

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

TIMOTHY C. PIGFORD, et al.,)
)
Plaintiffs,)
)
v.) Civil Action No.)
) 97-1978 (PLF))
ANN M. VENEMAN, Secretary,)
The United States Department)
of Agriculture,)
)
Defendant.)

CECIL BREWINGTON, et al.,)
)
Plaintiffs,)
)
v.) Civil Action No.)
) 98-1693 (PLF))
ANN M. VENEMAN, Secretary,)
The United States Department)
of Agriculture,)
)
Defendant.)

MONITOR'S MAY 2001 REPORT
REGARDING REGISTERS OF PETITIONS

I. INTRODUCTION

This report is filed to explain Class Counsel's progress regarding filings for claimants listed on the Register of Petitions.

II. BACKGROUND

The Court's Order of November 8, 2000, created a series of deadlines by which Class Counsel was obligated to file

supporting materials or withdrawals regarding Claimants who are listed on Class Counsel's Register. Background regarding the Register of Petitions and the Monitor's obligation to report on same can be found in the Monitor's Initial Report Regarding Registers of Petitions, filed on December 26, 2000, and in subsequent monthly reports. The Court's Order of April 27, 2001, suspended the deadlines imposed by the November 8, 2000 Order. The Court's Order of May 15, 2001, set a new deadline of September 15, 2001, for these filings.

The Order of May 15, 2001, required the Monitor to submit reports to the Court on the last days of May, June, July, August, and September of 2001. The reports are to summarize Class Counsel's progress based upon information provided by the Facilitator.

III. VALID AND INVALID REGISTER LISTINGS

The criteria for listing claimants on Registers are delineated in the Court's November 8, 2000, Order. They are: (1) the claimant received an Adjudicator or Arbitrator decision on or before July 14, 2000; (2) the claimant asked the attorney or law firm for assistance with the filing of his or her Petition for Monitor Review; and (3) the claimant presented counsel with a facially meritorious claim for a Petition for Monitor Review. Register listings that meet these criteria are valid Register listings. The Order provided that the Register

shall not include any claimant who had already had an attorney file a Petition on his or her behalf.

IV. MONITOR'S REPORT ON CLASS COUNSEL'S PROGRESS FOR THE PERIOD OF MARCH 16, 2001, THROUGH MAY 15, 2001

A. Facilitator's Data

The Facilitator reported to the Monitor the following figures regarding Class Counsel's filing of supporting materials and withdrawals from the valid portion of the Register during the period of March 16, 2001, through May 15, 2001.

FACILITATOR DATA REGARDING CLASS COUNSEL'S FILING FROM VALID PORTION OF REGISTER FOR PERIOD OF MARCH 16, 2001 THROUGH MAY 15, 2001

Source	Supporting Materials	Withdrawals	Total
Conlon, Frantz	177	162	339
Chestnut, Sanders	75	14	89
Of Counsel	0	0	0
Totals	252	176	428

In addition to filing supporting materials and/or withdrawals regarding claimants who are listed on the Register, Class Counsel has made filings for claimants who do not appear on the Register.¹

B. Class Counsel's Data

Class Counsel reported to the Monitor the following figures regarding Class Counsel's filing of supporting materials and withdrawals from the valid portion of the Register during the period of March 16, 2001, through May 15, 2001.²

¹ The Facilitator reports that Class Counsel filed supporting materials and/or withdrawals regarding a total of 498 claimants during the period of March 16, 2001, to May 15, 2001. This number is irrespective of whether the claimants appeared on the valid portion of the Register. Of the 498 claimants, supporting materials were filed on behalf of 303 claimants and withdrawals were filed on behalf of 195 claimants. This means that some "withdrawals" were filed regarding claimants who, according to the Facilitator, are not validly listed on the Register.

² Class Counsel noted that the Chestnut, Sanders figures were provided in a memorandum dated May 23, 2001, from Hank Sanders to Alexander Pires.

CLASS COUNSEL'S DATA REGARDING CLASS COUNSEL'S
 FILING FROM VALID PORTION OF REGISTER FOR
 PERIOD OF MARCH 16, 2001 THROUGH MAY 15, 2001

Source	Supporting Materials	Withdrawals	Total
Conlon, Frantz and Phil Fraas	193	174	367
Chestnut, Sanders	150	32	182
Totals	343	206	549

C. Reconciliation

The Facilitator reported to the Monitor on May 30, 2001, that the discrepancy between Class Counsel's figures and the Facilitator's figures is likely due to: (1) Class Counsel including data from a Chestnut, Sanders, submission of sixty-three filings that was postmarked May 16, 2001, and therefore misses by one day the deadline for inclusion in this reporting period; (2) Class Counsel continuing to consider certain claimants as listed on the Register even though, according to the Facilitator, those claimants do not meet the criteria for inclusion on the Register; and, (3) approximately twenty duplicate filings.

V. EXPLANATION FOR THE INCREASED WITHDRAWAL RATE

In a memorandum dated May 18, 2001, the Monitor asked Class Counsel to explain why Class Counsel's rate of withdrawals increased significantly beginning with the April 2001, filing, as compared with earlier filings. Class Counsel responded in a memorandum dated May 23, 2001, as follows:

With respect to Withdrawals, the numbers are somewhat misleading. There are more Withdrawals now because:

(i) During the early months, the number of Withdrawals was extremely low because the lawyers were reluctant to give up on any but the very weakest of cases.

(ii) Our attorneys have many "open files" for which, without additional information from Claimants, we cannot find a clear and manifest error. These open files fall into 2 categories:

(A) Cases where, over the course of many weeks, we repeatedly ask for information from the clients and the clients only respond when we present them with a deadline for receipt of said information - even then, the information received is not always helpful to Claimant's case;

(B) Cases where, over the course of many weeks, we repeatedly ask for information from the clients and the clients continue to be unresponsive even when we present them with a deadline for receipt of said information.

We have reached a point at which we must finally decide whether we can proceed with many of these cases. The end result is an increase in the number of questionable cases that end up as Withdrawals of representation. This is consistent with Judge Friedman's statement at the

November 8, 2000 hearing that we must "cabin our resources":

. . . given the standard for monitor review you conclude that you're not going to be successful, then why don't you cabin your resources and say, well, this one isn't worth spending a lot of time on . . .

Tr. at 11, lines 22-25.

(iii) Over the past year, our attorneys have become better at differentiating between cases which meet the standard set forth under ¶ 12(b)(iii) and cases which do not. Again, this has a direct impact on our ability to assess "questionable" cases. We also now have the benefit of decisions on Petitions for Monitor Review, giving us guidance on claims that will not be successful on appeal.

(iv) We try to assist Claimants in chronological order based upon when they received their decision and/or asked us for representation. In general, we have found that a pattern exists: the later group of cases have a higher proportion of cases with weaker grounds for appeal. Therefore, as we continue to work our way through the Register, the number of Withdrawals should increase.

(v) We are reviewing an increasing number of claims from farming families. Specifically, in many cases, multiple family members file individual claims when only one claim representing the entire family should have been filed. These claims are repetitive - sometimes word-for-word. For example, during the past months we reviewed four groups of 5 claims per family. Interestingly, when we discuss this phenomenon with the individual family members involved, they agree - albeit reluctantly - that only one claim should have been filed on behalf of the entire family. The result is few Petitions and a large number of Withdrawals.

VI. RESPONSES TO GOVERNMENT PETITIONS

In addition to filing supporting materials or withdrawals for claimants listed on the Register and filing petitions for claimants whose petition deadlines fall after November 13, 2001, Class Counsel files responses to Government petitions for Monitor review. When the Government petitions for Monitor review, the Facilitator routes the petition to Class Counsel for response. Due to privacy concerns, the petition is not routed directly to the claimant - it is sent only to Class Counsel. A letter is sent to the claimant to notify the claimant that the petition has been routed and the response time is running.³ The response time is sixty days. Class Counsel attempts to contact the claimant to work with the claimant to evaluate the merits of the petition and, where appropriate, to prepare a response to the petition.

³ For the March 2, 2001, routing, both the Facilitator and Class Counsel sent notification letters to the claimants about the filing and routing of Government petitions. After the March 2, 2001, routing, Class Counsel asked the Facilitator to stop sending the notification letter. From the March 9 routing through May 2001, Class Counsel provided the only notification to claimants regarding the filing and routing of government petitions. As of June 1, 2001, the Facilitator notification system has been reinstated.

A. Facilitator Data

The Facilitator reported to the Monitor the following figures regarding Class Counsel's filing of responses to government petitions for Monitor review for response deadlines falling during the period of March 16, 2001 through May 15, 2001.

FACILITATOR DATA REGARDING CLASS COUNSEL'S
 RESPONSES TO GOVERNMENT PETITION FOR PERIOD OF
 MARCH 16, 2001 THROUGH MAY 15, 2001

Referral Date	Count	Response Deadline	Responses Received
March 2, 2001	50	May 4, 2001	11
March 9, 2001	50	May 11, 2001	16

B. Class Counsel's Data

In a memorandum dated May 18, 2001, the Monitor asked Class Counsel to explain some of Class Counsel's practices regarding the filing of responses to Government petitions. In particular, the Monitor expressed concern about the timing of Class Counsel's notification of claimants regarding their opportunity to respond to Government petitions. Class Counsel responded in a memorandum dated May 23, 2001. Class Counsel's data is consistent with the Facilitator's information and provides additional detail. Portions of Class Counsel's response follow.

CLASS COUNSEL DATA REGARDING CLASS COUNSEL'S
 RESPONSES TO GOVERNMENT PETITION FOR PERIOD
 OF MARCH 16, 2001 THROUGH MAY 15, 2001

Batch of 50 Government Petitions	Received from Facilitator	Notice Mailed to Claimants (U.S. Mail)	Claimant's Response Deadline	Requests from Conlon, Frantz for Assistance	Responses Filed
1.	March 6	March 11	May 4	28	11
2.	March 13	March 15	May 11	29	16
3.	March 20	April 9	May 18	27	21
4.	March 27	April 9	May 25		
5.	April 3	April 23	June 1		

Class Counsel noted that in addition to these figures, the Chestnut, Sanders firm has filed nine responses.⁴

Regarding the response rate, Class Counsel noted that:

Our response rate for this batch was lower than expected because many of the claims were presented with a common objection by the government. Without prejudicing the interest of Claimants who were the subjects of these government Petitions, Conlon, Frantz can certify that it conducted a substantive inquiry into the issue and objection raised by the government. This inquiry included seeking the assistance of an Alcorn State University representative who traveled to rural Mississippi to investigate the issue and objection. This investigation factored into the

⁴ Class Counsel noted that Chestnut, Sanders firm notified Alexander Pires of the filing of these nine responses in a memorandum dated May 23, 2001, from Hank Sanders to Alexander Pires

conclusion that our best course of action would be to allow the Monitor to rule on this issue without submitting a response on behalf of Claimants. Each of the Claimants was informed of our investigation and our decision to not file a response.

Regarding the timing of notification to claimants, Class Counsel elaborates upon the data included in the table, above, by noting that:

Conlon, Frantz sent a letter to all claimants in each batch of government Petitions notifying each of the pendency of the government Petition. . . .

For each batch, the notices were mailed on the date identified under the column marked "Notice Mailed to Claimants (by U.S. mail)", above. Most of the notices were received by Claimants at least 6 weeks prior to their 60-day deadline to respond. Per your suggestion, each Claimant is given a choice as to whether they would like Class Counsel's representation.⁵ As described above, we have received between 27 and 29 requests for representation from each batch of 50 Claimants.

In addition, it should be noted that we have found that 3-5 Claimants out of each batch of 50 Claimants generally do not request our assistance until 2-3 days prior to said deadline. With one exception, we have been able to assist Claimants in this position.

Of the individuals who request our representation, we contact each by telephone in order to gather information for a response. If we cannot contact an individual by telephone, we attempt to

⁵ The Monitor notes that if a claimant were to choose to respond without the assistance of Class Counsel, some arrangement would have to be made consistent with the Privacy Act Protective Order and within the response timeframe to transfer the file and the government petition to another lawyer or, with appropriate redactions, to the claimant him or herself.

contact him/her by Federal Express. In turn, a series of telephone calls and faxes between the Claimant and our office as part of the process of preparing a response to the government Petition.

We cannot always find a basis for response and, as such, must inform the Claimant that we cannot help them and that they can file a response with the Monitor on their own. (We do not prejudice any Claimant's claim because we do not inform the Monitor which Claimants, within the group of "No Responses", did not seek our assistance and which Claimants we deemed did not have grounds to respond to the government petition.)

C. Resolution Regarding Timing of Notice

Under the system in which Class Counsel provided the only notice to claimants regarding the filing and routing of the Government's petition, notice was not always sent in a sufficiently timely manner.⁶ At the Monitor's suggestion, and with Class Counsel's consent, beginning June 1, 2001, the Facilitator will send notice to claimants immediately upon the routing of Government petitions to Class Counsel.

⁶ Some of the data provided by Class Counsel falls outside of this reporting period. That data reveals that when the third batch of Government petitions was routed, Class Counsel received the batch from the Facilitator on March 20, but did not send notice to the claimants until April 9, nineteen days later. When the fifth batch of Government petitions was routed, Class Counsel received the batch from the Facilitator on April 3, but did not send notice to the claimants until April 23, twenty days later.

VII. CONCLUSION

According to the Facilitator's data, during the period of March 16, 2001 through May 15, 2001, Class Counsel filed supporting materials or withdrawals on behalf of 428 claimants who are listed on the valid portion of Class Counsel's Register. Class Counsel's rate of withdrawals has increased significantly. This report contains Class Counsel's explanation for the increase rate of withdrawals.

Additionally, Class Counsel has begun evaluating and responding to Government petitions for Monitor review. Class Counsel assistance is requested by slightly more than half of the claimants who are the subject of each batch Government petitions.⁷ During this reporting period, Class Counsel filed responses to Government petitions on behalf of approximately half of the claimants who requested Class Counsel's assistance.

⁷ The Monitor will ask Class Counsel to address the question of whether in some cases (particularly in the third and fifth batches of Government petitions) the low rate of requests may be partly attributable to problems in the timing of the notice to the claimants. Actions by Class Counsel could have mitigated the affects of the relatively delayed mailings. This information will be included in the next monthly report.

This report contains Class Counsel's explanation regarding why responses were not filed in some of the cases in which assistance was requested.

Dated: May 31, 2001

Respectfully submitted,

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