

December 17, 2004

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VIA MESSENGER

Clerk's Office
United States Court of Appeals
for the District of Columbia Circuit
333 Constitution Avenue, NW
Washington, DC 20001

Re: *Rosemary Love, et al. v. Ann Veneman, Secretary, United States Department of Agriculture, United States Court of Appeals for the District of Columbia Circuit*

Dear Sir/Madam:

We represent Plaintiffs Rosemary Love et al. in the above-referenced matter. Enclosed for filing are the original and four copies of Plaintiffs' Petition for Permission to Take an Interlocutory Appeal Pursuant to 28 U.S.C. § 1292(b).

Kindly date-stamp the enclosed courtesy copy and return it to the messenger.

Please do not hesitate to contact me with any questions. Thank you for your assistance in this matter.

Sincerely,


Barbara S. Wahl

Enclosure

cc: Joshua Z. Rabinovitz, Esq. (w/enc.) (via first class mail)
Charles W. Scarborough, Esq. (w/enc.) (via first class mail)

LDR/133312.1

such discrimination complaints constitutes a cause of action under the APA or the ECOA -- is the subject of substantial difference of opinion by the district courts within this Circuit, involves a controlling question of law, and is of material importance to the advancement of this litigation. The District Court has certified the Order, demonstrating that it believes this Court should undertake interlocutory review of the issue.² USDA has also concurred that this Court should permit an interlocutory appeal of the issue.

In this case, as demonstrated below, each of the tests of 28 U.S.C. § 1292(b) is met. Most importantly, if this Court accepts interlocutory review of the District Court's denial of class certification under Fed. R. Civ. P. 23(f), and it should because immediate clarification of the law in this Circuit is needed, it should also permit interlocutory review of the APA/ECOA Claim. Class certification and the APA/ECOA Claim are intertwined and this Court should accept an interlocutory appeal of the APA/ECOA Claim in order to have all of the relevant issues before the Court for consideration in a single appeal.

**PROCEDURE AND BACKGROUND REGARDING PLAINTIFFS'
REQUEST FOR INTERLOCUTORY REVIEW OF THE APA/ECOA CLAIM**

On October 14, 2004, Plaintiffs' sought permission pursuant to Fed. R. Civ. P. 23(f) for interlocutory review of the District Court's denial of Plaintiffs' motion for class certification. On October 27, 2004, USDA responded to Plaintiffs' petition, agreeing that this Court should undertake an interlocutory review of the District Court's denial of class certification, and suggesting that the review be limited to an issue not yet before this Court -- the APA/ECOA Claim. *See* Defendants' Response to Plaintiffs' Petition for Permission to Take Interlocutory Appeal Pursuant to Fed. R. Civ. P. 23(f), at 3-4, 19-20. Plaintiffs' Rule 23(f) petition for an

² The Order, dated December 2, 2004, that certifies the District Court's Memorandum and Order dated December 13, 2001, is attached as Addendum 2.

interlocutory appeal of the District Court's denial of class certification is still pending.

The District Court invited Plaintiffs to seek interlocutory review of the APA/ECOA Claim, believing that the APA/ECOA Claim, coupled with the class certification ruling, should be reviewed immediately by this Court. In its September 29, 2004 ruling on class certification, the District Court noted that if Plaintiffs brought a motion for certification of the APA/ECOA Claim, it would be granted. The District Court stated:

As in *Garcia*, I recognize that this order denying class certification, together with my earlier ruling that plaintiffs' claim of failure to investigate did not state a claim under the ECOA or the APA, fundamentally alters the posture of this case. I will accordingly order proceedings in this court stayed so that plaintiffs may seek appellate review of the class certification question, see Fed. R. Civ. P. 23(f), **and, if asked to do so, I will certify my order of December 13, 2001, for interlocutory appeal.**

Mem. Op., dated Sept. 29, 2004, at 14-15 (emphasis added). On December 2, 2004, one day after receipt of Plaintiffs' motion to certify the APA/ECOA Claim for appellate review pursuant to 28 U.S.C. § 1292(b), the District Court granted Plaintiffs' motion.

LEGAL ARGUMENT

Under 28 U.S.C. § 1292(b), a district court can certify an order for interlocutory review if it determines that the order involves a controlling question of law, substantial contrary authority or other grounds for a difference of opinion exist, or an immediate appeal would materially advance the disposition of the litigation. 28 U.S.C. § 1292(b) (1992). See *United States v. Phillip Morris USA, Inc.*, 2004 WL 1514215 (D.D.C. June 25, 2004); *Virtual Def. & Dev. Int'l, Inc. v. Republic of Moldova*, 133 F. Supp.2d 9, 22 (D.D.C. 2001) (citing *Trout v. Garrett*, 891 F.2d 332, 335 n.5 (D.C. Cir. 1989)). Here, the District Court certified the December 13, 2001 Order for interlocutory review pursuant to 28 U.S.C. § 1292(b) with regard to the APA/ECOA Claim.

Once the district court has certified an order for interlocutory review, the court of appeals "may thereupon, in its discretion, permit an appeal to be taken from such order, if application is timely made." This Court should exercise its discretion to accept interlocutory review of the December 13, 2001 Order with regard to the APA/EOA Claim because all three of the § 1292(b) tests are met here.

I. A Substantial Ground for Differences of Opinion Exists.

The existence of contrary, inconsistent or unclear authority constitutes a "difference of opinion" warranting interlocutory review under 28 U.S.C. § 1292(b). *See APCC Services v. Sprint Communications, Co.*, 297 F. Supp. 2d 90, 97-98 (D.D.C. 2003), *appeal granted*, 2004 WL 434083 (D.C. Cir. Mar. 1, 2004). In this Circuit, there is now unclear and inconsistent authority as to whether causes of action for the failure to investigate discrimination complaints may be maintained under the APA and/or EOA. In virtually identical cases asserted by farmers who contend that USDA discriminated against them in the granting and servicing of farm loans, different district courts in this Circuit have reached opposite conclusions about the viability of the APA/EOA Claim. The split in the Circuit has created and will continue to create substantial confusion for potential class litigants in this Circuit.

There are significant differences of opinion as to whether plaintiffs may assert causes of action under the APA and/or the EOA for the USDA's failure to investigate their discrimination complaints. Plaintiffs here and in *Garcia v. Veneman*, C.A. No. 1:00CV02445 (JR), have maintained that these claims are both allowable and an appropriate basis for establishing commonality under Fed. R. Civ. P. Rule 23(a). Plaintiffs' APA/EOA Claim is supported by the USDA's own regulations, which authorize complaints as a means of enforcing EOA. *See* 7 C.F.R. § 15.6 (2004). Yet in its December 13, 2001 Order dismissing the

APA/ECOA Claim, the District Court held that there is no basis for Plaintiffs' APA/ECOA Claim and in its September 29, 2004 Order denying class certification, the District Court held that USDA's failure to investigate discrimination complaints could not constitute a basis for commonality. *See* Mem. Op., dated Sept. 29, 2004, at 2 (dismissal of the APA/ECOA Claim "means that the plaintiffs . . . must seek to satisfy Rule 23(a)'s commonality requirement in some other way"). The District Court made the same finding in *Garcia*. *See Garcia v. Veneman*, Mem. Op., dated Sept. 10, 2004.

In contrast, other district courts within the Circuit have held that the failure to investigate claims of discrimination provided sufficient commonality to certify a class under Fed. R. Civ. P. 23. In *Keepseagle v. Veneman*, 2001 WL 34676944 at *8 (D.D.C. Dec. 12, 2001), the district court found that the commonality requirement was satisfied, in part, by "USDA's alleged failure to properly process, account for, and/or investigate discrimination complaints" of Native-American farmers.³ And in *Pigford v. Glickman*, 182 F.R.D. 341, 349 (D.D.C. 1998), the district court also held that the Rule 23 commonality requirement was satisfied, finding that "[t]he unifying pattern of discrimination at issue in this case is the USDA's failure properly to process complaints of discrimination" lodged by black farmers. The presence of such conflicting rulings within this Circuit provides a firm basis for this Court to certify the issue for interlocutory appeal. *APCC Services*, 297 F. Supp. 2d at 97.

Moreover, the Court of Appeals should consider the APA/EOCA Claim at the same time it considers Plaintiffs' other class certification issues, assuming the Court grants Plaintiffs'

³ This Court declined to conduct an interlocutory review of the district court's grant of class certification in *Keepseagle*, finding that there is nothing "either novel or manifestly erroneous" about the district court's holding that USDA's failure to investigate discrimination complaints satisfies Rule 23(a)'s commonality and typicality requirements. *See In re Veneman*, 309 F.3d 789, 794 (D.C. Cir. 2002).

motion for review under Fed. R. Civ. P. 23(f). The Court should have before it all of the rulings that affect class certification, facilitating the issuance of a single decision that will clarify the inconsistent holdings that have emerged in the Circuit. Comprehensive, rather than a piecemeal approach, to appellate review is favored under well-established case law. *See Wagner v. Taylor*, 836 F.2d 578, 585 (D.C. Cir. 1987) (noting that “[j]urisdiction of the interlocutory appeal is in large measure jurisdiction to deal with all aspects of the case that have been sufficiently illuminated to enable decision by the court of appeals without further trial court development.”); *see also Energy Action Educ. Found. v. Andrus*, 654 F.2d 735,745, n. 54 (D.C. Cir. 1980) (finding that an appellate court may decide other aspects of a case that are "closely related" to the subject of an interlocutory appeal); *Long v. Bureau of Economic Analysis*, 646 F.2d 1310, 1317 (9th Cir. 1981) (holding that an appellate court may address issues that are "inextricably intertwined" with an appealable interlocutory order).

In the instant matter, the APA/ECOA Claim and the issues raised in Plaintiffs' Rule 23(f) Petition are closely related. They both concern whether USDA's failure to investigate Plaintiffs' discrimination complaints provide the basis for a cognizable cause of action and/or for commonality sufficient to satisfy Fed. R. Civ. P. 23(a). Consideration of both of these issues at the same time will promote judicial economy and reduce the risk of inconsistent rulings. USDA has acknowledged that interlocutory review of the District Court's rulings on both certification and the APA/ECOA Claim could “conserve judicial resources and promote consistency for this Court to provide guidance to the district courts sooner rather than later on the question whether these cases may properly proceed as class actions.” USDA's Response to Plaintiffs' Motion for Interlocutory Appeal under Fed. R. Civ. P. 23(f), at 9.

II. The Certified Order Addresses A Controlling Issue of Law.

Interlocutory review is warranted if the ruling to be reviewed is a controlling issue of law. 28 U.S.C. § 1292(b). A question constitutes a “controlling issue of law” if resolution of the question could determine the outcome or future course of the litigation. *See Judicial Watch, Inc. v. Nat’l Energy Policy Dev. Group*, 233 F. Supp.2d 16, 19 (D.D.C. 2002) (citing *Johnson v. Burken*, 930 F.2d 1202, 1206 (7th Cir. 1991) (a question is controlling if “interlocutory reversal might save time for the district court and time and expense for the litigants”); *see also In re: Vitamins Antitrust Litigation*, 2000 WL 673936 at *2 (D.D.C. Jan. 27, 2000).

Here, the issue proposed for certification - - whether Plaintiffs have alleged causes of action under the APA and/or ECOA arising from USDA’s failure to investigate their discrimination complaints -- is a controlling issue of law. The District Court’s dismissal of the APA/ECOA Claim removed an important basis for the Plaintiffs to establish sufficient commonality to support class certification, particularly in light of the District Court’s refusal to recognize any other basis for commonality. Courts have repeatedly treated class certification issues as controlling questions of law that are appropriate for interlocutory review. *See, e.g., Fellows v. Universal Rest., Inc.*, 701 F.2d 447, 447-48 (5th Cir.), *cert. denied*, 464 U.S. 828 (1983) (dismissal of class discrimination claims were reviewable under § 1292(b)); *see also C. Wright & A. Miller*, 16 Federal Practice & Procedure § 3931 (2004).

III. Certification Would Materially Advance the Disposition of the Litigation.

An immediate appeal would materially advance the disposition of the litigation by resolving the question of whether Plaintiffs may maintain the APA/ECOA Claim, and in turn whether they may pursue their claims as a class action. The District Court considered the dismissal of the APA/ECOA Claim, together with the denial of the motion for class certification

as “fundamentally alter[ing] the posture of the case,” and accordingly stayed the case to permit the Plaintiffs to seek interlocutory appeal of those rulings. Mem. Op., dated Sept. 29, 2004, at 14-15.

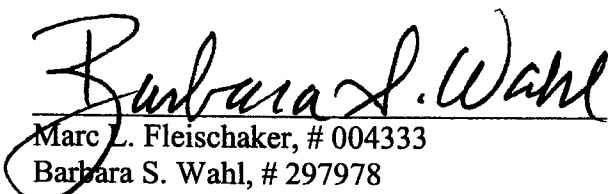
In the event that this Court agrees with the District Court that the APA/ECOA Claim fails to state a cognizable cause of action and that accordingly class certification is not warranted, the litigation would end for thousands of women farmers who are members of the putative class. Because of their limited resources, the lack of availability of administrative remedies through USDA, and the substantial investment of time and money needed to pursue their claims individually, they would likely have no other realistic means of prosecuting their individual claims against the USDA. Some class members, however, may struggle to press forward with their claims. A present determination of the viability of the APA/ECOA Claim could spare both the parties and the court system substantial time and expense rather than require the Plaintiffs to separately litigate their cases and only then confront the issue of the viability of the APA/ECOA Claim on appeal. See *Phillip Morris*, 2004 WL 1514215 at *3 (citing *APCC Services*, 297 F. Supp. 2d 90, 100).

CONCLUSION

The parties concur that this Court should accept interlocutory review of Plaintiffs' APA/ECOA Claim. As set forth above, Plaintiffs have demonstrated that consideration of the APA/ECOA Claim, along with the Rule 23 issues, at this time would give litigants much needed guidance, and provide an opportunity for comprehensive, efficient review. Moreover, the APA/ECOA Claim presents a controlling issue of law and interlocutory review would materially advance the disposition of the litigation. Consequently, at this time, this Court should permit the Plaintiffs to immediately appeal the December 13, 2001 Order.

Date: December 17, 2004

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that on December 17, 2004, I served a true and correct copy of Plaintiffs' Petition for Permission to Take an Interlocutory Appeal Pursuant to Fed. R. Civ. P. 1292(b) upon all parties, representatives and attorneys in this cause of action, by serving same via first class, postage prepaid on:

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Barbara S. Wahl

ADDENDUM 1

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ROSEMARY LOVE, *et al.*, :
 :
 Plaintiffs, :
 :
 v. : Civil Action No. 00-2502 (JR)
 :
 ANN VENEMAN, Secretary, U.S. :
 Department of Agriculture, :
 :
 Defendant. :

MEMORANDUM

Plaintiffs are farmers who claim that the United States Department of Agriculture discriminated against them on the basis of age, sex, marital status, race, color, national origin or religion, when it denied them credit and other benefits under farm programs.¹ Plaintiffs bring their claims under the Equal Credit Opportunity Act, 15 U.S.C. §§ 1691 et seq., the Administrative Procedure Act, 5 U.S.C. §§ 701 et seq., and the Declaratory Judgment Act, 28 U.S.C. §§ 2201 et seq. The government moves to dismiss under Fed. R. Civ. P. 12(b)(1) and 12(b)(6), arguing that the Court lacks jurisdiction over several claims and that plaintiffs have failed to allege a cognizable claim under any of the statutes they have invoked. For the reasons set forth below, that motion will be denied with respect to

¹ Plaintiffs also sue on behalf of others similarly situated and seek certification of a class of "not less than 3,000" farmers. The motion for class certification has been delayed pending resolution of this dispositive motion.

plaintiffs' claim for discrimination in lending decisions under ECOA, but granted on their other claims.²

Background

Plaintiffs allege that, from January 1, 1981, to December 31, 1999, the Farmers Home Administration and its successor, the Farm Service Agency, administered and maintained a credit program in a discriminatory fashion. More specifically, plaintiffs challenge the determinations of the USDA's credit agencies, which were authorized to make operating, farm ownership, and emergency loans to farmers who were otherwise unable to secure credit from commercial lenders.³ They also assert that the USDA acted arbitrarily in failing to investigate and resolve their discrimination complaints.

In 1998, responding to reports concerning the dismantling of USDA's civil rights enforcement program in the early 1980s, Congress extended the statute of limitations until October 21, 2000, for "eligible complaints" of discrimination alleged to have taken place at USDA between 1981 and 1996.

² This memorandum does not address the defendant's motions to strike the class allegations and to dismiss seven plaintiffs who are included in the first amended complaint as class members. Those issues will be addressed in connection with the pending class certification motion.

³ An operating loan aids in the maintenance of a farm. A farm ownership loan enables a farmer to buy, expand or improve a farm.

Agricultural, Rural Development, Food and Drug Administration, and Related Agencies Appropriation Act, 1999, Pub. L. 105-277, § 741, 112 Stat. 2681-30 (codified at 7 U.S.C. § 2279 Note). The present case is one of a number of claims filed shortly before the new deadline.⁴

Analysis

I. Exhaustion Issues

USDA's first asserted ground for dismissal is lack of subject matter jurisdiction, Fed R. Civ. P. 12(b)(1), for plaintiffs' failure to exhaust administrative remedies with respect to their claims under the Equal Credit Opportunity Act. An exhaustion requirement generally applicable to claims against the USDA is found in the Federal Crop Insurance Reform and Department of Agriculture Reorganization Act of 1994, Pub. L. No. 103-354, § 212, 108 Stat. 3718, 3210, and codified at 7 U.S.C. §

⁴ One of those suits, a class action filed on behalf of African American farmers, was settled by a consent decree allowing individual plaintiffs to present their claims for compensation. Pigford v. Glickman, 185 F.R.D. 82 (D.D.C. 1999), aff'd, 206 F.3d 1212 (D.C. Cir. 2000). Plaintiffs in the present suit maintain that many of the defendant's arguments have been resolved against the government in the Pigford litigation. Pigford focused solely on allegations of racial discrimination, however, and the Pigford consent decree contains no admission of engaging in discriminatory conduct. In any case, nonmutual offensive collateral estoppel is not available against the government. United States v. Mendoza, 464 U.S. 154, 160-63 (1984).

6912(e), along with other provisions defining the authority of the Secretary of Agriculture. It states:

Notwithstanding any other provision of law, a person shall exhaust all administrative appeal procedures established by the Secretary or required by law before the person may bring an action in a court of competent jurisdiction against-

- (1) the Secretary;
- (2) the Department; or
- (3) an agency, office, officer, or employee of the Department.

7 U.S.C. § 6912(e). Some courts have concluded that § 6912(e) is of jurisdictional significance, see, e.g., Gilmer-Glenville, Ltd. Partnership v. Farmers Home Admin., 102 F. Supp. 2d 791, 794 (N.D. Ohio 2000); Calhoun v. USDA Farm Service Agency, 920 F. Supp. 696, 701-02 (N.D. Miss. 1996), but that question has not been decided in the D.C. Circuit. See Deaf Smith County Grain Processors, Inc. v. Glickman, 162 F.3d 1206, 1214 (D.C. Cir. 1998) (dismissing an unexhausted claim without discussing whether § 6912(e) was jurisdictional).

Exhaustion statutes that create jurisdictional barriers to suit are written in "sweeping and direct" language that "is more than a codified requirement of administrative exhaustion." Weinberger v. Salfi, 422 U.S. 749, 757-58 (1975). The statute at issue in Salfi, for instance, barred review by any court except in accordance with the statutory scheme and provided that "[n]o action ... shall be brought under section 1331 or 1346 of Title 28 to recover on any claim arising under this subchapter." 42

U.S.C. § 405(h). Exhaustion statutes not considered jurisdictional, on the other hand, provide simply that actions not be initiated before available administrative remedies have been exhausted. Anderson v. Babbitt, 230 F.3d 1158, 1162 (9th Cir. 2000); Underwood v. Wilson, 151 F.3d 292, 294-95 (5th Cir. 1998). Section 6912(e) appears to be of the latter type and does not appear to support defendant's Rule 12(b)(1) motion to dismiss plaintiffs' ECOA claims on jurisdictional grounds. Farmers Alliance Mut. Ins. Co. v. Federal Crop Ins. Corp., No. 00-2347-JWL, 2001 WL 30443 at *2 (D. Kan. Jan. 3, 2001). It remains to be determined, however, whether failure to exhaust requires dismissal under Rule 12(b)(6).

Section 6912(e) requires exhaustion of "all administrative appeal procedures established by the Secretary or required by law." There are no administrative review procedures in ECOA itself, 15 U.S.C. §§ 1691 et seq. The administrative review process outlined in 7 C.F.R. Pt. 11 applies generally to appeals of adverse decisions through the USDA's National Appeals Division, however, and the administrative review processes outlined in 7 C.F.R. Pts. 15, 15a, 15b, 15d, 15e, and 15f apply to various types of discrimination claims filed before other parts of the Department. Part 15d (formerly Part 15, Subpart B), in particular, applies to the gender and age claims at issue in this suit.

Defendant's argument here is that the general appeals process found in 7 C.F.R. Pt. 11 is mandatory, and that plaintiffs' failure to follow it is fatal to their ECOA claims. That argument must be rejected. The language of Part 11 expressly excludes "persons whose claim(s) arise under ... [d]iscrimination complaints prosecutable under the nondiscrimination regulations at 7 CFR parts 15, 15a, 15b, [15d,] 15e, and 15f."⁵ 7 C.F.R. § 11.1 (2001). ECOA discrimination complaints are clearly "prosecutable" under Part 15d. Compare 15 U.S.C. § 1691(a)(1) (prohibiting discrimination in credit transactions "on the basis of race, color, religion, national origin, sex or marital status, or age") with 7 C.F.R. § 15d.2(a) (prohibiting discrimination in USDA programs and activities "on the ground of race, color, religion, sex, age, national origin, marital status, [or] familial status"). Moreover, the USDA abolished regulatory language in 1989 requiring its agencies generally to handle discrimination complaints "in accordance with the procedures established by law or regulation of the Department or any of its agencies for the handling of complaints or appeals ... which are not based on grounds of discrimination prohibited

⁵ At the time that 7 C.F.R. § 11.1 was issued, 64 Fed. Reg. 33,367 (June 30, 1999), the provisions now located in 7 C.F.R. Part 15d were located in Part 15, Subpart B. 64 Fed. Reg. 66,709 (Nov. 30, 1999).

by this subpart." 7 C.F.R. § 15.52 (1988); 54 Fed. Reg. 31,163, 31,164 (July 27, 1989).⁶

The Part 15d appeal process is not mandatory either, and defendant has conceded the point for purposes of this case. See Defendant's Memorandum in Support of Motion to Dismiss at 9; see also Plaintiff's Opposition App. 4 at 11-13 (Department of Justice memorandum, Jan. 29, 1998) (concluding that Part 15d exhaustion is not required by § 6912(e)).

⁶ The conclusion that § 6912(e) does not require Part 11 exhaustion is consistent with the way USDA has handled lending discrimination claims in the past. During the drafting of § 6912(e) and reforms of the National Appeals Division in 1994, USDA officials told Congress that they did not interpret the changes to require borrowers alleging discrimination to submit their claims to the Division. Instead, they indicated that discrimination complainants would continue to use Part 15 procedures, because those provided "a well-established and sufficient departmentwide appeal mechanism." H.R. Rep. No. 103-714 App. at 114, Questions Submitted by Congressman Stenholm re the National Appeals Division and USDA Answers (1994). Indeed, it appears that the USDA processed ECOA claims under its Part 15 procedures at least as recently as 1998. Plaintiff's Opposition App. 4 at 2 (Department of Justice memorandum, Jan. 29, 1998).

And when USDA officials made Part 15, Subpart B into the present Part 15d, they anticipated that ECOA claims would be processed under Part 15d. See, e.g., 63 Fed. Reg. 62,962, 62,963 (Nov. 10, 1998) ("Part 15d is not an ECOA administrative procedure Of course, the availability of 15d and ECOA often will be co-extensive, and it often will be the case that a 15d complaint will afford the Department an opportunity to provide relief to a complainant that may avoid an ECOA lawsuit.... There is no exhaustion of administrative [remedies] requirement to filing an ECOA lawsuit." (emphasis added)); id. (barring discrimination based on marital and familial status to match ECOA); 64 Fed. Reg. 66,709, 66,709 (Nov. 30, 1999) (barring discrimination based on participation in public assistance programs to match ECOA).

Thus, although § 6912(e) gave the Secretary of Agriculture authority to create mandatory administrative procedures for handling plaintiffs' complaints of discrimination, the Secretary has not done so. It follows that plaintiffs' claims need not be dismissed because of their failure to obtain final determinations by the Office of Civil Rights.⁷

II. Statute of Limitations

Defendant's second argument for dismissal is that most of the plaintiffs' ECOA claims are time-barred. This issue is properly resolved under the rubric of Rule 12(b)(1) because the statute of limitations in this case defines the scope of the U.S. government's waiver of sovereign immunity, and, thus, the Court's jurisdiction. See, e.g., United States v. Mottaz, 476 U.S. 834, 841 (1986); Warren v. United States, 234 F.3d 1331, 1335-38 (D.C. Cir. 2000).

⁷ This conclusion makes it unnecessary to consider whether Congress intended to trump exhaustion requirements when it extended the statute of limitations on certain discrimination complaints against the USDA. Agricultural, Rural Development, Food and Drug Administration, and Related Agencies Appropriation Act, 1999, Pub. L. 105-277, § 741, 112 Stat. 2681-30 (codified at 7 U.S.C. § 2279 Note). It is interesting to note, however, that Congress passed § 741 specifically because the USDA "failed to make timely and adequate response to discrimination complaints and the statute of limitations has expired through no fault of the complainant." H.R. Rep. No. 105-593 at 2 (1998). That is tantamount to a legislative finding that, at USDA, resort to administrative remedies was futile. Cf. Weinberger v. Salfi, 422 U.S. 749, 766 (1975) (noting that congressionally mandated administrative exhaustion requirements "may not be dispensed with merely by a judicial conclusion of futility" (emphasis added)).

ECOA's general limitations period requires that a district court action be brought within two years of an alleged violation. 15 U.S.C. § 1691e(f). Plaintiffs brought this suit on October 19, 2000, so -- unless the special extension is applicable -- claims of discriminatory acts or practices occurring before October 19, 1998, would be time-barred. It is not clear from the face of the complaint whether any of the plaintiffs' claims fall within the general limitations period, although Barbara Odom's claims of discriminatory denial of loans and debt restructuring in 1998 may be timely if the alleged acts took place late in the year.

Plaintiffs apparently did not bother to specify how their claims fall within the general ECOA limitations period because they filed this action on the eve of the last day for filing under the extended limitations period established by Congress in 1998. Agricultural, Rural Development, Food and Drug Administration, and Related Agencies Appropriation Act, 1999, Pub. L. 105-277, § 741, 112 Stat. 2681-30 (codified at 7 U.S.C. § 2279 Note). Defendants argue that the claims of several plaintiffs are time-barred even under the § 741 extension, however, because plaintiffs did not file "eligible complaints." An "eligible complaint" is defined as:

a nonemployment related complaint that was filed with the Department of Agriculture before July 1, 1997 and alleges discrimination at any time during the period

beginning on January 1, 1981 and ending December 31, 1996 --

(1) in violation of the Equal Credit Opportunity Act (15 U.S.C. 1691 et seq.) in administering --

(A) a farm ownership, farm operating, or emergency loan funded from the Agricultural Credit Insurance Program Account; or

(B) a housing program established under title V of the Housing Act of 1949; or

(2) in the administration of a commodity program or a disaster assistance program.

7 U.S.C. § 2279 Note. In defendant's submission, only written discrimination complaints filed with the Office of Civil Rights as required by Part 15d (or, presumably, another set of discrimination regulations where applicable) are "eligible" under this definition. That interpretation of the statutory definition, if accepted, would re-inject a limitations period into the case, because Part 15d rejects complaints not filed with the Office of Civil Rights within 180 days of discovery of the alleged discrimination. Only one of the plaintiffs in this case would unquestionably clear that hurdle.

Defendant's argument is problematic in part because the regulations now found at Part 15d have only applied since 1989; before that time, discrimination complaints had to be filed within 90 days but could be submitted directly to each agency or in certain circumstances to the Secretary of Agriculture. 7 C.F.R. § 15.52 (1988); 54 Fed. Reg. 31,163, 31,164 (July 27, 1989). Regardless of which version of the regulations would

apply to which claims, however, Congress's extension of the statute of limitations for complaints of discrimination in the administration of USDA loan programs "at any time" between 1981 and 1996 was a waiver of sovereign immunity. Courts must neither enlarge such waivers beyond what the statutory language requires, Library of Congress v. Shaw, 478 U.S. 310, 318 (1986), nor narrow them by unduly restrictive interpretation, Bowen v. City of New York, 476 U.S. 467, 479 (1986). Fortunately, the language of § 741 is plain. It does not support defendant's interpretation. It does not require "written" complaints (although the reference to "filing" them strongly suggests Congress' expectation that complaints would be made formally and in writing). It does not mention the Office of Civil Rights (in view of the legislative accord that gave rise to § 741, the omission may have been deliberate, see supra n. 7). And it makes no mention of Part 15d or its predecessor regulation.

Thus, a complaint filed anywhere in the USDA before July 1, 1997, would qualify for § 741's extended statute of limitations if it charged discrimination in the administration of loan programs with the USDA. Plaintiffs James Murnion, Rosemary Love, and Gail Lennon meet that standard.

It is not clear from the face of the complaint whether plaintiff Lind Marie Bara-Weaver can also satisfy § 741's requirements. She filed formal complaints in 1988 with the

Richmond Farmers Home Administration office and with the USDA Office of Inspector General in Washington D.C., but the amended complaint does not state explicitly whether she alleged discrimination. Nor, as noted supra, is it clear from the face of the complaint that the acts of which Barbara Odom complains occurred after October 19, 1998, so that her claims are timely under ECOA's normal statute of limitations. In deciding Rule 12(b)(1) motions, however, courts must generously construe allegations of a complaint in the plaintiff's favor. Scheuer v. Rhodes, 416 U.S. 232, 236, 94 S.Ct. 1683 (1974), overturned on other grounds, Harlow v. Fitzgerald, 457 U.S. 800 (1982); Foremost-McKesson, Inc. v. Islamic Republic of Iran, 905 F.2d 438, 440 n.3 (D.C. Cir. 1990). The "generous construction" rule and the interests of justice counsel denial of the motion to dismiss the claims of Ms. Bara-Weaver and Ms. Odom.⁸

III. Non-Lending Claims

Plaintiffs' allegations of discrimination in the administration of USDA's disaster benefit programs must be dismissed because a disaster benefit decision is not a "credit

⁸ Dismissal with leave to replead would only create more paper if Ms. Bara-Weaver and Ms. Odom can bring themselves within the § 741 extension. If they cannot, their claims will be dismissed later.

transaction" within the meaning of ECOA. 15 U.S.C. § 1691(a). Neither, of course, is a failure to investigate a complaint.

Plaintiffs also attempt bring their disaster benefit and failure to investigate claims under the Administrative Procedure Act, but they do not fit. The only plaintiff who alleged the unlawful denial of disaster benefits, Ms. Odom, was successful on her administrative appeal. And the allegation of failure to investigate plaintiffs' civil rights complaints fails to state a claim upon which relief can be granted under the APA.

APA review is available only for a "final agency action for which there is no other adequate remedy in a court." 5 U.S.C. § 704. Even if USDA's repeated and systematic failures to investigate and decide civil rights complaints were "final agency actions," see Sierra Club v. Thomas, 828 F.2d 783, 792-96 (D.C. Cir. 1987), Circuit precedent requires the rejection of APA claims for agency failure to investigate allegations of discrimination where Congress has provided an adequate alternative remedy. See, e.g., Women's Equity Action League v. Cavazos, 906 F.2d 742, 750-51 (D.C. Cir. 1990); Council of & for the Blind of Delaware County Valley, Inc. v. Regan, 709 F.2d 1521, 1531-33 (D.C. Cir. 1983) (en banc). Those cases might be distinguished on the ground that they involved private causes of action against third parties, but their central point is that APA review is not available for agency action "for which there is ...

[some] other adequate remedy in a court." Here the Equal Credit Opportunity Act provides such a remedy. Indeed, the steps Congress took to preserve that remedy by extending the statute of limitations were taken precisely because of USDA's failures to investigate.

Moreover, to the extent that plaintiffs are seeking monetary relief, the U.S. government has not waived its immunity against suits for damages under the APA. 5 U.S.C. § 702; Transohio Savs. Bank v. Director, Office of Thrift Supervision, 967 F.2d 598, 607-08 (D.C. Cir. 1992).

An appropriate order accompanies this memorandum.

JAMES ROBERTSON
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ROSEMARY LOVE, *et al.*, :
 :
 Plaintiffs, :
 :
 v. : Civil Action No. 00-2502 (JR)
 :
 ANN VENEMAN, Secretary, U.S. :
 Department of Agriculture, :
 :
 Defendant. :

ORDER

For the reasons set forth in the accompanying memorandum, it is

ORDERED that the defendant's motion to dismiss [#8] is **granted in part and denied in part**. It is

FURTHER ORDERED that the parties appear for a status conference **January 10, 2002, at 4:30 p.m.**

JAMES ROBERTSON
United States District Judge

ADDENDUM 2

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ROSEMARY LOVE, et al.,

Plaintiffs,

v.

ANN VENEMAN, SECRETARY
UNITED STATES DEPARTMENT
OF AGRICULTURE,

Defendant.

Case No. 1:00CV02502 (JR)

FILED

DEC - 3 2004

NANCY MAYER WHITTINGTON, CLERK
U.S. DISTRICT COURT

ORDER

Upon consideration of Plaintiffs' Motion for Certification of Order for Interlocutory Review Pursuant to 28 U.S.C. § 1292(b), it is hereby

ORDERED that this Court's Memorandum and Order dated December 13, 2001 be and hereby is certified for interlocutory review pursuant to 28 U.S.C. § 1292(b) on the question of whether plaintiffs' allegations of failure to investigate discrimination complaints state a claim under the Administrative Procedure Act, 5 U.S.C. § 551 *et seq.* or the Equal Credit Opportunity Act, 15 U.S.C. § 1691 *et seq.*, or both.

12/2/04
Date

James Robertson
James Robertson
United States District Judge

(N)

ADDENDUM 3

CERTIFICATE OF PARTIES

I hereby certify that the following individuals are Plaintiffs in the Third Amended

Complaint in the District Court action:

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Dumas, Arkansas 71639

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Mary L. Brown
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The foregoing Plaintiffs have filed suit on behalf of themselves and similarly situated individuals including the following individuals named in the Second Amended

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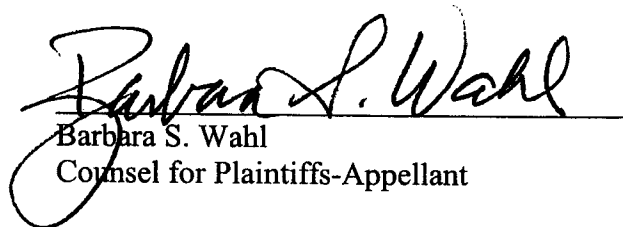
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The defendant in this action is Ann Veneman in her capacity as Secretary of the United States Department of Agriculture. No amici have sought to intervene in this matter as of this date.


Barbara S. Wahl
Counsel for Plaintiffs-Appellant