UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

GEORGE P. KEEPSEAGLE, *et al.*,		
Plaintiffs,	)	Civil Action No.: 99-3119 (EGS)
v.	)	
ANN VENEMAN,		
Defendant.	)	

OPINION & ORDER

This class action suit is brought by and on behalf of Native American ranchers and farmers who applied for United States Department of Agriculture ("USDA" or "the Agency") farm loans and benefit programs between January 1, 1981 and November 24, 1999. The class makes two claims: (1) that USDA discriminated against them on the basis of race in processing their farm program applications; and (2) that USDA did not investigate their complaints of discrimination. Plaintiffs bring their claims under the Equal Credit Opportunity Act ("ECOA"), 15 U.S.C. §§ 1691, *et seq.*, the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 551, *et seq.*, the Declaratory Judgment Act ("DJA"), 28 U.S.C. §§ 2201, *et seq.*, and Title VI of the Civil Rights Act of 1964 ("Title VI"), 42 U.S.C. § 2000d. The government moves for judgment as a matter of law as to all but one of plaintiffs' claims under Federal Rule of Civil Procedure 12(c).

Upon consideration of the defendant's Motion for Partial Judgment on the Pleadings, the opposition and reply thereto, the

relevant statutory and case law, and the oral arguments heard in open court on December 3, 2004, and for the following reasons, the Court concludes that defendant's motion should be GRANTED in part and DENIED in part.

I. BACKGROUND

Congress established the USDA with a mission "to foster and encourage the family farm system of agriculture in this country." *See* 7 U.S.C. § 2266(a). According to plaintiffs, because of this mission the Agency, through the Farmers Home Administration ("FmHA") and later the Farm Service Administration ("FSA"), is the lender of last resort for farmers and ranchers unable to obtain credit elsewhere.

The Agency is authorized to make: farm ownership loans to enable farmers to acquire, enlarge or improve farms; operating loans for annual crop production expenses and the purchase of equipment; and emergency loans to alleviate the effects of losses suffered in disasters and emergencies. *See* 7 C.F.R. §§ 1943.2, 1941.2,1945.2. FSA operates its loan programs through its state offices, district directors, and county offices. *See* Def.'s Motion at 6. Individual applications for loans are submitted and processed at the county level. *Id.* At all times relevant to this case, the FSA county supervisor submitted completed loan applications to a county committee, composed of three local, peer-elected farmers, for a recommendation on the applicant's eligibility for the requested loan. *Id.*

Plaintiff's Fifth Amended Complaint ("complaint") alleges extensive and deliberate discrimination against Native American farmers by USDA. The complaint cites a number of reports and findings in support of these allegations, including a 1997 report by the Civil Rights Action Team at USDA, *Civil Rights at the United States Department of Agriculture* ("CRAT Report"). That report detailed the obstacles and opposition that minority and impoverished farmers have faced in seeking USDA loans:

> The minority or limited-resource farmer tries to apply for a farm operating loan through the FSA county office well in advance of planting season. The FSA county office might claim to have no applications available and ask the farmer to return later. Upon returning, the farmer might receive an application without any assistance in completing it, then be asked repeatedly to correct mistakes or complete oversight in the loan application. Often those requests for correcting the application could be stretched for months, since they would come only if the minority farmer contacted the office to check on the loan processing. By the time processing is completed, even when the loan is approved, planting season has already passed and the farmer either has not been able to plant at all, or has obtained limited credit on the strength of an expected FSA loan to plant a small crop, usually without the fertilizer and other supplies necessary for the best yields. The farmer's profit is then reduced.

See Pl. Complaint at ¶ 103 (citing CRAT Report at 15). The report also described the disturbing impact the USDA's discrimination ultimately had on minority farmers' livelihoods.

> If the farmer's promised FSA loan finally does arrive, it may have been arbitrarily reduced, leaving the farmer without enough money to repay suppliers and any mortgage or equipment debts. In some cases, the FSA loan never arrives, again leaving the farmer without means to repay debts. Further operating and disaster

> loans may be denied because of the farmer's debt load, making it impossible for the farmer to earn any money from the farm. As an alternative, the local FSA official might offer the farmer an opportunity to lease back the land with an option to buy it back later. The appraised value of the land is set very high, presumably to support the needed operating loans, but also making repurchase of the land beyond the limited-resource farmer's means. The land is lost finally and sold at auction, where it is bought by someone else at half the price being asked of the minority farmer. Often it is alleged that the person was a friend or relative of one of the FSA county officials.

See Pl. Complaint at ¶ 104 (citing CRAT Report at 16). The report's findings are echoed in the named-plaintiffs' individual experiences. *See* Pl. Complaint at ¶¶ 3-67.

II. STANDARD OF REVIEW

A party is entitled to judgment on the pleadings pursuant to Fed. R. Civ. P. 12(c) if the moving party can demonstrate that there are no material facts in dispute and it is therefore entitled to judgment as a matter of law. *See Stewart v. Evans*, 275 F.3d 1126, 1132 (D.C. Cir. 2002) (citing *Peters v. Nat'l R.R. Passenger Corp.*, 966 F. 2d 1483, 1485 (D.C. Cir. 1992)). In deciding a motion for judgment on the pleadings, the court must "'accept as true the allegations in the opponent's pleadings' and 'accord the benefit of all reasonable inferences to the non-moving party.'" *See Stewart*, 275 F.3d at 1132 (quoting *Haynesworth v. Miller*, 820 F.2d 1245, 1249 n.11 (D.C. Cir. 1987)). Pursuant to Rule 12(c), if matters outside the pleadings are considered by the court, the motion is treated as one for summary judgment and decided in accordance with Rule 56.

III. DISCUSSION

A. Equal Credit Opportunity Act

In 1974, Congress enacted ECOA to prevent discrimination in the field of consumer credit. The Act makes it "unlawful for any creditor to discriminate against any applicant, with respect to any aspect of a credit transaction ... on the basis of race, color, religion, national origin, sex or marital status, or age." *See* 15 U.S.C. § 1691(a). "Creditor" is defined under the statute to include "any person who regularly extends, renews, or continues credit." *Id.* at § 1691a(e). "Person" includes a "government or governmental subdivision or agency." *Id.* at § 1691(f).

ECOA creates a private right of action against creditors who violate its antidiscrimination provisions. *Id.* at § 1691e. Under the statute, a private action must be brought within two years of the occurrence of the alleged violation.[1] *Id.* at § 1691e(f). In 1998, however, after it came to light that USDA had dismantled its civil rights division in 1983, Congress enacted remedial legislation, cited as § 741, that temporarily extended the statute of limitations for civil actions based on claims previously asserted in complaints filed with USDA. *See* Omnibus Consolidated Appropriations Act for Fiscal Year 1999, P.L. 105-277, Div. A., § 101(a) [Title VII, § 741], 112 Stat. 2681-30

[1] There are some exceptions to this time bar that are not applicable here.

(Oct. 21, 1998) (codified at 7 U.S.C. § 2279). *See also* Pl. Compl. at ¶¶ 131-139; Def.'s Motion at 11.

Pursuant to § 741, a civil action seeking relief with respect to discrimination alleged in an "eligible complaint" could be brought within two years after the enactment of the amendment (in other words, before October 21, 2000). For purposes of this waiver of the statute of limitations, 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[.]

§ 741(e). Thus, under Section 741, otherwise time-barred ECOA actions could be commenced on or before October 21, 2000, so long as the plaintiff had "filed with the Department of Agriculture before July 1, 1997," a "nonemployment related complaint" alleging discrimination under ECOA during the period January 1, 1981 through December 31, 1996.

Defendant contends that as the party invoking federal jurisdiction under § 741's waiver of sovereign immunity, plaintiffs "must allege in [their] pleading the facts essential to show" that they filed "eligible complaints" within the prescribed time frame. *See generally McNutt v. Gen. Motors*

Acceptence Corp., 298 U.S. 178, 189 (1936); *Tavoulareas v. Comnas*, 720 F.2d 192, 195 (D.C. Cir. 1983) ("Plaintiffs bear the burden of establishing jurisdiction, and it must appear on the face of the complaint.") (citations omitted). Defendant maintains that this Court has no subject matter jurisdiction over these claims because "none of the seven class representatives have alleged sufficient facts to demonstrate that their pre-November 1997 ECOA claims come within the limitations period authorized by § 741.

Defendant points out the well-established principle that the court need not "conjure up unpled facts to support conclusory allegations," *Hurney v. Carver*, 602 F.2d 993, 995 (1st Cir. 1979) (internal citations ommitted). Instead, they submit, a complaint must contain a sufficient level of specificity to provide the defendant with "fair notice of what the plaintiff's claim is and the grounds on which it rests," *Conley v. Gibson*, 355 U.S. 41, 47 (1957). Without such specificity, a plaintiff fails to state a claim. *See Material Supply Int'l, Inc. v. Sunmatch Industrial Co.*, 62 F. Supp. 2d 13, 19 (D.D.C. 1999) ("[c]onclusory allegations or legal conclusions masquerading as factual conclusions" ... "will not suffice to state a claim.")(quoting 2 Moore's Fed. Practice, s. 12.34[1][b] at 12-61 to 12-62).

Defendant further maintains that any alleged oral discrimination complaints are not "eligible" for Section 741's purposes. In support of this assertion, defendant notes that

Section 741 refers to "eligible complaint" as one previously "filed" with USDA and that numerous courts have held that "filed" means "written." *See Greene v. Whirlpool Corp.*, 708 F.2d 128, 130 (4th Cir. 1983) (holding that § 626(d) of Age Discrimination in Employment Act ("ADEA"), "by requiring a charge to be filed, implies that it must be written"); *Woodward v. Western Union Tel. Co.*, 650 F.2d 592, 594 (5th Cir. 1981) ("The necessity of a writing is fairly implicit in the requirement of the statute that the notice be 'filed.'"); *Reich v. Dow Badische Co.*, 575 F.2d 363, 368 (2d Cir. 1978) ("The statute does not say that the notice of an intent to file an action must be written, but ... by requiring that it be filed, implies that the notice must be written."); *Ritter v. United States*, 28 F.2d 265, 267 (3d Cir. 1928) ("The statute and regulations prescribed that a claim must be filed. This means a written claim, and not an oral one[.]").

According to defendant, USDA has long-standing, internal management guidelines that prohibit discrimination in the administration of its direct programs and activities. *See* 7 C.F.R. Part 15d. These internal guidelines include an administrative mechanism under which USDA accepts written complaints of discrimination in any USDA program, including the credit programs cited by plaintiffs in this case. *Id.* Under 7 C.F.R. 15d, participants in FSA programs who believe they have been victims of discrimination may, within 180 days of the alleged discrimination, file a written complaint with USDA's

Office of Civil Rights.

Defendant also argues that construing "eligible complaint" to require a complaint made in writing directly to USDA accords with Section 741's statutory purpose to eliminate prejudice to individuals who had properly filed an administrative complaint with USDA but who did not file a civil suit within ECOA's two-year limitations period because they were awaiting a response from the Agency. Defendant submits that the potential for such prejudice exists only as to those individuals who properly filed an administrative complaint, however, because only those complaints were subject to processing, and thus to potential mis-processing. In other words, because USDA's regulations for resolving discrimination complaints have always required written complaints and only a complaint made in writing would trigger agency action under USDA's discrimination regulations, it only makes sense, defendant argues, to require the same for a complaint to trigger Section 741. "Anyone who failed to make a previous complaint in writing would not have had a reasonable expectation for action by the agency, and, thus, they would not have the excuse for failing to bring a timely suit to court that Congress recognized by enacting § 741." Def.'s Motion at 21.

Defendant also argues that USDA's own interpretation of Section 741, which is intimately tied up with its administrative process, is entitled to deference. *See Independent Ins. Agents of America v. Hawke*, 211 F.3d 638, 643 (D.C. Cir. 2000).

Finally, because Section 741 effects an expansion of the government's waiver of sovereign immunity, defendant argues, any ambiguity in its terms must be resolved in favor of the government. *See, e.g., Dep't of Army v. Blue Fox, Inc.*, 525 U.S. 255, 261 (1999)(a waiver of sovereign immunity must be "strictly construed, in terms of scope, in favor of the sovereign."). To construe the language "eligible complaint" "filed" with USDA to include oral complaints would expand the meaning of those terms well beyond the plain language of their definitions and, as a result, greatly increase the number of suits for damages that could be brought against the government, defendant posits. Moreover, given the impermanent nature of oral complaints, the boundaries of any suits predicated upon them would be inherently difficult to pin down – particularly where, as here, such complaints must be recalled decades after they were allegedly made. In support of this argument, defendant quotes one court's comments in the ADEA context:

> Written notice supplies a greater degree of certainly than does oral notice; a written charge of discrimination serves as a permanent reminder and proof that the grievant initiated the process. Oral notice does not; it is subject to the vagaries of memory, and therefore injects a substantial and needless incertitude into the system.

Schroeder v. Copley Newspaper, 691 F. Supp. 1127, 1129 (N.D. Ill. 1988). Therefore, defendant maintains, construing "eligible complaint" to include oral grievances would run doubly afoul of the rule that a waiver of sovereign immunity is to be strictly

construed: not only would such an interpretation extend the waiver beyond the statute's plain terms, but the resulting expansion of the government's potential exposure to liability would be particularly open-ended given the inherent ambiguities in determining whether a plaintiff ever made an oral complaint and, if so, what its content was.

Thus, defendant avers, all of plaintiffs' ECOA claims are time-barred with the exception of one of Plaintiff Keepseagle's claims. After five amendments to their complaint, defendant submits, plaintiffs have not adequately pled that they filed an administrative complaint that met Section 741's timing requirement (*i.e.*, was filed before July 1, 1997), its content requirement (*i.e.*, alleged an ECOA violation that occurred during the period 1981-1996), and its requirement that complaints be made in writing to USDA.

Plaintiffs dispute defendant's contentions. They argue the Court must generously construe allegations in the complaint in plaintiffs' favor, that the complaint alleges that all plaintiffs filed "timely" claims of discrimination, and identifies those complaints with particularity sufficient to meet the liberal notice pleading standards of the federal rules. *See* Pl. Compl. at ¶¶ 10, 25, 34, 45, 53, 67.[2] *See also Grogan v. Gen. Maint.*

[2] Five of the six paragraphs in the complaint to which Plaintiffs cite, state, for each class representative, "Mr. [class representative] timely filed, either directly or through his Tribal Council complaints to the defendant regarding these acts of discrimination, which complaints were never acted on

Serv. Co., 763 F.2d 444, 449 (D.C. Cir. 1985) ("[A] complaint must be read broadly to determine whether it provides defendant with fair notice."). Therefore, plaintiffs contend, having alleged that plaintiffs' claims to USDA were timely, they have fulfilled the pleading requirement and no dismissal is warranted.

Plaintiffs also submit that at the time Section 741 was drafted and continuing to the present, USDA has accepted oral complaints. *See* "How to File a USDA Program Discrimination Complaint," USDA Office of Civil Rights, at http://www.usda.gov/cr/OCR/Program.htm (July 29, 2004) (describing two ways to make a "program discrimination complaint" - *by telephone* or by letter); *USDA-Farm Service Agency Handbook*, par. 253 at 9-2 (1997) ("Employees receiving written or *verbal complaints* must forward the complaint to the appropriate officials") (emphasis added). Moreover, although plaintiffs concede that USDA's regulations require written complaints, they counter that this is of little moment when USDA's actual practice, both before and after the passage of Section 741, has been to accept complaints orally – and it is this practice upon which plaintiffs and class members relied.

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pursuant to the applicable law, causing him substantial damage." The exception is the Mandans claims, which state "Between 1983 and 1990, the Mandans complained of discriminatory treatment to the ASCS staff, FmHA staff, Odell Ottmar - Chief of Reservation Programs, Bob Zimmerman – North Dakota Head of Farm Loan Programs, Ralph Leet – State Director of FmHA, Marshall Moore – State Director of FmHA, U.S. Congressman Byron Dorgan, Kent Conrad and Glen English, Al Spang – BIA Superintendent, and Jerry Jaeger – BIA Area Director."

Plaintiffs argue that because USDA accepted oral complaints, farmers who lodged such complaints were equally in compliance with USDA procedures as farmers who submitted written complaints, and thus are entitled to the same measure of relief. They contend there is no indication that Congress intended to close the courthouse doors to victims of USDA's discrimination who justifiably relied on USDA's own internal complaint procedures.

As to USDA's argument that the Court must require written complaints because Section 741 effected a waiver of sovereign immunity and thus must be narrowly construed, plaintiffs counter that while courts may not expand the waivers of sovereign immunity, it is equally true that courts may not "assume the authority to narrow the waiver [of sovereign immunity] that Congress intended, or construe the waiver unduly restrictively." *See Bowen v. New York*, 476 U.S. 467, 479 (1986) (internal citations omitted). The plain language of Section 741 does not require written complaints, and thus there is no justification to read in such a requirement.

In *Love v. Veneman*, Judge Robertson faced this issue in deciding the defendant's motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(1). In a memorandum opinion, he wrote

> ...Congress 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 Section 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.

2001 U.S. Dist. LEXIS 25201, *14-15.

In its reply brief, defendant reiterates that USDA's regulations require written complaints and note that USDA's practice and policy dictated that employees receiving oral complaints of discrimination would fill out an intake form for the complainant's signature. *See* Declaration of M. Farook Sait, attached to Def.'s Reply as Exhibit 1. If the oral complaint was received by telephone, defendant claims, the employee would mail the intake form to the complainant with instructions to sign and return the form and indicating that the complaint would be considered filed on the date of the oral complaint if the complainant signed and returned the form within the specified time period. Thus, defendant claims, oral claims were never accepted unless associated with a written complaint.

Defendant goes on to argue that plaintiffs have not provided any documents showing that any of the class representatives filed a claim of discrimination during the class period and that USDA

"ha[s] searched their files and have not found any such documents." *See* Declaration of Frederick D. Isler, attached to Def.'s Reply as Exhibit 2.

Section 741, however, is a remedial remedy passed because USDA's Office of Civil Rights was disbanded and failed to act on complaints (written or oral) for years, unbeknownst to the public. In fact, there is evidence that written complaints were lost or thrown away – so there is no guarantee that had plaintiffs filed written complaints the defendant would find them. Written complaints that were filed clearly did not "trigger" USDA action during the years in question - as is evident from the CRAT report and other evidence – so the defendant's argument that they be required under Section 741 is misplaced. *See, e.g., Pigford v. Glickman*, 185 F.R.D. 82, 88 (D.D.C. 1999) ("All the evidence developed by the USDA and presented to the Court indicates, however, that this system was functionally nonexistent for well over a decade. In 1983, OCREA [Office of Civil Rights Enforcement and Adjudication] essentially was dismantled and complaints that were filed were never processed, investigated or forwarded to the appropriate agencies for conciliation. As a result, farmers who filed complaints of discrimination never received a response, or if they did receive a response it was a cursory denial of relief. *In some cases, OCREA staff simply threw discrimination complaints in the trash without ever responding to or investigating them.* In other

cases, even if there was a finding of discrimination, the farmer never received any relief.") (emphasis added).

Finally, given the egregious allegations in the complaint and cited in the CRAT report, there is no reason to believe that USDA was following its own policy and informing people who made oral complaints that they needed to submit something in writing or to believe that USDA staff was following up telephone complaints with a form mailed for the complainant's signature.

When considering a motion for judgment on the pleadings, the Court will accept as true all allegations in the plaintiffs' pleadings and give plaintiffs the benefit of all reasonable inferences. *See Stewart v. Evans*, 275 F.3d 1126, 1132 (D.C. Cir. 2002). Considering that ECOA does not specify that complaints must be "written," and that waivers of sovereign immunity are not to be unduly narrowed, and in light of USDA's apparent policy of accepting oral complaints during this time period, the Court finds that the defendant is not entitled to judgment as a matter of law on plaintiffs' ECOA claims.

B. Administrative Procedure Act

Defendant argues that it is entitled to judgment as a matter of law as to plaintiffs' APA claims because APA review is precluded where a party already has an adequate remedy at law available. Defendants assert that ECOA provides an adequate remedy at law and therefore plaintiffs' APA claims must be dismissed. Plaintiffs respond that ECOA does not provide an

adequate remedy for their claims for relief based on the Agency's failure to investigate their discrimination claims.

On September 27, 2004 and December 2, 2004, Judge Robertson of this Court granted plaintiffs in two cases similar to the *Keepseagle* case leave to file interlocutory appeals "on the question of whether plaintiffs' allegations of failure to investigate civil rights complaints state claims under the Administrative Procedure Act ("APA") 5 U.S.C. § 551 et seq., or the Equal Credit Opportunity Act ("ECOA") 15 U.S.C. § 1591 et seq., or both." *See Garcia, et al. v. Veneman*, No. 00-2445 (D.D.C. Sept. 27, 2004)(order granting interlocutory appeal) and *Love, et al. v. Veneman*, No. 00-2502 (D.D.C. Dec. 3, 2004)(same).

On December 16, 2004, after the briefings on the defendant's motion in this case were submitted and the oral argument on the motion was held in this Court, the U.S. Court of Appeals for the District of Columbia Circuit granted the *Garcia* and *Love* plaintiffs permission to take those interlocutory appeals. *See In re: Rosemary Love, et al.*, No. 04-8010 (D.C. Cir.)(order granting permission to take an interlocutory appeal) and *In re: Guadalupe L. Garcia, For himself and on behalf of G.A. GARCIA and SONS FARM et al.*, No. 04-8008 (D.C. Cir.)(same).

This Court, therefore, will deny defendant's motion as to the APA claims without prejudice to a motion for reconsideration pending the outcome of those appeals. The Court will also stay discovery on the APA claims while those appeals are pending.

C. Declaratory Judgment Act

Defendant argues that the plaintiffs' DJA claims must be dismissed as a matter of law because the Act does not provide an independent waiver of the United States' sovereign immunity. In support, defendant cites *Benvenuti v. Dept. of Defense*, 587 F. Supp. 348 (D.D.C. 1984) and *Planned Parenthood of Cent. Texas v. Sanchez*, 280 F. Supp. 2d 590 (W.D. Tex. 2003).

In *Benvenuti*, an army physician brought suit against the Department of Defense, alleging tort and constitutional violations. The court noted that "a damages suit against the United States or its agencies cannot be maintained unless there exists an 'unequivocally expressed' statutory waiver of sovereign immunity. ... None of the statutes cited by plaintiff – the general federal question provision ... and the All Writs and Declaratory Judgment Acts ... – nor the constitution itself – operates as such waivers." 587 F. Supp. at 352. The court went on to discuss the Federal Tort Claims Act, which does provide a waiver of sovereign immunity, but found it inapplicable to the facts of the case. *Id.* at 352. Therefore, the court dismissed the plaintiff's *damages* claims. Nonetheless, the court remanded as to plaintiff's claims for declaratory and injunctive relief.

In *Planned Parenthood v. Sanchez*, the plaintiff family planning and abortion providers challenged a Texas legislature's rider that prohibited Medicaid and other federal funds from going to any health care providers who performed abortions, even though

those funds would not be used to perform abortions. 280 F. Supp. 2d at 593. The defendant Texas Commissioner of Health challenged the federal court's jurisdiction over the case. The court stated, "Section 2201, the Declaratory Judgment Act, likewise does not give the Court jurisdiction. The Fifth Circuit has held this statute cannot be an independent source of jurisdiction but merely permits an award of declaratory judgment when a court has another basis for jurisdiction." *Id.* at 602 (citing *Jones v. Alexander*, 609 F.2d 778 (5th Cir. 1980).

Plaintiffs respond to USDA's argument that the DJA does not separately waive sovereign immunity by noting that the DJA is not a jurisdictional statute and instead merely expands the scope of remedies available to plaintiffs who seek redress for violations of other statutes. Therefore, plaintiffs maintain, if the Court has jurisdiction over plaintiffs' ECOA and/or APA claims pursuant to a waiver of sovereign immunity, the Court also has jurisdiction to provide plaintiffs relief under the DJA pursuant to that same waiver and plaintiffs may seek declaratory relief under the DJA for violations of those statutes.

Defendant is not entitled to judgment as a matter of law as to plaintiffs' DJA claim. First, the doctrine of sovereign immunity bars suits for money damages absent a waiver of immunity. *See Marshall & Gordon, P.C. v. United States International Development-Cooperation Agency*, 557 F. Supp. 484, 488 (D.D.C. 1983)("The dispositive factor in determining the

applicability of sovereign immunity is the practical effect of the judgment or decree sought by the plaintiff. ... Generally, if 'the judgment sought would expend itself on the public treasury or domain, or interfere with the public administration,' ... then the suit is barred.") Thus, to the extent plaintiffs are seeking non-monetary relief, sovereign immunity is not an issue. Plaintiffs clarified during oral argument that they are not seeking monetary relief under the Declaratory Judgment Act. *See* Tr. at 10.

Moreover, the cases defendant cites do not support its contention that in this case the DJA claim must be dismissed. The *Benvenuti* court merely held that the DJA does not itself contain a waiver of sovereign immunity and the *Sanchez* case merely held that the DJA does not itself grant the federal court jurisdiction over a cause of action. The ECOA and the APA statutes contain waivers of sovereign immunity that allow suit against the United States government (in certain circumstances) and therefore, if plaintiffs prevail under one or both of those statutes, the plaintiffs may also be entitled to relief under the DJA.

D. Title VI

Defendant submits that Title VI of the Civil Rights Act prohibits federally *assisted* programs or activities from discriminating against benefit applicants or recipients on the grounds of race, color, or national origin. *See* 42 U.S.C. §

2000d. Defendant argues Title VI does not apply to programs, like those at issue here, that are conducted directly by the federal government. Plaintiff contends that there is a division of authority on this issue. *Compare Dorsey v. United States Dept. of Labor*, 41 F.3d 1551, 1552-53 (D.C. Cir. 1994) *with Doe v. Attorney General*, 941 F.2d 780 (9th Cir. 1991), *judgment vacated by*, *Reno v. Doe by Lavery*, 518 U.S. 1014 (1996).

During oral argument on the defendant's motion, plaintiffs' counsel conceded that in this jurisdiction, the controlling case law provides no Title VI claim against the Federal Government and plaintiffs' counsel stated that they plead the Title VI claim only to preserve their right to challenge that precedent before an en banc panel in the Court of Appeals for this Circuit. See Tr. at 24-25.

Therefore, defendant's motion for judgment on the pleadings as to the Title VI claims is granted.

E. Res Judicata

Finally, defendant urges the Court to dismiss three of the seven class representatives' claims as barred by the doctrine of *res judicata*.

> '[T]he parties to a suit and their privies are bound by a final judgment and may not relitigate any ground for relief which they already have had an opportunity to litigate – even if they chose not to exploit that opportunity – whether the initial judgment was erroneous or not.' The judgment bars any further claim based on the same 'nucleus of facts,' for 'it is the facts surrounding the transaction or occurrence which operate to constitute the cause of action, not the legal theory upon which a litigant relies.'

See Page v. United States, 729 F.2d 818, 820 (D.C. Cir. 1984)(quoting *Hardison v. Alexander*, 655 F.2d 1281, 1288 (D.C. Cir. 1981); *Expert Elec., Inc. v. Levine*, 554 F.2d 1227, 1234 (2nd Cir. 1977)).

Defendant contends class representative John Fredericks filed a complaint in the U.S. District Court for the District of North Dakota against the Secretary of Agriculture, the Director of the then National Appeals staff, and several other FSA and USDA employees, in which Mr. Fredericks alleged, among other things, that USDA had wrongfully taken a security interest in his cows, had wrongfully denied certain loan applications and loan servicing rights and inappropriately denied him access to certain programs. Defendant submits these are nearly the same allegations as those found in the Fifth Amended Complaint in this case. Ultimately, the court in North Dakota granted partial summary judgment to Mr. Fredericks. Defendant argues that because his 1994 action was litigated to a final judgment, he is barred from relitigating any claims based on the same nucleus of facts. Therefore, defendant argues, regardless of the legal theories Fredericks presented to the court in North Dakota in 1994, his current discrimination claim is barred by *res judicata*.

Defendant contends the same is true for class representatives Crasco and Alkire, who previously secured bankruptcy protection. Defendant submits that the same USDA loans at issue in this case would have been at issue in those

proceedings and any claims as to those debts could have been asserted in those bankruptcy proceedings, whether as an objection to USDA's proof of claim, *see* Fed. R. Bank. P. 3007, or, even more clearly, as an adversary proceeding under Part VII of the Bankruptcy Rules, *see* Fed. R. Bank. P. 7001. Craso and Alkire's final releases from bankruptcy, defendant believes, must bar their assertion of such claims now. Defendant notes the fact that the earlier proceeding was one in bankruptcy does not vitiate the *res judicata* effect of the prior judgment. *See Sure-Snap Corp. v. State Street Bank & Trust*, 948 F.2d 869, 875 (2d Cir. 1991) (finding that claim for tortious infliction of emotional distress against creditors should have been brought as part of bankruptcy proceeding and was therefore barred by *res judicata*).

Plaintiffs counter that none of the class representatives' claims are barred by *res judicata*. They contend Mr. Fredericks suit in 1994 was litigated before Congress enacted Section 741, extending the statute of limitations on Mr. Fredericks ECOA claims. Thus, according to plaintiffs, Mr. Fredericks did not have a fair and full opportunity to litigate the claims he now brings before this Court. Plaintiffs cite *Page*, 729 F.2d at 820, for the proposition that claims are not barred if they are based on facts not yet in existence at the time of the first action – here, plaintiffs argue, Section 741 was a fact not in existence at the time Mr. Fredericks original claim was litigated.

As to Plaintiffs Crasco and Alkire's claims, plaintiffs argue these, too, are not barred by *res judicata*. First, both plaintiffs bankruptcy claims were filed well before the enactment of Section 741 and therefore plaintiffs were in no position to seek relief under ECOA at the time of their bankruptcy actions. Second, plaintiffs submit, prior to the enactment of Section 741, both plaintiffs sought investigation and adjudication of their credit discrimination claims pursuant to the USDA's administrative complaint procedure. Given USDA's continuous representations between 1981 and 1996 that a complaint of discrimination could be remedied by lodging an internal agency complaint, these plaintiffs can hardly be expected to have simultaneously filed discrimination claims in the bankruptcy court. Moreover, plaintiffs point out, having invited plaintiffs to utilize its own dysfunctional internal complaint procedure and assured them of its effectiveness, USDA cannot now be heard to complain that these plaintiffs also failed to seek relief in another forum. It is this reliance, plaintiffs submit, that distinguishes this case from *Sure-Snap Corp. v. State Street Bank & Trust*. In *Sure-Snap*, the court refused to allow a corporation to bring a lender liability cause of action against its creditors after the institution of bankruptcy proceedings, because the corporation plainly could have brought the same action previously. *Id.* at 873.

In its reply brief, defendant responds that the fact that

Congress had not yet enacted Section 741 when the class representatives brought their prior claims does not excuse their failure to raise these claims in the earlier proceedings. Defendant contends the fact that defendant in those actions may have had an affirmative defense – the statute of limitations – against the ECOA claims does not excuse plaintiffs' failure to bring them. The defendant notes the statute of limitations is an affirmative defense that is waived if not raised. *See Canady v. S.E.C.*, 230 F.3d 362, 364 (D.C. Cir. 2000). Therefore, defendant avers, plaintiffs were obligated to raise the claims subject to the defendant's subsequent raising of the statute of limitations defense.

Further, defendant continues, although Plaintiff Crasco's claims were brought before enactment of Section 741, his bankruptcy case was not finally discharged until October 1999, approximately one year after Section 741's enactment. Thus, defendant argues, pursuant to Chapter 12's bankruptcy proceedings, a debtor must list all assets of the bankruptcy estate, including any assets that the debtor acquires after the commencement of the bankruptcy case but before the case is closed, dismissed, or converted to a Chapter 7 proceeding. *See* 11 U.S.C. §§ 521, 541, 1207. Because Section 741 resurrected Crasco's ECOA claims while his bankruptcy case was still pending, defendant submits, Crasco had a further opportunity to raise any ECOA claims that became available to him once Section 741 came

into effect. These include his claims alleged in the Fifth Amended Complaint.

Defendant's argument that these plaintiffs should have raised ECOA claims in their earlier suits despite the fact that those claims would clearly be barred by the statute of limitations (prior to Section 741) is unconvincing. While the statute of limitations is an affirmative defense subject to waiver, if defendant's logic is to be followed, a lawyer would have to plead each and every claim and statute pursuant to which there might be a claim, even knowing the statute of limitations had long passed. This not only seems inefficient and impractical, but at some point might violate the rules against bringing frivolous claims.

Judge Robertson addressed this issue in *Wise v. Glickman*, where defendants had argued to have one of the class member's claims barred by *res judicata*.

> There is no question that Chamblee's claims in this suit arise from the same "nucleus of facts," *Page*, 729 F.2d at 820, as the claims made in her previous suits; all three suits are based on the 1989 suspension of her application for loan servicing and a net recovery buyout. However, it is questionable whether Chamblee could have raised the discrimination claims she raises here in her initial suit, as that suit sought to have the government process her administrative appeal, so any other claims made at that time may have been deemed premature. Furthermore, Congress had not yet tolled the statute of limitations for discrimination claims against USDA at the time she filed her first suit. Neither had Congress tolled the statute of limitations when Chamblee filed her second suit, in 1997, so she could not have brought her current claims for relief then, either. As she has never had a full and fair opportunity to litigate her discrimination claims, they

will not be dismissed now.

Wise, 257 F. Supp. 2d 123, 131 (D.D.C. 2003).

Similarly, in this case Plaintiffs Frederick, Crasco and Alkire's claims will not be dismissed as a matter of law under the doctrine of *res judicata*.

IV. CONCLUSION

Based on the foregoing discussion, it is hereby

ORDERED that defendant's Motion for Partial Judgment on the Pleadings is **GRANTED in part** and **DENIED in part**; it is further

ORDERED that defendant is not entitled to judgment as a matter of law as to plaintiffs' claims brought pursuant to the Equal Credit Opportunity Act; and it is further

ORDERED that defendant is not entitled to judgment as a matter of law on plaintiff's Administrative Procedure Act claims at this time, but that the Court denies that aspect of defendants' motion without prejudice to a motion for reconsideration following resolution of the interlocutory appeals in *Garcia, et al. v. Veneman*, No. 00-2445 (D.D.C.) and *Love, et al. v. Veneman*, No. 00-2502 (D.D.C.); and it is further

ORDERED that defendant is not entitled to judgment as a matter of law as to plaintiffs' Declaratory Judgment Act claims; and it is further

ORDERED that defendant is granted judgment as a matter of law as to plaintiffs' Title VI claims; and it is further

ORDERED that defendant is not entitled to judgment as a

matter of law based on *res judicata* as to Plaintiffs Frederick, Crasco and Alkire's claims; and it is further

ORDERED that discovery on plaintiffs' Administrative Procedure Act claims is stayed pending resolution of the interlocutory appeals in *Garcia, et al. v. Veneman*, No. 00-2445 (D.D.C.) and *Love, et al. v. Veneman*, No. 00-2502 (D.D.C.).

Signed: EMMET G. SULLIVAN
United States District Judge
March 31, 2005