UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

BEATRICE B. McWATERS, et al.,

VERSUS

FEDERAL EMERGENCY MANAGEMENT AGENCY, et al.

CIVIL ACTION NO. 05-5488

SECTION "K" (3)

DEFENDANTS' POST-TRIAL BRIEF

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INTRODUCTION

This post-trial brief supplements defendants' memoranda on their motion to dismiss, which remains pending.[1] Part I, below, discusses the sovereign immunity issue in relation to each of plaintiffs' alleged causes of action, and addresses the jurisdictional cases cited by the Court at the start of the trial of this matter on February 23, 2006. Part II, below, explains how the Administrative Record submitted by the defendants and the evidence presented at trial on February 23-24 support defendants' position on each of plaintiffs' claims.[2] Although defendants continue to believe that no evidence outside the Administrative Record should be considered in this case, the evidence presented at trial further shows, along with the Administrative Record, that plaintiffs' claims are without merit.

ARGUMENT

I. All of Plaintiffs' Claims Are Precluded by Sovereign Immunity

Absent a valid and applicable waiver of sovereign immunity, a district court lacks subject matter jurisdiction over claims against the United States, its agencies, and federal officers acting in their official capacity. FDIC v. Meyer, 510 U.S. 471, 475 (1994). Only Congress can waive sovereign immunity; the Supreme Court has declared that a "waiver of the Federal Government's

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[1] Specifically, defendants filed a Memorandum in Opposition to Plaintiffs' Motion for Temporary Restraining Order and Preliminary Injunction and November 28, 2005 Motion for Temporary Restraining Order and Preliminary Injunction, and in Support of Defendants' Motion to Dismiss (docket #32) [hereinafter Defs' Memo. Dismiss], and a Reply Memorandum in Support of Defendants' Motion to Dismiss (docket #107)

[2] The "multi-headed hydra" of plaintiffs' complaint tends to resist compartmentalization. See Transcript, Motion in Limine and Motion for Class Certification at 8 (Feb. 22, 2006) (docket #122). Parts II.A. through II.F., below, represent defendants' best effort to collect plaintiffs' numerous claims into logically-related groups. All of the claims in each logically-related set are taken from more than one "cause of action" in plaintiffs' 104-page Third Amended Complaint, and some "causes of action" are reflected in more than one set of claims.

sovereign immunity must be unequivocally expressed in the statutory text . . . ." Lane v. Peña, 518 U.S. 187, 192 (1996) (emphasis added). The Stafford Act does not contain any waiver of sovereign immunity. The Administrative Procedure Act waives sovereign immunity in some circumstances, but it does not apply where another statute "preclude[s] judicial review." 5 U.S.C. § 701(a)(1). Here, the APA's waiver of sovereign immunity does not apply because the Stafford Act "preclude[s] judicial review" of the actions complained of when it states that "[t]he Federal Government shall not be liable for any claim based upon the exercise or performance of or the failure to exercise or perform a discretionary function or duty on the part of a Federal agency or an employee of the Federal Government in carrying out the provisions of this [Act]." 42 U.S.C. § 5148.

These principles preclude judicial review of all of plaintiffs' claims in this case, because all of the agency actions challenged here involve "the exercise or performance of or the failure to exercise or perform a discretionary function or duty." Plaintiffs' first and second causes of action allege delays in processing applications for disaster assistance, but there is no basis in the Stafford Act for requiring FEMA to process applications within any particular length of time. Plaintiffs' third through ninth causes of action allege that FEMA has failed to provide various types of notice, but nothing in the Act requires FEMA to provide any particular types of notice. Indeed, since disasters happen quickly and circumstances change rapidly, permitting suits to enjoin FEMA from providing some kind of notice, or to compel the agency to provide notice in the middle of a disaster, would seriously hamper the agency's ability to respond to changing circumstances.

Plaintiffs' tenth and eleventh causes of action allege improper application of FEMA's modification of its policy on separated households, but nothing in the Stafford Act requires

FEMA to provide assistance separately to people who were in the same pre-disaster household. Plaintiffs' twelfth and thirteenth causes of action allege that FEMA has illegally required victims to apply for SBA loans as a condition of receiving housing assistance. Although the Act prohibits FEMA from denying housing assistance for failure to apply for a loan, the Act does not require the agency to publicize that fact or to notify all applicants for housing assistance that they need not complete an SBA loan application.

Plaintiffs' fourteenth and fifteen causes of action allege violations of 42 U.S.C. § 5151(a) in relation to the alleged SBA loan requirement, the policy on separated households, and the delay in providing housing assistance. The sixteenth cause of action alleges a violation of the Due Process Clause in the termination of the Short-Term Lodging Program, apparently also based in part on 42 U.S.C. § 5151(a), which requires FEMA to promulgate regulations insuring the "equitable and impartial" processing of applications for assistance, "without discrimination on the grounds of . . . economic status."[3] As explained in defendants' reply memorandum in support of their motion to dismiss, even if this statute could be read as an enforceable substantive command regarding the processing of applications, rather than as only a mandate to promulgate certain regulations, the agency's termination of assistance could not be held to violate such a provision under a "disparate impact" theory, because people who are economically disadvantaged will always be more affected by a disaster than other persons, and will always be more in need of federal disaster assistance.

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[3] On the merits of plaintiffs' sixteenth cause of action, plaintiffs did not, in opposing defendants' motion to dismiss, respond to defendants' assertion that there is no legal basis for compelling FEMA to continue the Short-Term Lodging Program. See Defs' Memo. Dismiss at 17-19 (docket #32). Plaintiffs must, therefore, be deemed to have conceded the accuracy of that assertion. In any event, since the agency has undeniably continued that program until two weeks after a participant receives either Section 408 housing assistance or a denial of such assistance, there is no conceivable basis for challenging FEMA's "termination" of the program.

Further, this Court lacks subject matter jurisdiction even though plaintiffs allege various constitutional violations. As the Supreme Court has explained, the United States must waive sovereign immunity for a court to exercise subject matter jurisdiction over it, even if the plaintiff alleges a constitutional claim. "The sovereign's immunity from suit exists whatever the character of the proceeding or the source of the right sought to be enforced. It applies alike to causes of action arising under acts of Congress, and to those arising from some violation of rights conferred upon the citizen by the Constitution." Lynch v. United States, 292 U.S. 571, 582 (1934) (citations omitted) (emphasis added). For example, in Maricopa County v. Valley National Bank, the Supreme Court reviewed a statute withdrawing a previously granted statutory right of the several States to collect taxes on the stock of national banks. The plaintiff argued that retrospective application of the statute violated the Fifth Amendment. Rejecting this claim, the Court cited Lynch for the proposition that "the power to withdraw the privilege of suing the United States or its instrumentalities knows no limitations." 318 U.S. 357, 362 (1943).

The United States' immunity from suit inheres in the nature of sovereignty. "'The contracts between a Nation and an individual are only binding on the conscience of the sovereign and have no pretensions to compulsive force. They confer no right of action independent of the sovereign will.' The rule that the United States may not be sued without its consent is all embracing." Lynch, 292 U.S. at 580-81 (quoting Hamilton, The Federalist, No. 81). Indeed, the Supreme Court clarified that, unless Congress has waived sovereign immunity, an individual may not bring suit in court against the United States even to enforce legal obligations. Lynch, id. at 581. As the Court explained, "When the United States creates rights in individuals against itself, it is under no obligation to provide a remedy through the courts. It may limit the Individual to administrative remedies." Id. at 582 (citations omitted). Therefore, "Congress has the power not

only to accord the privilege of suit against the Government in whatever manner or form it chooses, but to withdraw it as well and this applies alike to causes of action arising under an Act of Congress and to those arising under the Constitution." Duisberg. v. United States, 89 F. Supp. 1019, 1022 (Ct. Cl. 1950) (citing Lynch).

In keeping with these cases, the Fifth Circuit has held that sovereign immunity precludes constitutional claims unless an applicable statute has waived such immunity. In Humphreys v. United States, plaintiff asserted that the Double Jeopardy Clause prohibited the IRS from assessing both a civil penalty and a criminal penalty for the same tax liability. 62 F.3d 667 (5th Cir. 1995). The Fifth Circuit rejected that claim for lack of jurisdiction, noting that "the United States cannot be sued without its consent," and that "28 U.S.C. § 1331 . . . granting district courts jurisdiction over cases arising under the Constitution, is not a waiver of sovereign immunity." Id. at 673. Because the Constitution itself did not waive sovereign immunity, the Humphreys court lacked jurisdiction over the plaintiff's constitutional claim.

This principle also applies to claims for monetary damages. In American Federation of Government Employees v. Stone, plaintiff alleged that the Transportation Security Administration's failure to pay him his promised salary violated the Due Process Clause. 146 Fed. Appx. 704 (5th Cir. 2005) (Exhibit A hereto), affirming in part, vacating in part 342 F. Supp. 2d 619 (N.D. Tex. 2004). The Fifth Circuit affirmed dismissal of that claim for lack of subject matter jurisdiction:

> The Little Tucker Act provides a waiver of sovereign immunity and a grant of federal jurisdiction over constitutional claims for money damages only where the constitutional provision in question mandates payment of money damages. The Due Process Clause is not such a provision. We therefore affirm the district court's dismissal of McCrary's due process claim for lack of jurisdiction.

Id. at 705 (citations omitted). Necessarily, therefore, the Due Process Clause itself does not waive sovereign immunity. See Persyn v. United States, 935 F.2d 69, 72 (5th Cir. 1991) (noting that Tucker Act constitutes waiver of sovereign immunity for certain "civil actions founded upon the Constitution or an Act of Congress"); Laeger v. United States, No. CIV. A. 96-2145, 1997 WL 244417, at *1 (W.D. La. Feb. 7, 1997) (citing Lynch and dismissing constitutional claims on grounds of sovereign immunity).

Although a handful of cases in other jurisdictions have assumed that courts may review constitutional claims, see Marozsan v. United States, 852 F.2d. 1469 (7th Cir. 1988) (en banc); Rosas v. Brock, 826 F.2d 1004 (11th Cir. 1987); Bartlett v. Bowen, 816 F.2d 695 (D.C. Cir. 1987), those cases fail to give proper deference to decisions such as Lynch and the strong presumption against waivers of sovereign immunity. See Lehman v. Nakshian, 453 U.S. 156, 162 n.9 (1981) (referring to "strong presumption against waiver"). Moreover, an exception for constitutional claims would swallow the rule. Allegedly "[c]onstitutional 'questions' are everywhere — it is easy to pose questions and occasionally is possible to characterize a mistaken view of the law or the facts as 'arbitrary,' an 'abuse of power', hence unconstitutional. Only an unimaginative lawyer would be unable to find a constitutional 'question' in most proceedings . . . ." Marozsan, 852 F.2d at 1490 (Easterbrook, C.J., dissenting) (citations omitted). For all of these reasons, the Fifth Circuit was correct to dismiss the constitutional claims on the grounds of sovereign immunity in Humphreys v. United States, American Federation of Government Employees v. Stone, and Persyn v. United States, and Judge Little of the Western District of Louisiana was correct to follow suit in Laeger v. United States. This Court should do likewise.

II. Assuming the Court Has Jurisdiction, Plaintiffs' Claims Are Without Merit

A. FEMA Has Made Extremely Substantial Progress in Resolving Applications for Assistance from Victims of Hurricane Katrina

Plaintiffs' first, second, fifteenth, and seventeenth causes of action allege that FEMA has not resolved quickly enough certain requests for assistance from victims of Hurricane Katrina. On this basis, they plead violations of the Stafford Act and the Due Process Clause. As noted in defendants' motion to dismiss, there is no legal basis for compelling FEMA to resolve applications within any particular period of time, and FEMA's progress with Katrina applications has, in any event, mooted any such claim. Moreover, the Administrative Record and the evidence adduced at trial show that these claims are without merit as a matter of fact, and that the pace of FEMA's processing is "rationally related" to the legitimate governmental interest in processing applications correctly. See Simi Investment Co. v. Harris County, Tex., 236 F.3d 240, 249-51 (5th Cir. 2000).

Plaintiffs do not — and could not — contend that FEMA should or can resolve in one day all 1.7 million applications that it has received from Katrina victims. See Admin. Record, Vol. 3, Tab 90, AR00553;[4] Trial Transcript, Vol. 4, 360:16-361:21; 365:19-366:15 (testimony of Donna Dannels).[5] Some reasonable period of time is obviously necessary to work through such a large body of applications. Evidence adduced at trial shows that FEMA had resolved, as of February

[4] Defendants filed the Administrative Record in this matter on February 7, 2006 (docket #89). It was also admitted as Plaintiffs' Trial Exhibit 5.

[5] Citations to "Trial Transcript" refer to the Transcript of Motion for Permanent Injunction in this action. The transcript of the morning session on February 23, 2006 is Volume 1; the transcript of the afternoon session on February 23 is Volume 2; the transcript of the morning session on February 24 is Volume 3; and the transcript of the afternoon session on February 24 is Volume 4. In each citation to the transcript, the first number after the volume number is the page number, and the number after the colon is the line number.

20, 2006, all but 2.3% of the Katrina applications that were pending on December 19, 2005. See Trial Transcript, Vol. 4, 419:4-423:8; Defs' Trial Exs. 3-9. Defendants' bi-weekly reports to the plaintiffs between December 19, 2005, and February 13, 2006, reflect FEMA's substantial progress throughout that period. See Defs' Trial Exs. 3-8.

Furthermore, FEMA had, in fact, taken action on all of the 1,591 applications that remained pending on February 20.[6] See Trial Transcript, Vol. 4, 422:11-426:12. They were "pending," not because FEMA had not yet addressed them at all, but because the agency had processed them to a certain point but had not yet finally resolved them, such as because they were awaiting inspection, or because FEMA was awaiting documents from the applicants, or because the applicants may have received too much FEMA assistance pursuant to their requests. See Trial Transcript, Vol. 4, 422:11-426:12 & Defs' Trial Ex. 9.

This progress is particularly reasonable given the challenges that responding to Hurricane Katrina has posed for FEMA. For example, the agency's computer system, the National Emergency Management Information System ("NEMIS"), was designed to handle 300 simultaneous users and to take approximately 10,000 registrations per day. In responding to Hurricanes Katrina and Rita, however, the system was handling 3,000 simultaneous users and taking more than 100,000 registrations per day. See Trial Transcript, Vol. 2, 97:7-14; Vol. 3, 318:19-319:7. Those circumstances caused several problems, including extreme system slowness, crashes, and delays in linking scanned documents to each applicant's file. See Trial Transcript, Vol. 3, 319:8-322:12.

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[6] Moreover, it would not be correct to assume that all of those applications had been pending since August 29 or August 30. Given that FEMA is still taking applications from Katrina victims (currently until April 11, 2006), some of the applications that were pending on December 19 could have been submitted, for example, on December 1 or December 18. See Trial Transcript, Vol. 4, 426:13-25.

Responding to Hurricane Katrina also presented significant challenges to FEMA's manpower. For example, in most disasters, approximately 95% of applications for disaster assistance are automatically resolved by NEMIS, without human intervention. See Trial Transcript, Vol. 3, 325:18-326:15. In contrast, because of the wide displacement of Katrina victims and other circumstances caused by this disaster, "many, many, many, if not most applications" from Katrina victims could not be auto-determined within NEMIS, requiring a much greater level of intervention by FEMA caseworkers to resolve the applications. See Trial Transcript, Vol. 3, 326:16-327:2. FEMA hired thousands of additional workers immediately after Hurricane Katrina, but their training was greatly truncated, such that each new employee was unable to handle correctly the full range of issues that fully-trained employees can handle correctly without assistance. See Trial Transcript, Vol. 4, 367:11-371:20. Similarly, FEMA's existing contract for home inspections, before Hurricane Katrina, did not call for the contractor to inspect, in a short period of time, as many residences as became necessary as a result of Katrina. See Trial Transcript, Vol. 4, 364:5-366:21.

The widespread displacement of persons after Hurricane Katrina also presented other significant challenges for FEMA, which added to the time needed to resolve some applications for assistance. For example, the inspection of many pre-disaster residences — which is normally required partly to prevent fraud — could not occur in many instances because the residences or their former locations were inaccessible, or because the applicants were no longer in the Gulf Coast region. See Trial Transcript, Vol. 4, 375:20-377:25; 391:22-392:23 The agency addressed this problem, in part, by presuming interior damage based on the level of exterior damage. Id. FEMA also used its discretion to waive the inspection requirement for applicants from the most devastated areas. See Trial Transcript, Vol. 2, 106:4-24;Vol. 4, 341:8-19; 385:15-387:23.

Additionally, when the agency had exhausted all other means of verifying an applicant's occupancy of a pre-disaster residence, the agency searched its records from prior disasters in an effort to verify occupancy by reference to an earlier application from the same person. See Trial Transcript, Vol. 4, 378:1-380:25.

Thus, even assuming plaintiffs could plead a claim for "delay" in processing federal disaster assistance under the law, no such claim would have been viable here, under the Stafford Act or the Due Process Clause.

B. Plaintiffs Have No Viable Claim in Relation to Notice Regarding Federal Disaster Assistance

Plaintiffs' third through ninth causes of action allege, as violations of the Stafford Act and the Due Process Clause, that FEMA failed to provide various types of notice regarding assistance under the Stafford Act. As pointed out in defendants' motion to dismiss, nothing in the Stafford Act requires FEMA to provide any particular kind or frequency of notice, and plaintiffs lack any protectable "property" interest that would allow them to complain of inadequate notice under the Due Process Clause. In any event, the Administrative Record and the evidence adduced at trial show that FEMA has provided adequate notice "reasonably calculated" to inform applicants, to the extent such notice would be appropriate (though not required) under the Stafford Act.[7] See U. S. Pipe & Foundry Co. v. Webb, 595 F.2d 264, 274-75 (5th Cir. 1979) (due process requires notice "reasonably calculated, under all the circumstances, to apprise interested parties") (quoting Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 314 (1950)).

[7] This section of defendants' post-trial brief addresses plaintiffs' claims regarding notice. Other permutations of these claims — such as how FEMA implemented the policies about which it notified applicants — are addressed elsewhere in this brief.

Plaintiffs' third and fourth causes of action allege that FEMA did not notify Katrina applicants regarding limitations on the use of their first tranche of assistance, or regarding the criteria for recertification. See Third Amended Complaint ¶¶ 178, 185.[8] Material in the Administrative Record reflects, however, that FEMA notified applicants, by telephone and by mail, how they could receive further assistance even if they had used their initial assistance for purposes other than housing, and that the agency permitted applicants to qualify for the second tranche of assistance upon self-certifying that they had used the initial assistance for serious and essential needs, and still needed housing assistance. See Admin. Record, Vol. 1, Tab 8, AR00289; Vol. 2, Tab 66, AR00472; Vol. 3, Tab 91, AR00560; Vol. 3, Tab 98, AR00736; Vol. 3, Tab 99, AR00738; see also Trial Transcript, Vol. 4, 355:24-357:8; 397:21-399:9. The Administrative Record and uncontroverted testimony at trial also indicate that FEMA did not require Katrina victims to use their initial assistance only for housing expenses, as normally required, because it recognized that many applicants had received the assistance before they received the letter telling them its purpose. See Admin. Record, Vol. 2, Tab 66, AR00472; Vol. 2, Tab 70, AR00485; Vol. 3, Tab 98, AR00736; Trial Transcript, Vol. 4, 397:8-399:9.

Plaintiffs' fifth and sixth causes of action allege that FEMA failed to notify them that they could receive additional assistance based on household size and "other circumstances." See Third Amended Complaint ¶¶ 190, 192, 199. Given plaintiffs' focus on fair market rental rates during the trial of this matter, the phrase "other circumstances" in this claim apparently refers to the geographical location of each applicant. Material in the Administrative Record reflects,

[8] The third and fourth causes of action also allege that FEMA did not notify applicants regarding the circumstances under which assistance can be provided for up to eighteen months. See Third Amended Complaint ¶¶ 178, 185. Plaintiffs themselves have not, however, submitted any evidence regarding any such claim.

however, that FEMA notified applicants, in a news release and public service announcements, that the amount of their initial assistance could be adjusted based on their location and household size. See Admin. Record, Vol. 4, Tab 121, AR00836 ("During the recertification process, FEMA may adjust the relevant fair market rate for the location and family size of each eligible household."); Vol. 18, CD #9, mix_MS_LA_housing30.mp3, mix_MS_LA_housing60.mp3.[9] Indeed, uncontroverted testimony at trial indicated that "several thousand" evacuees requested adjustments in the amount of their initial assistance and received them — further showing that they had been notified of the possibility of receiving such an adjustment. See Trial Transcript, Vol. 4, 388:8-389:9; 467:4-9.

Plaintiffs' seventh and eighth causes of action allege that FEMA failed to notify them regarding "the availability of and how to apply for a trailer." See Third Amended Complaint ¶¶ 206, 213. Uncontroverted testimony at trial indicated, however, that providing financial assistance or direct assistance (that is, rent versus a travel trailer or mobile home) is entirely within FEMA's discretion, and that there is no separate process to "apply for a trailer." See Trial Transcript, Vol. 4, 344:8-346:11. Indeed, direct assistance "is never available up front at the time of registration." See Trial Transcript, Vol. 4, 344:22-23. Applicants who are eligible for housing assistance will "automatically" receive rental assistance, see Trial Transcript, Vol. 4, 345:16-17; then, once FEMA consults with the state and local governments regarding the "many local

[9] FEMA has filed, on the same day as this post-trial brief, a supplement to the Administrative Record in relation to plaintiffs' claim regarding the amount of Section 408 housing assistance. See infra text & notes at 20-27. Defendants are in the process of locating documents reflecting dissemination of the agency's public service announcements, and will file a second supplement to the Administrative Record with such documents once they are located.

jurisdictional issues involved," some applicants may start receiving direct assistance instead. See Trial Transcript, Vol. 4, 345:1-3.[10]

Donna Dannels, the Acting Deputy Director of FEMA's Recovery Division, testified that the agency publicizes the possibility of switching to direct assistance by several means:

> We use the news media. We use local organizations. It's very easy to get the word out, and then people contact us to make that request. We set up, you know, the disaster recovery centers where people can come in. So that's not ever an issue. There's almost always more demand than there is space available for travel trailers.

See Trial Transcript, Vol. 4, 345:19-346:11. In relation to Katrina victims specifically, the demand for direct assistance (from evacuees who, obviously, have learned of its availability) "far exceeds what [FEMA officials] have been able to place." See Trial Transcript, Vol. 4, 348:6-16.[11]

C. FEMA Has Consistently Applied and Widely Disseminated Its Waiver of Receipts for the First Tranche of Housing Assistance

Plaintiffs' third and fourth causes of action are also apparently meant to allege a substantive claim regarding improper application of FEMA's waiver of the requirement, in relation to the first tranche of Katrina housing assistance, to use such assistance only for housing expenses.[12] As explained in defendants' motion to dismiss, plaintiffs' claim in that regard is

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[10] Issues to be addressed with local jurisdictions include securing the land, resolving environmental issues, and getting utility hook-ups. See Trial Transcript, Vol. 4, 346:12-348:5.

[11] Plaintiffs' ninth cause of action alleges that each of the purported failures regarding notice was a violation of 42 U.S.C. § 5151(a). See Third Amended Complaint ¶ 220. That cause of action is meritless for the reasons stated above and in the Reply Memorandum in Support of Defendants' Motion to Dismiss (docket #107), pages 9-11.

[12] Since these causes of action are entitled "Failure to Provide Notice" and clearly focus on FEMA's alleged failure to provide "information," see Third Amended Complaint ¶¶ 176-88, they do not appear to allege substantively that FEMA has failed to implement its waiver. Such a claim is addressed here, nevertheless, given that plaintiffs' first motion for preliminary injunction (continued...)

moot. In any event, material in the Administrative Record and testimony at trial demonstrate that FEMA has widely disseminated and consistently applied its waiver of this requirement.

Normally, in order to receive further rental assistance from FEMA, an applicant must "recertify" periodically by (1) providing receipts showing that the past assistance was used for rent, (2) providing a statement that she has a continuing need for rental assistance, and (3) show that she has developed, and is implementing, a plan for permanent housing. See Trial Transcript, Vol. 4, 358:17-359:18. Rental assistance is usually provided in one-month increments, with recertification required every month. See Trial Transcript, Vol. 4:358:17-359:7 ("or sometimes two months"). In light of the unique circumstances of responding to Hurricane Katrina, however, FEMA modified these requirements.

Specifically, FEMA is giving Katrina victims rental assistance in three-month increments, correspondingly increasing the recertification interval. See Trial Transcript, Vol. 4, 395:14-396:3. Further, FEMA sent a letter to all applicants who had received the first tranche of housing assistance, explaining that they could receive continued assistance by submitting either "[r]eceipts showing that you paid rent at another location and spent all your initial rental assistance **OR** a statement" indicating that they had received the initial assistance before receiving "official written notification" of its purpose, or that they had exhausted the initial assistance on "serious and essential needs." See Admin. Record, Vol. 2, Tab 66, AR00472; Vol. 3, Tab 91, AR00560; Vol. 3, Tab 98, AR00736 (emphasis in original). That letter was accompanied by a form on which the applicant could provide the needed statement. FEMA also disseminated this

[12](...continued)
sought relief in that regard.

information to applicants by telephone, using "auto-dialer" scripts. See Admin. Record, Vol. 1, Tab 8, AR00289.

Additionally, FEMA disseminated this Katrina-specific policy to its personnel. Memoranda on this subject were issued to personnel in FEMA's National Processing Service Centers ("NPSCs") on November 30 and December 3, 2005. See Admin. Record, Vol. 2, Tab 69, AR00482; Vol. 2, Tab 70, AR00485. A slightly-revised memorandum on the same subject went to NPSC personnel on December 8, 2005. See Admin. Record, Vol. 2, Tab 73, AR00493.

At trial, Donna Dannels, the Acting Deputy Director of FEMA's Recovery Division, testified that the agency has taken the actions reflected in these documents. See Trial Transcript, Vol. 4, 397:8-400:22. Additionally, Ms. Dannels, who also serves as FEMA's Chief of National Processing Service Center Operations, testified that directives to NPSC staff are conveyed to the staff in "a variety of ways." See Trial Transcript, Vol. 3, 304:21-305:1; Vol. 4, 407:23-25. For example, as each shift begins in a NPSC, supervisors meet with the employees to review any new information or guidance. Such directives then "become[] a part of the NEMIS processing guidance," which is available to employees within FEMA's computer system at appropriate steps in the process. See Trial Transcript, Vol. 4, 407:23-408:10.

D. FEMA Has Consistently Applied and Widely Disseminated Its Modification of the Policy on Separated Households

Plaintiffs' tenth, eleventh, and fourteenth causes of action allege improper application of FEMA's modification of its policy on separated households, under which FEMA can usually provide assistance only "for one temporary . . . residence" for each "pre-disaster household," as required by the Stafford Act and FEMA's regulations. 44 C.F.R. §§ 206.113(a), 206.117(b)(1)(i)(A), (ii)(B); see 42 U.S.C. § 5155(a) (prohibiting "duplication of benefits").

They allege that FEMA has thus violated the Stafford Act and the Due Process Clause.[13] As explained in defendants' motion to dismiss, FEMA's actions — even before this case was filed — mooted plaintiffs' challenge regarding the modification of this policy for victims of Hurricane Katrina. Materials in the Administrative Record reflect that modification and its dissemination and implementation, and testimony at the trial further establishes those facts.

On September 19, 2005, FEMA headquarters sent a memorandum notifying its regions that "temporary housing assistance for more than one residence may be provided to a household whose members are displaced and living in different geographic locations from one another as a result of Hurricane Katrina." See Admin. Record, Vol. 1, Tab 14, AR00302. The staff of the NPSCs were similarly notified on the same date. See Admin. Record, Vol. 1, Tab 15, AR00305. Staff of the Disaster Recovery Centers were so notified on September 27, 2005. See Admin. Record, Vol. 1, Tab 22, AR00317.

Additionally, FEMA sent a letter to each Katrina applicant who did not receive housing assistance because another pre-disaster household member had been assisted, explaining that the applicant could submit documentation showing that he had relocated separately from other pre-disaster household members.[14] See Admin. Record, Vol. 3, Tab 91, AR00560; Vol. 3, Tab 99,

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[13] It is difficult to see how FEMA could be said to have violated the Stafford Act in implementing a policy modification, favorable to applicants, that was not statutorily required. Moreover, to the extent the modification of the rule on separated households could possibly be said to touch upon the substantive component of the Due Process Clause, that rule — and the degree of its modification — would be "rationally related" to the legitimate governmental interest in preventing fraud. See Simi Investment Co. v. Harris County, Tex., 236 F.3d 240, 249-51 (5th Cir. 2000); see also Trial Transcript, Vol. 4, 400:23-403:2.

[14] In questioning Ms. Dannels on the first day of trial, plaintiffs' counsel sought to establish that an evacuee linked to another person who had already received assistance would have to submit rent receipts to show that they had been separated as a result of the disaster. See Trial Transcript, Vol. 2, 128:5-131:11. That, however, is a misrepresentation of the agency's

(continued...)

AR00738. The agency also disseminated this information directly to applicants by telephone, using "auto-dialer" scripts. See Admin. Record, Vol. 1, Tab 8, AR00290; Vol. 3, Tab 91, AR00560. Further, a FEMA news release issued on November 26, 2005, indicated that the agency could consider separate applications from, among others, "Families who lived together before a disaster but who have been displaced in different geographical locations." See Admin. Record, Vol. 2, Tab 67, AR00474. FEMA also issued a "Recovery FAQ Sheet" describing this modification. See Admin. Record, Vol. 3, Tab 106, AR00750.

At trial, FEMA's Acting Deputy Director of Recovery testified that FEMA has taken the actions reflected in the above-cited documents from the Administrative Record. See Trial Transcript, Vol. 4, 406:3-407:22. She reiterated that the agency is providing assistance separately to members of a single household that were separated as a result of Katrina. See Trial Transcript, Vol. 2:120:2-19; 120:25-121:23; Vol. 4, 400:23-402:6; 457:13-20. Ms. Dannels also testified regarding how directives of this kind are brought to the attention of FEMA personnel. See Trial Transcript, Vol. 4, 407:23-408:10.

E. FEMA Has Never Required Katrina Victims to Apply for an SBA Loan to Receive Housing Assistance

Plaintiffs' twelfth, thirteenth, and fourteenth causes of action allege that FEMA has illegally required victims to apply for a loan from the Small Business Administration as a condition of receiving housing assistance, and that Katrina victims have not received such assistance when "the SBA loan application has not yet been processed or was not completed

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[14](...continued)
practice, as reflected in both the auto-dial script and the letter sent to the linked evacuees: they had to submit either rent receipts or a "separate lease," along with a letter explaining why the household had been separated as a result of the disaster. See Admin. Record, Vol. 3, Tab 91, AR00560; Vol. 3, Tab 99, AR00738. (The trial transcript contains an apparent transcription error at Vol. 2, 128:17. The word "for" should be "or".)

properly." See Third Amended Complaint ¶ 247. This, they allege, violates the Stafford Act and the Due Process Clause. In responding to defendants' motion to dismiss, plaintiffs did not address defendants' assertion that those claims are factually incorrect; therefore, plaintiffs must be deemed to have conceded that aspect of defendants' motion. In any event, material in the Administrative Record testimony at trial establish that plaintiffs' allegation is not, and cannot be, correct.

FEMA does not require disaster victims to apply for an SBA loan in order to receive housing assistance. See Trial Transcript, Vol. 4, 354:17-355:7. Indeed, the agency's computer system is "hard-coded" so that such linkage would be "impossible": "NEMIS will not generate a . . . determination that you are not eligible for housing assistance because you did not complete an SBA application. It simply cannot happen." See Trial Transcript, Vol. 4, 355:3-12; see also Trial Transcript, Vol. 2, 98:10-16. Moreover, there is nothing a FEMA employee could do in entering an applicant's data into NEMIS that would cause the system to require the person to apply for an SBA loan before they could receive housing assistance. See Trial Transcript, Vol. 4, 355:13-18.

Additionally, material in the Administrative Record and testimony at trial indicate that FEMA has communicated with applicants in an effort to correct any misunderstanding on this subject. The agency sent a letter to all applicants who had been referred to the SBA for a loan, stating that applicants "**are not required to make application with the SBA to receive temporary housing assistance from FEMA**." See Admin. Record, Vol. 3, Tab 91, AR00564 (emphasis in original); Trial Transcript, Vol. 4, 357:9-358:8. The agency also communicated this information to applicants by telephone, using "auto-dialer" scripts, and has distributed public service announcements that include this information. See Admin. Record, Vol. 1, Tab 8,

AR00289; Vol. 18, CD #9, 15_Housing_SBA.mp3, 30_Housing_SBA.mp3; Trial Transcript, Vol. 4, 355:19-357:8; see also supra note 9.

Indeed, the testimony of one of the plaintiffs themselves belies their allegation that applicants cannot receive housing assistance if "the SBA loan application has not yet been processed." See Third Amended Complaint ¶ 247. Plaintiff Cameron Eaton testified that she requested — and received — her first tranche of housing assistance from FEMA before the Small Business Administration had processed her application for a loan. See Trial Transcript, Vol. 3, 214:25-215:14.

Ms. Eaton's testimony also suggests that some applicants simply misunderstand when an SBA loan application is required and when it is not. If a disaster victim seeks FEMA assistance to address "other needs" — that is, "to meet disaster-related medical, dental, funeral expenses" or "personal property, transportation, and other necessary expenses or serious needs resulting from the major disaster, " 42 U.S.C. § 5174(e) — the agency's regulations require the individual to apply for an SBA loan. 44 C.F.R. § 206.119(a) (providing that one criterion of eligibility for "other needs" assistance is denial or inadequacy of an SBA loan). In fact, Ms. Eaton testified that she applied for assistance to cover personal property:

> Q. In addition to getting the 2,358 after this case was filed, did you get any other money? And first let me ask you, before this case you were named as a plaintiff, can you tell me what else you had applied for?
> A. I was supposedly to get a settlement on my property value.
> Q. What property was that?
> A. The items that I lost during the flood in my home here in New Orleans. And the SBA, I suppose was the reason why that didn't come through for as long as it did. And then I eventually did get that settlement as well.

See Trial Transcript, Vol. 3, 221:24-222:8 (emphasis added).

This testimony suggests that Ms. Eaton was confused. She testified that she initially believed an SBA application was required to receive "assistance" — that is, any kind of

assistance — and that, once she received her first tranche of housing assistance, she assumed that "something must have changed in the way they were processing people." See Trial Transcript, Vol. 3, 214:25-215:14. In reality, nothing had "changed"; as Donna Dannels testified, an SBA loan application has never been required to receive housing assistance. See Trial Transcript, Vol. 2, 98:10-22. But, since Ms. Eaton also sought "other needs" assistance — that is, assistance to cover the value of her personal property — and since she had the vague understanding that her receipt of such assistance was connected to the processing of her SBA loan, a FEMA representative had no doubt told her that she would have to apply for an SBA loan, and Ms. Eaton apparently developed the erroneous impression that that instruction applied to all forms of FEMA assistance.

F. Plaintiffs Have No Viable Claim Regarding the Amount of FEMA's Housing Assistance to Katrina Victims

Finally, plaintiffs seek to challenge the amount of Section 408 housing assistance that FEMA provides, or has provided, to Katrina victims. It is difficult to discern the precise contours of this challenge, since no claim regarding the calculation of housing assistance is alleged in the Third Amended Complaint.[15] The claim appears to be either that FEMA violated the Stafford Act by failing to provide "fair market rent" in the first tranche of assistance to some victims of Hurricane Katrina, or that the amount of FEMA's assistance for victims in Louisiana (or maybe the entire Gulf Coast) is inadequate, or that the amount of FEMA's assistance nation-

[15] For this reason, defendants sought to exclude any evidence on this subject at trial, and continue to believe that the Court should not permit plaintiffs to press any such claim. Plaintiffs' failure to plead a claim regarding the calculation of rental rates has prejudiced defendants' ability to defend against such a claim at trial, such as by not allowing defendants an opportunity to prepare evidence regarding whether an increase in HUD's rates or FEMA's rates itself has an effect on the housing market in an area, or whether HUD's published rates include utility expenses.

wide is inadequate — or perhaps all of the above. No matter how this "claim" is understood, it is without merit.

Where FEMA chooses to provide rental assistance (as opposed to direct assistance), the Stafford Act requires that the amount of assistance be "based on the fair market rent for the accommodation provided." 42 U.S.C. § 5174(c)(1)(A)(ii). FEMA's regulations state that the agency will "base the rental assistance on the Department of Housing and Urban Development's current fair market rates for existing rental units. FEMA will further base the applicable rate on the household's bedroom requirement and the location of the rental unit." 44 C.F.R. § 206.117(b)(1)(i)(B); see 42 U.S.C. § 1437f(c)(1) (requiring HUD to establish fair market rents periodically, not less than once a year). HUD's fair market rates are updated periodically, and are published in the Federal Register. See 70 Fed. Reg. 57,654 (Oct. 3, 2005); see also HUD USER - Datasets: Fair Market Rents, available at http://www.huduser.org/datasets/fmr.html (content updated Mar. 13, 2006). HUD's rates are published by State, then for each metropolitan area within each State, and for each county that does not lie within a metropolitan area. Id.

In general, FEMA follows HUD's published rates in determining the amount of rent assistance under Section 408. See Trial Transcript, Vol. 3, 317:7-11; 329:7-330:21. As the Acting Deputy Director of FEMA's Recovery Division testified, HUD is the federal "expert" on housing costs. See Trial Transcript, Vol. 2, 134:4-9; 140:8-15; Vol. 3, 330:11-21. FEMA has the discretion, however, to depart from HUD's published rates, and sometimes does so. See Trial Transcript, Vol. 2, 140:8-18; Vol. 3, 330:11-331:2.

On February 16, 2006, FEMA departed from HUD's October 2005 rates after HUD authorized public housing agencies in areas affected by Hurricane Katrina to pay up to 120

percent of the published rates. See Admin. Record, Vol. 19, Tab 621, 06021;[16] see also 71 Fed. Reg. 7,831 (Feb. 14, 2006). Based on HUD's notice, FEMA increased its fair market rents for all parishes in the State of Louisiana by twenty percent. See Admin. Record, Vol. 19, Tab 622, 06032. Additionally, when HUD increased its fair market rents in New Orleans and Baton Rouge by 35% and 25%, respectively, on March 6, 2006, FEMA incorporated those increases into NEMIS for those two areas. See Admin. Record, Vol. 19, Tab 625, 06040; Vol. 19, Tab 627, 06046; Vol. 19, Tab 628, 06049; Vol. 19, Tab 629, 06052; Vol. 19, Tab 630, 06055; Vol. 19, Tab 631, 06045; see also 71 Fed. Reg. 11,286 (Mar. 6, 2006). FEMA is currently in the process of considering further departures from HUD's published rental rates. See Trial Transcript, Vol. 4, 343:12-344:7.

For FEMA to base the amount of rent assistance on an applicant's location, the applicant obviously has to know his location and must communicate it to FEMA. In the immediate aftermath of Hurricane Katrina, however, some applicants did not know where they were going. Therefore, in order to expedite assistance to households from the most devastated areas, FEMA waived its usual requirement to inspect the pre-disaster residences in those areas before providing assistance, and gave those households their first tranche of assistance based on the national average of HUD's fair market rents for a two-bedroom unit.[17] See Trial Transcript, Vol. 2, 106:4-24; 132:18-133:2; Vol. 4, 341:8-19; 385:15-387:23. Thus, some of those households initially received more than was needed for their locations — especially if the household consisted of only one person — and others initially received less. See Trial Transcript, Vol. 2:134:22-135:7;

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[16] Volume 19 of the Administrative Record was filed on March 15, 2006.

[17] Requiring an inspection of the pre-disaster residence is one of several important requirements designed to prevent the fraudulent receipt and use of federal disaster assistance. See Trial Transcript, Vol. 4, 353:8-354:15.

Vol. 4, 386:9-17. This was known as "Transitional Housing Assistance." See Trial Transcript, Vol. 4, 382:2-19.

The Acting Deputy Director of FEMA's Recovery Division further explained why a national average was used:

> The whole purpose of doing a national average is that we didn't know where people were, so we couldn't adjust to where they were. . . . Most of [the telephone numbers provided by applicants] are cellphones. . . . I would say 60 percent of the people use electronic funds deposit and they do not maintain their addresses with us.

See Trial Transcript, Vol. 2, 136:1-15. There was also a concern that some evacuees would not be able to reach FEMA to update their address. See Trial Transcript, Vol. 2, 136:16-21. All other Katrina evacuees who received rental assistance — that is, those not from the most devastated areas — received the fair market rent for their actual post-disaster locations. See Trial Transcript, Vol. 2, 106:4-107:6; 132:18-133:2; Vol. 4, 341:8-19. Also, if an applicant was sheltering in a hotel room paid for by FEMA under Section 403 of the Stafford Act, then received his first tranche of assistance under Section 408 and left the hotel, the amount of that first tranche was based on the fair market rent of the location to which the applicant was relocating. See Trial Transcript, Vol. 4, 480:17-481:15.

To the extent plaintiffs complain that FEMA failed to provide "fair market rent" in the first tranche of assistance to some victims of Hurricane Katrina, the claim would be meritless both factually and conceptually. As a conceptual matter, FEMA's provision of a national average to victims in the most devastated areas was a service to the victims. FEMA could have waited to learn the ultimate post-evacuation location of every Katrina applicant and provided an amount of rent assistance based on that location, but that would have greatly delayed the receipt of assistance. The Acting Deputy Director of FEMA's Recovery Division testified:

> Q. I believe you have testified that when FEMA provided the transitional housing assistance, the $2,358, that was based on an average for the entire country. Why is that? Why did FEMA not base that initial assistance for people in the geospatial area on the fair market rent where they were living?
> A. Because it would have taken us weeks to months to reach them, contact them, determine where they were located, and enter that in on a case-by-case basis. Their assistance would have been delayed by weeks or months.

See Trial Transcript, Vol. 4, 479:3-11. FEMA should not be faulted or penalized for its efforts to provide housing assistance to the hardest-hit evacuees as quickly as possible — indeed, this is yet another illustration of the wisdom of the Stafford Act's non-liability provision.

As a factual matter, FEMA advised evacuees that they could receive a supplement to that first tranche if they were living in a more expensive area, see Admin. Record, Vol. 18, CD #9, mix_MS_LA_housing30.mp3, mix_MS_LA_housing60.mp3, and the agency instructed its personnel to provide such supplementation and how to process it. See Admin. Record, Vol. 1, Tab 23, AR00321; Vol. 2, Tab 69, AR00483; Vol. 2, Tab 73, AR00494; Vol. 19, Tab 624, 06037; Vol. 19, Tab 626, 06042; Vol. 19, Tab 640, 06083; see also supra note 9. Indeed, "several thousand" applicants requested such a supplement to their first tranche, and received it. See Trial Transcript, Vol. 4, 382:8-383:15; 388:8-17; 479:24-480:3. Additionally, upon recertifying for assistance and receiving the second tranche, each Katrina applicant — including those from the most devastated areas — received an amount based on their location and family size. See Trial Transcript, Vol. 4, 388:8-17; 479:19-23; Admin. Record, Vol. 2, Tab 69, AR00483; Vol. 2, Tab 70, AR00485; Vol. 2, Tab 73, AR00494; Vol. 19, Tab 623, 06034; Vol. 19, Tab 624, 06037; Vol. 19, Tab 626, 06042; Vol. 19, Tab 640, 06083-84.

To the extent plaintiffs seek to challenge FEMA's rental assistance rates in general — either in Louisiana, in the Gulf Coast region, or nationwide — aside from the amount of Transitional Housing Assistance for Katrina victims, they have failed to lay an adequate factual founda-

tion for such a claim. The only evidence that plaintiffs presented at trial regarding alleged market rental rates is purely anecdotal and otherwise unreliable, irrelevant, or both. It consisted of (1) a newspaper excerpt showing apartments being offered for rent in the New Orleans area around the time of trial, see Pls' Trial Ex. 7; (2) testimony from Patricia Mauldin regarding apartments in New Orleans listed on "DHROnline" (http://www.dhronline.org/), as of February 15, 2006;[18] see Trial Transcript, Vol. 2, 175:16-177:14; (3) testimony from Maryann Russ regarding apartments in Houston listed on DHROnline as of February 23, 2006, see Trial Transcript, Vol. 3, 295:24-296:9; (4) testimony from plaintiff Cameron Eaton that "the rent was running between nine and 1,200 for a two bedroom house" in Decatur, Georgia, and "around $1,200 a month" for a house in New Orleans, see Trial Transcript, Vol. 3, 218:15-20 (emphasis added); 221:17-23; and (5) testimony from plaintiff Dorothy Craft that two-bedroom apartments in Chicago cost $900 per month. See Trial Transcript, Vol. 3, 287:1-10.

Most of this "evidence" was hearsay, and much of it was admitted over defendants' objections. Like most hearsay evidence, plaintiffs' evidence cannot even be relied upon for the propositions stated on its face, much less for the overall market conditions for which plaintiffs apparently presented it. For example, the newspaper excerpt, aside from its obviously hearsay nature, does not indicate the rates at which apartments in general are being rented in New Orleans (that is, both apartments advertised in the newspaper and apartments not so advertised); nor does it even establish the rents at which the listed apartments were ultimately rented, only the rents at which they were being offered.

Further, witnesses Mauldin and Russ testified regarding the contents of an Internet site, and plaintiffs failed to cite any applicable exception to the hearsay rule that would permit such

[18] DHROnline is a non-federal Web site, although it is linked on the FEMA Web site.

testimony. Additionally, Ms. Mauldin testified as to the availability of apartments in the New Orleans area on February 15, 2006, for "under $800" per month (given that $2358 for three months would provide $786 per month). See Trial Transcript, Vol. 2, 175:16-177:14. That testimony was irrelevant for several reasons, however: the figure of $2358 applied only to the first tranche of housing assistance, which, for most evacuees, would have ended on or about December 1 (three months after August 29, and two and a half months before February 15); most evacuees would not have been in New Orleans while using the first tranche of assistance; an evacuee receiving $2358 in the first tranche could have received a supplement based on the area where she was located; and an applicant located in New Orleans beginning on February 16 would have received 120% of the HUD rate for New Orleans (or $835), not $786 per month. Moreover, plaintiffs' evidence of market rents did not indicate the quality of the properties being offered at the rates cited.[19]

In fact, some of plaintiffs' evidence actually serves to establish the reasonableness of HUD's published market rental rates. Plaintiff Dorothy Craft testified that the rent for a two-bedroom apartment in Chicago is approximately $900 per month. See Trial Transcript, Vol. 3, 287:1-10. HUD's current rate for a two-bedroom apartment in Chicago is $901. See 70 Fed. Reg. 57,654 (Oct. 3, 2005); see also HUD USER - Datasets: Fair Market Rents, available at http://www.huduser.org/datasets/fmr.html (content updated Mar. 13, 2006). Plaintiff Pamela Bradix testified that the rent for her current apartment in San Antonio, Texas, is approximately

[19] Indeed, before Hurricane Katrina, Ms. Eaton was living in a "house" in New Orleans for which she was paying $1,100 per month in rent, suggesting that her current home in Decatur, Georgia, which normally rents for the same amount, may be above the median range that HUD's rates are meant to represent. See Trial Transcript, Vol. 3, 215:15-216:14; 228:15-16.

$649 per month — although the number of bedrooms was not stated. See Trial Transcript, Vol. 3, 249:2-12. HUD's current rate for a two-bedroom apartment in San Antonio is $732 per month.

Finally, neither HUD nor FEMA can control the market conditions in an area, and it would be impossible, particularly in New Orleans, for FEMA to pay an amount sufficient to guarantee that every applicant would be able to find an available rental. See Trial Transcript, Vol. 4, 478:21-479:2.

CONCLUSION

Accordingly, Defendants' Motion to Dismiss should be granted, judgment should be entered for the defendants, and this action should be dismissed with prejudice.

* * *

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing document was served on all counsel of record by electronic mail on this 15th day of March, 2006.

/s/ W. Scott Simpson

W. SCOTT SIMPSON

H

Briefs and Other Related Documents

This case was not selected for publication in the Federal Reporter.

Please use FIND to look at the applicable circuit court rule before citing this opinion. Fifth Circuit Rule 47.5.4. (FIND CTA5 Rule 47.)

United States Court of Appeals,
Fifth Circuit.
AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES LOCAL 1;
Justin McCrary,
Plaintiffs-Appellants,
v.
David M. STONE, in his official capacity as Acting Administrator,
Transportation Security Administration,
U.S. Department of Homeland Security,
Defendant-Appellee.
No. 05-10009.
Summary Calendar.

Decided July 27, 2005.

Background: Federal employee and union brought action alleging that government had failed to pay employee salary offered in offer letter. The United States District Court for the Northern District of Texas, 342 F.Supp.2d 619, dismissed action for want of jurisdiction, and plaintiffs appealed.

Holdings: The Court of Appeals held that:
(1) union lacked representational standing;
(2) district court was required to assume jurisdiction under Little Tucker Act and reach merits of breach of contract claim; and
(3) Little Tucker Act jurisdiction did not extend to due process claim.
Affirmed in part, vacated in part, and remanded.

West Headnotes

[1] Labor and Employment 1982
231Hk1982 Most Cited Cases
Union did not have representational standing to participate in federal employee's contractual salary dispute with government, as employee's individual involvement in case was necessary.

[2] Federal Courts 976
170Bk976 Most Cited Cases
District court was required to assume jurisdiction under Little Tucker Act and decide case on merits where same issue as to existence of contract was determinative of both district court's jurisdiction and federal employee's breach of contract claim. 28 U.S.C.A. §§ 1295(a)(2), 1346(a).

[3] Federal Courts 1141
170Bk1141 Most Cited Cases
Review of judgment on merits on breach of contract claim brought under Little Tucker Act would be available only in Federal Circuit. 28 U.S.C.A. § 1295(a)(2).

Exhibit A

[4] Federal Courts 974.1
170Bk974.1 Most Cited Cases
District court lacked jurisdiction under Little Tucker Act over federal employee's due process claim, as Act's waiver of sovereign immunity and grant of jurisdiction as to constitutional claims for money damages extended only to those constitutional provisions, unlike the Due Process Clause, that mandated payment of money damages. U.S.C.A. Const.Amend. 5; 28 U.S.C.A. §§ 1295(a)(2), 1346(a).

***704** Mark D. Roth, Gony Frieder, Washington, DC, for Plaintiffs-Appellants.

William Kanter, Stephanie Robin Marcus, Washington, DC, for Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Texas (USDC No. 3:04-CV-1219).

Before REAVLEY, JOLLY and HIGGINBOTHAM, Circuit Judges.

PER CURIAM: [FN*]

> FN* Pursuant to 5TH CIR. R. 47.5, the Court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

***705** [1][2][3][4] Plaintiffs American Federation of Government Employees Local 1 (the Union) and Justin McCrary appeal the district court's dismissal of their suit for lack of subject matter jurisdiction and failure to state a claim. Reviewing de novo, we affirm in part, vacate in part, and remand for the following reasons:

1. Our appellate jurisdiction in this case is limited initially to determining whether the district court had jurisdiction under the Little Tucker Act, 28 U.S.C. § 1346(a). 28 U.S.C. § 1295(a)(2); *Smith v. Orr,* 855 F.2d 1544, 1547-52 (Fed.Cir.1988).

2. We conclude that the Union lacked representational standing because McCrary's individual involvement in the case is necessary. *Friends of the Earth v. Laidla Envtl. Servs.,* 528 U.S. 167, 181, 120 S.Ct. 693, 145 L.Ed.2d 610 (2000) (stating that representational standing requires that neither the claim asserted nor the relief requested requires the participation of individual members of the organization); *Zuspann v. Brown,* 60 F.3d 1156, 1160 (5th Cir.1995) ("We are free to uphold the district court's judgment on any basis that is supported by the record[.]"). We affirm the dismissal of the Union from the suit.

3. The determination of whether a contract existed between McCrary and the Transportation Security Administration (TSA) requiring payment of the salary specified in the offer letter is determinative of both the district court's jurisdiction under the Little Tucker Act and the merits of McCrary's breach of contract claim. The district court was therefore required to assume jurisdiction and decide the claim on the merits. *Williamson v. Tucker,* 645 F.2d 404, 415-16 (5th Cir.1981). Because the district court did not so here, we vacate its dismissal of the breach of contract claim for want of jurisdiction and remand for a

determination on the merits. Review of that court's judgment on the merits will be available only in the Federal Circuit. 28 U.S.C. § 1295(a)(2).

4. The district court lacked jurisdiction over McCrary's due process claim. The Little Tucker Act provides a waiver of sovereign immunity and a grant of federal jurisdiction over constitutional claims for money damages only where the constitutional provision in question mandates payment of money damages. *United States v. Testan,* 424 U.S. 392, 400-02, 96 S.Ct. 948, 47 L.Ed.2d 114 (1976). The Due Process Clause is not such a provision. *LeBlanc v. United States,* 50 F.3d 1025, 1028 (Fed.Cir.1995); *Duarte v. United States,* 532 F.2d 850, 852 (2d Cir.1976). We therefore affirm the district court's dismissal of McCrary's due process claim for lack of jurisdiction. *Zuspann,* 60 F.3d at 1160.

Affirmed in part, vacated in part, and remanded.

146 Fed.Appx. 704

Briefs and Other Related Documents
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• 05-10009 (Docket) (Jan. 04, 2005)

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