UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

THE COWTOWN FOUNDATION INC.	)
MEMBER, LEROY SMITH JR.	)
Plaintiffs	)
V.	)
	)
UNITED STATES DEPARTMENT	)
OF AGRICULTURE, SECRETARY	)
OF AGRICULTURE, ASSISTANT	)
SECRETARY OF CIVIL RIGHTS-	)
SUCCESSOR	)
Defendants	)

Case: 1:21-mc-00045
Assigned To : Jackson, Amy Berman
Assign. Date : 04/28/2021
Description: Misc.

MOTION TO COMPEL A FORMAL HEARING PURSUANT ADMINISTRATIVE

PROCEDURES ACT 5 U.S.C § 706

The Plaintiffs, the Cowtown Foundation and Leroy Smith Jr., seek an order to compel the Defendants, the U.S. Secretary of Agriculture and Assistant Secretary of Civil Rights to adhere to the Congressional Acts of the 2008 Food Energy and Conservation Act where moratorium relief was given, prohibiting farm foreclosure and offsets of Socially Disadvantaged Farmers (SDFs) outlined in the class action settlement of *Pigford v. Glickman*, 185 F.R.D. 82 (D.D.C. 1999). The Agency has a long history of discriminatory patterns and practices in denying SDFs lending which is prohibited under Equal Protection Credit Opportunity Act (ECOA) 15 U.S.C. §1691 et seq and enforcement of foreclosure without due process which is prohibited under Administrative Procedures Act (APA) 5 U.S.C. § 706(2)(A) and is a violation of the Equal Protection Clause of the Fifth Amendment.

JURISDICTION AND VENUE

As the United States Government is a defendant to this action, and it arises under the federal laws of the United States, this court has jurisdiction pursuant to 28 U.S.C. § 1331 and 28 U.S.C. § 1346. Venue lies in this judicial district by virtue of 28 U.S.C. § 1391(e) because the events or omissions out of which these claims arise took place in this district.

JUDICIAL REVIEW OF INFORMAL RULEMAKING UNDER THE APA

Under the Administrative Procedures Act (APA), the district court's review Respondents' informal rulemaking to determine if it was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). As the Supreme Court held in Citizens to Preserve *Overton Park v. Volpe*, 401 U.S. 402 (1971), "the generally applicable standards of § 706 require the reviewing court to engage in a substantial inquiry." *Id*. at 415. At the same time, however, the Supreme Court acknowledged, "the Secretary's decision is entitled to a presumption of regularity." *Id*. The Court emphasized, however, that the "presumption is not to shield [the Secretary's] action from a thorough, probing, in-depth review." *Id*. The tension inherent in these mandates is revealed by the Court's own declaration that though "this inquiry into the facts is to be searching and careful, the ultimate standard of review is a narrow one. The court is not empowered to substitute its judgment for that of the agency." *Id*. at 416.

Judicial Review of the Sufficiency of the Administrative Record

The APA directs that "the court shall review the whole record or those parts of it cited by a party . . .." 5 U.S.C. § 706. The definition of what exactly constitutes the "whole record" is not

entirely clear, but in *Overton Park* the Supreme Court directed lower courts to confine their review of agency decisions to "the full administrative record that was before the Secretary at the time he made his decision." *Id.* at 420. The Court clarified this mandate in *Camp v. Pitts*, 411 U.S. 138 (1973), stating that "the focal point for judicial review should be the administrative record already in existence, not some new record made initially in the reviewing court." *Id*. at 142; see also *Fla. Power & Light Co. v. Lorion*, 470 U.S. 729, 743-44 (1985) ("The task of the reviewing court is to apply the appropriate APA standard of review, 5 U.S.C. § 706, to the agency decision based on the record the agency presents to the reviewing court").

STANDING

"The United States Supreme Court has made plain that a 'concrete and demonstrable injury to [an] organization's activities —with the consequent drain on the organization's resources— constitutes far more than simply a setback to the organization's abstract social interests' and thus suffices for standing. *Havens Realty Corp*., 455 U.S. at 379."

BACKGROUND

The Cowtown Foundation Inc. is a Tennessee Corporation that represents Socially Disadvantaged Farmers members from across the United States at the administrative level. The Cowtown Foundation has very little resources and often exhausts those resources traveling to different areas in the interest of social and economic justice denied to these members of a protected class.

Leroy Smith Jr., is a Black Farmer from Cary, Mississippi who is a member of a protected class. Smith is a *Pigford* class member who has suffered experienced ongoing discriminatory and adverse action against him by the respondents: like other Socially Disadvantaged Farmers.[1] In 1995, Smith purchased 1,740 acres of land through a farm ownership loan. However, he was approved for only a portion of what he needed to purchase the property. As a result, Smith was forced to overcollateralize his property. After 1996, Smith was continuously denied all USDA loans he applied for leading to an acceleration of the past loans and an eventual bankruptcy.

In April 2004, the Fifth District Bankruptcy Court discharged the debt owed to the USDA. Despite Smith's discharge order, the USDA continued to collect on the debt by sending Smith certified letters in 2006 stating he owed $245,000. In 2007, they accelerated the debt to $367,000. The USDA did not remove the debt from their records until 2010, but by that time Smith had lost his home, land, equipment and non-farming businesses, and affiliated property.

In 1999, after attempting to settle his past discrimination complaints under *Pigford*, Smith was denied injunctive relief. The Arbitrator denied relief and the Monitor upheld the decision despite two prior NAD decision filings in Smith's favor citing discrimination regarding loan denials in the early 1990s (see ex.1 and 2). In November 2009, the Office of Civil Rights within the USDA issued a final agency decision informing Smith there was no finding of discrimination regarding his past 2006 complaint that never received a final agency decision. However, a December 2009, letter from Dr. Joe Lennard rescinded the previous November decision stating the Complaint was reopened.

[1] When a person is a member of a protected class or designated a Socially Disadvantaged Farmer According to Section 2501(e)(2) of the Food, Agriculture, Conservation, and Trade Act of 1990 (7 USC 2279(e)(2)), a Socially disadvantaged farmer or rancher (SDA) is defined as a farmer or rancher who is a member of a "Socially Disadvantaged Group."

For the past 11 years, Smith has been waiting to receive a final agency decision without communication from the USDA. Smith's complaints are, a continuation of discrimination as multiple complaints lodged at the USDA have never been settled. Inaction by the Respondents, the Secretary of Agriculture in particular, has caused irreparable harm and has deprived Petitioner Smith of liberty and property as enjoyed by similarly situated White farmers.

ENFORCEMENT OF THE EQUAL PROTECTION CLAUSE OF THE FIFTH AMENDMENT TO CEASE DENIAL OF DUE PROCESS TO PROTECT PROPERTY PURSUANT 5 U.S.C. § 706 AND 42 U.S.C. § 1480(c)(d)

Socially Disadvantaged Farmers have been deprived of the opportunity to own property and denied the liberty to enforce this right under due process. In *Brown v. Board of Education of Topeka*, the U.S. Supreme Court ruled unanimously (9–0) that racial segregation in public schools violated the Fourteenth Amendment of the Constitution. It prohibits states from denying equal protection of the law to any person within their jurisdictions. The decision declared that separate educational facilities for white and Black American students were inherently unequal. In *Bolling Et. Al. v. Sharpe et. al*., 1954, the Supreme Court held the Equal Protection Clause of the Fourteenth Amendment was applicable under the Fifth Amendment prohibiting the federal government from denying due process making equal protection of the law applicable in all matters. Unfortunately, the USDA does not adhere to the equal protection of the law as it pertains to Socially Disadvantaged Farmers in its failure to provide a final agency decision as outlined in the APA and ECOA.

When a similarly situated White farmer has a grievance, he can file directly with the Administrative Law Judge7 C.F.R. §§ 15.8(c); 10(f); 10(g); Subpart C. His complaint takes the ordinary course to receive a determination, which is typically within 180 days. In 1862, when the

USDA was established, it required former enslaved Africans to have credit or collateral to secure a farm loan. From the beginning, the USDA earned the title, "the last plantation," due to the predatory lending terms directed against Black farmers.

The Civil Rights Report of 2003 found that loan applications from White farmers were processed in an average of 60 days, compared to 220 days for Black applicants. Notably, between 2006 to 2016, Black farmers were foreclosed on at a higher rate than any other race, making up 13 percent of USDA foreclosures. This is significant because they make up less than 3 percent of farm loan recipients. Despite Black farmers being a part of the Socially Disadvantaged r protected class as defined under the Food, Agriculture, Conservation, and Trade Act of 1990 (7 25 U.S.C. 2279(a)) and the Civil Rights Act of 1964, they are only given the opportunity to be foreclosed upon and not due process to protect their property. This is a violation of the Fifth Amendment. We are seeking enforcement of the APA statute to toll the statute of limitation and ECOA in an effort to require the USDA to provide a final agency decision in a timely manner like it has done for White farmers. Furthermore, we are seeking due process for the Plaintiff in obtaining a formal administrative hearing based on the record just as white farmers are given.

JUDICIAL REVIEW OF INFORMAL RULEMAKING UNDER THE ADMINISTRATIVE PROCEDURE ACT (APA) PURSUANT § 5 U.S.C.706 REQUIRE TO EXHAUST ADMINISTRATIVE REMEDIES

The avoidance of the Assistant Secretary of Civil Rights in rendering a final agency decision is an abuse of discretion. Purposefully, tolling the 180-day rule under the APA (which requires a final agency decision and subsequent use of the "lapse of 180-days" as a basis to dismiss many Socially Disadvantaged Farmers cases in District Court) is an abuse of power. Under the Administrative Procedures Act (APA), the District Court's review the Respondents' informal

rulemaking was to determine if it was, "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). As the Supreme Court held in Citizens to Preserve *Overton Park v. Volpe*, 401 U.S. 402 (1971), "the generally applicable standards of § 706 require the reviewing court to engage in a substantial inquiry." *Id*. at 415. The Court clarified this mandate in *Camp v. Pitts*, 411 U.S. 138 (1973), stating that, "the focal point for judicial review should be the administrative record already in existence, not some new record made initially in the reviewing court." *Id*. at 142; see also *Fla. Power & Light Co. v. Lorion*, 470 U.S.729, 743-44 (1985) ("The task of the reviewing court is to apply the appropriate APA standard of review, 5 U.S.C. § 706, to the agency decision based on the record the agency presents to the reviewing court").

White farmers get final agency decisions in the prescribed time of 180 days, as set forth in the APA, which allows for a formal hearing. This is unlike Socially Disadvantaged Farmers who often wait years to receive a final agency decision and are often denied a formal administrative hearing like in the case of the Plaintiff. If a program complaint was not subject to section 741 provisions, the Office for Civil Rights is subject to the provisions of the Administrative Procedures Act in which the ASCR has 180 days to render a final agency decision. We prayerfully request the Court review the full administrative record to prove non-compliance of the APA 180-day rule that is contrary to public policy of the Congressional moratorium and the terms of the *Pigford* settlement agreement.

CONTINUING VIOLATION UNDER ECOA PURSUANT TO§ P.L. 105-277, §741

USDA's refusal to provide a final agency decision in prohibiting SDF from relief as outlined under the *Pigford* settlement decree is a continuing violation of ECOA.[2] The ECOA prohibits discrimination against credit applicants based on race, color, religion, national origin, sex, marital status, age, or source of income. 15 U.S.C. §§1691 et seq.

Under ECOA §P.L. 105-277, §741, in the fiscal year of 1999, Congress passed legislation allowing Socially Disadvantaged Farmers who had pending claims of discrimination against the USDA from 1981 to 1996, the right to pursue their claim in court, void of the tolling of the statute of limitations. Section 741(a) allowed a farmer to file a complaint in Federal District Court or (b) a right to a formal administrative hearing after USDA issued a final agency decision. Once again, Congress had to step in and has now mandated, without discretion the Secretary to write off all debt for SDFs under the Emergency Relief for Farmers of Color Act of 2021 which allocated $4 billion to pay off outstanding debt, taxes, and offsets. The Act states that Secretary shall provide relief for 100 percent of the total debt and 20 percent for tax purposes. Respondent Secretary of Agriculture has now added the terminology "up to" in an attempt to deprive Socially Disadvantaged Farmers of the full performance of a Congressional Act to provide relief that has been denied for nearly twenty-five years (see ex. 7). The history of discriminatory pattern and practices by a long lineage of past and present Secretary's to manipulate administrative relief must

[2] The Supreme Court has held that "federal statutes of limitations are generally subject to equitable principles of tolling," *Rotella v. Wood*, 528 U.S. 549, 560 (2000), and that such principles should apply "unless tolling would be inconsistent with the text of the relevant statute," *Young v. United States*, 535 U.S. 43, 49 (2002) (internal quotation and citation omitted). To prevail on an equitable tolling claim, a plaintiff must show that "[s]he has been pursuing h[er] rights diligently, and . . . that some extraordinary circumstance stood in h[er] way." *Pace v. DiGuglielmo*, 544 U.S. 408, 418 (2005).

stop. We are requesting the Court to compel the Secretary to enforce what has been legislated into law by Congressional Acts.

Like in the Plaintiff, many claimants have sought relief and enforcement of the *Pigford* decree in District Courts, i.e. *Beniot* or like the Plaintiff in bankruptcy court, only for the USDA to request a dismissal for failure to exhaust remedies under ECOA. The USDA's abuse of the two statute of limitations is another cause for dismissal. Often, the USDA will exercise its sovereign immunity and move to bar the request for damages under the Civil Rights Act, the APA, and the Fifth Amendment.

Despite the USDA's omission of racial and gender discrimination in the settlement of *Pigford v. Glickman*, 185 F.R.D. 82 (D.D.C. 1999), Native Americans (*Keepseagle v. Veraman*, 2001 U.S. Dist. LEXIS 25220 (D.D.C. December 11, 2001)), Hispanics (*Garcia v. Vilsack*, 563 F.3d 519 (D.C. Cir. 2009), cert. denied, 130 S. Ct. 1138 (2010)), and White women (*Love v. Connor*, 525 F. Supp. 2d 155 (D.D.C. 2007).), ECOA provisions practice is still taking place via the refusal to provide a final agency decision and denial of a formal hearing.

In 2008, recognizing the USDA's continued violation of ECOA, Congress passed the Food Energy and Conservation Act known as, "the Farm Bill." This provided a moratorium without discretion on foreclosures and offsets for farmers. The challenge with the moratorium was that the farmer had to obtain a final agency decision for the provision to apply. We are requesting enforcement under § P.L. 105-277, §741 by the Secretary of Agriculture.

The Secretary of Agriculture's inaction in enforcing the moratorium is not only a violation of the 2008 Farm Bill, but also a violation of the Civil Rights Act of 1964 (title 6 amended 1991) that prohibits discrimination based on contractual agreements. The Secretary had a contractual agreement to adhere to, but purposefully failed to issue relief, a final agency decision, or allowance of a formal hearing. This is a defiant display of repudiation.

The District of Columbia Circuit Court has recently applied the doctrine of equitable tolling in a variety of cases, most notably, "in cases where strict application [of the statute of limitations] would be inequitable." *Phillips v. Heine,* 984 F.2d 489, 491 (D.C. Cir. 1993); see also *Jankovic v. Int'l Crisis Group,* 494 F.3d 1080, 1086-87 (D.C. Cir. 2007) (holding that equitable tolling applies when the plaintiff is unable to find information vital to his claim). Tolling can only begin upon the discovery of an injury. The refusal to issue a final agency decision or respond to SDF complaint discovery has been a purposefully delay thereby tolling the statute of limitations under ECOA. The non-enforcement of the ECOA in issuing a final agency decision led to the loss of property. Therefore, we are requesting a final agency decision from the USDA on behalf of the Plaintiff based on the authority of the 2008 moratorium and the Emergency Relief for Farmers of Color Act of 2021 which mandates the Secretary to release all public and private debt, barring any and all adverse actions from private lenders.

PRAYER OF RELIEF

1. Compel the Secretary of Agriculture for a formal hearing on the Merits to Petitioner Smith and other members of the Cowtown Foundation who are eligible for the same under § 741;
2. Compel the Secretary to declare, under seal of this court, all Socially Disadvantaged Farmers' loans written off, complete with loan number and a certified copy of the debt write off; and the payment of 20 percent of the total write off to farmers within 180 days of the filing of this action;
3. Compel the Secretary of Agriculture and the United States Attorney to use the authority granted to the Secretary of Agriculture pursuant 42 U.S.C. § 1480(c)(d) to release all liens and UCC filings in the county in which the real property is located. Further, to enter the released real property into this Court including language that the loans associated with released property is forever barred against adverse action such as foreclosure and offsets and mail a certified copy to the Socially Disadvantaged Farmer or Rancher;
4. Compel the Secretary of Agriculture to return all offset money taken by the Respondents, the Secretary of Agriculture, and the Department of Agriculture from Socially Disadvantaged Farmers or Ranchers who did not receive a final agency decision within 180 days, consistent with the Administrative Procedures Act and Food Energy and Conservation Act, later codified as 7 CFR 766. 358;
5. Compel Respondent Secretary to declare, within 120 days, that all land belonging to Socially Disadvantaged Farmers or Ranchers facing foreclosures, and guaranteed banks associated with foreclosure, if any, have been paid in full and are forever barred from any

adverse action from a private lender(s) on any and all eligible loans subject to debt relief under the Emergency Relief for Farmers of Color Act of 2021;

6. Compel Respondents, the Secretary of Agriculture and the United States Attorney General -Merrick Garland, to submit to this Court all foreclosures of program farm ownership loans or farm operating loans that led to foreclosure of Socially Disadvantaged Farmers who had an accepted discrimination complaint from May 22, 2008 to present. This also includes third party actions in which the United States guaranteed the loan;
7. Compel Respondents, Secretary of Agriculture- Tom Vilsack and the United States Attorney General, to bring claims in the jurisdiction in which foreclosure action was taken against Socially Disadvantaged Farmers who had pending foreclosure complaints after May 22, 2008. The Secretary of Agriculture can bring such claims in certain jurisdictions under fraudulent transfers and powers granted to the Secretary under 42 U.S.C.§ 1980(c)(d). Such loans were provided moratorium relief by settlement agreement through the 2008 Food Energy and Conservation Act, later codified as 7 C.F.R. 766.358;
8. ECOA was enacted by Congress in 1989. ECOA is a federal statute that prohibits credit grantors from discriminating when granting credit based on race, color, religion, national origin, gender, marital status, or age. ECOA Section 741(c) provides: ―if an eligible claim is denied administratively, the claimant shall have at least 180 days to commence a cause of action in a Federal Court of competent jurisdiction seeking review of such denial. We are requesting reasonable attorney's fees and costs under ECOA; and
9. In addition, the Equal Access to Justice Act (EAJA) deems the United States liable for attorneys' fees in many court cases and administrative proceedings that it loses (and some that it wins) in the event it fails to prove that its position was substantially justified. 5

U.S.C. § 504 and 28 U.S.C. § 2412(d). As noted in the Decision and Order entered in this case, the costs of the action and attorney fees are added to the award. 15 U.S.C. §1691e(d). Traditionally, the usual starting point for determining the amount of a reasonable fee is an examination of the number of hours reasonably expended multiplied by a reasonable hourly rate. *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983). Reasonableness is required in both the number of hours billed and the rate sought. Parties seeking an award, "should submit evidence supporting the hours worked and the rates claimed." Id. at 433, 437. Where, as in this case, the fees and costs are being paid pursuant to the Equal Access to Justice Act (EAJA) (See, 7 C.F.R. §15f.25).

IN CONCLUSION

Due to the long history of discriminatory practice, the Petitioners request the Court grant a prayer of relief.

Respectfully submitted,

s/Jillian Hishaw_____
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Dated: April 23, 2021

Counsel for Plaintiffs

IN THE UNITED STATES FEDERAL COURT

FOR THE DISTRICT OF COLUMBIA

In Re:	)	
	)	
COWTOWN FOUNDATION	)	
LEROY SMITH JR.	)	**Case No.:**
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CERTIFICATE OF SERVICE

Defendants

The Secretary of Agriculture-Tom Vilsack
The Dept. of Agriculture
The United States Attorney General-Merrick Garland
Unknown Private Banks

I certify that a true and correct copy of this action was sent via certified mail to the following:

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The Department of Agriculture
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The United States Attorney General-
Merrick Garland
U.S. Department of Justice

950 Pennsylvania Avenue, NW
Washington, DC 20530-0001

The Assistant United States Attorney General
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