTACHARYYA: We have no objection to 19, Your
19 Honor. With respect to 18, to the extent plaintiffs' requests
20 ask us to go through individual borrower files in order to
21 provide answers, obviously identifying each one of those
22 documents would be tremendously burdensome. To the extent we are
23 responding to a smaller group of interrogatory responses, we can
24 attempt to answer 18 to the extent it does not become burdensome.

25 MR. HILL: If I may be heard, Your Honor?

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1 THE COURT: All right, Mr. Hill.

2 MR. HILL: What we are asking for in 18 is to the extent
3 they have actually referred to or reviewed a document in
4 connection with formulating a response, we'd like to know what
5 that document is. That's a standard discovery request.

6 THE COURT: I know. That's what's wrong with discovery.
7 This is one of these questions that sort of disappears into its
8 own ether, you know.

9 MR. HILL: That may be, Your Honor but it seems it is
10 certainly within the purview of rule 26 which allowed us to take
11 discovery that will allow us to identify documents and
12 individuals who -- that may have relevant information; and I
13 can't see for the life of me what burden would be associated with
14 if I reviewed the document, listing it. I'm not asking them to
15 go out and do something unusual. You look at the document. You
16 review that document in coming up with your answer. Then list
17 it. So we can have an opportunity to review it.

18 THE COURT: You said you'll make a good faith effort to do
19 what you can. Do what you can and say what you haven't been able
20 to do. We can contest the response to that later on.

21 MS. BHATTACHARYYA: Yes, Your Honor.

22 THE COURT: All right. Document requests 13 to 15.

23 I told you I wasn't going to send this to a magistrate
24 judge. You're just going to have to sit here with me and crawl
25 through these things.

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1 MS. BHATTACHARYYA: With respect to -- with respect to
2 request number 13, Your Honor, obviously reserving any privileges
3 that might be asserted, we won't go outside of USDA, but to the
4 extent there are documents maintained in USDA, which is the only
5 named defendant here, we will produce what we've got.

6 THE COURT: All right.

7 MS. BHATTACHARYYA: With respect to document request
8 number 14, we can produce that to the extent it exists.

9 With respect to document request number 15, I believe this
10 is one of those requests that falls outside of Your Honor's
11 ruling about the scope of discovery, since it goes to the
12 processing of civil rights complaints.

13 THE COURT: Sustain the objection to 15.

14 25 through 30?

15 MS. BHATTACHARYYA: There are two 25s, Your Honor, so --

16 THE COURT: So there are.

17 MS. BHATTACHARYYA: That's part of the problem.

18 MR. HILL: I apologize, Your Honor. We did have a snafu
19 there; but --

20 THE COURT: Which 25 are you talking about, Mr. Hill?

21 MR. HILL: The first one. The second one I dubbed 26.

22 THE COURT: Oh, all right.

23 MS. BHATTACHARYYA: But then there are two --

24 THE COURT: All right. All right.

25 MS. OLSON: What's happened in the past week, we put the

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1 correct number --

2 THE COURT: To be fair, he said 25 through 30. That
3 includes 25, 25, 26, 27, to 287 and 29. Inclusive.

4 MR. HILL: It was a bad typing day.

5 MS. BHATTACHARYYA: With respect to what I call 25-A, Your
6 Honor, to the extent not produced in response to other previous
7 questions. I'm not sure how that remains applicable here given
8 the limited nature of what we all agree should be produced at
9 this stage. I'm not sure we can respond. In any event, I
10 believe it is overbroad for a number of reasons.

11 THE COURT: For the time being, without prejudice to
12 you're reasking that question, I'll sustain the objection to 25-A
13 on page 10.

14 Next 25?

15 MS. BHATTACHARYYA: With respect to 25-B, we are still
16 attempting to track down, Your Honor, whether or not these
17 reports exist; but assuming that they do exist for every month in
18 a 20-year period, that's somewhat burdensome. We can -- to try
19 to collect and -- those. But we will attempt to do what we can.

20 THE COURT: Do what you can.

21 MS. BHATTACHARYYA: With respect to 26, Your Honor, this
22 is a question that is the subject of a 30(b)(6) deposition, so we
23 would ask the document production at least be delayed until the
24 30(b)(6) deponent can be talked to.

25 MR. HILL: That doesn't make any sense, Your Honor.

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1 THE COURT: Now, now, counsel.

2 MS. BHATTACHARYYA: I would add again, Your Honor, this is
3 a 30(b)(6) deposition -- the subject of which has already been --

4 THE COURT: You can say you don't understand it, but to
5 say it doesn't make any sense is not allowed. Produce all
6 documents that discuss, reflect, refer to or relate to any
7 decision, discuss, refer...

8 Well, I'm going to -- I don't know whether I'm sustaining
9 this objection or not; but to the extent your point is find out
10 what those documents are in connection with a 30(b)(6)
11 deposition, fine. That you can do.

12 MS. BHATTACHARYYA: I think the same applies to number 27,
13 Your Honor.

14 THE COURT: Same ruling.

15 What about number 287?

16 MS. BHATTACHARYYA: 28 and 29 refer to document retention
17 policies. Most of those were produced to the Love plaintiffs.

18 THE COURT: Produce them again. We've been over documents
19 and interrogatories that have not been objected to. Some have
20 been objected to. I've issued rulings on them. When are you
21 going to respond to these?

22 Not in 60 days. They've been outstanding for some time.

23 MS. BHATTACHARYYA: May I have a few minutes to confer?

24 THE COURT: You can have one minute to confer since it is
25 now one minute to 6:00.

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1 MS. BHATTACHARYYA: Thank you.

2 (Discussion off the record.)

3 MS. BHATTACHARYYA: Your Honor, we can certainly begin
4 production of the -- of the policies -- of the various policy
5 documents relatively quickly.

6 Within 10 days.

7 It will take longer -- obviously -- for any documents that
8 need to be transported from field offices, particularly as
9 Mr. Sitcov indicated for documents associated with active
10 borrowers. It will take longer with respect to any information
11 that has to be collected from field offices.

12 To the extent there is information, for example, just to
13 pick one out of thin air, about Spanish language programs that
14 are located in field offices in 28 counties and eight states, it
15 will take some time to get the requests out into the field,
16 collect those documents, bring them back to Washington and get
17 them to the plaintiffs. We do anticipate that we can start
18 production within 10 days with respect to the policy documents
19 that are maintained centrally and then hopefully go from there as
20 quickly as possible.

21 THE COURT: I will refrain from making the obvious point,
22 the point Mr. Hill would like to get up to give but having been
23 told he can't make irascible comments he won't, I will refrain
24 from the obvious point that since you didn't object to these you
25 should have started that process a long time ago. I will accept

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1 your statement that you will start doing that now and do it as
2 quickly as you can in good faith and respond to the document
3 production requests and interrogatories as to which I made a
4 ruling as fast as you can; and in any event, you will make at
5 least a complete pass at responding to all of these
6 interrogatories and document production requests within 30 days.

7 And that, counsel, completes my work day. I am now going
8 on vacation until tomorrow morning. I expect you to do the same
9 thing. Good night.

10 MR. HILL: Thank you, Your Honor.

11 (Proceedings adjourned at 5:58 p.m.)

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CERTIFICATE

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I, DENNIS A. DINKEL, Official Court Reporter, certify that

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the foregoing pages are a correct transcript from the record of

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proceedings in the above-entitled matter.

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Dennis A. Dinkel

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