

## P R O C E E D I N G S

1  
2 THE DEPUTY CLERK: Civil Actions 97-1978 and 98-1693.  
3 Timothy Pigford, et al and Cecil Brewington, et al versus Ann  
4 Veneman. Mr. Pires, Mr. Fraas, Mr. Chestnut, Miss Sanders, Mr.  
5 Stein, Mr. Fierst, Mr. Beato and Mr. Lear for the plaintiffs.  
6 Mr. Sitcov, Mr. Henry and Miss Goitein for the defendant. Miss  
7 Roth is the Monitor and Mr. Lewis is the Mediator.

8 THE COURT: Everybody is here.

9 Let me just say a couple of things before we start.  
10 This is a status conference and with some specific questions or  
11 issues on the table that I tried to set out in an Order of  
12 April 6th. And I think I'm going to ask the Monitor to give me  
13 a report and then I'll hear from whoever wants to say anything,  
14 but what I'm concerned about is the fact that by May the 15th  
15 all of the petitions for Monitor Review have to be filed with  
16 respect to decisions that were made on Track A and I guess  
17 Track B as well, but the numbers suggest that we should be  
18 focusing on Track A, decisions made on Track A either within  
19 the preceding 120 days or prior to then because of the Order  
20 that I issued back in -- on November the 8th over the vigorous  
21 objection of the Government.

22 The way that I see this, to put it in context, and you  
23 all may have different recollections and different views, is  
24 that when this case was settled, we had a Fairness Hearing, we  
25 had all sorts of discussions, we had objectors, we had draft

1 settlement agreements, Consent Orders that went back and forth  
2 with some changes made. But essentially if you look back at  
3 the transcript and you look back at my Opinion the belief that  
4 everybody had was that those farmers -- first of all, everybody  
5 thought there would be many fewer farmers in the class and many  
6 fewer people filing claims, but the belief that everybody had  
7 was that under Track A there was a very low threshold of proof,  
8 that this would probably be about, I don't know how you would  
9 quantify it, a 95 percent success rate. In my Opinion I said  
10 that I thought it would be virtually automatic. One of the  
11 reasons that everybody thought it would be virtually automatic  
12 is because it was represented that it wouldn't be a problem to  
13 find similarly situated white farmers, and class counsel said  
14 they had that, and I don't mean to be pejorative, they had that  
15 information in their hip pocket. And it was class counsel's  
16 belief that that would be easy.

17           And, you know, to the extent that there are lots of  
18 people frustrated, and I have to say this, I know there are  
19 fees in the background, there are all sorts of other things in  
20 the background, but the thing that I'm frustrated about and I  
21 want to focus on, is the farmers. And they believed, and you  
22 can tell me if I'm wrong, Mr. Chestnut, Miss Sanders, Mr.  
23 Pires, Miss Roth, you all have been all over the South talking  
24 to people, I haven't, but they believed that at the time of the  
25 settlement that most of them were going to get something and

1 that's because we thought it was going to be virtually  
2 automatic and that's because we thought finding similarly  
3 situated white farmers wasn't going to be a problem. And then  
4 it turned out to be a problem. And Mr. Pires has said -- he's  
5 taken some of the blame for that. So we have a 60 or 62  
6 percent success rate which means that there are more petitions.

7           Now, the Government might have filed more petitions if  
8 the success rate had been higher but I think we all believed  
9 from the beginning that most of the petitions -- the Government  
10 wasn't going to file that many petitions, even if the success  
11 rate were higher, but most of the petitions were going to come  
12 from the farmers. So we start with having many more farmers  
13 filing claims than we anticipated, and I understand that now  
14 with the late filings and I assume, having delegated this to  
15 Mr. Lewis, that most of the late filings are going to be  
16 declined. That's not what we were focusing on. But there are  
17 16-some thousand late filings. But we're talking about the 20  
18 or so thousand that actually filed timely and that have been or  
19 are being processed. That's what the focus is today, I think.

20           So because the success rate was lower at the initial  
21 stage, the number of petitions are greater. And there are some  
22 additional claims, there were white farmer problems, and so  
23 forth. So one of the things I was concerned about as we got  
24 ready to appoint the Monitor was those -- that 40 percent or  
25 whatever we anticipated the number would be and if there was no

1 similarly situated white farmer and if the file that was  
2 reviewed by the Track A decisionmakers didn't have that  
3 information, they would -- it would be hard to prove. They  
4 might prove manifest injustice but they wouldn't be able to  
5 prove it in the absence of a similarly situated white farmer.

6           So once again over the vehement objection of the  
7 Government, in the Order of Reference I said that the files  
8 could be supplemented with additional information. The  
9 Government was not happy. They thought that was changing the  
10 bargain. But I did it. And my thought was that the primary  
11 thing that those files would be supplementing, probably two  
12 things, one is sometimes there's actually more than one claim  
13 but because of the way the claim file was prepared only one  
14 claim was included or it was not clear that there might  
15 actually be separate claims. The primary thing I think was  
16 finding that white farmer. And that's what was going on.  
17 Because it seemed to me that we should not punish the farmers  
18 for the failings of the lawyers who prepared the claims  
19 packages. And some of the failings of the lawyers, if we want  
20 to call them that, are simply because people were overworked.  
21 There was much more to be done than people thought. But there  
22 may be other reasons as well.

23           Then there was a realization that the Consent Judgment  
24 didn't have a deadline for the filing of the petitions for  
25 Monitor Review. In fact, as I recall it, the only deadline in

1 the Consent Decree that's relevant is that at the end of five  
2 years this entire apparatus we've constructed would be gone,  
3 including the Monitor. And so it was clear to everybody that  
4 if the Monitor was to make decisions before she faded off into  
5 the sunset we had to have deadlines for Monitor Review and for  
6 filing of petitions for Monitor Review.

7           And so there was a stipulation, and I say all of this  
8 because I think we find ourselves here in part because of  
9 agreements that were made, not Orders that I issued, but  
10 agreements that were made and then I issued Orders. And the  
11 agreement was that all of the petitions could be processed  
12 within 120 days. So that takes you from July 14th, the day of  
13 the agreement, to November 13th.

14           Now, somewhere along the way, and I think if you read  
15 the Consent Decree, and maybe Mr. Pires or Mr. Chestnut or  
16 anybody else who are among class counsel -- the Consent Decree  
17 did not, did not obligate them to handle each and every  
18 individual claim that came down the pike. It contemplated some  
19 people might file pro se. Not that that would be the best  
20 thing in the world. It contemplated other lawyers might get  
21 into the act. But it didn't contemplate -- it certainly didn't  
22 say that they had to handle each and every claim.

23           Now, I think Mr. Pires and his colleagues essentially  
24 did tell people they would do it but I don't think they were  
25 obligated to do it, according to the Consent Decree. In fact,

1 there were some other lawyers who were not in the counsel --  
2 of-counsel group or maybe they were in the of-counsel group but  
3 not the original counsel group who had small groups of claims  
4 in various States and they processed them, claims and  
5 petitions, and they processed them.

6 Then in November Mr. Pires said this could not be done  
7 by the -- within the 120 days which by then was almost elapsed,  
8 that was agreed upon in July. And he needed more time. And  
9 the Government objected vehemently to any more time because of  
10 the agreement and the commitments.

11 And so what I said was -- I'm not quite sure how to  
12 characterize what I said, that I wouldn't give them more time,  
13 but I would. And that what he had to do, what counsel had to  
14 do, given the numbers that -- of people whose petitions they  
15 had to process was to give us a list, a register of who those  
16 people were and then -- recognizing that would be a rough cut,  
17 withdraw some that didn't have a claim to pursue under the  
18 petition and get the petitions filed at a rate of 400 a month.  
19 And that number -- that five- or six-month period was proposed  
20 by class counsel and the number that could be processed per  
21 month was proposed by class counsel. Or maybe we took the  
22 overall number -- that's what we did. We took the overall  
23 number and took the number of months that was proposed by class  
24 counsel and did what appeared to be simple math.

25 So now -- then there are about 2000 of those petitions

1 left, and the Monitor can give me a report, but the first month  
2 seemed to go well, and the second month seemed to go pretty  
3 well. And then the numbers dwindled. And we face this May  
4 15th deadline. And what I'm concerned about is that, not  
5 just -- just is it humanly possible to do this in that period  
6 of time and more importantly, is it possible to do a quality  
7 job, because turning in a petition if you haven't taken the  
8 time to try to find that other similarly situated white farmer  
9 accomplishes nothing.

10           Now, I don't know what percentage of the petitioners  
11 are going to succeed. We probably are not going to get up to  
12 the 90 or 95 percent total that we thought we might when the  
13 settlement agreement was signed. But I would hope that we'd  
14 get higher than 60 or 62 percent and that there would be some  
15 success in those petition processes or why bother having them.  
16 And if I'm right, and my recollection of the history of the  
17 case, the success rate depends in large part on finding  
18 similarly situated white farmers. Now, that takes time,  
19 whether it's Al Pires or somebody else, although it should be  
20 fast if it were Mr. Pires and his colleagues and Mr. Chestnut  
21 and his colleagues because they know the case, know the  
22 history, of reviewing a file, seeing what's deficient in the  
23 claim package. Fixing it up. Talking to the client. Trying  
24 to find the white farmers.

25           In the midst of all of this I issued an Opinion on

1 attorneys' fees and I have to tell you I really think that what  
2 I said should have been no surprise to anyone if you read the  
3 Consent Decree. If you read the document that you all  
4 negotiated and signed when you settled the case. And it was  
5 previewed in my decision with respect to the Banks Law Firm to  
6 a certain extent.

7           The only reason I didn't decide it sooner was because  
8 I was hopeful, and maybe had been led to believe, that this  
9 whole fee issue could be settled. And I've looked back at a  
10 number of old transcript where it was suggested that that was  
11 quite possible. But what seems to have happened and since I  
12 issued that decision is that it's had an impact on the number  
13 of lawyers and the amount of time that those lawyers are  
14 spending on the Monitor petition process. And I assume that's  
15 because -- for two reasons. One is that presumably given what  
16 the standard is, that the number of petitions that are going to  
17 succeed is assumed -- is presumed to be small or moderate. But  
18 not -- it's not assumed that the overwhelming number of people  
19 that petition for Monitor Review given the standard that was  
20 written into the Consent Decree after negotiations, a lot of  
21 people are going to lose, and so if you have to succeed or  
22 prevail to get paid, then getting new lawyers in the act would  
23 be hard, and I understand that it is also having an impact on  
24 the existing lawyers. Mr. Pires has cut back on his staff.  
25 Other people have been impacted by the now certain knowledge



1 that you're not going to get paid for working on petitions  
2 unless you succeed.

3 I still think that there should be a way to resolve  
4 and settle the fee issue and put more money in the pockets of  
5 the lawyers that have worked on this case to date, but with  
6 respect to the individual claims -- I mean, you know, 60  
7 percent -- if there had been a 60 percent success rate it would  
8 seem to me that somebody ought to be able to come up with a  
9 formula that says if you take X-number of claims and the  
10 average number of hours per claim was, or maybe there are  
11 different categories of claims, and take 60 percent of that  
12 number, if both sides are willing to accept some sort of rough  
13 justice, that that might be a way to solve that and -- or close  
14 to solving it. And certainly with respect to the question of  
15 out-of-pocket expenses it ought to be even easier to solve.  
16 But going forward and including the claims that have been filed  
17 to date, but going forward on the Monitor petitions, whatever  
18 lawyers do this are only going to get paid if they're  
19 successful.

20 But coming back to where I started from, and then I'll  
21 ask Miss Roth to give us some specifics, and then I'll hear  
22 from everybody, we were all very proud of ourselves when this  
23 case settled and thought that what was an intractable problem  
24 had been ameliorated, not solved. That a lot of farmers who  
25 thought they would never see a penny were going to get

1 something and that maybe, just maybe overtime they would even  
2 feel that the Government going forward might be more fair than  
3 it's been in the past. That was the hope. This was a first  
4 step. A lot of people actually have gotten checks.

5           And, you know, I just personally -- I shouldn't take  
6 it personally, but I just am proud of what we did. And if it  
7 begins to fall apart in this last phase and if the 40 percent  
8 that didn't succeed feel they don't have lawyers to help them  
9 now or that they're doing a slipshod job or that they don't  
10 have a chance of succeeding with the Monitor because of a lot  
11 of mistakes that have been made along the way, a lot of good  
12 things have been done along the way, but some mistakes have  
13 been made as well, or let's put it this way, time has been  
14 allowed to pass without things being done that should have been  
15 done somehow.

16           And I also feel that, and I know this is easier said  
17 than done, that lawyers have obligations to their clients even  
18 though they're not getting paid or even when they don't know if  
19 they're going to get paid. Sometimes it depends what rules you  
20 play on. If you take a contingent fee case, you may get  
21 nothing, you may get a lot. If you get paid by the hour you  
22 may get nothing -- you won't get nothing, you'll be paid by the  
23 hour regardless of the outcome. And under ECOA and the Equal  
24 Access to Justice Act you've got to succeed. And the only  
25 thing that may have changed is you all thought I was going to

1 say something different about that paragraph of the Consent  
2 Decree. And maybe you guessed wrong or bet wrong or maybe you  
3 weren't reading it -- certainly weren't reading it the same way  
4 I was.

5           But now where are we and what are we going to do about  
6 the farmers that ought to have petitions prepared, that are of  
7 sufficient quality that they stand a chance of success with the  
8 Monitor even under the standard that you all negotiated, which  
9 is a heavy burden. And that's really the issue that I'm most  
10 concerned about. I really want you to settle this attorneys'  
11 fees thing. I would hope that it can be resolved without the  
12 lawyers that should be spending their time on helping the  
13 farmers in the time that remains having to devote too much of  
14 their time to the fee question. But I don't know how to get  
15 there and I'll let Miss Roth say something, but -- and I want  
16 to say this as kindly as I can, Mr. Pires, I think you made  
17 some commitments and some prognoses that you haven't been able  
18 to meet and -- for a variety of reasons, and from my  
19 perspective with May 15th staring us in the face unless  
20 somebody's got a plan that makes sense, not just to get the  
21 numbers processed which even that seems close to impossible,  
22 but to do it in some sort of a professional way that means that  
23 your clients have a chance of succeeding. And we -- the case  
24 was resolved and some people have succeeded. But -- and I am  
25 sure -- and Mr. Chestnut can tell me if I'm wrong, I think

1 he'll tell me I'm right, there are lots of people that will  
2 always think this case wasn't fairly settled, that they still  
3 got the wrong end of the stick, that they still have no faith  
4 in the Government. They didn't get any money out of it, they  
5 should have gotten more money out of it.

6 But I think we all have something still to be proud of  
7 to this point, and if there was a message sent, and not only  
8 messages sent but checks sent, and I just don't want to see it  
9 fall apart in this last stage.

10 And I'm very troubled by what I've been reading in  
11 Miss Roth's reports and what I've been hearing, and as much  
12 respect as I've got for Mr. Chestnut, Mr. Pires, and Mr.  
13 Sitcov, you know, who has gotten beat up as much as he's been  
14 beat up but in the end he helped move these things along and  
15 some of his colleagues deserve some of the credit.

16 I don't want to see it fall apart and I don't want  
17 people to feel that they've been let down by people on whom  
18 they placed some confidence. I just don't know what to do  
19 about it, and I'm hoping that you all -- it's probably not Mr.  
20 Sitcov's problem at this point but I'm hoping that we have some  
21 way to deal with it.

22 I have spoken longer than I intended to. Miss Roth,  
23 do you want to add anything at this point or shall I hear from  
24 Mr. Pires?

25 MS. ROTH: Your Honor, I'll just give a brief

1 away from being done, that we've had this problem. And I  
2 understand the difficult choice you have if your case is being  
3 handled by lawyers who offer two things that I don't know where  
4 you can get anywhere else.

5           There's nobody like us who understand farm law. It's  
6 interesting that we get criticized but we never get criticized  
7 for that because we are the bar for that. There's very few  
8 people who can do that. And secondly, we are an intergraded  
9 group of lawyers who have been involved for four years and we  
10 stayed from the beginning to the end under incredible financial  
11 circumstances.

12           And I think I'm holding JL up. JL?

13           MR. CHESTNUT: May it please the Court, good morning,  
14 Your Honor -- good afternoon.

15           THE COURT: Good afternoon, Mr. Chestnut.

16           MR. CHESTNUT: I want to, Your Honor, if I might,  
17 provide a non-Washington perspective --

18           THE COURT: That's always helpful.

19           MR. CHESTNUT: -- of this case. A number of  
20 agreements were made in this case. Some I participated in.  
21 Some I didn't. Each and every one of these agreements though  
22 were based on our best estimates. That's all we had. More  
23 often than not, in this unprecedented litigation those  
24 estimates turned out to be wrong. Sometimes egregiously wrong.  
25 And there had to be adjustment all along the line. At one

1 point I initially thought that this class would not number more  
2 than 6000 people. And it exploded. And this has been part of  
3 the problem.

4 But I want to first assure Your Honor that this case  
5 is not about to fall apart. This case is not going to fall  
6 apart. It is my life. It is my partner's life. I'll fall  
7 apart before I let this case fall apart.

8 Also I want you to know that in spite of the constant  
9 criticism that we suffer through almost daily, this Court could  
10 select at random a sampling of the class and of the various  
11 black farmer organizations and bring them here and they all  
12 would tell you not only have they been represented well, but  
13 constantly. Daily class counsel goes far beyond the call of  
14 duty. We spend hours and hours, Your Honor, explaining to poor  
15 people who can't read and write why they don't qualify for this  
16 class. There's no way I could bill anybody for that. I'm not  
17 interested in billing anybody. That's part of what my life is  
18 all about. But every day we go through that.

19 There are all kinds of aspects to this case that you  
20 can't know unless you visit ground zero. You have to be in  
21 Mississippi and Alabama and Georgia. You have to know these  
22 folks, commiserate with them, to really understand this case.  
23 It has never never been about money. It never never will be  
24 about money. Some of the members of this class, Your Honor,  
25 are as old or older than I am. And a tax-free \$50,000 payment

1 does not do much for them. I mean he can go and pay off two,  
2 three debts. Buy some farm equipment. And that's about it.  
3 It is not about money really to the class. It never was.

4           If you want to know, Your Honor, how this case is seen  
5 at what I call ground zero, I want to tell you that in an  
6 improbable unforgettable little town called Itta Bena,  
7 Mississippi there's a poor blind black farmer who stands on the  
8 street corner every Saturday morning and sings a song he  
9 composed and the title of it is The Day Us Talked to the Big  
10 Judge in Washington. I went to Itta Bena and he sang it for  
11 me. We talked about it. And then we both cried. He is  
12 talking, Your Honor, about a day when this Court, a United  
13 States District Court in the Nation's capital, permitted poor  
14 ungrammatical black farmers from Alabama, from Mississippi,  
15 from Georgia, from Virginia, to come in here and not talk  
16 through lawyers but to talk directly about their pain and about  
17 asking you to abolish a Government department really recreated  
18 in Lincoln's Administration to help farmers. The -- this Court  
19 in permitting that to happen caused a more lasting, a more  
20 positive, a more important national impact, brought hope where  
21 there wasn't any. And that day is more important, believe me,  
22 Your Honor, that day is more important than all the checks the  
23 Government could ever write.

24           This case has never been about money. The money part  
25 comes in when Rose and JL and Hank Sanders in Alabama have to

1 go to Alabama bankers who don't like black farmers generally  
2 and don't like us in particular and borrow 3.5 million dollars,  
3 and they don't make it easy. It's excruciatingly hard and  
4 embarrassing, but we don't care. We believe in this case. We  
5 believe in the people. We believe in what this Court has done  
6 in this case.

7           It costs us, Your Honor, more than \$200,000 a year in  
8 interest on loans that we have borrowed on behalf of this  
9 class. That is money we can't recover from the Government and  
10 don't want to recover. If it costs \$500,000 and we would pay  
11 the Government the taxes owed it and still use it on behalf of  
12 the class.

13           I want Your Honor to understand this class is not  
14 about to fall apart, but there are problems. And I would have  
15 to tell you, Your Honor, some of these problems derive from  
16 maybe the thickness of my skull. When we were negotiating with  
17 my dear dear friend, Mr. Sitcov, for the consent settlement,  
18 had I had any inkling that each claim would be litigated almost  
19 as if it was a class action unto itself I never would have  
20 agreed to it. I don't know of any farmer who would have agreed  
21 to that. If I had known I was negotiating a situation whereby  
22 in Track B cases we would have these monumental struggles over  
23 discovery, lengthy Hornbook motions to dismiss, I never would  
24 have agreed to that. What I had in mind and what I mistakenly  
25 thought everybody else had in mind was that we were talking



1 about something more in the nature of arbitration.

2           And I have never understood, and Your Honor knows that  
3 I take the same position that Al does, we agree with you most  
4 of the time but I've always been bothered by the proposition  
5 that a poor farmer unless that poor farmer wins, we can't even  
6 get reimbursed, much less paid for the time spent preparing his  
7 case, preparing and presenting his case. I thought, Your  
8 Honor, the class won the right to be heard, to that point the  
9 Government had denied these people the right to be heard. That  
10 I thought was the success. And then I learned that, no, you  
11 have agreed that even though they have a hearing now you have  
12 to go in and win.

13           And so Rose and JL and there's Hank and there's the  
14 rest of us, we're down there in Alabama now, how do we go to  
15 this farmer and say, well, I've got to take your case  
16 regardless and I've got these bankers over here who are calling  
17 me all kinds of names and we're struggling, but one thing that  
18 we have always said, that the class comes first. We will  
19 represent the class and we will represent the class with  
20 quality.

21           I'm going to ask Rose to speak in a minute. She won't  
22 take long. But I want you to know and I want to say to Your  
23 Honor that Rose Sanders took over the team at my request and  
24 she has supervised both the A and B cases. And under her  
25 supervision we got -- she got through, all of -- with our team,