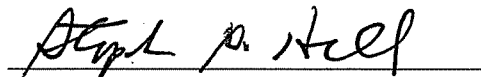


Pursuant to LCv R(m), plaintiffs have conferred with defendant's counsel who opposes this motion.

Respectfully submitted,



Alan M. Wiseman #187971
Kenneth C. Anderson #243962
Robert L. Green, Jr. #935775
HOWREY LLP
1299 Pennsylvania Avenue, N.W.
Washington, D.C. 20004
(202) 783-0800
(202) 383-6610 (fax)

Stephen S. Hill #927137
HOWREY LLP
1299 Pennsylvania Avenue, N.W.
Washington, D.C. 20004
(202) 783-0800
(202) 383-6610 (fax)
Attorneys for Plaintiff
GUADALUPE L. GARCIA, Jr., *et al.*

Date: October 19, 2010

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

_____)	
GUADALUPE L. GARCIA, JR., <i>et al.</i> ,)	
)	
Plaintiffs,)	
)	
v.)	Civil Action No. 1:00CV02445
)	(RBW)
TOM VILSACK, Secretary of the)	
United States Department of Agriculture,)	
)	
)	
Defendant.)	
_____)	

**MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF
PLAINTIFFS' EMERGENCY MOTION TO STAY PUBLICATION OF
DEFENDANT'S PROPOSED NOTICE OF A CLASS-WIDE SETTLEMENT
PENDING COURT REVIEW**

INTRODUCTION

On October 6, 2010, Plaintiffs, in response to defendant's September 27, 2010 status report ("Defendant's Status Report"), filed a motion ("Motion") requesting that the court review defendant's notice of proposed settlement, claims administration and settlement ("proposal"), certify a settlement class, and "hold in abeyance the proposed notice pending resolution of th[e] motion." *See* Dkt. #182. As set forth fully in the Memorandum of Points and Authorities In Support of Plaintiffs' Motion To Review Defendant's Proposed Notice and Terms of Class-Wide Settlement And To Certify A Settlement Class ("Plaintiffs' 10/6/10 Memorandum"), plaintiffs asked the court to hold in abeyance defendant's proposal until the court had ruled on plaintiffs' Motion because the proposed notice is defective in key respects that will result in untold numbers of the putative class members being misled and losing their right to pursue valid claims.

Despite the pending Motion, defendant has taken the position that the government is under no obligation to await a ruling by this court before proceeding with its proposed notice and other unilateral measures to publicize the proposed class-wide settlement. On October 15, 2010, at 7:38 p.m., defendant filed a Second Status Report, informing the court and plaintiffs that the government intends to publicize and initiate its claims process perhaps as early as October 20, 2010. *See* Dkt. #184. Plaintiffs respectfully request that this court issue an order holding in abeyance any public announcement or notice of the proposed class-wide settlement process until after the court has ruled on plaintiffs' pending Motion. Such an order will not prejudice the other efforts defendant has indicated the government will undertake in preparing to roll out the proposed settlement claims process.

ARGUMENT

UNLESS IMMEDIATELY STAYED PENDING COURT REVIEW, DEFENDANT'S PROPOSED NOTICE WILL MISLEAD PUTATIVE CLASS MEMBERS AND CAUSE THEM TO FORFEIT VALID CLAIMS.

As outlined in Defendant's Second Status Report, defendant intends to "issue a press release; meet with stakeholders; launch a website containing information about the claims process; and activate a call center to gather names and contact information from farmers who are interested in receiving a claims package." *See* Dkt. #184. Defendant also claims that after filing its Second Status Report, defendant would "provide Plaintiffs' counsel and lodge with the Court *in camera* certain additional documents (or working drafts thereof) that it intends to publicize when it initiates the claims process, which it will do on or after October 20, 2010, the date on which Defendant's response to plaintiff's pending motion is due." *Id.* Despite requests by plaintiffs' counsel that defendant permit the court to rule on the pending Motion before proceeding with any such notice, defendant refuses to do so. *See* Exhibit I. Defendant even refuses to state precisely when the government will proceed with the proposed notice.

As of this date, defendant has not provided to plaintiffs any of the additional documents that defendant stated that the United States Department of Agriculture (“USDA”) will use to initiate the settlement claims process. However, based on the proposed notice and fact sheet that defendant has already lodged with the court, there are sufficient grounds to conclude that the proposed notice and fact sheet are misleading and will confuse putative class members. In such circumstances, this court has “both the duty and the broad authority” to exercise control over class actions to prevent such abuse. *Gulf Oil Co. v. Brand*, 452 U.S. 89, 100 (1981). Moreover, the court can and must prevent communications of a settlement offer that would mislead or confuse the putative class members. *See Keystone Tobacco Co. v. U.S. Tobacco Co.*, 238 F. Supp. 2d 151, 154 (D.D.C. 2002). Here, the potential for misleading putative class members is heightened by the submission of unspecified additional documents at or very near the time of publication, thereby allowing no time for a thorough review and assessment of such documents.

As plaintiffs make clear in Plaintiffs’ 10/6/10 Memorandum at 10, 21-23, the class certification issue is very much alive. Indeed, “the Federal Rules of Civil Procedure, and the advisory committee notes thereto, expressly contemplate that a court may revisit its rulings on class certification ...” at any time “until final judgment.” *In re Terazosin Hydrochloride Antitrust Litig.*, Case No. 99-MDL-1317-Seitz/Klien, 2005 U.S. Dist. LEXIS 46189, at *12 (S.D. Fla. Mar. 17, 2005); *see also* Fed. R. Civ. P. 23(c)(1)(C) (“an order [under Rule 23(c)(1)] may be altered or amended before final judgment.”). Given that fact and the clear potential for abuse inherent in defendant’s proposed notice, the court should order defendant to delay any publication of the proposed notice until it has ruled on plaintiffs’ pending Motion.

There are serious flaws in the proposed notice and claims process. *See* Plaintiffs’ 10/6/10 Memorandum at 11-18. For example, defendant has indicated that the government plans to post in USDA field offices, and to mail to individual farmers

identified on one or more undisclosed mailing list, information regarding its class-wide settlement proposal. However, defendant has yet to clarify whether this information will be distributed in both English and Spanish. Further, defendant has yet to indicate what mailing list will be used or how USDA will contact those farmers who were either driven from farming years ago or never permitted to enter farming because they were denied applications or were otherwise discouraged from applying to participate in USDA-administered farm programs. Allowing defendant to proceed with its clearly inadequate notice would not merely be unfair, but will undoubtedly lead to putative class members losing the right to pursue valid claims because defendant plans, as part of the proposed process, to ask the court to lift the current stay preventing the running of the statute of limitations. There is thus the very real possibility that untold thousands of Hispanic farmers will lose the right to pursue valid claims without ever learning of the pending lawsuit or the proposed settlement.

Trying to entice desperate, cash-starved farmers suffering the effects of the worse recession since the Great Depression to settle without providing them adequate details of the settlement proposal is clearly misleading and prejudicial. Indeed, defendant would require farmers with pending claims against USDA to dismiss any such claims before providing them with the information necessary to make an informed decision, including such basic information as how much they may recover, if anything, the procedure for handling their claims, the standard of proof, if any, to be applied to their claims, how their claims will be reviewed, and whether the adjudicator's decisions will be subject to any type of review. *See In re Gen. Motors Corp. Engine Interchange Litig.*, 594 F.2d 1106, 1139-40 (7th Cir. 1979). Additionally, defendant requires those farmers who are not parties to the pending *Garcia and Love* lawsuits, to file new lawsuits, which they must then promptly dismiss with prejudice, in order to participate in the settlement process, thus needlessly incurring a \$350 filing fee, rather than the \$0.44 postal fee to mail a claims form in a typical Rule 23 class settlement. To impose upon require

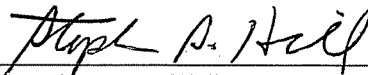
indigent farmers who have suffered decades of admitted discrimination such needless fees and procedural hurdles to take part in a class-wide settlement process can have but one purpose and that is to suppress the number of farmers asserting valid claims.

Having seen fit to lodge these documents with this court and thereby give the impression to putative class members that the court has approved these documents, defendant is not only acting in a misleading manner, but is using the prestige of the court to foist upon unsuspecting putative class members a settlement that is discriminatory on its face and purports to be a class-wide settlement while denying the putative class members their rights under Fed. R. Civ. P. 23. Given defendant's insistence upon proceeding with the flawed settlement process without waiting for the court to rule upon the pending Motion, only swift action by the court in holding in abeyance defendant's stated plan to proceed with the proposed notice will prevent the government from irreparably harming untold numbers of putative class members without any recourse whatsoever. Simply put, the court should not permit defendant to mislead putative class members in such a fashion and give to those class members the false impression that the court has approved the government's actions.

CONCLUSION

For the foregoing reasons and for the reasons set forth more fully in Memorandum Of Points And Authorities In Support Of Plaintiffs' Motion To Review Defendant's Proposed Notice And Terms Of Class-Wide Settlement And To Certify A Settlement Class, the court should order defendant to delay issuance of any public notice of the proposed settlement until the court has ruled on the pending Motion (Dkt. #182) in its entirety.

Respectfully submitted,



Stephen S. Hill #927137
HOWREY LLP
1299 Pennsylvania Avenue, N.W.
Washington, D.C. 20004
(202) 783-0800
(202) 383-6610 (fax)
Attorneys for Plaintiff
GUADALUPE L. GARCIA, Jr., *et al.*

Alan M. Wiseman #187971
Kenneth C. Anderson #243962
Robert L. Green, Jr. #935775
HOWREY LLP
1299 Pennsylvania Avenue, N.W.
Washington, D.C. 20004
(202) 783-0800
(202) 383-6610 (fax)

Date: October 19, 2010

Civil Action No. 1:00CV02445

EXHIBIT 1

Hill, Stephen

From: Olson, Lisa (CIV) [Lisa.Olson@usdoj.gov]
Sent: Friday, October 15, 2010 10:27 AM
To: Hill, Stephen
Cc: Wiseman, Alan; Ruyak, Robert
Subject: RE: Garcia v. Vilsack

Stephen:

Thanks for your e-mail. In answer to your question, USDA intends to publish the document you inquired about without waiting for the Court to rule on your motion. We are not committing to any particular date, but a public announcement of the proposed administrative process could come as soon as October 20, 2010.

Although this does not seem to be the most appropriate forum to debate the other issues you raised, we have been more than forthright with you as to the content of the proposed administrative process, and have given you ample opportunity to participate constructively in that process.

Lisa

From: Hill, Stephen [mailto:HillStephen@howrey.com]
Sent: Thursday, October 14, 2010 1:11 PM
To: Olson, Lisa (CIV)
Cc: Wiseman, Alan; Ruyak, Robert
Subject: RE: Garcia v. Vilsack

Dear Lisa:

I am in receipt of your e-mail of late yesterday afternoon and would have responded sooner but for the fact that I was out of the office. I note that while you state that "USDA is moving forward to implement the administrative process along the lines we previously discussed," you did not indicate a date, if any, upon which USDA currently proposes to issue the notice. I trust that USDA's "moving forward" does not include an actual publication of the notice and roll out of the proposed claims process before the court has ruled on plaintiffs' pending motion. If USDA does intend to publish the proposed notice before the court rules on the motion, then I hereby request that you state so unequivocally and the date on which USDA plans to publish the notice so that we can explore our options in terms of protecting the interests of the putative class. As far as suggestions to improve USDA's proposed process, I commend to your attention the pending motion's detailed discussion of the inadequacy of the proposed notice. Suffice it to say if you wish to provide further details about the proposed process than you have heretofore been willing to provide, we shall be happy to provide you additional comments and suggestions.

Sincerely,

Stephen S. Hill
Partner
Howrey LLP
1299 Pennsylvania Avenue, N.W.

10/19/2010

Washington, D.C. 20004
(202)383-6967
(202) 383-6610 (fax)

From: Olson, Lisa (CIV) [mailto:Lisa.Olson@usdoj.gov]
Sent: Wednesday, October 13, 2010 5:18 PM
To: Hill, Stephen
Subject: RE: Garcia v. Vilsack

Stephen: thank you for your email. As we have previously indicated, USDA is moving forward to implement the administrative process along the lines we have previously discussed. Contrary to the suggestion in your email, USDA is under no obligation to halt its plans, and the Government has not committed to hold off on the proposed notice except with respect to the 81 plaintiffs named in the complaint (and any other clients you identify). As indicated in Ian Gershengorn's October 5, 2010 letter and consistent with our representations in court, we remain open to any constructive suggestions you have on providing the widest possible notice to Hispanic farmers of the proposed claims procedure. Lisa

From: Hill, Stephen [mailto:HillStephen@howrey.com]
Sent: Friday, October 08, 2010 12:00 PM
To: Olson, Lisa (CIV)
Cc: Wiseman, Alan
Subject: Garcia v. Vilsack

Lisa:

In light of our pending motion, the briefing schedule for that motion, and the on-going settlement discussions that you acknowledged in open court, I trust that the government will not go forward with the proposed notice until the court has ruled upon motion.

Sincerely,

Stephen S. Hill
Partner
Howrey LLP
1299 Pennsylvania Avenue, N.W.
Washington, D.C. 20004
(202) 383-6967
(202) 383-6610 (fax)

10/19/2010

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

_____)	
GUADALUPE L. GARCIA, JR., <i>et al.</i> ,)	
)	
Plaintiffs,)	
)	
v.)	Civil Action No. 1:00CV02445
)	(RBW)
TOM VILSACK, Secretary of the)	
United States Department of Agriculture,)	
)	
Defendant.)	
_____)	

[PROPOSED] ORDER

Upon consideration of Plaintiffs' Emergency Motion To Stay Publication of Defendant's Proposed Notice Of A Class-Wide Settlement Pending Court Review and Defendant's opposition thereto, it is hereby

ORDERED that Plaintiffs' Motion to Stay Publication of Defendant's Proposed Notice Of A Class-Wide Settlement Pending Court Review is GRANTED, and

ORDERED that Defendant shall not publish the proposed Notice or otherwise publicize the proposed settlement until further order of the Court.

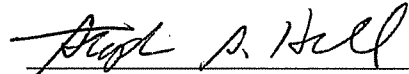
SO ORDERED this _____ day of October, 2010

Reggie B. Walton
United States District Judge

CERTIFICATE OF SERVICE

I hereby certify that on the 19th Day of October, 2010, I have caused Plaintiffs' Emergency Motion To Stay Publication Of Defendant's Proposed Notice Of A Class-Wide Settlement Pending Court Review and the supporting memorandum of points and authorities to be served by operation of Court's electronic filing system upon defendant's counsel as follows:

Lisa A. Olson, Esq.
Michael Sitcov, Esq.
U.S. Department of Justice
Civil Division
20 Massachusetts Ave., N.W.
Room 7300
Washington, D.C. 20530



Stephen S. Hill