

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

ROSEMARY LOVE, et al.,)	
)	
Plaintiffs,)	
)	Case Number: 1:00CV02502
vs.)	
)	Judge: Walton, J.
THOMAS VILSACK, SECRETARY)	
UNITED STATES DEPARTMENT OF)	
AGRICULTURE,)	
)	
Defendant.)	
)	

PLAINTIFFS’ RESPONSE TO MOTION TO INTERVENE

Plaintiffs, by and through their undersigned counsel, submit this Response to the Motion to Intervene (ECF No. 124), filed on March 23, 2011, and served on Plaintiffs on March 28, 2011. The Motion to Intervene (“Motion”) was filed on behalf of hundreds of women (“Movants”) who now wish to establish themselves as plaintiffs in this action. Plaintiffs support women seeking redress for discrimination suffered at the hands of the United States Department of Agriculture (“USDA”). However, allowing intervention in this case at this time would not assist in obtaining positive resolution of the women’s claims. Plaintiffs respectfully suggest that the Court either deny the Motion without prejudice to Movants’ ability to seek intervention at an appropriate time, or hold it in abeyance until an appropriate time in the future.

RELEVANT BACKGROUND

This case was filed on October 19, 2000, to seek redress for the unlawful discrimination against women by USDA in connection with its farm loan programs. This Court denied class certification in 2004, and the D.C. Circuit Court of Appeals affirmed that decision in 2006. *Love*

v. Veneman, 224 F.R.D. 240, 246 (D.D.C. 2004), *aff'd in relevant part, Love v. Johanns*, 439 F.3d 723, 730 (D.C. Cir. 2006).

Plaintiffs' commencement of this action tolled the statute of limitations for all putative class members, whether or not they became litigants in a legal action. This Court has expressly recognized that despite the denial of class certification, the statute of limitations remains indefinitely tolled for all women who fit the proposed class definition included in Plaintiffs' most recent complaint. *See* Order at 1, May 19, 2006, ECF No. 79 ("the statute of limitation continues to toll as to all putative class members for all claims asserted in the Third Amended Complaint . . ."); Order at 1, July 19, 2010, ECF No. 111 (stay to remain in place).

After lengthy and ongoing discussions between lead attorneys for Plaintiffs and Defendant USDA, USDA and the Department of Justice announced that the government would offer an administrative process to settle the discrimination claims of women farmers who are able to satisfy the criteria established by the government. *See* Press Release, USDA (Feb. 25, 2011), <http://www.usda.gov/wps/portal/usda/usdahome?contentidonly=true&contentid=2011/02/0085.xml> (last visited Apr. 9, 2011). The process will include a 180-day claims period, which is scheduled to begin no earlier than this summer. *See* Claims Process Framework, Ex. A to USDA's Request for Proposals, at 2 (attached hereto as Exhibit 1); Frequently Asked Questions, USDA, <https://farmerclaims.gov/FarmerClaims/farmer.do?pageAction=Help> (last visited Apr. 9, 2011). The government has indicated that it will not seek to have the stay in this case lifted until after the 180-day claims period has run. *See* Claims Process Framework at 6.

ARGUMENT

Movants seek intervention of right under Fed. R. Civ. P. 24(a), or alternatively, permissive intervention under Fed. R. Civ. P. 24(b). Intervention is not proper at this time under either theory.

Intervention of right is granted to a movant who “[o]n timely motion”:

claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant’s ability to protect its interest, unless existing parties adequately represent that interest.

Fed. R. Civ. P. 24(a)(2). To gain intervention of right, Movants must show that they meet *all* factors of Rule 24(a): (1) a timely motion; (2) an interest relating to the property or transaction at issue; (3) a practical impairment to their ability to protect their interests if intervention is not allowed; and (4) the inadequacy of representation of their interests by the current parties.

Hartman v. Duffy, 158 F.R.D. 525, 531 (D.D.C. 1995); *see also D’Amato v. Deutsche Bank*, 236 F.3d 78, 84 (2d Cir. 2001) (“Denial of the motion to intervene is proper if any of these requirements is not met.”). Permissive intervention may be allowed in the Court’s discretion if: (1) a timely motion is filed; (2) the movants’ claims share a common question of law or fact with the claims in the case; and (3) intervention would not cause undue delay or prejudice to the adjudication of the parties’ rights. Fed. R. Civ. P. 24(b)(1)-(3).

A. Movants’ Motion Is Not Brought At An Appropriate Time.

Movants must show that their motion is timely to be granted intervention under Fed. R. Civ. P. 24(a) or (b). The issue of timeliness is a threshold matter; if a motion is untimely, a court need not consider it further. *United States v. British Am. Tobacco Australia Svcs., Ltd.*, 437 F.3d 1235, 1238-39 (D.C. Cir. 2006); *Hodgson v. United Mine Workers of Am.*, 473 F.2d 118, 129

(D.C. Cir. 1972) (“timeliness is a prerequisite to any claim for intervention under Rule 24.”).

Whether a motion for intervention is timely is committed to a court’s discretion, and a court must consider all of the circumstances of the case when deciding whether a motion to intervene is timely, including the time that has passed since the case began, whether allowing intervention would disrupt the proceedings, the purpose for which intervention is sought, and potential prejudice to the original parties. *Karsner v. Lothian*, 532 F.3d 876, 886 (D.C. Cir. 2007); *British Am. Tobacco*, 437 F.3d at 1238. Because negotiations are ongoing in this case and there is no threat that the stay will be imminently lifted, the Movants’ Motion is not timely at this juncture.

Lead counsel for Plaintiffs have engaged for nearly two years in negotiations with the government, and counsel continue in their efforts to make the administrative process that will be offered more fair for all women farmers who may qualify, including Movants. At this point, the litigation is stayed and there is no further litigation activity while the government’s proposed administrative program continues to take shape and is finalized. Intervention now will serve no purpose in furthering the Movants’ pursuit of their individual claims in litigation or in the administrative process to be offered by the government. When the administrative program is finalized and begun, Plaintiffs, Movants, and many other women farmers will have the opportunity to decide whether they want to participate in that process or pursue their claims in court, and at that time, the addition of new plaintiffs may be appropriate. But at the current time, because the precise parameters of the program are not yet finalized and known, and Plaintiffs, Movants, and other putative plaintiffs cannot make fully informed decisions about their plans

going forward, the addition of hundreds more plaintiffs would serve no positive purpose and could complicate the current proceedings.¹

Movants contend that intervention is necessary now to protect their interests, and rely on the Court's comments during the December 3, 2010 status conference to support that contention. Interveners' Memo. at 7 (quoting Transcript of Dec. 3, 2010 Status Conf. at 7, ECF No. 121 ("once they become parties they have two options it seems to me; they can participate in the claims process. If they think the process is flawed and they're not going to get a fair shake they don't have to, and then they pursue their relief in this court.")). During the December status conference, the Court addressed solely whether it had the authority to review the government's administrative claims process, which Plaintiffs had argued would affect tens of thousands of women nationwide who, under the plan then proposed by the government, would each have to file and then dismiss a complaint in federal court in order to participate in the claims process.² The Court's comments do not imply that intervention is necessary now; they simply reflect the Court's recognition that, once the claims process is finalized and offered, current and putative plaintiffs will all be able to choose whether to participate in the process or litigate.

The government has represented that it will not move to lift the stay in this case, which continues to toll the statute of limitations for putative plaintiffs, until after the filing of administrative claims is complete. *See* Claims Framework at 2, 6. Because the 180-day claims period within which claimants may file claims will not begin until this summer at the earliest, there will be no motion to lift the stay in this case until at least 2012. *See* Frequently Asked

¹ Plaintiffs believe that maintaining the current litigation stay is necessary while the administrative claims process is finalized, and while it is ongoing. To the extent Movants may seek to prematurely lift the stay in this case, Plaintiffs would oppose that action.

² The government has since modified its proposal and removed the requirement that a claimant file a complaint and dismiss it with prejudice as a condition to filing an administrative claim.

Questions, USDA, <https://farmerclaims.gov/FarmerClaims/farmer.do?pageAction=Help> (last visited Apr. 9, 2011). Putative plaintiffs will then have made informed decisions about whether or not to participate in the administrative process.

Before the administrative program is finalized, and before there is any motion to lift the stay, which continues to preserve the rights of Movants and others to bring legal actions, Movants' Motion to Intervene is premature. The addition of hundreds of new plaintiffs at this juncture would not clarify pending issues or further the development of the case. Accordingly, Movants have failed to demonstrate that their Motion is timely, as required for intervention under either Fed. R. Civ. P. 24(a) or (b).

B. Plaintiffs Adequately Represent Movants' Interests.

Additionally, Movants cannot show that Plaintiffs do not adequately represent their interests, as required for intervention of right. Though a class was not certified in this case, the Court has continuously tolled the statute of limitations for all women farmers, beyond the ten named Plaintiffs, whose claims would fall under the Plaintiffs' Third Amended Complaint. Plaintiffs' attorneys have negotiated over a long period of time with USDA and Department of Justice attorneys, always with the understanding that Plaintiffs speak for thousands of women, who may or may not ultimately participate in the administrative claims process. Moreover, Movants do not set forth any claims or arguments not already covered by Plaintiffs in this case. *Cf. Bldg. & Constr. Trades Dep't, AFL-CIO v. Reich*, 40 F.3d 1275, 1282 (D.C. Cir. 1994) (where movants who had filed amicus brief failed to present any additional arguments not raised by parties, their interests were adequately represented, precluding intervention as of right). Plaintiffs have represented the interests of women farmers for over a decade in this Court, and their ability to do so has not been recently impaired.

CONCLUSION

As evidenced by their investment of time and resources in this case, Plaintiffs support women farmers' pursuit of redress for USDA's discrimination, and do not wish to hinder the efforts of women who, after considering the administrative claims process offered by the government, ultimately prefer to pursue claims in court. However, before the administrative program is finalized and before the stay may imminently be lifted, intervention in this case³ by hundreds of plaintiffs is not necessary, helpful, or efficient. At this time, Plaintiffs continue to work to improve that administrative process for all women, and thus believe intervention at this juncture is premature. Movants would suffer no injury or prejudice if the Court were to deny their Motion without prejudice to re-file it at an appropriate time, or if the Court were to simply hold their Motion in abeyance until a more appropriate time.

³ Movants are certainly free to assert their claims in a separate case. Movants argue that if they brought a separate case, they would "have to bear the difficult burden of reestablishing the facts already found in this case and re-litigating the class certification issue." Interveners' Memo. at 9. These need not be impediments to Movants bringing their own, separate action. First, there has been very limited fact-finding by the Court in this case, and the fact that prevalent discrimination has existed at USDA has been well-documented by USDA itself and others. Second, Movants certainly would not be *required* to relitigate the class certification issue in a new, separate action, but if they chose to do so would perhaps benefit from the opportunity given the varying results reached by different judges in ruling on class certification motions in separate cases involving groups of minority farmers. *Compare Love*, 224 F.R.D. at 246; *Garcia v. Veneman*, 224 F.R.D. 8, 17 (D.D.C. 2004), *aff'd in relevant part*, *Garcia v. Johanns*, 444 F.3d 625 (D.C. Cir. 2006) (class certification denied), *with Keepseagle v. Veneman*, No. Civ.A.9903119EGS171, 2001 WL 34676944, at *15 (D.D.C. Dec. 12, 2001); *Pigford v. Glickman*, 182 F.R.D. 341, 352 (D.D.C. 1998) (class certification granted). Further, courts have held that a litigant's investment of time and resources in filing another case does not sufficiently impair or impede a movant's ability to protect her interests, thereby requiring intervention under Rule 24(a). *See, e.g., In re Holocaust Victim Assets Litig.*, 225 F.3d 191, 199 (2d Cir. 2000).

Dated: April 11, 2011

Respectfully submitted,

/s/ Barbara S. Wahl

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⁴ Counsel for the proposed interveners includes Alexander Pires, one of the counsel of record for the *Love* Plaintiffs, though not the lead counsel. Mr. Pires has requested that his name be included in this Response by the existing Plaintiffs to the proposed intervention of new plaintiffs; the inherent conflict in these two positions is noted.